THE LIBERTY TO SELL SEX: THE CASE FOR REGULATION OF LEGAL PROSTITUTION IN THE UNITED STATES

by

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This thesis was prepared under the direction of the candidate's thesis advisor, Dr. Mark Tunick, and has been approved by the members of her/his supervisory committee. It was submitted to the faculty of The Honors College and was accepted in partial fulfillment of the requirements for the degree of Bachelor of Arts in Liberal Arts and Sciences.

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ABSTRACT

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Prostitution is a controversial service which went through periods of legalization and criminalization in American history. The main problem is a social taboo which considers prostitution to be morally wrongful and a social nuisance. After the Progressive Era, Congress outlawed sexual acts it deemed immoral using Commerce Clause powers. Since the sexual revolution of the 1960s, legislation regulating sex devolved to the states. Currently, prostitution is banned in forty-nine states. I argue that prostitution should not be abolished because it is not inherently harmful, it is not an immoral act, and it has liberty interests found within the United States Constitution. The federal government should define prostitution as a legal activity between consenting adults, and the states should regulate the practice as it does other legitimate professions.

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Introduction

Prostitution obtained the nickname 'the oldest profession' because it persisted throughout human societies. Equally persistent are questions of whether prostitution is wrong and how it ought to be regulated. Prostitution has a complicated history in the United States. During the Gilded Age (1870-1900), municipalities experimented with legal prostitution. Politicians during this era "sought to regulate urban life by clustering entertainment into commercial neighborhoods."[1] Local ordinances created red-light districts with tacit approval from police and the courts. There was a theory of segregation that if "evil [prostitution] is concentrated and more easily controlled," then "it would protect other neighborhoods from its manifestations."[2] Red-light districts helped cities grow as patrons went there for sexual services. Most American cities had red-light districts, such as San Francisco's Barbary Coast or New Orleans' Storyville.[3] The most well-known red-light district was the Tenderloin in the center of Manhattan, New York. Corrupt policemen protected these areas despite the presence of both legitimate and illegitimate businesses. NYPD officer Alexander S. Williams once boasted, "I've been having chuck steak ever since I've been on the force, and now I'm going to have a bit of tenderloin (brothel)."[4]

By 1910, Progressive reformers could no longer tolerate prostitution. Red-light districts gained a negative reputation as hotbeds of venereal disease. Furthermore, prostitution was affiliated with white slavery and the vice trust. White slavery was the supposed existence of "an international conspiracy to seduce, entrap and ultimately enslave [white] American girls into a

[1] Mara L. Keire, "The Vice Trust: A Reinterpretation of the White Slavery Scare in the United States, 1907-1917," *Journal of Social History* 35 (1): 5-41 (2001), 13.

[2] Howard B. Woolston, *Prostitution in the United States, Volume 1* (New York: The Century Co., 1921), 103.

[3] Peter C. Hennigan, "Property War: Prostitution, Red-Light Districts, and the Transformation of Public Nuisance Law in the Progressive," *Yale Journal of Law & the Humanities* 16 (1): 123-198 (2004), 125.

[4] Edwin G. Burrows and Mike Wallace, *Gotham: A History of New York City to 1898* (New York: Oxford University Press, 1999), 959.

life of prostitution."[5] The vice trust was a metaphor for anyone who "profited from prostitution's commercial production."[6] Local supporters responded to this criticism by arguing that "red-light districts attracted tourists, provided a significant number of jobs, and strengthened the city's economy." [7] These arguments held little appeal for elite Progressives who stoked white slavery fears and anti-trust sentiments to dismantle red-light districts. This rhetoric made prostitutes unwilling victims of corporate capitalism, rather than independent workers of a legitimate voluntary practice.

The Gilded Age acceptance and Progressive Era disapproval of prostitution laid the foundations of political and scholarly debate in the twentieth century. The authority to regulate prostitution is mainly devolved to the states with the federal government only stepping in when prostitution crosses state lines. The Supreme Court ruled in *Hoke v. United States* that the police power of the states allows them to "unquestionably control…the morals of their citizens, and…it extends to making prostitution a crime."[8] Prostitution is currently outlawed in forty-nine out of the fifty states. The only exception is Nevada where "it is unlawful for any person to engage in prostitution or solicitation therefor, except in a licensed house of prostitution."[9] In historical context, the *Hoke* decision aligned with the overall Progressive mood against prostitution and immoral sexual acts in general. The Supreme Court has since limited government power over sexual relations as society became more accepting after the 1960s sexual revolution. Supreme Court jurisprudence in the late twentieth century struck down laws regulating what was once

[5] Hennigan, 157.
[6] Keire, 15.
[7] Ibid.
[8] *Hoke v. United States*, 227 U.S. 308 (1913) at 321.
[9] *NV Rev Stat § 201.354 (2017)*

deemed as immoral sexual practices.[10] The landmark Supreme Court case which began this trend was *Griswold v. Connecticut*. The Supreme Court found a right of privacy within the penumbras of the First, Third, Fourth, Fifth, and Ninth Amendments of the U.S. Constitution.[11] A liberty interest using the Due Process Clause of the Fourteenth Amendment was invoked for the right to privacy in the concurrences of Justice Harlan and Justice White. The *Griswold* decision led to cases such as *Roe v. Wade*, which prohibited the state from criminalizing abortion in the first trimester because abortion was found within the zone of privacy.[12] The Supreme Court found substantial liberty interests deserving of strict scrutiny, the most stringent standard of judicial review, in activities such as using contraceptives, same-sex relationships, interracial relationships, and abortion.

The problem is that prostitution, as all other activities deemed immoral, is entrenched as a social taboo. Prostitution in the United States is shackled by the legacy of the Progressive era. Lars O. Ericsson argues, "Once we have been able to liberate ourselves from these taboos we will come to realize that we are not justified in devaluating the prostitute."[13] Prostitution deserves to be reevaluated as other sexual activities were. First, is prostitution harmful? If prostitution is harmful, then it ought to be prohibited by the government. Second, is prostitution immoral? Opponents of prostitution fall into three camps: feminists who see prostitutes as coerced into the practice by male driven demand, sentimentalists who argue that prostitution is distasteful to society and ruins love, and Kantians who would prohibit prostitution because it

[10] Examples of these Supreme Court cases include: *Loving v. Virginia*, *388 U.S. 1* (1967) which struck down laws prohibiting interracial marriage, *Lawrence v Texas,* 539 U.S. 558 (2003) which struck down state laws criminalizing homosexual intercourse as illegal sodomy, and *Obergefell v. Hodges*, 576 U.S. ___ (2015), which struck down laws which prohibited homosexual marriage.

[11] *Griswold v. Connecticut*, 381 U.S. 479 (1965) at 485.

[12] *Roe v. Wade*, 410 U.S. 113 (1973) at 164.

[13] Lars O. Ericsson, "Charges against Prostitution: An Attempt at a Philosophical Assessment," *Ethics* 90, (3): 335-36 (1980), 342.

turns people into a means towards an end of sexual fulfillment. Third, does prostitution have a substantial liberty interest? This question is answered by analyzing how the Supreme Court framed the phrase liberty found in the Fourteenth Amendment. Legislation prohibiting prostitution may be unconstitutional should prostitutes have liberty interests. Finally, if we do agree that prostitution should not be illegal, can it still be regulated in a way that addresses the concerns of its critics while preserving the liberty interest of those engaged in prostitution, and if so, how can federal and state government best regulate prostitution as a legitimate profession? I argue that prostitution is neither harmful nor immoral. Opponents argue that all prostitution is immoral but that claim becomes unconvincing where prostitution is consensual. U.S. legislation which prohibits prostitution should be struck down because Supreme Court precedent shows that the right to sell sex can be seen as protected by the Due Process Clause. Thus, governments in the United States should not criminalize prostitution and should only regulate it as far as it does not infringe on the liberty interests of the prostitute.

Chapter 1:

Prostitution and Harm

Introduction

John Stuart Mill argued that government power is restricted when it interferes with personal liberty. The first type is the liberty of thought, "of speaking and of writing."[14] The second type is the liberty of tastes and pursuits, "of framing the plan of our life to suit our own character; of doing as we like, subject to such consequences as may follow."[15] The third type is the liberty of association, "the freedom to unite for any purpose not involving harm to others."[16] Government power over society is framed by the harm principle. In Mill's words, "Whether the means used be physical force in the form of legal penalties, or the moral coercion of public opinion…the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others."[17] In the case of prostitution, the issue becomes whether prostitutes harm others by selling sex, and whether selling sex inherently harms the prostitute. Mill and his philosophical forbearers had a complicated task of answering the question: what constitutes a harmful act?

We must distinguish being hurt and being harmed. Someone is hurt when they experience a sharp, or sudden, pain. Someone is harmed when a wrong was committed. Being restrained or imprisoned unjustly is a great harm. Criminals do not have a right to not be punished, but innocent people do carry that right. As per the harm principle, someone loses their rights to liberty when they harmed another. If I broke my leg playing football, then I was hurt. The injury

[14] John Stuart Mill, "On Liberty," in *The Collected Works of John Stuart Mill, Volume XVIII - Essays on Politics and Society Part I*, ed. John M. Robson, 213-311 (Toronto: University of Toronto Press, 1977), 227.
[15] Ibid, 226.
[16] Ibid.
[17] Ibid, 223.

was obtained as a natural risk from my liberty of tastes and pursuits to play football and I do not have a right to not have a broken leg. I am harmed if someone else broke my leg while assaulting me, because a wrong was committed on my person. In Mill's view, people who commit a wrong should be punished by the government. Joel Feinberg expanded Mill's harm principle by saying that governments which seek to minimize harm should have legal wrongs be "invasions of interests which violate established priority rankings."[18] Harm can be a setback of interests, of a person's liberty to frame their own life. Since interests of different people are unavoidably in conflict, society as a whole determines which interests are more important. As such, Feinberg argued that punishment carries an "expressive function of the community's condemnation."[19]

Let's say a false rumor spread that I eat babies. If the rumor spreads publically, it could violate my liberty to seek employment or join associations. The person who spread the rumor has infringed on my rights by wrongfully defaming my character. Mill strongly objected to government power over speech. It could be that the rumor did not infringe on my rights, since any background check would reveal the lie, and I was merely offended. It could be that the rumor started because someone had the opinion that I was creepy. Mill would not think that the rumor starter should be punished if the baby rumor was merely an opinion because "there is no parity between the feeling of a person for his own opinion, and the feeling of another who is offended at his holding it."[20] When someone has a wrong or offensive opinion society, in Mill's view, can only justifiably "express its dislike or disapprobation" of such conduct through "advice, instruction, persuasion, and avoidance."[21] There are moments, however, when opinions can cause harm. Mill gives the following example: "an opinion that corn-dealers are starvers of

[18] Joel Feinberg, *Harm to Others* (New York: Oxford University Press, 1987), 35.
[19] Joel Feinberg, *Doing & Deserving; Essays in the Theory of Responsibility* (Princeton: Princeton University Press, 1970), 98.
[20] Mill, "On Liberty," 283.
[21] Ibid, 292.

the poor…ought to be unmolested when simply circulated through the press, but may justly incur punishment when delivered orally to an excited mob assembled before the house of a corn-dealer."[22] This example becomes complex when one considers the Internet. Rumors can potentially spread globally and attract Internet mobs. The most dedicated in these Internet mobs employ doxxing, revealing private information such as home address and phone numbers, and thus expose targets to public shaming and physical threats.[23] A rumor can be harmful if it was started with malicious intent. The original rumor starter can claim that they were merely saying a rude joke, or that people made the rumor worse the more they spread it. Even if defamation of character is wrong, we cannot expect that every person who spread the rumor had malicious intent nor can we expect the government to punish everyone who spread the rumor.

The claim that prostitution is a great social evil has transformed from a moral argument into a social taboo. The government should not punish sex workers simply because of the populace's negative thoughts. Social aversion does not inherently mean that something is harmful. One could easily say that they do not like a certain minority because they are different, but that is opinion. Opponents of prostitution could find the social taboo against prostitution as protected speech, but anyone can say prostitution is bad. There are specific actions involving prostitution which do carry merit for a discussion of harm. Opponents would say that prostitution is harmful because sex workers are coerced into performing sexual acts, spreads venereal diseases, and prevents sex workers from getting better jobs and living their life to the fullest. On the other hand, proponents of prostitution could say that the government should not infringe on prostitution because the sex workers are properly exercising their liberty of tastes and pursuits.

[22] Ibid, 260.

[23] Jasmine McNealy, "What is doxxing, and why is it so scary?," *The Conversation*, May 16, 2018. < https://theconversation.com/what-is-doxxing-and-why-is-it-so-scary-95848>

Buyers who abuse sex workers should be the ones punished by the state. At this point, we cannot say that prostitution is prima facie harmful.

Mill's Views on Prostitution

Prostitution occupies a gray zone in liberal philosophy. On the one hand, the specific act of selling or purchasing sex does not prima facie violate the harm principle. Of course, prostitution is very offensive to certain groups. Feinberg suggested that a liberal state should punish not only acts that harm others, but acts that offend others. This offense principle states that one could "provide reason for creating moral offenses such as open lewdness, solicitation, and indecent exposure…the selling of pornography…and activities offensive to religious or patriotic sensibilities."[24] Mill did not equate harm with offense because the government should prevent wrongs, not prevent hurt feelings. If someone displeases us, "we may express our distaste and stand aloof" but "shall not therefore feel called on to make his life uncomfortable."[25] On Mill's view, the state does not have the authority to enforce laws over what happens between two consenting adults in the bedroom. The harm principle sets a high bar for justifying government power which ensures heightened protection for individual liberty. Yet, Mill adamantly opposed prostitution. He wrote in a letter that,

> With the exception of sheer brutal violence, there is no greater evil…than prostitution. Of all modes of sexual indulgence, consistent with the personal freedom and safety of women, I regard prostitution as the very worst; not only on account of the wretched

[24] Feinberg, *Harm to Others*, 13.
[25] Mill, "On Liberty," 279.

women whose whole existence it sacrifices, but because no other is anything like so corrupting to the men.[26]

This statement is paradoxical when juxtaposed with Mill's liberal philosophy. On its face, prostitution is a consensual act between two adults. However, Mill's objection to prostitution makes sense when one reads his essay *The Subjection of Women*. Mill, there, notes that women have long been oppressed and subjected for no good reason. A traditional argument defending the subjection of women is that women are naturally subservient and unequal to men. But Mill denies that argument; he denies that "any one knows, or can know, the nature of the two sexes" until conditions of equality exist.[27] What is natural can only be found by allowing both sexes to freely develop their personal sovereignty. Mill did not oppose prostitution because it was inherently harmful. Rather, he opposed prostitution because it reinforced inequality, which is the true harm. Mill particularly despised the ideas promoted by the historian William E.H. Lecky, who believed prostitutes were "the best safety valves" that allowed males to sexually relieve themselves so they do not corrupt their virtuous wives.[28] Mill focused his criticism "on those who encouraged prostitution, especially for their personal gain, and who exploited the often vulnerable."[29]

For instance, Mill opposed the Contagious Diseases Act because it displayed how the government unfairly prosecuted women. This law was passed in 1864 by the British government, and empowered police officers to arrest women suspected of being prostitutes in the vicinity of

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[26] John Stuart Mill, "Letter to Lord Amberley, February 2, 1870" in *The Collected Works of John Stuart Mill, Volume XVII - The Later Letters of John Stuart Mill 1849-1873 Part IV*, eds. Francis E. Mineka and Dwight N. Lindley, 1692-1695 (Toronto: University of Toronto Press, 2006), 1692.

[27] John Stuart Mill, "The Subjection of Women," in *The Collected Works of John Stuart Mill, Volume XXI - Essays on Equality, Law, and Education*, ed. John M. Robson, 259-340 (Toronto: University of Toronto Press, 1984), 276.

[28] Mill, "Letter to Lord Amberley, February 2, 1870," 1693.

[29] Claire McGlynn, "John Stuart Mill on prostitution: radical sentiments, liberal proscriptions," *Nineteenth-Century Gender Studies* 8 (2): 1-15 (2012), 9.

military towns and ports. If an arrested woman had a venereal disease or sexually transmitted disease (STI), they were then detained in specialized lock hospitals. Mill was outraged because this law not only attacked "a particular class of women," but subjected all women to "a tyrannical operation by force of law."[30] He called out the hypocrisy of only quarantining women when it was men who actively sought sexual services at the brothels. Mill's critique angered the Royal Commission, who asked Mill during a hearing on the subject: "Am I to understand you seriously propose that in this country we should adopt a system of espionage over every man seen going into a brothel, and that men seen to go into a brothel should be subject all alike to personal examination?"[31] While Mill did not like espionage in general he responded that the government's goal of preventing the spread of venereal disease required the quarantine of both sexes. After all, it was men who would then cause harm by bringing the diseases home to their innocent families.[32] Mill was not the only one who criticized the Contagious Disease Acts, and thus they were repealed by 1886.

Despite thinking "prostitution should [not] be classed and recognized by the State," Mill conceded there might be liberty interests for pimps and brothel-keepers because he "cannot lay down a general rule on the subject."[33] Mill is conflicted because while "fornication must be tolerated [since it does not violate the harm principle]…should a person be free to be a pimp?"[34] It appears as though the actual culprit in anti-prostitution laws should be the pimp, since it is their business practices which sell women to clients as prostitutes. However, British law was more focused on punishing the sex worker and client for spreading sexual disease. If Mill's harm

[30] John Stuart Mill, "The Contagious Diseases Act," in *The Collected Works of John Stuart Mill, Volume XXI - Essays on Equality, Law, and Education*, ed. John M. Robson, 349-373 (Toronto: University of Toronto Press, 1984), 368.
[31] Ibid, 362.
[32] Ibid, 361.
[33] Ibid, 359.
[34] Mill, "On Liberty," 296.

principle is accurately applied, the pimp ought to be the one punished since they are the ones who facilitate the harm of spreading disease that the state found troublesome. Of course, this leaves the question of whether prostitution not involving pimps is a harmful act. One of Mill's problems with the Contagious Diseases Act was that the government gave tacit approval for brothels. Mill wanted prostitution discouraged and condemned because it promoted sexual inequality, but could not decide on whether legitimately prohibited by using state coercion.

Mill might be more accepting if prostitutes truly acted consensually. The public mindset on prostitution has radically changed. Prostitution is no longer universally condemned and some countries have even fully legalized it as a legitimate profession. Mill's worries that prostitution empowered a patriarchal system have dissipated as recent feminist movements recognize that some sex work can be legitimate and not coercive. Even males have become sex workers. The new positive outlook on sex work in the twenty-first century indicates there is a liberty interest in being able to engage in prostitution consensually. Thus, it is imperative to revisit the harm principle as it applies to prostitution.

Is Prostitution Harmful?

The most common claim of why prostitution should legitimately be criminalized because it harms others is that it spreads venereal disease, or sexually transmitted infections (STI). This assumption was the basis of laws such as the British Contagious Diseases Act and the American Chamberlain-Kahn Act. STI's are increasing around the world in general due to changing sexual behaviors such as larger numbers of partners, increasing sex rates among adolescents, and inconsistent condom use. A 2012 study in Florence involving 469 participants (321 males, 148 females) found that 20% have had sex with more than five partners within a year, and 50% had

been diagnosed with an STI in their life: syphilis (39.3%), genital warts (64.6%) and chlamydial infections (42.9%).[35] Prostitutes are particularly in danger of contracting an STI due to their high number of sexual partners. If a prostitute and client agree to safe sex and the client decides to remove the condom during intercourse, the prostitute has no legal recourse to sue the client. One Canadian study found that 41.9% of clients, or johns, in 1994 Vancouver refused to use condoms.[36] Due to social stigma, some prostitutes refuse to get medically tested or see a doctor. Even if they do get tested, the tests are usually invalid because "they are unreliable…take days or weeks before results are available" and the prostitute would have seen more clients in the meantime.[37] The spread of venereal diseases has substantially halted as a result of vaccines and current medicine. Issues related to prostitution and venereal disease could be stopped with legalization. In doing so, "sex workers are empowered to negotiate condom use, improve their access to public services, and protect them from violence and abuse."[38] One study found that seventeen European countries that have legalized some aspects of sex work have "significantly lower HIV prevalence" among sex workers, around 95% less, "than countries that criminalize all aspects of sex work."[39] One of the core problems of the Contagious Diseases Act in Britain, as Mill found, was that there was no rational reason why venereal diseases should be treated

[35] C Silvestri, et al., "Social and behavioral determinants as risk of sexually transmitted diseases: Report by a sample from the Sexually Transmitted Disease Unit in Florence, Italy," *G Ital Dermatol Venereol* 147 (4): 341-348 (2012), 347.

[36] Leonard Cler-Cunnningham, and Christine Christensen, *Violence against women in Vancouver's street level sex trade and the police response* (Vancouver: PACE Society, 2001), 86.

[37] Laila Mickelwait, "Myth vs. Fact: 6 Common Myths About Prostitution and the Law," *Exodus Cry*, March 24, 2015. < https://exoduscry.com/blog/general/myth-vs-fact-6-common-myths-about-prostitution-and-the-law/>

[38] Avert, "Sex Workers, HIV, and AIDS," August 29 , 2017. <https://www.avert.org/professionals/hiv-social-issues/key-affected-populations/sex-workers#footnote91_ggwx3j3>

[39] Aaron Reeves, et al., "National sex work policy and HIV prevalence among sex workers: an ecological regression analysis of 27 European countries," *The Lancet* 4 (3): 134-140 (2017): 134.

differently than other disease.[40] This arbitrary category only served to stigmatize prostitutes who wanted to seek treatment.

A second argument that prostitution is harmful is that it promotes sex trafficking. One study, which analyzed 150 countries, found that those with "legalized prostitution experience a larger reported incidence of trafficking inflows."[41] In 2007, the US Department of State reported, "Sex trafficking would not exist without the demand for commercial sex flourishing around the world…including prostitution and related activities."[42] Here again, one might argue that what contributes to the harm (in this case sex trafficking) is not prostitution per se but the fact that safe versions are illegal. The goal of legalization should be to create an opposite "substitution effect replacing illegal, forced prostitution with voluntary, legal prostitution."[43] The country which has the most open legalization of prostitution is New Zealand. Since their prostitution laws in 2003, New Zealand has "found no incidence of human trafficking" because legalization "made it easier for sex workers to report abuse and for police to prosecute sex crimes."[44] It appears that the countries which fear legal prostitution will promote sex trafficking are the countries which still make prostitution illegal. The United States has a case study where prohibition backfired. When alcohol was prohibited from 1920-1933 the high demand allowed mafias to grow in power and wealth. At the same time, alcohol became more deadly as bootleggers sold at higher concentrations since it made the product less bulky and easier to transport without detection by the police. The failure of alcohol prohibition is used to argue for the legalization of drugs. The

[40] Mill, "The Contagious Diseases Act," 358.

[41] Seo-Young Cho, Axel Dreher, and Eric Neumayer. "Does Legalized Prostitution Increase Human Trafficking?" *World Development* 41: 67-82 (2013), 67.

[42] Condoleezza Rice, et al., *Trafficking in Persons Report* (Washington D.C.: US Department of State 2007), 27.

[43] Reeves, 70.

[44] Abigail Hall-Blanco, "Legalized Prostitution Is Safer," *Las Vegas Sun,* February, 19, 2017. <https://lasvegassun.com/news/2017/feb/19/legalized-prostitution-is-safer/>

war on drugs also led to more potent concentrations to keep up with addiction-driven demands and cartels grew more violent.[45] While prostitution is not a good, keeping it illegal similarly increases the profitability of sex work and makes trafficking more appealing to criminal enterprises. In relation to the harm principle there is one important distinction between prostitution and sex trafficking. The former is a consensual act between adults, while the latter is a type of slavery which frequently uses children and is not consensual. It could be argued that prostitution is willingly allowing oneself to be sold into slavery. Yet this critique could be applied to any other profession. One could say that becoming a white collared worker makes one a wage slave to the company. However, where prostitution is consensual, then just like white collared workers, sex workers could leave the practice if they choose. Sex trafficking completely restricts one's sovereignty and thus the government has rightful authority to prevent it. There must be a legal distinction made between prostitution and sex trafficking.

A third argument that prostitution is harmful is that prostitutes are victims. One British survey of 240 prostitutes found that 30% of the prostitutes "reported being slapped, punched, or kicked," whereas 17% of the prostitutes "cited attempted rape."[46] Overall the survey found that 64% of the 240 prostitutes experienced client violence at some point.[47] The majority of prostitutes experience "being hunted, dominated, harassed, assaulted and battered."[48] One survey done across nine countries found that "89% of respondents wanted to escape prostitution, but did

[45] Christopher J. Coyne and Abigail R. Hall, Four Decades and Counting: The Continued Failure of the War on Drugs, *Cato Institute*, April 12, 2017. < https://www.cato.org/publications/policy-analysis/four-decades-counting-continued-failure-war-drugs>

[46] Stephanie Church, et al., "Violence by clients towards female prostitutes in different work settings: questionnaire survey," *BMJ* 322 (7285): 524–525 (2001), 524.

[47] Ibid, 525.

[48] Katie Pedigo, "Prostitution: A 'Victimless Crime'?," *Al Jazeera*, March 19, 2003. <https://www.aljazeera.com/indepth/opinion/2013/03/20133187151912199.html>

not have other options for survival," and "68% met criteria for PTSD."[49] However, to be a prostitute is not necessarily to be a victim per se. Victimization occurs only when a client assaults the professional. At its core prostitution is a transaction, trading money for a service. There are risks in being a prostitute, but it should not justify making it illegal. There exist other risky jobs such as mining, boxing, serving in the military, or roofing. Yet these jobs are legal. There is a legal doctrine called *volenti non fit injuria* (to a willing person, injury is not done). Feinberg acknowledged this principle because harms in which "the victim consented" must be "excluded from those that are properly called wrongs."[50] For example, boxing is a high contact sport where fighters consent to hurting one another. Due to the very nature of the sport, it would be a folly to punish boxers who exercised their liberty. Thus, the law says that boxers hurt each other but do not harm each other. Prostitution has risks but they are not inherent. Prostitution at its core basis is just sex. Even when the client wants to perform something painful like bondage, the action falls under the non volenti principle insofar as the prostitute consented to that act. Now it could be argued that prostitution ought to be prohibited because of the potential to cause harm. After all, we punish drunk drivers with a DUI because they have the potential to cause an accident. This is reasonable legislation. A drunken person has their senses inebriated and is thus prone to cause harm. However, we should not take the fact that an action may potentially harm as sufficient reason to prohibit it on Mill's harm principle: that position would be too radical. Unlike a drunk, the prostitute herself is not the risk. The risk comes from the potential of a violent client and that STD could spread. A government regulation which has clients undergo background checks would mitigate that risk. Adopting a 'potential harm' principle means living in a world surrounded by bubble wrap. We could stop drunken driving accidents by removing all

[49] Melissa Farley, et. al., *"*Prostitution and Trafficking in Nine Countries: An Update on Violence and Posttraumatic Stress Disorder,*" Journal of Trauma Practice* 2 (3): 33-74 (2008), 33.

[50] Feinberg, *Harm to Others*, 35.

obstacles on the road so it becomes akin to an empty desert. If we wanted to stop the potential of sexual partners being abusive then we could prohibit sex altogether. The government should only prevent harms which are wrongs. The harm principle does not prohibit consensual activities where the parties involved voluntarily setback their interests. According to Feinberg, the volenti principle is fully plausible when a consenting person is a "competent and unimpaired adult" who "has not been misled, threatened, lied to about relevant facts, or manipulated by subtle forms of conditioning."[51] Prostitutes who consensually trade sexual services for profit are not victims.

Conclusion

Mill's issue with prostitution was not that selling and purchasing sex was harmful, but that it promoted a male dominated mentality. This is a moral argument, and not an accurate application of the harm principle. Three arguments are generally made that prostitution is harmful: it spreads disease, it promotes sex trafficking, and it foreseeably creates victims. The first objection fails because prostitutes are singled out for spreading a disease that anyone with sexual relations can spread and thus do not seek treatment due to the stigma, the second objection fails because it wrongly conflated prostitution with the actual harmful act of sex trafficking, and the third objection fails because the government should not intervene in practices where participants voluntarily interact with each other. While the question of whether prostitution is morally correct is not yet answered, it is clear that prostitution is not harmful.

[51] Ibid, 116.

Chapter 2:

Prostitution and Morality

Introduction

Perhaps more common than the argument that prostitution is harmful is the argument that prostitution is immoral. The idea that laws should prohibit or require behavior based on society's collective judgment of what is right and what is wrong is called legal moralism. Patrick Devlin defended the doctrine by saying, "If men and women try to create a society in which there is no fundamental agreement about good and evil they will fail; if, having based it on common agreement, the argument goes, the society will disintegrate…If the bonds were too far relaxed the members would drift apart. A common morality is part of the bondage."[52] Devlin's view of legal moralism, insofar as it rests on a view of morality as based solely on common agreement, is similar to moral relativism, where moral judgments or agreements about good and evil differ between societies. H.L.A Hart articulated a different conception: that legal moralism is "strongly associated with a specific conception of morality as a uniquely true or correct set of principles," not man-made, but rather based in natural rights.[53] Hart's view of legal moralism is based on moral universalism, where an ethical system applies across all rational moral actors. Whether universal or relative, societies seem to have a basic framework of values. It is notable that Mill rejects legal moralism, as actions should be prohibited only if it causes harm to others, not if it is regarded by society as immoral. My aim in this chapter is not to denounce or promote the principles of legal moralism. Rather, even if we were to accept legal moralism the case to prohibit prostitution based on legal moralism is not strong.

[52] Patrick Devlin, *The Enforcement of Morals* (Oxford: Oxford University Press, 1965), 10.
[53] H. L. A Hart, *Essays in Jurisprudence and Philosophy* (Oxford: Oxford University Press, 1983), 248.

Even though historical judgment tells us that prostitution was accepted during antiquity, moral frameworks developed over recent centuries led to prostitution's almost universal condemnation. The shift of public opinion against prostitution became rigidly enforced by the Victorian Era of the 1800s as the British imposed stringent social standards throughout their dominions. These social codes have since changed and more positive views of sex work have led to more liberal policies towards prostitution around the world since the late twentieth century. As public attitudes and moral values change, it is important to know what morality means. The simple definition is that morality answers what actions are right, a proper conduct, or wrong, an improper conduct. Theorists, especially universalists, can appeal to normative theories on how the world ought to be. It is truly disappointing that, as Lars O. Ericsson noticed, few have given prostitution dedicated "philosophical treatment."[54] Some common critiques against prostitution have become cliché, but they hold genuine philosophical concerns. For brevity this chapter focuses on three types of criticism: prostitution oppresses women, prostitution ruins the value of relationships, and prostitution belittles the human self. Respectively these critiques fall under the philosophical frameworks of feminism, sentimentalism, and Kantian. Legal moralists would prohibit prostitution if any of these moral doctrines are violated. I argue that prostitution is not immoral within these principles.

The Feminist Response

Ericsson framed the feminist charge as the claim that prostitution "constitutes extreme inequality between the sexes."[55] Prostitution on the feminist charge is wrong insofar as it promotes gender inequality as male driven demand coerces some women to sell their bodies for

[54] Ericsson, 335.
[55] Ibid, 348.

sex. Mill anticipated the feminist argument when he said that prostitution was a greater evil "not only on account of the wretched women whose whole existence it sacrifices, but because no other is anything like so corrupting to the men."[56] As a social movement, feminism seeks the end of sexism which has historically suppressed women. Jacquetta Newman and Linda White said feminists condemn legal policy enforcing criminal sanctions against sex workers, agree that consent is the necessary condition of legitimate sex, and recognize that "commercial sex workers are subject to economic coercion and are often victims of violence."[57] Nonetheless, there exists a clear divide in the feminist view of prostitution. On the one hand are feminists who argue that governments should abolish prostitution because it is inherently sexist towards women. On the other hand are feminists who maintain that prostitution is a legitimate form of work for women and concerns about whether it is truly consensual could be addressed through proper government regulation. There exists empirical evidence on both sides of the arguments, and this can be seen in the variety of prostitution policies around the world.

Feminists who oppose prostitution claim that all prostitutes are wrongfully coerced into the practice. Debra Satz argues that some markets ought to be restricted because of their "origins in destitution and desperation."[58] She compares prostitution with the use of child labor, which allows for an influx of cheap products which benefits a wide variety of people. However, that does not mean we should accept the practice of child labor just because it is economically efficient. Satz sees that the "whip of poverty and hunger" can compel people to work in morally ambiguous markets.[59] Anne Phillips similarly writes that there is an intrinsic inequality in "the

[56] John Stuart Mill, "Letter to Lord Amberley, February 2, 1870," 1692.

[57] Jacquetta Newman and Linda White, *White Women, Politics, and Public Policy: The Political Struggles of Canadian Women* (Oxford: Oxford University Press, 2012), 247.

[58] Debra Satz, Why Some Things Should Not Be for Sale The Moral Limits of Markets (New York: Oxford University Press, 2010), 5.

[59] Ibid.

economic circumstances that lead some people but not others to offer intimate bodily services" and "in the relations of esteem that typically flow from this."[60] Phillips objects to the 'it's my body' defense because that phrase "obscures the power relations involved."[61] The market which exists for sexual pleasure differs from other disliked jobs because the seller becomes subordinate to the buyer. The worker needs the job to avoid hunger and being homeless, and agrees, or rather is compelled, because the boss wants to maximize profits. Granted, this criticism can be applied to low end jobs in general, where workers subject themselves to arduous cheap labor. There is a dichotomy between the bosses, or pimps, exploiting the prostitute and the prostitute submitting to the will of the buyer.

Both Satz and Phillips appeal to studies which support their concerns that prostitution arises out of necessity. There are a substantial number of prostitutes who feel as though selling sex is the only way to stay financially afloat. A study conducted with 36 American prostitutes found that 42% started because of economic needs.[62] Similarly a study done with prostitutes in five locations of New Zealand, after the passage of the Prostitution Reform Act of 2003, found that 73% of participants "needed money to pay for household expenses."[63] The New Zealand study was more expansive than the American one and found that financial incentives were more prominent for female prostitutes than transgender or male ones, who mainly wanted to explore their sexual identity.[64] However, there are reasons to doubt to these studies for the feminist charge. The New Zealand study does not support the feminist charge because everyone needs

[60] Anne Phillips, "It's My Body and I'll Do What I Like With It: Bodies as Objects and Property," *Political Theory* 39 (6): 724–48 (2001), 741.

[61] Ibid.

[62] Meredith Dank, et al., *Estimating the Size and Structure of the Underground Commercial Sex Economy in Eight Major US Cities* (Washington D.C.: The Urban Institute, 2014), 220.

[63] Gillian Abel, Lisa Fitzgerald, and Cheryl Brunton, *Prostitution Reform Act on the Health and Safety Practices of Sex Workers* (Christchurch: University of Otago, 2007), 9.

[64] Ibid, 10.

money to pay for their expenses. People on the lower end of the economic ladder generally seek out low-end jobs. Those who become prostitutes are not coerced into the profession as though there are no other alternatives. They could have also become fry cooks at a fast-food restaurant or accountants at a business firm. One of the appeals of prostitution is that it can make more profit than lower-end jobs, and even match high-end jobs in earnings. For example one Canadian escort revealed how she made "$48,660 USD at $160/hour in 2016/2017," and was excited because she projected to make "$58,391 USD the following year."[65] New Zealand actually has the world's most liberal and accepting policy towards prostitution which incentives even the middle-class to consider sex work as a viable economic option.[66] In that country, there is no choice between prostitution as an illegal underground job and a legal low-end job. Rather, it is a choice between two governmentally recognized professions and prostitution happens to be a higher paying one. The New Zealand study shows that women can be fine with being a prostitute for its financial incentive.[67] This trend can be seen worldwide in the broader sex work industry.

Meanwhile, the American study was unrepresentative. The sample size of 36 prostitutes from across the country is not a significant sample size, considering the total population of over 300 million. Focusing on brothels and pimps is also very unrepresentative of prostitution as a whole. There are actually three main types of prostitution: pimp, street, and escort. These different types show varying power relations between the seller and client. Pimp-based prostitution is the type which is the most problematic to feminist theory. Pimps are the functional equivalent of managers in that they "recruit and instruct their employees, manage finances, and

[65] Ally Sabatina, "4 Sex Workers Answer On How Much They Actually Earn," *The Financial Diet*, February 1, 2018. <https://thefinancialdiet.com/4-sex-workers-much-actually-earn/>

[66] New Zealand prostitution legislation is analyzed in-depth in Chapter 4.

[67] Abel, et. al, 9.

provide protection and security."[68] However, since pimps are involved in an underground business they are prone to using violence. They use physical coercion if a prostitute is disrespectful or does not like the client they were given. If a prostitute wants to leave pimps use psychological manipulation by "promising and providing financial support, safety, and personal relationships."[69] They purposefully recruit women who have hardships in life. Pimps take away women's choices in selecting their own clients and setting their own fees. However, this facet of the profession does not mean the whole practice is morally wrong. Pimp-owned brothels can either be regulated to protect worker's rights or be outright abolished. In the other two types of prostitution the workers are less coerced by males. Street prostitution, also known as kerb-crawling, is when prostitutes solicit potential clients in public. Protests against street prostitution are more focused on public decency than coercive power relations.[70] Meanwhile, escort prostitution is when the prostitute or an intermediary seek clients through means such as telephone or internet communication and meet the client in a private location.

Without an intermediary, the client and the prostitute set their own prices for certain sexual acts. For example, escorts tend to seek out wealthy clients and meet them at restaurants or hotels. In a way, escorts can be considered the model sex worker because their clientele are more likely to pay for the service and remain cordial out of fear of exposure. Since prostitution is illegal in the United States, a client can have sex with the prostitute and not be legally obligated to pay. After all, since it is not a legal job a prostitute cannot sue over not getting paid. However, wealthier clients have more incentive to pay. They afford higher end prostitutes, and even continuously meet one they particularly like. At the same time, wealthy clients have substantially

[68] Dank, 152.
[69] Ibid, 161.
[70] Belinda Brooks-Gordon, *The Price of Sex: Prostitution, Policy, and Street* (New York: Routledge, 2006), 3.

higher consequences if they are exposed buying prostitutes since they could lose social standing. The escort service appears to be the safest and most profitable of the types of prostitution due to the leverage prostitutes have where the practice is illegal. Pimp-based prostitution occupies a middle ground because the pimp protects the prostitute from bad clients and ensures that they are paid. Yet, underground pimps also tend to exploit the worker. Street prostitution is the most dangerous because clients are generally poorer individuals who have little to lose if they are caught in the act, so they could essentially rape the sex worker without being legally punished. Obviously, a prostitute would be less incentivized to report a sex crime when it would expose their illegal job. Street prostitutes are also at the most risk of being abducted by sex traffickers since they are the most exposed and do not have sufficient protection. Apart from pimp-managed prostitution, which is more likely to be coercive, there is no prima facie case against prostitution in general as prostitution is not inherently coercive.

It becomes worth it to read arguments made by feminist philosophers who agree that prostitution is a legitimate profession. Martha Nussbaum argues that because prostitution is similar to many jobs that are not legally problematic, then prostitution should also not be legally problematic. She found that stigmatization of prostitution is merely based "on class prejudice or stereotypes of race or gender."[71] For example, we could look at the profession of teaching. In Ancient Greece, sophists were not trusted by aristocrats and philosophers like Plato because they took money for teaching philosophical values and the art of rhetoric. The fear was that sophists would teach the sons of politicians wrong moral values or teach someone of the lower class the art of deception in politics. Today, it would be unusual to hear arguments against teaching and both rhetoric and philosophy has since because a central part of liberal education, even as

[71] Martha C. Nussbaum, "Whether From Reason Or Prejudice: Taking Money For Bodily Services," *The Journal of Legal Studies* 27 (2): 693-723 (1998), 694.

professors can disagree with each other's theories. Interestingly, Nussbaum compared prostitution with the profession of the philosophy professor because both "provide bodily services in areas that are generally thought to be especially intimate and definitive of selfhood."[72] As seen with the previously discussed New Zealand study prostitutes can experiment with their gender identity and sexual orientation, while also giving clients the chance to experiment with their sexual fantasies. As such, philosophy professors earn money for researching what they think is true about the nature of the world. One profession stigmatized, for reasons similar to prostitution, was opera singing. Nussbaum describes how female opera singers used to be discouraged because it was "shameful to display one's body to strangers in public, especially in the expression of passionate emotion."[73] Opera singing, and the arts in general, was discouraged from depicting nudity not because of a reasoned moral argument, but because it was simply distasteful. Thus, Nussbaum argues that prostitution should not be legally problematic because other professions which perform analogous functions have been found to be acceptable.

Besides Nussbaum, there are feminist theorists who see the value of sex work. Hallie Liberto argues against the claims that prostitution violates a person's self-worth. She used an analogy of weak waiving of rights where "I waive my right to not have you walk on my property, it is with the understanding that I can change my mind whenever I want and, in so doing, effectually retract your privilege to walk on my property."[74] Prostitution is self-alienating in a weak sense when a prostitute can opt-out of having their body used for sexual services at any point. What feminist opponents truly fear, Liberto distinguishes, is sex work where a person surrenders the right to their body during a period of time where they cannot revoke access. Thus,

[72] Ibid, 704.
[73] Ibid, 699.
[74] Hallie R. Liberto, "Normalizing Prostitution versus Normalizing the Alienability of Sexual Rights: A Response to Scott A. Anderson," Ethics 120 (1): 138-145 (2009), 141.

prostitution involving an intermediate, a pimp, becomes morally ambiguous because the prostitutes are sold off to perform sexual services rather being in control of selling their sexual services. Granted, prostitutes can still negotiate with pimps over pricing and have some protection over the clients allowed to buy sexual services. Sexual trafficking, then, is immoral because people are completely stripped of their sexual autonomy by the middleman and sold off as slaves, as the person has neither has input into the clients they service nor get money for the service. Thus, proper prostitution which should be legal is that where they willingly exchange sexual services for benefits, and retain the ability to retract the service at any time. Much like those in other professions, the prostitute acknowledges that retracting or changing the quality of a service means not getting paid or not getting paid completely.

The Sentimentalist Response

Moral sentimentalism says that moral facts are fundamentally based in our feelings and emotions. Sentimentalism is a non-empirical method of understanding morality which bases its arguments on people's feelings. As David Hume summarized, "Morality is determined by sentiment."[75] Francis Hutcheson further explained that "there is nothing more requisite in laying the foundation of morals" than the discovery of what "affections and conducts are virtuous."[76] He believed that the chief happiness of any being "consists in the full enjoyment…of its nature's desires."[77] The fact that prostitution is a very distasteful act to people indicates that it offends the moral senses.

[75] David Hume, *An Enquiry Concerning the Principles of Morals* (London: A. Millar, 1751), 203.
[76] Francis Hutcheson, *A System of Moral Philosophy* (London: A. Millar, 1755), 98.
[77] Ibid, 100.

Ericsson described a common claim that prostitution "is the great social evil representing a flagrant defiance of common decency."[78] David Hume contrasted between natural sentiments and social conventions. In his discussion, of promises, Hume says that breaking a promise is wrong not naturally, or based on moral sentiments, but because there is a social practice that in effect punishes you for breaking the promise. When someone makes a promise, they understand that they are subjected to the penalty of never being trusted again if they fail. The reason is that, by social sentiment, "all contracts and promises ought carefully to be fulfilled in order to secure mutual trust and confidence" because that "is the general interest of mankind."[79] The claim that prostitution is a great social evil comes from a natural sentiment where the natural, or anthropological, purpose of sex is to reproduce and form a family. Prostitution similarly perverts this natural purpose because it neither promotes having children nor promotes building a family. Prostitutes have sex for money, and clients have sex for the sake of sex. This relationship leads to the idea that prostitution is a great evil for all of human society. Sentimentalists believe that selling sex violates the natural sentiment of love. Ericsson also identified a claim that "the relation between prostitute and customer must by the nature of things be a very poor relation to non-mercenary sex."[80] Mill offered a similar argument in that prostitution causes the "total absence of even a temporary gleam of affection and tenderness."[81] This claim is based on an ideal that sex should be between two people who are romantically involved.

Prostitution has been called the great social evil due to religious or social standards of decency. William E.H. Lecky recounted a time when prostitutes were venerated throughout Asia Minor and Greece "under the names of the temples of Venus (which the Greeks knew as

[78] Ericsson, 337.
[79] Hume, 52.
[80] Ericsson, 339.
[81] John Stuart Mill, "Letter to Lord Amberley, February 2, 1870," 1692.

Aphrodite)."[82] The status of the courtesan which was protected in ancient Greece and Rome declined with the rise of Christian values of chastity and sex. During Victorian England prostitution was seen through "the image of the innocent male seduced by the life-seeking immoral female."[83] At the same time, the legal system in England was unwilling to outright ban prostitution because "the purchase of sex was considered preferable to the perversion of self-abasement (masturbation) or the debasement of pure women."[84] The Victorian image of prostitution became modern taboo where men refuse prostitutes because it is a "crude financial attraction" or "see it as a slight on their attractiveness if they pay for women rather than attract them."[85] So far the moral arguments focused on the state of the prostitute, but the state of the client is equally important. In one era people desired to preserve a traditional nuclear family, but exploring one's sexuality and sexual desires is more accepted in recent times. Prostitutes serve a role that goes beyond the safety-valves for lust seen in Victorian times. Male prostitutes shed light into this topic because, since the 1960s counterculture, they are "portrayed…as a quest for gay identity" which "does not construct the workers as victims."[86] Clients of male prostitutes can be closeted men who want to explore their sexuality. Likewise, women prostitutes help men who see themselves as unattractive, unhappy, and in need of companionship. Instead of being the great social evil, prostitutes can save clients from loneliness. When the prostitute consents, they serve a role in helping others relieve their carnal and intimate desires. Just like there can be an evil sentiment towards prostitutes, there can be a good sentiment towards prostitutes.

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[82] William Edward Hartpole Lecky, *History of European Morals from Augustus to Charlemagne Volume 2* (London: Longmans, Green, and Co., 1869), 163.
[83] Brooks-Gordon, 7.
[84] Ibid.
[85] Brooks-Gordon, 8.
[86] Kerwin Kaye, "Male prostitution in the twentieth century: pseudohomosexuals, hoodlum homosexuals, and exploited teens," *Journal of Homosexuality* 46 (2): 1-77 (2003), 48.

Even if the claim that prostitutes are the great evil is exaggerated, we have to address whether prostitution actually violates the sanctity of marriage. In *U.S. v. Bitty*, Justice Harlan held that "women who offer their bodies to indiscriminate intercourse with men… are in hostility to the idea of the family as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony."[87] Dave Quist, executive director of the evangelical organization Institute of Marriage and Family Canada, bluntly stated, "The concept that mom's job is having sex with strangers sets the wrong tone for family life."[88] A more nuanced position is that if prostitution is socially acceptable, then it weakens the private intimate relationship that is the basis of marriage. These concerns come from the desire that a nuclear family founded on marriage is the best way to structure society. However, the 1960s counterculture has challenged these traditional notions. For one thing, it has become more socially acceptable to have relationships that are not male-female. Some scholars even promote the idea of having multiple sexual partners for different reasons. Elizabeth Brake argues that "Caring relationships in general are primary goods."[89] She rejects the idea of restraining marriage to one person because "people simply do not and cannot develop and exercise their moral powers in isolation but do so in relationships with other people."[90] As such one can have polygamy where one spouse is used for sex, one for conversation, one to do a specific hobby, and one to have kids with. The sentimentalist defense of marriage becomes over-exclusive. Granted, Brake did not say whether prostitution constitutes a caring relationship. I believe that in some situations, it does. Prostitutes help those who are unable to have stable relationships or who need a night of companionship. Of

[87] *U S v. Bitty*, 208 U.S. 393 (1908), at 401.

[88] Gudrun Schultz, "National Post Advocating Legalization of Prostitution Again," *LifeSiteNews*, July 13, 2006. < https://www.lifesitenews.com/news/national-post-advocating-legalization-of-prostitution-again>

[89] Elizabeth Brake, "Minimal Marriage," *Ethics 120* (2):302-37 (2010), 328.

[90] Ibid.

course, by definition, a prostitute cannot be a spouse to her client. Yet there is still a relationship involved. Apart from Brake's views on polygamy, there is still a claim that prostitutes destroy monogamous marriages by taking away the spouse. This idea unjustly shifts the blame to the prostitute. If a married person seeks out a prostitute, the problem is not the sex worker, but the disloyal spouse. Marriages are strengthened or weakened by how committed a couple is towards each other. Even if prostitution remained illegal, unfaithful people would still seek an affair. A multidisciplinary team of American scholars suggested that prostitutes might actually save failing marriages by preventing adultery, an intimate relationship with a different person, and preventing abuse, by diverting excess male sexual energy away from "the wives of other men…or unwilling sexual partners."[91]

A final sentimentalist challenge is that sex with a prostitute is of inferior quality to sex with an intimate partner. Elizabeth Anderson argues that good sex is "realized only when each partner reciprocates the other's gift in kind, offering her own sexuality in the same spirit in which she received the other's, as a genuine offering of the self."[92] Anderson's view is a feminist critique which believes that buying and selling sex devalue sex itself, so in a world where sex is bought and sold, we cannot have good sex. This specific feminist view was criticized by Liberto in the previous section, but Anderson's argument relates to the sentimentalist argument Ericson identified that there is an ideal type of sex which should be infringed upon. The claim is that sex should only be between two people who love each other and are, ideally, committed through marriage. Sex is more complicated than this sentimental view, and has played multiple roles in human society. In prostitution's case, we must distinguish between sex for business and sex for

[91] Paul R. Abramson, Steven D. Pinkerton, Mark Huppin, *Sexual Rights in America: The Ninth Amendment and the Pursuit of Happiness* (New York: NYU Press, 2003), 116.

[92] Elizabeth Anderson, *Value in Ethics and Economics* (Cambridge: Harvard University Press, 1993), 154.

pleasure. For example, I can be a game developer for a multi-million dollar company and also enjoy playing video games. One fulfills the desire from making a profit from the activity, while one fulfills the desire in pleasure from the activity. As Ericson point out, it is unfair to compare "the ideal all-embracing sex act" with "the prostitute-customer relationship."[93] A prostitute's happiness comes from making a profit rather than the sex itself, while the client is left pleased and fulfilled since they wanted that company.

The Kantian Response

There are a series of challenges to prostitution which can be summarized as a Kantian objection, coming from the principles developed in Immanuel Kant's *Groundwork of the Metaphysics of Morals*. Certain actions are intrinsically right or wrong. Kant wants us to envision a world where everyone adheres to our maxims, or principles of action. A maxim is morally good if it is "objectively necessary of itself," a categorical imperative. If the maxim is good "merely as a means to something else," then it is a hypothetical imperative.[94] Kant rejected the view that moral worth is based on desire, because it is devoid of reason. Rather, he believes moral principles come from certain duties that all rational actors follow.

In order to determine whether an action is morally correct, Kant established two principles. First is the principle of universality, where I ought to act "in such a way that I could will that my maxim should become a universal law."[95] A maxim fails this prong if it is contradictory "in our own will" when applied universally.[96] There is no challenge against prostitution in this principle. The maxim I want to universalize, I want to be a prostitute to earn a

[93] Ericsson, 342.
[94] Immanuel Kant, "Groundwork of the Metaphysics of Morals," in *Ethical Theory: An Anthology, Second Edition,* ed. Russ Shafer-Landau, 487-498 (Malden: Wiley-Blackwell, 2013), 490.
[95] Ibid, 486.
[96] Ibid, 494.

profit, can be reformulated as I want to be X to earn money Y. If this was wrong, then all jobs violate the Kantian principle. It could be said that a world where everyone is a prostitute violates my will to have a meaningful relationship. Yet in a world where everyone follows my maxim, it would be common practice to have a significant other who is also a sex worker. As argued in the sentimentalist section, there is a difference between having sex for work and having sex for pleasure.

The second principle, and more important in the prostitution discussion, is one of humanity, where we must act in a way where humanity is used "as an ends, never merely as a means."[97] According to this principle one might argue that prostitution is wrong because prostitutes are a means to an end. Mill likewise observed that prostitution causes women to be "completely a mere thing used simply as a means, for a purpose which must be disgusting to her."[98] The job per se is a not the problem, it is the manner in which it is performed. Prostitution does not respect the self because it reduces my body as a means to make money. Prostitution also does not respect the other because I use their body as a means to satisfy my sexual urges. A similar claim is explained by Ericsson when he notes that many people "take a dim view of people who use money to substitute" real love with bought love.[99] Kant argued that sex is immoral when "those who give themselves to another person, merely to satisfy inclination, still continue to let their person used as a thing; for the impulse is directed towards sex, and not towards humanity."[100] The Kantian view is that all sexual relations that are not intended for procreation are immoral because couples use each other's bodies for pleasure. A Kantian would define meaningful work as that which "is freely entered into, allows the worker to exercise their

[97] Kant, "Groundwork of the Metaphysics of Morals," 496.
[98] John Stuart Mill, "Letter to Lord Amberley, February 2, 1870," 1692.
[99] Ericsson, 355.
[100] Immanuel Kant, *Lecture on Ethics*, trans. Peter Heath (Cambridge: Cambridge University Press), 158.

autonomy and independence, enables the worker to develop their rational capacities, and provides a wage sufficient for physical welfare."[101] Kant's critique might apply to pimp prostitution, but it does not fit with prostitution where the worker chooses her own clients and gets all the profit.

Kant seemingly contradicted himself when he allowed sex between married couples because "nothing can belong to the one that does not also belong to the other."[102] In this discussion on sex, Kant specifically argued against concubinage. A concubine is a woman who has an intimate sexual relationship with a man but cannot marry him as he is already has a wife. Concubines were common amongst the European nobility, and gave birth to illegitimate children. In a way, concubines are more used as objects than prostitutes. Prostitutes do not have an intimate love affair with their clients as their relationship is based on financial transaction. Concubines, however, usually held feelings for their lover but could not raise a legitimate family with them. Prostitute-client relationships are not so one-sided. Instead of sex objects, prostitutes are workers. They make an earning used to benefit their persons. If a person is made into a sex slave, then they are being used as an object for sexual desires. However, two people who consent in exchanging sexual services for monetary profit is different. In this instance both are using each other's bodies for mutual gain. The client respects the whole being of the prostitute by recognizing her dignity and worth through the act of paying her for a service.

[101] Norman E. Bowie, "A Kantian Theory of Meaningful Work," *Journal of Business Ethics* 17 (9): 1083-1092 (1998), 1083.

[102] Kant, *Lecture on Ethics*, 379.

Conclusion

In this chapter I argued that, even if we adopted legal moralism, there is no moral theory which can definitively say that prostitution is immoral. Feminist opponents of prostitution claim that prostitution creates gender inequality where women sell their bodies due to male driven demand. I respond that consensual prostitution has an equal relationship between worker and client. Sentimentalists argue that prostitution was a great social evil and that it is sex of poorer quality. I respond that prostitutes can better the lives of lonely persons, and that having sex for business and having sex for pleasure is distinct. The Kantian charge makes the claim that prostitutes should be used as means to an end, which in this case is fulfilling sexual desire. I respond that the argument becomes moot because prostitutes and clients use each other's bodies for mutual gain, thus respecting each other's dignity. Since I argue against claims that prostitution is harmful and that it is immoral, the next step is to see if prostitution can be protected as a right within U.S. jurisprudence.

Chapter 3:

Prostitution and U.S. Jurisprudence

Introduction

In the United States, prostitution legislation in the twentieth century was molded by the relative laxness of Gilded Age politicians and the moral crusade of Progressive reformers. Currently, prostitution is illegal in 49 out of 50 states. The federal government only interferes in interstate commercial matters such as sex trafficking or child pornography. As the previous chapters argued that prostitution is not harmful, nor is it inherently immoral, it should be reasoned that it does not deserve to be illegal. That being said, these arguments may not persuade legislators to change standing laws. The only way that legislatures could be forced to overturn or change laws is if they violate some clause in the U.S. Constitution. The U.S. Supreme Court has authority in this regard through judicial review. A hypothetical question which could be litigated is whether there is a right to prostitution in the Constitution. If there is such a right, then where is it? The right to prostitution is of course not specifically enumerated in the Constitution, nor is it specifically prohibited. The Supreme Court, however, has established or expanded legal rights inferred from the clauses. Using the Court's precedents, it is possible that one day prostitution will be found to promote fundamental liberty interests through the Due Process Clause of the Fourteenth Amendment.

Personal Liberty

A relevant example of how the Supreme Court inferred rights is privacy, which is not explicitly written in the U.S. Constitution and only enumerated in eleven state constitutions. The first justice who promoted the right to privacy was Justice Brandeis in his dissent in *Olmstead v.*

United States where he said, "The makers of the Constitution undertook to secure conditions favorable to the pursuit of happiness….the right to be left alone -the most comprehensive of rights."[103] Brandeis' words would not be influential until thirty years later when *Griswold v. Connecticut* established that privacy was a fundamental right subject to strict scrutiny, the highest standard of judicial review a government law has to pass in order to be constitutional. However, the seven justices who advocated for privacy were divided in how to constitutionally justify the right. The majority opinion written by Justice Douglas said "various guarantees create zones of privacy."[104] Specifically, privacy interests can be derived in the penumbras created from the First Amendment's right of association, from the Third Amendment's prohibition against quartering soldiers, from the Fourth Amendment's right to be secure from unreasonable searches and seizures, and from the Ninth Amendment's acknowledgment of rights not enumerated of the Constitution.[105] Taken together, these enumerated amendments imply the right to be left alone from wanton government intrusion. The concurrences are also important. Justice Goldberg argued that one must only look to the Ninth Amendment because it protects "rights so basic and fundamental and so deep-rooted in our society."[106] Meanwhile, Justice Harlan focused on the Due Process Clause of the Fourteenth Amendment which protects "basic values implicit in the concept of ordered liberty."[107]

It is doubtful that the justices would find prostitution a right as deep-rooted and traditional as privacy. If they researched the history of prostitution, they would only find deep-rooted hatred towards it. However, it is not impossible for justices to consider that prostitution laws should be viewed through strict scrutiny. After the *Griswold* decision, the Supreme Court

[103] *Olmstead v. United States*, 277 U.S. 438 (1928) at 478.
[104] *Griswold v. Connecticut*, 381 U.S. 479 (1965) at 484.
[105] Ibid, at 485.
[106] Ibid, at 491.
[107] Ibid, at 500.

protected various controversial sexual relations from government intrusions as they fit within the zone of privacy. In *Griswold* the Court struck down laws which prohibited the use of contraceptives between married couples. In *Eisenstadt v. Baird*, the Court struck down laws which prohibited the use of contraceptives between unmarried couples. Justice Brennan expanded the scope of the Griswold position because "if the right to privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion."[108] In *Roe v. Wade*, the Court included abortion in the first trimester as a right found in the zone of privacy because "it is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[109] Importantly, Justice Blackmun in his majority opinion brought back the arguments that privacy could be found "in the Fourteenth Amendment's concept of personal liberty" or in "the Ninth Amendment's reservation of rights to the people." Although the trimester framework for abortion was departed from in *Planned Parenthood v. Casey*, the plurality opinion retained the "essential holding of Roe."[110] In *Loving v. Virginia* the Court struck down laws prohibiting interracial marriage because marriage "is one of the vital personal rights essential to the orderly pursuit of happiness by free men."[111] In *Obergefell v. Hodges* the Court ruled that "the right to marry is a fundamental right inherent in the liberty of the person…under the Due Process Clause…so couples of the same-sex may not be deprived of that right or liberty."[112]

We should not immediately discount the idea that prostitution has the same protections as contraceptives, abortion, interracial marriage, or same-sex marriage. The defining feature of prostitution which separates it from other sexual acts is economic transaction. However, a

[108] *Eisenstadt v. Baird*, 405 U.S. 438 (1972) at 453.
[109] *Roe v. Wade*, 410 U.S. 113 (1973) at 153.
[110] *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) at 850.
[111] *Loving v. Virginia*, 388 U.S. 1 (1967) at 12.
[112] *Obergefell v. Hodges*, 576 U.S. ___ (2015).

decision to have sex for money is a private decision, as even abortion includes an economic transaction. All sexual actions besides heterosexual intercourse between married couples was considered a morally wrongful act by a majority of the population at one point, but each have since seen liberal reforms and acceptance. It could be said that prostitution could also be found within the zone of privacy. The most analogous case is *Lawrence v. Texas* which extended the right to privacy to conduct which "is private and consensual."[113] In that case, the Court struck down a Texas sodomy law which criminalized sodomy. *Griswold*, *Loving*, and *Obergefell* expanded privacy rights for married couples. *Roe* and *Casey* expanded privacy rights for abortion. *Baird* and *Lawrence* brought privacy rights to private sexual relationships. At its core prostitution is a private and consensual act. When a client becomes abusive or violent, the government has a right to intervene. This makes sense with the harm principle. If the prostitute is being coerced to be a sex slave, by either pimp or a sex trafficker, then the government has authority again. Prostitutes acting through her liberty with a consenting client, however, act within a zone of privacy free from unrestrained government intrusion. The Court recognized that "adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons."[114] Granted, *Lawrence* is one of the few cases which recognized the privacy in person's private sexual relations.

Prostitution also differs from other protected sexual relations because it holds an economic component. This factor of prostitution was the reason why a lower court refused a privacy challenge to an anti-prostitution law. In *People v. Williams*, the Appellate Court of Illinois rejected defendant's argument that she characterized "her conduct as private sexual activity between two consenting adults," and "more aptly described [her conduct] as the

[113] *Lawrence v. Texas*, 539 U.S. 558 (2003) at 564.
[114] Ibid, at 567.

commercial sale of sex."[115] It is also disconcerting how *Lawrence* itself declined to "involve public conduct or prostitution" in its holding that certain sexual activity is protected by a right to privacy.[116] Perhaps it is possible to define a new right to commercial sex using the same arguments which had inferred a right to privacy.

The penumbra argument is applicable to prostitution because the decision to have sex for money could be seen as a privacy right. Unlike privacy, however, it is doubtful that the Framers would have even acknowledged prostitution as a fundamental right. Indeed, the Framers adhered to the moral arguments against prostitution, as was common in Anglo-Saxon society. John Adams once wrote, "There is one enemy, who is more formidable than famine, pestilence and the sword…the corruption which is prevalent in so many American hearts, a depravity that is more inconsistent with our republican governments."[117] Adams referred to frivolousness and vice. And of course the Framers of the original Constitution knew nothing of the Fourteenth Amendment.

Yet the Bill of Rights recognizes that the people do have rights not explicitly stated. The Ninth Amendment states, "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."[118] In his Griswold concurrence Justice Goldberg argued that inferred fundamental rights can be established by justices if they "look towards the traditions and collective conscience of the people."[119] Given its varied history in the United States it is doubtful that prostitution would be protected by the Ninth Amendment. Perhaps in the future sex work would reach a level of positive social consciousness which makes

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[115] *People v. Williams*, 811 N.E.2d 1197 (Ill. App. Ct. 2004) at 1198.
[116] *Lawrence v. Texas*, 539 U.S. 558 (2003) at 578.
[117] John Adams, *The Works of John Adams, Volume 9*, ed. Charles Francis Adams (Boston: Little, Brown and Company, 1854), 461.
[118] *The Constitution of the United States, with Index, and the Declaration of Independence*, 23.
[119] *Griswold v. Connecticut*, 381 U.S. 479 (1965) at 493.

it a fundamental right, but then it would be difficult to ascertain when sex work becomes traditional. Other justices have pointed out that the Ninth Amendment only allows for the amendment process to legitimately enshrine new rights as the people see fit. It is a tool of democracy, not a tool for judicial power. Justice Scalia summarized this view, "The Constitution's refusal to deny or disparage other rights is far removed from affirming any one of them, and even farther removed from authorizing judges to identify what they might be, and to enforce the judges' list against laws duly enacted by the people."[120] Nonetheless, Ninth Amendment jurisprudence could be used to base a right to prostitution on it.

Most importantly for the case of prostitution is the liberty interest found in the Due Process Clause of the Fourteenth Amendment which prohibits any government from depriving "any person of life, liberty, or property, without due process of law."[121] Liberty is an important word and the Supreme Court has a legacy of jurisprudence which defined how it applied to certain actions. Substantive due process is a doctrine used by the courts to protect fundamental rights from government intrusion using strict scrutiny, whether those rights were enshrined in the Constitution or not. It is possible that a future Supreme Court case could either place prostitution under the zone of privacy or make it a right by its own accord. As sex work becomes more common with the advent of the Internet and becomes more favorably looked upon due to changing moral standards, there is an argument that prostitutes have a real liberty interest in having this profession.

[120] *Troxel v. Granville*, 530 U.S. 57 (2000) at 91.
[121] *The Constitution of the United States, with Index, and the Declaration of Independence*, 26.

Economic Liberty

Since prostitution merges sexual relations with profit, it is essential to analyze the economic side of substantive due process. In the early twentieth century, the word liberty in the Due Process Clause was used to challenge economic laws. Similar to privacy interests, any economic right which was found to be fundamental was protected by strict scrutiny review. Under this standard a law was struck down if the government interfered with the fundamental right and the law was not narrowly tailored to achieve a compelling state interest. If a right was not fundamental, then the law merely had to pass a rational basis review where the government only needed a legitimate state interest. Substantive due process in the economic realm began with *Lochner v. New York*. At issue in *Lochner* was a law which restricted how many hours bakers could work. The Court struck down the law because the "general right to make a contract in relation to his business is part of the liberty of the individual protected by the 14th Amendment."[122] In *Meyer v. Nebraska* the Supreme stated that "the liberty protected by the Due Process clause…without doubt...denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life."[123] Dissenters during the Lochner era believed that the Court had become a super-legislature which struck down laws it did not like. Justice Holmes dissented in *Lochner* because the case was "decided upon an economic theory which a large part of the country did not entertain."[124] This argument mirrors the privacy dissenters who said the Court cannot invent rights which were not enumerated. Indeed, Justice Hughes said that "freedom of contract is a qualified, and not an absolute, right."[125] The Lochner era declined after the Court in *West Coast Hotel Co. v. Parrish*

[122] *Lochner v. New York*, 198 U.S. 45 (1905) at 53.
[123] *Meyer v. Nebraska*, 262 U.S. 390 (1923) at 399.
[124] *Lochner v. New York*, 198 U.S. 45 (1905) at 75.
[125] *Chicago, Burlington & Quincy .R.R. Co. v. McGuire*, 219 U.S. 549 (1911) at 567.

upheld a state minimum wage law, and was completely repudiated in *Williamson v. Lee Optical Co* when the Court said that state laws regulating businesses are only subject to rational basis review. Looking back on the era, the Court regretted when "the Due Process Clause of the Fourteenth Amendment was used to strike down state laws, regulatory of business and industrial conditions."[126]

The collapse of Lochner jurisprudence did not spell the end of substantive due process, as seen in the privacy decisions, and even the economic aspect of substantive due process is not completely overruled. The *Meyer* decision, for example, is still cited as precedent because its list of potential due process rights foreshadowed later decisions. One of those rights included "to engage in any of the common occupations of life."[127] The right to contract has been rejected by the Court, but it remains popular amongst people who believe in laissez-faire, or limited government involvement in the economy. One scholar rejected the judicial activism view of Lochner and said that the case actually promoted neutrality based in common law, where "governmental intervention was constitutionally troublesome, whereas inaction was not."[128] Other scholars believe that the return to Lochner is inevitable. Thomas Colby and Peter J. Smith argued that conservative circles are ready to claim that "the original meaning of the Constitution embraces unenumerated economic rights."[129] These scholars believe that something changed among conservative intellectuals where the old originalism that promised "judicial restraint in its implicit mandate of judicial deference to legislative majorities" was replaced by a new originalism that "the job of the judge is to ensure that representative institutions conform to the

[126] *Williamson v. Lee Optical Co.,* 348 U.S. 483 (1955) at 488.
[127] *Meyer v. Nebraska*, 262 U.S. 390 (1923) at 399.
[128] Cass R. Sunstein, "Lochner's Legacy," *Columbia Law Review* 87 (5): 873-919 (1987), 874.
[129] Thomas Colby and Peter J. Smith, "The Return of Lochner," Cornell Law Review 100 (527): 527-601 (2015), 601.

commitments made by the people of the past."[130] Put simply the originalists have shifted the focus from original intent of the Framers, that state governments have the power to regulate economic activity, to the original meaning of the Constitution, where commitments include the economic right to contract. As the sex work industry expands, it could revive arguments for more personal control between a sex worker and their client. Prostitution would benefit from a right to contract because the clients can establish their sexual need and the prostitute would set down their price. This is how prostitution is currently performed in its underground illegal state, but it stands to reason that participants would want to maintain their way of conducting business should it become legal.

The Lochner majority would say that laws prohibiting or regulating prostitution should be judged on a strict scrutiny standard. Since Lochner has been effectively overturned, what is left is rational basis review. This judicial standard was laid out in *Nebbia v. New York*. The case dealt with a Milk Control Board the State created in 1933 to set retail prices to protect dairy farmers. A grocery store owner challenged the statute on a due process claim. In a 5-4 decision the Supreme Court sided with New York. Justice Roberts wrote that while "the use of private property and the making of private contracts are, as a general rule, free from governmental interference," they are still "subject to public regulation when the public need requires."[131] But due process demands only that "the law shall not be unreasonable, arbitrary, or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained."[132] The Ninth Circuit Court of Appeals in *ESP v. Gascon*, addressing the constitutionality of a law against prostitution, upheld the law using a rational review standard. They found that California had legitimate state interests which included "discouraging human

[130] Ibid, 589-591.
[131] *Nebbia v. New York*, 291 U.S. 502 (1934) at 522.
[132] Ibid at 523.

trafficking and violence against women, discouraging illegal drug use, and preventing contagious and infectious diseases."[133]

Prostitution prohibition laws, according to current jurisprudence, have to be evaluated by a rational basis test. According to this standard, a law is constitutional if it is based a rational government interest. Given that governments claim that prostitution spreads disease and promotes sex trafficking, prostitution prohibitions will pass rational basis. Thus, what is needed is for prostitution prohibition to be judged by strict scrutiny, where they could fail because they are not narrowly tailored for a compelling government interest. This change would require the Supreme Court to either revive Lochner and say that the right to contract is a fundamental right, or say that prostitution is a fundamental right within the zone of privacy. One way to achieve this end is for another federal court to rule differently than the Ninth Circuit, or for the Supreme Court to overrule *ESP v. Gascon*. This is possible if governments adopt the reasoning I used in previous chapters to denounce the legitimate government interests found by the Ninth Circuit. To recap, the legitimization of prostitution would actually decrease sex trafficking, as seen in New Zealand, so prohibition is counterintuitive. The drug problem is an issue like sex trafficking that the government conflates with prostitution. The venereal diseases claim rests on a discriminatory policy which focused on women suspected of being prostitutes and ignored the clients who slept with them. Legalization would resolve this issues better then prohibition. Thus, it seems that the remaining way that prostitution can be protected by economic due process is if *Nebbia v. New York* is overturned and *Lochner v. New York* becomes controlling again. If this is adopted, then there would be massive consequences across the United States. Yes, prostitution would be allowed because governments should not interfere in the freedom of contract between a worker and her client. It would be unwise to bring back the Lochner standard because it would take

[133] *Erotic Service Provider v. Gascon*, No. 16-15927 (9th Cir. 2018) at 13.

away power from legislatures and give it to the courts. The dissent in Nebbia did have a point in saying that government regulation should not be merely "management, control, and dictation."[134] However, economic substantive due process is not the way we should challenge these regulations. We could still do so with substantive due process involving personal liberty.

It seems that prostitution's best bet is to argue that it exists within the constitutionally protected zone of freedom as a type of sexual relationship, rather than just a financial transaction. Indeed, there is some merit to this. The line between prostitution and other sex hinges on whether there was direct payment. It seems arbitrary though as people are accepting of hook-up culture, wherein a person asks out a stranger on an expensive date before having sex. There are even dating apps like Tinder which promote hooking-up between consenting adults, even though hooking-up sounds like prostitution with extra steps. It is best said that prostitution is neither fully within the economic sphere nor fully within the sexual relationship spheres, it exists in both. Perhaps the solution is to create a hybrid right of prostitution which incorporates government regulation of the economy with the privacy of a sexual relationship. This maneuver is not without precedent. In *Wisconsin v. Yoder*, the Supreme Court struck down a compulsory education law because a parent's freedom of religion outweighed a compelling state interest to educate children. This case indirectly created a parent's right to homeschool children. The Court had created a hybrid right where the constitution's guarantee of free exercise of religion merged with the Fourteenth's concept of liberty. A savvy judge could one day create a hybrid right for prostitution which merges liberty jurisprudence with the freedom of expression, for instance.

[134] *Nebbia v. New York*, 291 U.S. 502 (1934) at 554.

Conclusion

Prostitution has a very complicated history in U.S. jurisprudence. Its legalization by the Supreme Court would have to come from the Due Process Clause of the Fourteenth Amendment. This amendment had been used by the Court to find fundamental rights that were not enumerated in the Constitution. Thus, the question becomes whether selling sex is a right given to the people. For the most part, prostitution would fail to become a right of the economic side because of the downfall of *Lochner v. New York*. Governments have rational interests for prohibiting the practice. If economic due process was the only path prostitution could take, then we would have to convince legislatures that prostitution is not as dangerous or immoral as they think, so that they could modify existing laws.

However, the sexual component may merit protection from the individual liberty side of due process. Sexual practices prohibited on moral grounds were given protection by the Supreme Court. Such practices included homosexual and interracial relationships. They were found to be protected by a zone of privacy established in *Griswold v. Connecticut*. I believe that prostitute-client relationships can also be found within that zone of privacy. The main reason that prostitution is prohibited is not because of the arguments that it promotes sex trafficking or illicit drug use. Rather, the main issue is that Americans maintain an unfounded social taboo against prostitution. Bringing back Lochner would be too risky because of how it disrupts governmental regulatory powers. The more likely route is that activists would have to convince state legislatures that prostitution is neither harmful nor immoral. If the Supreme Court approved the liberty to sell sex on a privacy charge, then it would be the first step to dispelling the negative stigma toward prostitution and undermining those supposed rational government interests in prohibiting it.

Chapter 4:

Prostitution and Regulation

Introduction

Assuming we agree that prostitution could be legal, we still may want it to be regulated. Regulations would assure that prostitution is neither harmful nor coercive. The legal issue thus becomes whether the federal government or the states take the mandate. Americans retain the anti-prostitution attitude which dates back to the beginning of the twentieth century. Similar to the cases of abortion and same-sex marriage, legalization would force the governments to remove prostitution as a criminal enterprise. Without the criminal label it is likely that the supportive and impartial populace would become more accepting towards prostitutes. At the same time the backlash would be strong amongst the population who condemn prostitution. Prostitution inevitably faces an up-hill battle. Assuming prostitution could not be prohibited due to a hypothetical Supreme Court decision, or would not be prohibited from the democratic process, it needs to be regulated. Both the federal government and the state governments would play a role in regulating prostitution. Obviously federal laws would regulate prostitution across state lines. Meanwhile, states become laboratories of democracy which experiment with regulation. Justice Brandeis summarized this principle best:

> "To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."[135]

[135] *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932) at 311.

Federal Regulations

The Commerce Clause in Article I, Section 8, and Clause 3 of the Constitution states that Congress has the power "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[136] Interstate prostitution has long been within the jurisdiction of the federal government. In 1875, Congress passed the Page Act which outlawed the importation of women for the purposes of prostitution. The core federal statute which regulates prostitution is the White-Slave Traffic Act or the Mann Act of 1910. The law made it a felony "to engage in interstate or foreign commerce transport of any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose."[137] The Supreme Court upheld the constitutionality of the Mann Act because of Commerce Clause powers. In *Hoke v. U.S.*, the Court held that the Mann Act is constitutional because "while women are not articles of merchandise, the power of Congress to regulate their transportation in interstate commerce is the same, and it may prohibit such transportation if for immoral purposes."[138] Originally the Mann Act was broad enough to where Congress could regulate all types of sexual activities it deemed immoral. The Court defined debauchery in the Mann Act's sexual provisions in *Athanasaw v. U.S* as "an excessive indulgence of the body; licentiousness, drunkenness, corruption of innocence, taking up vicious habits."[139] Finally *Caminetti v. U.S.* upheld the broad scope of Mann Act because the "power of Congress under the commerce clause," allows the federal government to "keep the channels of interstate commerce free from immoral and injurious uses,"

[136] *The Constitution of the United States, with Index, and the Declaration of Independence*, 6.
[137] Sixty-First U.S. Congress, *White-Slave Traffic Act of 1910* (U.S. 36 Stat. 825), 825. <https://govtrackus.s3.amazonaws.com/legislink/pdf/stat/36/STATUTE-36-Pg825a.pdf>
[138] *Hoke v. U.S.*, 227 U.S. 308 (1913) at 309.
[139] *Athanasaw v. U.S.*, 227 U.S. 326 (1913) at 331.

and "enables it to forbid the interstate transportation of women and girls for the immoral purposes."[140]

The Mann Act's actual effect was that Congress broadly regulated any sexual acts it deemed immoral. The Supreme Court in *Caminetti v. United States* upheld the Mann Act because the power of Congress under the Commerce Clause includes "the authority…to keep the channels of interstate commerce free from immoral and injurious uses."[141] The Mann Act went through multiple amendments which refocused the federal government's authority over sex. In 1986, Congress removed broad language about immorality and made it a felony to partake "in any sexual activity for which any person can be charged with a criminal offense."[142] The Mann Act is refocused into stopping child prostitution and sex trafficking, but prostitution in federal law is still conflated with these two crimes. For instance, the most recent amendment to the Mann Act in 2006 only mentions the word 'prostitution' in relation to solicitation of a minor.[143] Similarly, in 2018, FOSTA criminalized participation in a venture which "knowingly assists, facilitates, or supports sex trafficking."[144] FOSTA is criticized by activists because it punishes sex workers who use certain websites to promote their services since sex traffickers can also use those same ventures.[145]

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[140] *Caminetti v. U.S.*, 242 U.S. 470 (1917) at 470.

[141] *Caminetti v. U.S.*, 242 U.S. 470 (1917) at 471.

[142] Ninety-Ninth U.S. Congress, *Child Sexual Abuse and Pornography Act of 1986* (U.S. 100 Stat. 3510), 3511. < https://www.govinfo.gov/content/pkg/STATUTE-100/pdf/STATUTE-100-Pg3510.pdf#page=1>

[143] One Hundred and Ninth U.S. Congress, *Adam Walsh Child Protection and Safety Act of 2006* (U.S. 120 STAT. 587), 591. < https://www.govinfo.gov/content/pkg/STATUTE-120/pdf/STATUTE-120-Pg587.pdf#page=1>

[144] One Hundred and Fifteenth U.S. Congress, *Allow States and Victims to Fight Online Sex Trafficking Act of 2017* (U.S. 132 Stat. 1253), 1255. <https://www.congress.gov/115/plaws/publ164/PLAW-115publ164.pdf>

[145] Meghan Peterson, et al, "The New Virtual Crackdown on Sex Workers' Rights: Perspectives from the United States," *Anti-Trafficking Review* (12): 189–193, (2019), 189.

In the first half of the twentieth century the Supreme Court extensively expanded commerce clause power. *Wicker v. Filburn* is a case that expanded commerce clause powers to economic activities which did not directly interfere with interstate commerce. In the specific case, Filburn violated a New Deal law because he grew more wheat than was permitted so he could feed his animals. The Supreme Court upheld the law because, even though Filburn did not plan to sell his wheat in interstate commerce, by growing his own wheat in excess of what the law permitted, he indirectly affected commerce by not buying wheat through the market. Congress had the authority to regulate any economic activity which "exerted a substantial economic effect on interstate commerce."[146] There were justices who objected to commerce clause powers interfering with the state's police powers. In *Hammer v. Dagenhart* the Court struck down a federal law regulating child labor because "the power to regulate interstate commerce was not intended as a means of enabling Congress to equalize the economic conditions in the States" despite "the evils inherent in the [commercial activity]."[147] A unanimous Court later overturned *Hammer v. Dagenhart*. In *United States v. Darby Lumber Co*., the Court upheld a federal fair labor law because the Commerce Clause can neither be enlarged nor diminished by the exercise or non-exercise of state power."[148]

It was not until *Lopez v. US* where the Supreme Court struck down a congressional regulation for overextending commerce clause power. The Court struck down a federal law which banned the possession of handguns near schools because "it was not an essential part of a larger regulation of economic activity" and is not an activity "connected with a commercial transaction."[149] *United States v. Morrison* restricted the Wickard standard by saying that

[146] *Wickard v. Filburn*, 317 U.S. 111 (1942) at 124.
[147] *Hammer v. Dagenhart*, 247 U.S. 251 (1918) at 251.
[148] *United States v. Darby Lumber Co*., 312 U.S. 100 (1941) at 114.
[149] *United States v. Lopez*, 514 U.S. 549 (1995) at 561.

Congress cannot regulate "noneconomic, violent criminal conduct based solely on the conduct's aggregate effect on interstate commerce."[150] However, Wickard is still applicable to economic conduct. Federal commerce clause powers were restricted by the end of the twentieth century. By the end of the twentieth century, regulation of prostitution had already devolved to the states. Congress had removed the broad language in the Mann Act which regulated all types of immoral sex practices. Federal legislation now regulates prostitution when it relates to interstate sex trafficking or distribution of child pornography. The states, in their turn, have abolished the practice of prostitution on moral grounds.

The devolution of prostitution regulation to the states does not mean that the federal government no longer has a role. As seen from Commerce Clause jurisprudence, only Congress has authority over interstate commerce. They also help define the scope of prostitution's legality. As long as prostitution is connected with sex trafficking in federal law, the states follow suit and impose prohibitions on the practice. In order to begin legalization, prostitution must be uniformly defined at the federal level as a consensual act between adults where sexual services is done for monetary gain. Most laws defining prostitution do not include the word 'consensual' or 'adult' so the term prostitution gets conflated with sex trafficking and child prostitution. As discussed in Chapter 1, the act of exchanging sex for money is a victimless crime, but because it is illegal, prostitutes are exposed to other crimes (rape, assault, burglary, homicide, etc.) which they cannot report to law enforcement for fear of arrest. The Mann Act is codified as 18 USC 2421, which punishes anyone who knowingly transports any individual "with intent that such individual engage in prostitution, or in any sexual activity for which any person can be charged with a

[150] *United States v. Morrison*, 529 U.S. 598 (2000) at 617.

criminal offense, or attempts to do so."[151] The federal government must explicitly remove prostitution's affiliation with crime and immoral purposes. This can be done by repealing the Mann Act and rewriting laws so they specifically focus on prohibiting sex trafficking and child prostitution.

Repealing the Mann Act removes the legacy of prostitution as a federal crime, but the federal government still has the power to regulate interstate prostitution. The federal government has governed consensual prostitution related to immigration, military bases, and enticement. For immigration, the U.S. government prohibits "the importation into the United States of any alien for the purpose of prostitution."[152] They also deny visas to any immigrant "who…is coming to the United States solely, principally, or incidentally to engage in prostitution."[153] If prostitution is legalized, then these laws would have to be rewritten. It could be illegal for someone to transport sex slaves and child prostitutes from crossing state lines, but not consensual adults. The federal government can also hold that prostitution should be legal if consensual among adults, but immigration can still be restricted to prevent prostitutions from entering since those jobs are not as valued as engineers. The issue is not that the government values other jobs more; the issue is that being a prostitute is the sole factor which prevents a work visa. It would be rational, then, to deny a visa to an immigrant prostitute if they fail an STI test or have other criminal charges against them. Relating to the military, the U.S. government punishes anyone who "engages in prostitution or aids or abets prostitution or procures or solicits for purposes of prostitution, or keeps or sets up a house of ill fame, brothel, or bawdy house" within "reasonable distance of any

[151] U.S. Code, Transportation Generally, "*Title 18: Crimes and Criminal Procedures*," 18 USC 2421.

[152] U.S. Code, "Importation of Alien for Immoral Purpose," *Title 18: Crimes and Criminal Procedures,* 8 USC 1328.

[153] U.S. Code, "Inadmissible Aliens," *Title 18: Crimes and Criminal Procedures*, 8 USC 1182

military or naval camp."[154] This law shares the goal of the British Contagious Diseases Act in which the purpose is to protect the military from venereal diseases. The reason why the original Contagious Diseases Act was repealed was because it gave police the authority to arrest women on a whim that they were a prostitute, and restrain them in specialized hospitals. It would not be reasonable to arrest a prostitute who just happened to be in the area.

A question which is important to consider is how much prostitutes should be restricted from advertising their services or soliciting potential clients. The U.S. government punishes anyone who "persuades, induces, entices, or coerces any individual to travel in interstate or foreign commerce… to engage in prostitution."[155] This made it a felony for prostitutes to promote their services as broadly as other jobs. Sex workers cannot advertise through television broadcast, radio, or the internet as these are interstate communications. We have to consider whether sex workers have the right to advertise their services to begin with. We can look at an analogous case. In *Bates v. State Bar of Arizona* the Court ruled that lawyer advertising was commercial speech entitled to protection under the First Amendment because banning it only served to "inhibit the free flow of information and keep the public in ignorance."[156] Granted, legislatures would not be banning sex work advertisements because they lie about the services they perform. Governments would be restricting sex work advertisements because of the sexual content. The Supreme Court set up a test when it comes to regulation of commercial speech. In *Central Hudson Gas & Electric Corp. v. Public Service Commission* the Court said the government is allowed to regulate commercial speech if the regulation fits a substantial

[154] U.S. Code, "Prostitution near military and naval establishments," *Title 18: Crimes and Criminal Procedures,* 18 U.S. Code 1384.

[155] U.S. Code, "Coercion and Enticement," *Title 18: Crimes and Criminal Procedures*, 18 USC 2422 (a).

[156] *Bates v. State Bar of Arizona,* 433 U.S. 350 (1977) at 365.

government interest.[157] If the federal government wanted to prevent children from hearing prostitution ads, then it would be reasonable to restrict this content through broadcasting. Indeed, the federal government has the constitutional authority to do so. In *FCC v. Pacifica Foundation*, the Court upheld sanctions against a public broadcaster who used indecent words. They held that the federal government has plenary power over the public airways because "broadcasting has the most limited First Amendment protection," and "is uniquely accessible to children."[158] However, preventing all avenues for advertisement would violate the prostitute's freedom of speech. The internet should be allowed to advertise prostitution. Where these ads are located are in places where children do not usually go, such as pornographic sites. The government should shut down sex traffickers who use online sites, but this should not hurt real prostitutes. Indeed, prostitutes could even alert the government when sketchy behavior occurs on their websites and they can specifically track down the culprits involved. A controversial form of advertisement is solicitation on the streets. I feel that this matter is best left for the states. Prostitutes usually solicit strangers in specific adult oriented locations, like in the vicinity of strip clubs, and at late night hours. Yet, the state governments have a legitimate interest in preventing children from possibly seeing it and preventing the risk of prostitutes being abducted by abusive clients.

There deserves to be unity in federal government law to legitimize prostitution across the states. I cannot stress how important it is for the federal government to define prostitution as a consensual activity that is separate from sex trafficking or child prostitution. This indicates to the states that they could regulate prostitution as its own legal business. Obviously, the federal government has plenary power over interstate prostitution. Yet, the states should be the ones who regulate the majority of prostitution. They should be the ones who figure out how to license

[157] *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980) at 566.

[158] *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978) at 727-728.

them, how brothels and escort agencies should be operated, whether street promotion should be allowed, what legal protections are afforded to prostitutes and clients, and whether prostitution is consolidated in red-light districts or mixed with all other businesses. Luckily, there are plenty of prostitution regulations around the world for the states to be draw on as examples.

A Test for State Policies

A study done by the Canadian Parliament categorized policies towards prostitution as criminalization, decriminalization, and legalization. Criminalization seeks to "reduce or eliminate prostitution," decriminalization merely "repeals prostitution-related criminal law" with few regulations, and legalization regulates prostitution as "a legal occupation."[159] Since prostitution is not harmful when it is not coerced, not immoral, and could have constitutional protection in the Due Process Clause, decriminalization and legalization policies are what have to be considered. Some states might prefer to decriminalize prostitution and leave it mostly unregulated. These policies benefits prostitutes who want to maintain their laissez-faire practices. At the same time, there are legitimate state interests in regulating sex work.

The policy question is what regulations ensure that prostitutes have a safe working environment for all involved? Criteria must be set up to evaluate prostitution policies with the aforementioned goal. First, does the policy allow prostitutes to carry out their jobs? This criterion involves having a safe place for the prostitute to perform her job, removing restrictions designed to make it hard for them to sell sex and for clients to buy sex, allowing the prostitute and her client to carry out the transaction smoothly, allowing prostitutes to advertise their works in some capacity, and restricting the underage from being prostitutes. Second, does the policy give legal

[159] Lara Barnett and Lyne Casavant, *Prostitution: A Review of Legislation in Selected Countries* (Ottawa: Parliamentary Information and Research Service, 2014), 2.

protections to the prostitute? This criterion involves allowing prostitutes to sue abusive clients, mandate that prostitutes and clients have access to STI testing, some sort of licensing program so prostitutes are not operating underground. The best examples for decriminalization policies are from the Australian Capital Territory (ACT) and New Zealand. For legalization, Nevada and Victoria, Australia provide varying examples. A final policy to consider is the Nordic Model which does not fit the definitions of decriminalization or legalization and is among the most stringent. The two point test can be used as a rubric to help states decide what a good prostitution regulation is.

Decriminalization Policies

Prostitution in the Australian Capital Territory (ACT) was at first governed by the Police Offences Act of 1930. The anti-prostitution law made it a criminal offense for any person to "knowingly live wholly or in part on the earnings of prostitution" or "in any public place persistently solicit or importune for immoral purposes."[160] The punishment for partaking in prostitution or living off its funds was "imprisonment for three months."[161] The punishment for being a prostitute was "paying five pounds or imprisonment for two months."[162] Meanwhile the punishment for keeping a brothel was paying twenty pounds.[163] Interestingly, in all jurisdictions "escort agency work is not an offence" and the ACT specifically did not outlaw "one-woman brothels."[164] Throughout the twentieth century the attitude of the public towards

[160] Government of the Australian Capital Territory, "An Ordinance Relating to Police Offences," *No. 9 of 1930* (July 25, 1930), 6. < https://www.legislation.act.gov.au/View/a/1930-9/19301125-48959/PDF/1930-9.PDF>

[161] Ibid, 7.

[162] Ibid, 4.

[163] Ibid, 5.

[164] Susan Pinto, Anita Scandia and Paul Wilson, *Prostitution Laws in Australia* (Canberra: Australian Institute of Criminology, 1990), 3.

sex work shifted favorably. In 1990, an official federal government report recommended that because "prostitutes are demanding a voice in their own employment," society must accept "the choices made by these women and respond accordingly."[165] The Australian states and territories divided themselves between decriminalization laws which gave prostitutes command over the industry, and decriminalization with control (legalization) laws which gave the government regulatory control. The ACT enacted a decriminalization law called the Sex Work Act of 1992. This law decriminalized prostitution, and authorized "a Registrar of Brothels and Escort Agencies."[166] At the same time, the law made it illegal to operate a brothel "other than in a prescribed location," and solicit "a person for the purpose of offering or procuring commercial sexual services in a public space."[167]

Currently ACT governs prostitution through the Sex Act of 1992, recently amended on October 10, 2019. Using the policy criteria, we must evaluate whether U.S. states would be wise to mimic this model. First, does the policy allow prostitutes to carry out their jobs? Owners of brothels and escort agencies must register their personal information to the regional government, and provide annual notices with a small fee.[168] Unlike other Australian territories the ACT does not license sex workers. Only the owners of prostitution-based companies have to be licensed. This means that independent prostitutes are free to carry out their job unless they publically solicit. Second, does the policy give legal protections to the prostitute? The Act lays out a comprehensive list of disqualifying offenses that a client could commit including sexual assault, acts of indecency, using duress to induce person to provide commercial sexual services, and even

[165] Ibid, 9.

[166] Government of the Australian Capital Territory, "Sex Work Act 1992," *No. 64 of 1992* (December 1, 1992), 3. <https://www.legislation.act.gov.au/View/a/1992-64/19930507-4667/PDF/1992-64.PDF>

[167] Ibid, 6.

[168] Government of the Australian Capital Territory, "Sex Work Act 1992," *A1992-64* (October 10, 2019), 7-8. <https://www.legislation.act.gov.au/View/a/1992-64/current/PDF/1992-64.PDF>

obligations to use prophylactics. With this list, prostitutes are legally protected from manipulative or abusive clients.

Another Oceania country which merits attention is New Zealand. As a British dependency from 1856-1947, New Zealanders held Anglo-Saxon Victorian values. This moral attitude was embodied in the Vagrancy Act from 1866–1884 and the Contagious Diseases Act from 1869-1910. Restrictions which prohibited brothels, solicitation, and living off wages made from selling sex made prostitution de facto illegal. The various criminal codes legislating prostitution were consolidated under the Massage Parlours Act 1978. The Act defined an act of prostitution as "the offering by a man or a woman of his or her body for purposes amounting to common lewdness for payment."[169] The 1978 Act allowed massage parlors, defined as "any premises on or from which any person, by way of business, performs or offers to perform massage, or arranges or offers to arrange for the performance of massage, on any other person."[170] The owners of massage parlors also had to be licensed by the government.[171] Perhaps not surprisingly these parlors became de facto brothels as the law did not define lewdness nor explicitly ban massages causing sexual pleasure, only defining the action as that which "relaxes muscle tension, stimulates circulation, increases suppleness, or otherwise."[172] The suggestive phrasing which suggests masturbation might not be coincidental as massage parlors are common nicknames for brothels. The law also forced the owners of massage parlors to "maintain a list showing the full name, address, and date of birth of every person employed or engaged by him," a list which may be obtained by the police on demand.[173] Interestingly the punishment for being

[169] New Zealand Parliament, "Massage Parlours Act 1978," *1978 No. 13* (August 9, 1978), 78. < http://www.nzlii.org/nz/legis/hist_act/mpa19781978n13218/>
[170] Ibid, 77.
[171] Ibid, 78.
[172] Ibid, 77.
[173] Ibid, 87.

a masseuse caught performing an act of prostitution was only a suspension of license.[174] Clients went unpunished.

In 2002 a New Zealand government report recommended that a prostitution reform bill be passed not to promote "prostitution as an acceptable career option," but to "enable sex workers to have, and access, the same protections afforded to other workers."[175] The committee acknowledged a pragmatic approach to prostitution in that that they can "neither condone nor condemn it, but recognize its existence in society."[176] Rather than criminalize prostitution, the New Zealand Judicial Committee resolved to handle the harms of prostitution through legislative means which protect sex workers. Thus, the Prostitution Reform Act passed Parliament in 2003 with a vote of 60-59. The stated purposed of the Act is to "(a) safeguard the human rights of sex workers and protects them from exploitation, (b) promote the welfare and occupational health and safety of sex workers, (c) be conducive to public health, (d) prohibit the use in prostitution of persons under 18 years of age, (e) and implement certain other related reforms."[177] Now the policy criteria will be applied to see if it is a good model for U.S. states to follow. First, does it allow prostitutes to carry out their jobs? The Act revoked all previous restrictions. Brothels-keeping has been decriminalized, and their zoning is legislated though local ordinances.[178] Solicitation, or advertisement of sexual services, is allowed on the streets, but restricted in broadcasting, most public newspapers, and public cinema.[179] The Massage Parlours Act 1978

[174] Ibid, 94.
[175] New Zealand Parliament, *Prostitution Reform Bill (*Wellington: Justice and Electoral Committee, 2002), 1.
[176] Ibid, 2.
[177] New Zealand Parliament, "Prostitution Reform Act 2003," *2003 No 28* (June 27, 2003), 4. <http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/-ilo_aids/documents/legaldocument/wcms_117415.pdf>
[178] Ibid, 8.
[179] Ibid, 7.

was repealed.[180] The only people who were not allowed to be prostitutes were minors under the age of 18 and immigrants. Besides those two groups, sex workers could finally live off the profits they earned. Second, does the policy give legal protections to the prostitute? Each "operator of a business of prostitution" was required to "give health information (whether oral or written) to sex workers and clients."[181] Furthermore, as sex workers were "at work for the purposes of the Health and Safety at Work Act 2015," they had employee benefits such medical insurance, life insurance, disability insurance, retirement plans, and sick leave.[182] The Act also protected sex workers from "inducing or compelling persons," and allowed them to "refuse to provide commercial sexual services."[183] These legal protections are broad and the inclusion of healthcare is a boon for prostitutes.

Legalization Policies

The first legalization policy to consider is from the U.S. State of Nevada, which is peculiar in that it is the only U.S. state which allows prostitution in any capacity. Nevada has had brothels since the mid nineteenth century. Nevada became a state in 1864, and the new State Legislature "passed laws that permitted cities to regulate their own brothels."[184] As was the tendency during the Gilded Age, the Nevada brothels were segregated in red light districts. The difference is that, unlike brothels in other states which were allowed due to tacit approval from law enforcement, Nevada's brothels were legally approved. Urban brothels in Las Vegas and Reno became popular. As brothels and red-light districts across the country closed due to

[180] Ibid, 23.
[181] Ibid, 6.
[182] Ibid, 7.
[183] Ibid, 9-10.
[184] Margaret Davis, "Modern Courts and the Oldest Profession: The Litigious Development of Legalized Brothels in Ontario and Nevada," *Public Interest Law Reporter* 18 (1): 66-73 (2012), 69.

Progressive reforms, Nevada's vice districts were untouched. The situation changed in 1949 when city officials closed a brothel in Reno. The local government claimed that the brothel was a public nuisance which "annoys, injures, and endangers the safety, health and comfort of the citizens of the county and offends public decency."[185] The public nuisance claim was justified by the fact that statutes prohibited brothels "within 400 yards of a school or church, or in any house fronting on a principal business street in any town in Nevada."[186] The Nevada Supreme Court sided with the government, ringing the death knell on fully legalized prostitution. By 1951 all brothels in Reno and Las Vegas were closed. Remaining legal brothels were isolated in rural areas. The State Legislature then enacted a law in 1971 which banned "brothels for any county with a population in excess of 200,000" which then was raised to 400,000.[187] It seemed Nevada would be the 50th and final state to outlaw prostitution. Indeed, the Nevada Chamber of Commerce wanted to outlaw prostitution because they assumed tourists would not want to visit a city with legal sex work. [188] Then, in 1978, the Nevada Supreme Court reversed its *Cunningham* precedent. The 1971 State Legislature repealed "the common law rule that a house of prostitution constitutes a nuisance per se" because it created a state "statutory licensing scheme for houses of prostitution outside of incorporated cities and towns."[189] Since a state law did not see brothels as a public nuisance, city ordinances could not see them as nuisances either. Cities did not completely lose their regulatory powers over prostitution; it just had to be in accordance with state law. The Nevada Supreme Court affirmed the Lincoln County referendum which supported establishing brothels in 1970 reversed course in 1978 because the local government "expended

[185] *Cunningham v. Washoe County*, 203 P.2d 611 (Nev. 1949) at 63.
[186] Ibid, 65.
[187] Davis, 69.
[188] Barbara G. Brents, Crystal A. Jackson, and Kathryn Hausbeck, *The State of Sex: Tourism, Sex and Sin in the New American Heartland* (New York: Routledge, 2010), 68.
[189] *Nye County v. Plankinton*, 587 P.2d 421 (Nev. 1978), at 422.

large amounts of money on improving [the brothels]."[190] While no one in Nevada could challenge brothels on public nuisance charges anymore, the Nevada Supreme Court allowed voters to get rid of them through referendums.

Currently, prostitution in Nevada is regulated by Section 244.345 of the Nevada Revised Statutes, which allows counties "whose population is less than 700,000" to license and regulate brothels.[191] Prostitution is illegal in Carson City, Clark County, Douglas County, Eureka County, Douglas County, Lincoln County, Pershing County, and Washoe County. Big cities included in the counties with criminal prostitution include Reno and Las Vegas. The counties which operate brothels are Churchill Counties, Esmeralda County, Lander County, Mineral County, Nye County, and Storey County.

Let us use the policy rubric to see if Nevada's legal model carries merit. First, does the policy allow prostitutes to carry out their jobs? Brothels have to pay annual licensing fees in legal counties. These fees vary and can range from US $100,000 in Storey County to US $200 in Lander County.[192] County restrictions include zoning and the number of sex workers allowed to work in any brothel. Section 201.430 of the Nevada Revised Statutes makes it illegal for prostitutes or brothel owners to advertise "in any public theater, on the public streets of any city or town, or on any public highway…or in any county, city or town where prostitution is prohibited by local ordinance."[193] Local ordinances can also increase the number of restrictions on advertisement, with the exception of the Internet which is interstate commerce. Legal prostitutes also require work permits by registering with the police. These restrictions do not allow some prostitutes to carry out their work. Street prostitution and escort prostitution is

[190] *Kuban v. McGimsey*, 605 P.2d 623 (Nev. 1980), at 624.
[191] NV Rev Stat § 244.345 (2013).
[192] Barnett and Casavant, 20.
[193] NV Rev Stat § 201.430 (2013).

banned, leaving only one avenue. Brothel prostitution is restricted so much that prostitutes can neither advertise their services nor seek clientele in highly populated areas. Furthermore, prostitutes had their earnings split evenly with brothel owners and taxi services specifically designed to bring customers to the brothels.[194] The restrictions made it difficult for sex work to flourish. There is no right to flourish in an unregulated environment. Yet, if the regulations are so stringent that it prevents a certain job from even being economically viable, then it violates due process. This can be seen in how some states heavily restrict abortion clinics from operating or from allowing clients to receive medical treatment from them. These restrictions are naturally challenged in the courts. Second, does the policy give legal protections to the prostitute? In order to obtain a work permit, prostitutes take mandatory HIV screening. It is illegal "for an individual who is HIV-positive to engage in prostitution," and "brothel owners may be liable for damages if clients become infected with HIV."[195] Prostitutes do not have the "authority to refuse customers" unless they are "approved by management."[196] Despite working for government licensed brothel owners, prostitutes are considered independent contractors so they "cannot receive unemployment, retirement or health care benefits."[197] Since prostitutes have to choose between joining heavily regulated brothels and the illegal underground where they are risk of being hurt, the Nevada laws would not be an optimal model for legalization. The intense restrictions which deprive prostitutes of the ability to effectively work and the lack of legal protections could become the basis of a lawsuit which reaches the Supreme Court on a due process claim.

[194] Vivian Giang, "Everything You Ever Wanted To Know About Prostitution In Nevada," *Business Insider*, December 14, 2011. <https://www.businessinsider.com/prostitution-legal-nevada-prostitutes-brothels-sex-2011-12?op=1>

[195] Barnett and Casavant, 20.

[196] Giang, *Business Insider*.

[197] Ibid.

The second legalization policy comes from Victoria, Australia. Victoria was the first Australian state which advocated regulation over suppression. As in the ACT, prostitution in Victoria first was modeled after British legislation. The Vagrant Act 1852 said that "any common Prostitute who is in any Street or public Highway or being in any place of public Resort" behaves "in a riotous or indecent manner."[198] Meanwhile the Conservation of Public Health Act 1878 mirrored the British Contagious Disease Act in that suspected prostitutes who do not turn themselves in will be "apprehended and conveyed to a hospital and placed there for medical treatment, and such warrant shall be a sufficient authority to all persons for the arrest and detention of such female."[199] Prostitution criminal law then consolidated into the Crime Acts 1890. Despite the fact that Part II of the law was called "Suppression of Prostitution," it included legal rights for consensual prostitutes over the age of 21.[200] The act charged any person who through "threats or intimidation procures or attempts to procure any woman or girl to have unlawful carnal connection" with a prison sentence of two years.[201] The act also punished owners of brothels who "permitted the defilement of girls on their premises."[202] An unlawful detention of a prostitute happened if they can prove that a client threatened legal proceedings or "withholds from such woman or girl any wearing apparel or other property belonging to her."[203] A client could not threaten prostitutes, through civil or criminal suits, if they did not consent to their demands. Despite how the Victorian public accepted brothels, the government cracked down on them by the early twentieth century. The Police Act 1907 punished any male who

[198] Government of Victoria, "An Act for the better prevention of Vagrancy, and other Offences," *No. XXII* (December 29, 1852), 2. <http://www.austlii.edu.au/au/legis/vic/hist_act/tva1852127.pdf>

[199] Government of Victoria, "An Act for the Conservation of Public Health," *No. DCXXXL* (December 2, 1878), 138. <http://www.austlii.edu.au/au/legis/vic/hist_act/tcopha1878318.pdf>

[200] Government of Victoria, "An Act to amend the Crimes Act 1890 and for other purposes," *No. 1231* (December 23, 1891), 4. < http://www.austlii.edu.au/au/legis/vic/hist_act/ca189182.pdf>

[201] Ibid, 5.

[202] Ibid.

[203] Ibid, 6.

"knowingly live on the earnings of prostitution," and punished any person who let their house be used for "immoral purposes."[204] Brothels shut down across Victoria from government pressure but were eventually revitalized by a popular movement in the 1980s.

Prostitution in Victoria, Australia is currently regulated by Prostitution Control Act 1994. The stated purpose of the act is to "control prostitution in Victoria."[205] This law gives the government more regulatory power than the law in the ACT, but less than Nevada policies. The question is whether it is good policy. First, does the policy allow prostitutes to carry out their jobs? The Act regulates brothels and escort agencies, but does not allow street prostitution.[206] Brothel-keepers and managers of escort agencies "must not carry on business as a prostitution service provider" without a government license.[207] The prostitutes themselves do not need a work visa or license. Small-brothels, however, are exempt from the license if they had received a permit under a 1987 act and if the business is managed by one or two persons.[208] There are no clear restrictions on prostitutes themselves except not being allowed to solicit on the streets, and a minimum age of 18 years. Second, does the policy give legal protections to the prostitute? Part 2 of the Act deals with offenses connected with prostitution. More active protections include punishments against persons who force others "into or to remain in prostitution," punish persons who "live on earnings of prostitutes," and punish persons who enter brothels with the intention of "intimidating, insulting or harassing a prostitute."[209] These legal protections create the basis for a safe working environment.

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[204] Government of Victoria, "An Act to amend the Police Offences Acts," No. 2093 (October 22, 1907), 2-3. < http://www.austlii.edu.au/au/legis/vic/hist_act/poa1907140.pdf>

[205] Government of Victoria, "Prostitution Control Act 1994," No. 102 of 1994 (December 13, 1994), 2455. <http://www.austlii.edu.au/au/legis/vic/hist_act/pca1994295.pdf>

[206] Ibid, 2467.

[207] Ibid, 2472.

[208] Ibid, 2473.

[209] Ibid, 2463-2468.

The Challenge of Stringent Regulations

It would not be surprising if some states wanted to adopt tougher regulations of prostitution. These types of regulation are called abolitionist, serving a "middle ground between prohibition and legalization."[210] The most popular abolitionist model began in Sweden and has since been adopted in Norway, Iceland, Northern Ireland, Canada, France, Ireland, and Israel. Ever since 1999 Sweden has "criminalized the activities of customers and other exploiters rather than those of individuals selling sexual services who are perceived as victims of exploitation."[211] The motivating drive behind the Nordic model is a belief that prostitution is a practice which is coerced by the buyers. The countries who have adopted this model do not want to prosecute prostitutes but help them get out of sex work. So, does the policy allow prostitutes to carry out their jobs? The answer is clearly no. The stated goal of this model is to destroy prostitution by "causing the exploitation business model to collapse for lack of demand."[212] Even if the selling of sex is de jure legal, it is unfeasible to earn money when the government punishes the buyers. One statistic shows that "1,200 were prosecuted for the purchase of sexual services between 2008 and 2011," but none could be criminally prosecuted because prostitutes denied having performed a sexual service.[213]

The Nordic Model has been criticized for its marginal impact on prostitution as it remained steady despite the fierce challenges. Most prostitutes have resorted to working underground in makeshift brothels or from the Internet. One unique way prostitutes have

[210] Barnett and Casavant, 2.
[211] Ibid, 13,
[212] Mary Ann Peters, "Nordic Model key to beating exploitation of sex workers," *CNN*, April 18, 2016. < https://www.cnn.com/2016/04/18/opinions/prostitution-nordic-model-peters/index.html>
[213] Barnett and Casavant, 14.

circumvented the law was to meet clients through Airbnb, a digital lodging service.[214] Second, does the policy give legal protections to the prostitute? Technically there is no legal harm done to prostitutes as the clients are targeted. This does not mean the prostitutes are necessarily protected. The Nordic Model emboldened the stigma against prostitutes and made it difficult for women "to get help from social services and the police," which "stoked their fear of eviction or loss of custody of their children."[215] Driving prostitution underground might cause a negative effect. The prostitutes are at higher risk from getting a venereal disease or being abducted into sex trafficking since they are deterred from seeking help.

Assuming a future where the Supreme Court struck down anti-prostitution laws, the Nordic Model would cause a huge legal battle between reformers and abolitionists. The best analogy would be with abortion. Even though the Court recognized the right to get an abortion, some states have either passed laws which discouraged women from obtaining abortions, made it virtually impossible to get abortions, or have passed laws which directly contradict the Court's precedent in hopes of getting it overturned.

Conclusion

When regulating sex between consenting adults as a business the main question is "what role should legislation (in particular, criminal law) play in regulating adult prostitution?"[216] The main goal of prostitution policy ought to address how prostitution can occur in a safe working environment. Strength of regulations can be as light as decriminalization, middle-ground like

[214] John Dyer, "Swedish Sex Workers Are Using Airbnb to Get Around the Law," *Vice*, February 11, 2016. < https://www.vice.com/en_us/article/3kw4nw/swedish-sex-workers-are-using-airbnb-to-get-around-the-law>

[215] David Crouch, "Swedish Prostitution Law Targets Buyers, but Some Say It Hurts Sellers," *The New York Times*, March 14, 2015. < https://www.nytimes.com/2015/03/15/world/swedish-prostitution-law-targets-buyers-but-some-say-it-hurts-sellers.html>

[216] Barnett and Casavant, 21.

legalization, or stringent. The states should experiment with which policy works best as long as it does not inhibit prostitutes from working, and as long as it gives prostitutes legal protections, and does not violate constitutional personal liberty protections. The Oceania models are good models for U.S. states to mimic. First, they fit within the policy criteria. Second, these countries share an Anglo-Saxon tradition with the United States. At one point they also adhere to Victorian attitudes towards prostitution, but have since moved past it. Third, Australia serves as a good analogy because it also has a federal government like the United States. Of course, each U.S. state could create unique prostitution regulations. Factors which have to be considered include street prostitution, the regulation of brothel and sex work industries, which type of people could be allowed to be clients, what government benefits would prostitutes get, what actions are crimes against prostitution, and who can legally live off the profits of sex work.

The purpose of this chapter was to suggest how policies could be framed. States whose populations are more accepting of sex work could be inspired from the New Zealand policy or Australian Social Territory policies. States who are accepting, but more reserved, could follow Victoria, Australia policy which has moderate government control. There will be the states that begrudgingly have to keep prostitution legal but create a stringent regulation which strongly discourages the practice. They will look towards policies such as the Nordic model. In these cases, the court systems will have to step in to knock down legislation which infringes on liberty rights. There are many types of prostitution policies in the world but these five serve as a starting point to what could be the future of U.S. prostitution legislation should the social taboo finally collapse.

	ACT, Australia	New Zealand	Nevada, U.S.A.	Victoria, Australia	Nordic Model
Benefits sex work?	Yes	Yes	No	Yes	No
Legal Protections?	Yes	Yes	No	Yes	Yes
Recommended	Yes	Yes	No	Yes	No

Conclusion

The main argument of this thesis can be summarized as "once we dispense with the subjective, moralistic condemnation of prostitution, little basis remains for prohibiting commercial sexual activities."[217] The social taboo against prostitution is a relic from Victorian times. In order for sex work to flourish, the stigma must dissipate. Legalization cannot occur until this mental barrier is removed. In order to do so, the first two chapters of the thesis focused on normative concerns in order to undermine the social taboo against prostitution. The last half of the thesis sought out a legal remedy for prostitution in the United States. Prostitutes and sex workers in general should have the personal liberty to use their body how they want and make a living off of it. Government regulations should decriminalize prostitution and regulate the practice so it becomes a safe working environment.

The first chapter focused on whether prostitution was harmful. John Stuart Mill had argued that governments could punish individuals who caused harm. The three arguments that prostitution violated the harm principle were that it spread venereal disease, promoted sex trafficking, and sex workers were victims. I responded that venereal diseases can equally be the fault of clients and that government regulation could monitor this issue without banning the practice, that the normative difference between prostitution and sex trafficking is consent, and that victimization is not a normative attribute of prostitution because of the volenti non fit iniuria (to a willing person, injury is not done) principle.

The second chapter dealt with moral challenges against prostitution. The feminist charge was that prostitution is a coercive practice where men are in charge. I responded that sex work is a legitimate type of work for women to choose, and that consensual prostitution has an equal

[217] Abramson, et. al., 135.

relationship between worker and client. The sentimentalist charges against prostitution were that the profession threatened the sanctity of marriage and that it made sex of poorer quality. I responded that prostitutes can better the lives of lonely persons, that it is the fault of an unfaithful spouse if they seek sex out of marriage, and that having sex for business and having sex for pleasure are two distinct emotional states. The Kantian charge makes the claim that prostitutes should be used as means to an end, which in this case is fulfilling sexual desire. I respond that the argument becomes moot because prostitutes and clients use each other's bodies for mutual gain, thus respecting each other's dignity.

As common arguments that prostitution is harmful and immoral were knocked down, the task was to see how prostitution would fit into American jurisprudence. The third chapter looked at Supreme Court cases to see if a right to prostitution could exist. For decades the Court used substantive due process to find fundamental rights not enumerated in the Constitution. They based their arguments on the Due Process Clause in the Fourteenth Amendment which states that states shall not "deprive any person of life, *liberty*, or property, without due process of law." For the sake of prostitution, the word liberty could be defined economically or personally. In *Lochner v. New York* the Court struck down an economic regulation because they found people to have a freedom of contract in their jobs. This jurisprudence was shunned in the twentieth century as the Court expanded the ability of Congress to regulate interstate commerce through the Commerce Clause and allowed states to regulate their own economy through police powers. Since economic based lawsuits heavily favor the government with rational basis reviews, prostitutes would lose if they argued that they have a right to contract. However, personal liberty cases bore more fruit. The Supreme Court used substantive due process to justify rights of privacy, abortion, and marriage. Prostitutes might win a lawsuit against state prohibition laws

because they exist within a zone of privacy and have liberty interests as a type of sexual relationship. It is more likely that they will not win because of the economic aspect of prostitution. In this case, the only path is for the democratic electorate to prove to their government why prostitution is not harmful or immoral. Even though Nevada has legal prostitution, the social taboo is still behind their strict regulations. All that is needed is one state to truly give sex work a genuine chance so that the ball begins rolling for legalization across the country.

Finally the last chapter is a policy paper on how the American government should regulate prostitution. If the Supreme Court ever ruled that selling sex is a fundamental liberty right, then the federal government would have to remove the phrasing which connected prostitution which its sexual trafficking laws. Meanwhile, the states would have to be bastions of democracy and experiment with prostitution policies if it became legalized. The states could come up with unique policies or look abroad for examples. I analyzed five types of prostitution policies around the world: The Austrian Capital Territory, New Zealand, the U.S. State of Nevada, the Austrian State of Victoria, and the Nordic Model. I recommended which of these models would be good policies depending on whether they could make prostitution a safe working environment. The rubric I created asked whether the policy benefitted sex work, and whether prostitutes had legal protections. The rubric resulted in the ACT, New Zealand, and Victoria laws being good models for legal prostitution.

The global view of sex work is changing. No longer is it a universal vice to use one's own body for profit. Prostitutes are the most ostracized of sex workers despite their longevity in human history. Instead of driving them underground where they are at risk of being harmed, it would be best to let them be themselves in an accepting world. The social stigma is strong but

unfounded. The United States has a complex history with prostitution, but one day it could be a world leader in making positive sex work legislation.

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