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Regulating the Sex Trade

John Avery

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## Regulating the Sex Trade

John Avery

The oldest profession<sup>1</sup> has been around for time immemorial and will be around long after this paper is dust. Sex is a driving force for all animals, and is a thirst for which there is no drink. There will always be those who seek sex and those who are willing to provide it for a price. Prostitution takes many forms, from a high-end escort who will make more money than the average doctor or lawyer, to the streetwalker who plies her trade for the price of a dime bag, to the middle class mom who wants to make a few extra dollars to help her family.<sup>2</sup>

The sale of sex has always had critics. These range from moral commentators touting religion and social values to more functional espousements regarding measurable social harm, to the arguments of feminists. Indeed, some feminist commentators regard prostitution as the last sexual stronghold of male dominion over women, while others see the criminalization of prostitution as a barrier to complete female agency.<sup>3</sup> The natural counterpoint to this position being that prostitution is the sexual stronghold of women,

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<sup>1</sup> Also known as the oldest form of oppression in certain feminist circles and by the U.S. Dep't of State, THE LINK BETWEEN PROSTITUTION AND SEX TRAFFICKING (2004), available at [http://www.defense.gov/home/features/2008/0608\\_ctip/docs/Prostitution%20Fact%20Sheet.pdf](http://www.defense.gov/home/features/2008/0608_ctip/docs/Prostitution%20Fact%20Sheet.pdf).

<sup>2</sup> For an in depth discussion on the many kinds of sex work see, Christine Harcourt, *The Many Faces of Sex Work*, 81(3) SEXUALLY TRANSMITTED INFECTIONS 201 (June 2005).

<sup>3</sup> Angela Miles, *Prostitution, Trafficking and A Conversation with Janice G. Raymond*, 22(3-4) CANADIAN WOMEN'S STUDIES 26-29 (2003).

who are the ones generally in charge of the commodity being sold, and the ones in charge of the exploitation.

Moral arguments against prostitution, although the most ubiquitous, are at best ethereal and impractical. They are also altogether unhelpful in a free society when dealing with issues of human “vices” such as drugs, alcohol, and particularly prostitution, the roots of which are at the very core of human motivation. The exploration of moral legislation and ideals are beyond the scope of this paper.<sup>4</sup>

There are many pitfalls to the sale of sex. Practical concerns include the spread of Sexually Transmitted Diseases (STD’s), drug use, and other criminal activities among prostitutes. Additionally, as in any profession, there are those who will exploit it. The exploitation of women (particularly of poor or disenfranchised women) by pimps, sex traffickers, etc, is a huge concern. There is also apprehension at the very real promulgation of other illegal conduct that tends to center around prostitution.

The link between drugs and prostitution is profound. It is one of the main reasons many prostitutes are on the street.<sup>5</sup> Various studies have indicated that somewhere between 18-27% of prostitutes entered the profession to pay for drug habits.<sup>6</sup> Therefore any system trying to combat prostitution should have some focus on recovery programs for prostitutes. Our system seldom however offers any meaningful attempt to help prostitutes with drug addictions or in the escape of the prostitution trade. The only real

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<sup>4</sup> For a more complete analysis about the moral issues often invoked regarding prostitution, see Igor Primoratz, *What’s Wrong with Prostitution?*, 68(264) PHILOSOPHY 159 (April 1993).

<sup>5</sup> Ellen Mitchell, *Crack Addiction is Forcing Prostitutes Onto the Streets*, N.Y. TIMES, February 18, 1990.

<sup>6</sup> Alexis M. Kennedy *et al.*, *Routes of Recruitment into Prostitution*, 15(2) JOURNAL OF AGGRESSION, MALTREATMENT AND TRAUMA 2 (2007).

'help' prostitutes may get is jail time in which to sober up. There are occasional programs designed to help prostitutes, one such program in Dallas gives prostitutes a choice between free rehab and jail.<sup>7</sup> Most prostitutes are often never even offered any such services.<sup>8</sup> A quick review of prostitution literature reveals that such programs are not universally available and are shockingly lacking in most countries. Many of the programs that do exist are not designed to handle the unique problems prostitutes face in exiting prostitution and consequently have only modest success rates. The link between intravenous drug use and disease is an additional complication. While it has been shown that many prostitutes, with regular condom use, have the same prevalence of HIV infection as the general population, those who abuse intravenous drugs are much more likely to be HIV positive.<sup>9</sup> Although this data is suggestive that drug-using prostitutes, as opposed to prostitutes in general, are the main causative agent for the spread of disease, this is by no means conclusive. In either case it is a seldom-regarded yet important aspect of prostitution reform.

Feminist commentators have vastly varied views. Radical feminists, whose usual heralds include Kathleen Barry and Catharine MacKinnon, see prostitution as the perpetuation of male sexual dominance over women, and the dehumanization, degradation, and ultimately objectification of women. Meanwhile others see legalized

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<sup>7</sup> Jeff Carlton, *Dallas Program Treats Prostitutes as Sex Crime Victims*, ASSOCIATED PRESS, January 6, 2010.

<sup>8</sup> Anthony M. DeStefano, *Prostitute Survey Cites Cop Abuses*, NEWSDAY, June 23, 2003.

<sup>9</sup> Van Veen *et al.*, *HIV and Sexual Risk Behavior among Commercial Sex Workers in the Netherlands*, 39(3) ARCHIVES OF SEXUAL BEHAVIOR 718 (2010).

prostitution as liberating to women and their sexuality, allowing them to ply a profitable and recession resistant ‘trade’.<sup>1011</sup>

Almost all societies have some laws governing prostitution. Their scope varies widely yet their goals are more or less uniform.<sup>12</sup> The goals of most existing laws and regulations are to cure one of the pitfalls discussed above. There is no panacea for these ills, whether some may seem conjured or not, and indeed sometimes the “cure” has been worse than the disease. No matter the case, real, illusory, or created, prostitution is not going away, and it is up to society to deal with these problems as best as possible.

In this paper I will discuss some of the methods and approaches the Netherlands, the United States and Sweden have taken in order manage prostitution, as well as some of those methods accompanying pitfalls and payoffs. I will then discuss the total affect of these legislations as applied to the goals of alleviating feminist critiques and practical concerns regarding prostitution. Finally I will propose several sets of rules that take the best of the three approaches to form a more perfect and effective means to legislate the sex trade.

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<sup>10</sup> Niklas Jakobsson & Andreas Kotsadam, *The Law and Economics of International Sex Slavery: Prostitution Laws and Trafficking for Sexual Exploitation*, 33 EUROPEAN JOURNAL OF LAW AND ECONOMICS 5 (2010), available at <http://www.springerlink.com/content/4pxl287621454465/>.

<sup>11</sup> For an extremely insightful although slightly dated article on feminist thought on prostitution, see Belinda Cooper, *Prostitution: A Feminist Analysis*, 11(22) WOMEN’S RIGHTS LAW REPORTER 99 (1989).

<sup>12</sup> “There is a significant difference between the concept of decriminalization and the concept of legalization. Decriminalization makes the practice free from legal punishment. Legalization gives the practice all the protections of civil law. These include the legal enforcement of contracts, the protections of labor laws such as occupational safety laws, antidiscrimination laws, and Social Security, workers’ compensation, and unemployment laws.”

Law Library, American Law and Legal Information, *Sex Offenses: Consensual – Prostitution* 2104, available at <http://law.jrank.org/pages/2104/Sex-Offenses-Consensual-Prostitution.html>.

## The American Model

Outside of 11 Counties in Nevada,<sup>13</sup> Prostitution is completely illegal in all forms in the United States. There are a variety of laws governing prostitution. The laws generally make it a misdemeanor<sup>14</sup> to sell sex for money.<sup>15</sup> Some states also have laws creating mandatory HIV tests for those convicted of prostitution,<sup>16</sup> as well as higher level charges (felony) for selling sex after testing positive for HIV.<sup>17</sup> Many states also make illegal the purchase of sex, meaning the johns may be arrested as well. There are also many laws against pandering, pimping,<sup>18</sup> etc. These laws are also enforced with different degrees from jurisdiction to jurisdiction, especially regarding the type of prostitution. Most of the discussion will however focus on low-end street prostitutes who are the ones

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<sup>13</sup> For details on which counties are legal or illegal and their accompanying penalties for prostitution, *see*

<http://prostitution.procon.org/view.resource.php?resourceID=119#3>.

<sup>14</sup> For specific penalties for prostitutes, customers, pimps, and brothel owners under all 50 states, *see id.*

<sup>15</sup> N.J. STAT. § 2C:34-1(a)(1) defines prostitution as “sexual activity with another person in exchange for something of economic value, or the offer or acceptance of an offer to engage in sexual activity in exchange for something of economic value.” Their definition of sexual activity also encompasses nearly any sexual act the mind can think of.

<sup>16</sup> See Illinois Supreme Court decision upholding the states law making HIV tests mandatory for those convicted of prostitution. *People v. Adams*, 597 N.E.2d 574 (Ill. 1992).

<sup>17</sup> NEV. REV. STAT. § NRS 201.358, makes it a category B felony for a prostitute to solicit after receiving the results of a positive HIV test. This increases the fines and penalties to a possible 2-10 years in prison and/or a \$10,000 fine.

<sup>18</sup> N.J. STAT § 2C:34-1(a)(4) governs the illegality of pimping and pandering and makes it an offense of the third degree unless a minor is involved.

in the highest danger of victimization and who are most likely to be drug abusers and have the least means to mitigate the negative effects of their occupation.

Although most of the American system banning prostitution is based on moral disdain, as discussed above, these alone are insufficient to be the basis of real regulation with an eye toward reasonable and justifiable social goals. Although many individual statutes governing prostitution in the United States cite moral grounds, the Department of State has declared illegality based on more tangible reasoning, stating that prostitution should be illegal in order to protect the safety of women, reduce related criminal activity and stop the spread of disease.<sup>19</sup> There are also several feminist critiques favoring the American system, the paramount proponents being radical feminists.

Radical Feminists argue that prostitution is essentially victimization of women. In this view woman should not be looked at with sexual agency all on their own. That is, one should not protect the institution of prostitution as promoting female choice, but instead one must look to the underlying reasons as to why the woman is a prostitute in the first place. Janice Raymond, a professor at the Emerita School of Women's Studies and Medical Ethics at the University of Massachusetts and a proponent of this view,<sup>20</sup> argues that all women, despite their 'choice' to enter prostitution are essentially being exploited by men. She argues that because of this there should be a total<sup>21</sup> ban prostitution even if a minority of women are not abused or coerced into it. Their view is not without merit, in a study of legal prostitutes in Nevada brothels, 81% desperately wanted to escape the life.

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<sup>19</sup> U.S. Dep't of State, *The Link Between Prostitution and Sex Trafficking* (2004).

<sup>20</sup> Miles, *supra* note 3, at 26.

<sup>21</sup> For purposes of this paper Total Ban will refer to all forms of prostitution being illegal, as apposed to certain countries where only some forms such as brothel prostitution are illegal. For more information on these countries, see U.S. Dep't of State, *supra* note 1.



Whether their wish is because of conditions or because it is an essentially exploitative trade (as radical feminists argue) is up to interpretation however.<sup>22</sup>

The American system, by anecdotal observation, has reduced the number of prostitutes there would be in a legal regime. There are fewer prostitutes per capita<sup>23</sup> than in countries such as Holland and Germany where prostitution is widely accepted.<sup>24</sup> It is presumed that reduction is due to law enforcement efforts, rather than economic differences, as the economic opportunities in the countries under comparison are generally equivalent. Our system cannot be likewise compared on an equal basis to a country such as Ghana, where economic compulsion may be the overriding reason. However, although the U.S. may have a lower per capita rate of prostitution, that cost may be being borne by those fewer individual prostitutes who generally live under worse conditions than their Dutch or German counterparts. A fuller explanation of which is below.

The negative aspects of the American System are far more convincing than radical feminist arguments promoting it. The side affects of complete illegality are varied and comprehensive to the entire institution of prostitution. The laws themselves not only cultivate public feelings of moral condescension toward sex workers, this bias

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<sup>22</sup> MELISSA FARLEY, PROSTITUTION AND TRAFFICKING IN NEVADA: MAKING THE CONNECTIONS, 155 (2007).

<sup>23</sup> Karen Hindle *et al.*, PROSTITUTION: A REVIEW OF LEGISLATION IN SELECTED COUNTRIES, 21 Canadian Library of Parliament, Legal and Legislative Affairs Division, November 20, 2003.

JJ. Pottterat *et al.*, *Estimating the Prevalence and Career Longevity of Prostitute Women*, 27 JOURNAL OF SEX RESEARCH 224 (1990).

<sup>24</sup> To see per capita prostitution in many other parts of the world see, J. Vandepitte *et al.*, *Estimates of the Number of Female Sex Workers in Different Regions of the World*, 82 SEXUALLY TRANSMITTED INFECTIONS (2006).

exacerbates the already precarious situation of many prostitutes. Under this system prostitutes are provided little if any political or legal power. They are seen as trash generally unworthy of the aegis of the law.<sup>25</sup> It may also be extremely hard to root out this bias against prostitutes in the legal system,<sup>26</sup> and that even should normalization/legalization be possible, it will not be immediately effective in ameliorating the situation, making it extremely difficult for prostitutes to receive help or redress after being robbed, raped or beaten; occurrences that happen at an alarming rate.<sup>27</sup> In such a political climate, the objective of protecting women from exploitation goes out the window, and instead fosters further danger for the sex worker.

This political powerlessness and the targeting by law enforcement of those who are already seen as victims<sup>28</sup> only leads to negative outcomes. Similar to 1920's prohibition, having an illegal status drives the institution underground and creates ever-worsening outcomes. From an economic standpoint the sex trade is inherently market driven and the prostitutes need to be concentrated in order to be found and have their services bought.<sup>29</sup> In a system of total illegality however the sex worker must be invisible, which drives up the cost of solicitation. This cost is borne typically through

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<sup>25</sup> Scott A. Anderson, *Prostitution and Sexual Autonomy: Making Sense of the Prohibition of Prostitution*, 112 ETHICS 749 (July 2002), (citing Martha Nussbaum, WHETHER FROM REASON OR PREJUDICE: TAKING MONEY FOR BODILY SERVICES, 27 JOURNAL OF LEGAL STUDIES 693-723 (1998)).

<sup>26</sup> *Id.* at 756.

<sup>27</sup> Melissa Farley *et al.*, *Prostitution, Violence, and Post-Traumatic Stress Disorder.*, 27(3) WOMEN & HEALTH 37-49, (1998); *see also* LINDA A. FAIRSTEIN, *SEXUAL VIOLENCE, OUR WAR AGAINST RAPE* (1993).

<sup>28</sup> Miles, *supra* note 3, at 26.

<sup>29</sup> Steven Levitt *et al.*, *An Empirical Analysis of Street-Level Prostitution*, Preliminary Report of Economics Department, University of Chicago 2 (2007), *available at* <http://economics.uchicago.edu/pdf/Prostitution%205.pdf>.

bribing officials, the use of pimps, or both. The cost of avoiding police arrest<sup>30</sup> usually entails paying the price in sex,<sup>31</sup> or with a cash bribe.<sup>32</sup> However these bribes are still ineffective at protecting sex workers from violence from johns and Johnny Law himself.<sup>33</sup> Additionally/alternatively prostitutes turn to pimps to solicit for them and protect them from both johns and Johnny Law alike. The cost to the prostitute of having a pimp is usually quite high, often requiring large kickbacks of earnings, and risking being beat or raped by their pimp, or worse.<sup>34</sup> The extra costs of solicitation, combined with limited bargaining power, ultimately lowers wages and has the effect of sex-workers having to take in more clients per day to meet their monetary needs. An additional danger may include the offering of ‘extras’ such as not using a condom as an additional inducement to the client, even further exacerbating the STD issue.<sup>35</sup>

Radical Feminists are not completely happy with the American system for much the same reasons. They would like to eliminate prostitution altogether, however they

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<sup>30</sup> *Id.* at 15.

<sup>31</sup> *Id.* at 2. This Chicago based study also found it more likely for a prostitute to have sex with a cop than to be arrested by one.

<sup>32</sup> Police Corruption runs rampant as evidenced by a simple google search. For a case of a widespread corruption ring in New Jersey, see Alexander Voriente, *Ex-Chief Tells of Widespread Police Corruption*, N.Y. TIMES, April 1, 1999, available at <http://www.nytimes.com/1999/04/01/nyregion/ex-chief-tells-of-widespread-police-corruption.html?ref=alexandervoriente>.

<sup>33</sup>In one study, 24% of street prostitutes reported being raped by a police officer, Jody Raphael & Deborah Shapiro, *Sisters Speak Out: The Lives and Needs of Prostituted Women in Chicago*, Center for Impact Research 20 (2002), available at <http://impactresearch.org/documents/sisterspeakout.pdf>. Many prostitutes report violence, extortion, and sexual assault. See Levitt, *supra* note 29, at 2.

<sup>34</sup> Detailed analysis of pimping and its detrimental effects is beyond the scope of this paper but for more information, see Evelina Giobbe, *An Analysis of Individual, Institutional, and Cultural Pimping*, 1(1) MICHIGAN JOURNAL OF GENDER & LAW 33-57 (1993).

<sup>35</sup> JANICE RAYMOND *et al.*, *Put in Harm's Way*, in POLICING THE NATIONAL BODY: SEX, RACE, AND CRIMINALIZATION 217 (2002).

acknowledge the fact that prostitution will take place regardless of laws.<sup>36</sup> Their issue with the American system is how it attempts to control it. Most attempts at control are aimed at arresting the prostitute not the johns.<sup>37</sup> Radical Feminists would only prosecute exploiters, johns and pimps and vigorously defend women from being prosecuted for their own ‘victimization’, since, to them, all prostitutes are victims.<sup>38</sup> Indeed most, if not all, feminist groups are in agreement on the point of not prosecuting the sex workers themselves, although their reasoning from case to case varies substantially however.

Finally the criminalization of prostitution has an economic impact. The cost of actually seeking out and prosecuting prostitutes in San Francisco alone was 11.4 million dollars.<sup>39</sup> Other cities such as Dallas also bear a significant burden of over 10 Million dollars spent to arrest prostitutes.<sup>40</sup> Additional costs to states include the imprisonment of prostitutes which costs Texas over 8 Million dollars a year.<sup>41</sup> Beyond just monetary figure, the cost is borne in the disproportionately large amount of time police spend on these arrests.<sup>42</sup>

The Regime in the United States is far from perfect, it appeases some radical feminists in their critiques, while failing in the eyes of others, as well as in the eyes of many other feminist groups. While the U.S. regime does seem effective at reducing the

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<sup>36</sup> Miles, *supra* note 3, at 26.

<sup>37</sup> Levitt, *supra* note 29, at 5.

<sup>38</sup> Miles, *supra* note 3, at 28. *See also*, discussion of Swedish system below.

<sup>39</sup> US PROStitutes Collective, *Yes on Prop K: Get the Facts* (2011), available at <http://www.yesonpropk.org/UUC.html>.

<sup>40</sup> Julie Pearl, *The Highest Paying Customers: America's Cities and the Costs of Prostitution Control*, 38 HASTINGS LAW JOURNAL 769 (1987).

<sup>41</sup> Dave Fehling, *Millions of Tax Dollars Spent Yearly to Incarcerate Prostitutes*, HOUSTON TELEVISION NEWS, January 27, 2011.

<sup>42</sup> Pearl, *supra* note 40.

number of individual prostitutes and occasionally helps prostitutes escape the life;<sup>43</sup> these benefits seem meager compared to the damage it causes to those remaining, as it compounds many of the evils the laws were supposed to eliminate. Ultimately the benefits do not justify the burdens and a fundamental reform is overdue and sorely needed.

### **The Dutch Model**

The Netherlands takes a much more liberal approach to the sex industry. Although prostitution has not been illegal *per se* for over a hundred years, it became officially recognized as a legal profession by statute in 2000. The goals of that legislation were:

- A. Protect prostitutes from commercial exploitation
- B. Fight involuntary prostitution and trafficking
- C. Combat the sexual abuse of juveniles
- D. Advance the position of individuals working as prostitutes
- E. Eliminate criminal involvement in the prostitution industry; and
- F. To limit the number of not European Union residents working as prostitutes<sup>44</sup>.

It has since been subject to vast regulation usually at the municipal level. In general however prostitutes and brothels must both obtain licenses,<sup>45</sup> and brothels must maintain certain health standards. For a prostitute that often means regular STD checks,

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<sup>43</sup> Via jail time versus more conventional help.

<sup>44</sup> Hindle, *supra* note 26, at 18.

<sup>45</sup> Anna G. Korvinus, *Trafficking in Human Beings, Third Report*, The Bureau of the Dutch National Rapporteur on Trafficking 87 (2005).

for brothels that means any number of municipal regulations on how they must operate, advertise and keep their shops. All prostitutes must be at least 18, (21 if new proposed legislation passes). Pimps are allowed as long as there is no coercion.<sup>46</sup> The system is heavily policed and enforcement taken seriously. Municipalities are also granted the right to create their own regulations regarding prostitution and how it must be done.<sup>47</sup>

Additionally sex workers are required to pay taxes and contribute to social insurance. Social insurance in the Netherlands is the Dutch equivalent to Canadian state medical insurance combined with American style Social Security, Welfare, Disability, and Unemployment benefits.<sup>48</sup> Some jurisdictions also require brothels to carry pension plans. Only members of the European Union are allowed to legally work, which has caused some underground prostitution similar to that in the U.S. Anyone who has entered illegally via human trafficking is entitled to governmental assistance.<sup>49</sup> Street prostitution only accounts for 5% of total (known) prostitution,<sup>50</sup> and many districts have specific zones for it. Most prostitution is done in brothels or via escort services.

The Dutch system is very progressive, yet still plagued with problems. Chief among the criticisms being the allegation that legalization has led to an increase in Sex Trafficking. The Netherlands allows EU members to apply for prostitution permits,

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<sup>46</sup> NETHERLANDS MINISTRY OF FOREIGN AFFAIRS, DUTCH POLICY ON PROSTITUTION 2 (2004) [Hereinafter N.M.F.A.], *available at* <http://www.mfa.nl/contents/pages/743/prost.pdf>.

<sup>47</sup> For a more detailed description and explanation of the Dutch system and many of its implications see the publication put out by the Netherlands Ministry of foreign affairs. *Id.*

<sup>48</sup> Kingdom of the Netherlands, *Dutch Social Policy* (2010), *available at* <http://www.dutchembassyuk.org/page/index.php?i=79>.

<sup>49</sup> They are allowed 3 months to use public medical care, legal services etc, and may be granted permanent residency under circumstances similar to U.S. asylum laws; N.M.F.A., *supra* note 46, at 7.

<sup>50</sup> *Id.* at 5.

which may help traffickers obtain legal status for the women they ‘import’. A report by the Coalition against Trafficking Women reported that 80% of prostitutes in Holland are foreigners, with 70%<sup>51</sup> having no work papers indicating they were trafficked in.<sup>52</sup> These figures also do not include prostitutes who could not be tallied, including illegals whom are often trafficked in. Numbers such as these are cause for concern<sup>53</sup> and many to believe that trafficking has been inflating as a consequence of legalization.<sup>54</sup> They use these numbers in a campaign to flaunt the supposed failures of legalization.

In response to trafficking problems the Dutch government has taken proactive steps to prevent sex slavery. Besides strict enforcement of regulations all persons to ask to see a prostitutes working papers<sup>55</sup> or license<sup>56</sup> before purchasing their services, and additionally have set up systems to help girls who have been trafficked in the country, allowing them amnesty and permanent residency.<sup>57</sup>

The Dutch dispute these allegations stating as a result of strict enforcement compared to other countries with broad bans, but weak enforcement, arguing that

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<sup>51</sup> Marie-Victoire Louis, *Legalizing Pimping, Dutch Style*, LE MONDE DIPLOMATIQUE, March 8, 1997.

<sup>52</sup> Many cling to these numbers despite the fact that they represent the trafficked population before the official recognition and regulation of prostitution in the Netherlands in 2000. They also draw upon the fact that there is still a large trafficking presence, see Nevada Coalition Against Sex Trafficking, *Myths and Facts about Nevada Legal Prostitution*, available at <http://www.nevadacoalition.org/factsheets/LegliznFactSheet091707c.pdf>.

<sup>53</sup> Amanda Kloer, *70% Rise in German Sex Trafficking Due to Legal Prostitution?*, (2010), available at <http://news.change.org/stories/70-rise-in-german-sex-trafficking-due-to-legal-prostitution>.

<sup>54</sup> Nevada Coalition Against Sex Trafficking, *supra* note 52.

<sup>55</sup> Working papers are to demonstrate the prostitute is from the European Union.

<sup>56</sup> Licenses are subject to some discretion and may not be granted if someone is suspected of being trafficked. N.M.F.A., *supra* note 46, at 1-4.

<sup>57</sup> *Id.* at 6-7.

legalization has actually decreased trafficking in the Netherlands.<sup>58</sup> The Centre for Information and Research on Organized Crime and the Dutch Ministry of Justice has released reports claiming a reduction in trafficked and illegal prostitutes.<sup>59</sup> These studies give support to the Dutch model and to legalization of prostitution as a positive force. In either case the jury is still out on the issue, and we must await more comprehensive studies to decide the affects legalization has on trafficking.

The problem of trafficking is not isolated to the Netherlands or to countries with open prostitution, indeed this is a burgeoning area of great importance as human/sex trafficking is extremely wide spread and is extensive in the United States<sup>60</sup> as well. One problem that aggravates the devastation caused to trafficked workers particularly in the Netherlands and other legal regimes is the same as that for all prostitutes in America; they have to hide if they are too afraid to come out to authorities that they were trafficked. This causes their conditions to worsen, reducing or eliminating their bargaining power, causing them to make less money, forcing them to see more johns to make up the difference, and being more likely to accede to demands for dangerous ‘extras’ such a not using a condom.<sup>61</sup>

One main goal of legalization subsumed into “advancing the position of prostitutes” was the ability to regulate and to regulate the use of condoms and to check

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<sup>58</sup> Korvinus, *supra* note 45, at 91.

<sup>59</sup> Dina Siegel & A.L. Daalder, *Prostitution in the Netherlands Since the Lifting of the Brothel Ban*, Center for Information and Research on Organized Crime 2 (2007), available at, [http://www.ciroc.nl/nieuwsbrieven/en\\_nieuwsbrief%20sep07.pdf](http://www.ciroc.nl/nieuwsbrieven/en_nieuwsbrief%20sep07.pdf).

<sup>60</sup> Trafficking only mentioned briefly as its scope is vast and beyond the purview of this paper. For more information on both American sex trafficking and European trafficking, see U.S. DEP’T OF STATE, *TRAFFICKING IN PERSONS REPORT* (2009); see also, U.N. ODC., *Trafficking in Persons; Analysis on Europe* (2009).

<sup>61</sup> Raymond, *supra* note 35, at 217.



sex workers regularly for STD's. Radical Feminists argue against the supposed use of legalization to counter transmission of sexually transmitted disease.<sup>62</sup> They cite the World Health Organization, stating that men are 20 times more likely to transmit HIV to women than visa versa.<sup>63</sup> In other words it is really the johns who are the vectors of the disease and it is they who give the disease to the girls, and their wives/girlfriends and then eventually to more prostitutes.<sup>64</sup> Janice Raymond points out that because of this fact the system set to 'protect the women' is a farce, the logical extension of which is that it is designed to only legitimate the protection of men, not the girls, and that any attempt to say regulation is for the girls is merely a shield behind which male domination continues in disguise.<sup>65</sup> Ms. Raymond seems to ignore the fact however that although it is not completely fair it is still effective. An Australian<sup>66</sup> study found STD infection in illegal prostitutes at 80 times the level of their legal brothel equivalent.<sup>67</sup> The main focus of many studies<sup>68</sup> has been condom use and the efficacy of enforcing their use to prevent STD transmission. The legalization of prostitution has made it possible to require and

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<sup>62</sup> Miles, *supra* note 3, at 31.

<sup>63</sup> *Id.*

<sup>64</sup> The old feeling being that "prostitution is ultimately the source of contamination of the 'good' wife through the husbands weak moment." Melissa Farley & Vanessa Kelly, *Prostitution: A Critical Review of the Medical and Social Sciences Literature*, 11(4) WOMEN AND CRIMINAL JUSTICE 6 (2000).

<sup>65</sup> *Id.* at 31.

<sup>66</sup> Some states in Australia have legal prostitution.

<sup>67</sup> Bebe Loff *et al.*, Prostitution, Public Health and Human-Rights Law, 356(9243) THE LANCET 1766 (2000).

<sup>68</sup> For an overview of various other studies regarding the efficacy of condom requirements for prostitution, see Luis Scaccabarozzi, *Sex Workers and HIV*, AIDS Community Research Initiative of America (2005), available at <http://www.thebody.com/content/art14140.html>.

enforce prostitutes use of condoms, and drastically reduce transmission rates<sup>69</sup> among street and brothel sex workers.<sup>70</sup> Condom use is still impossible to truly regulate among the large portion of prostitution that is escort or home based. These women however are able to take refuge under the law and are not unduly denied bargaining power and control over their bodies, and are hence more likely to use condoms and charge higher prices.

Feminist arguments also espouse the rejection of the idea that women prostitutes have any free will in the first place. In particular this problem is exacerbated in legalized settings, “State Sponsored Prostitution”.<sup>71</sup> Legitimizing and accepting prostitution, in their view, undermines women’s ability to escape prostitution, and undermines their critique that all prostitution is exploitation of women.<sup>72</sup> Whether you agree with this view or not, one cannot ignore that fact that prostitution will happen, and in lieu of punishing sex workers they should be treated with dignity and respect and provided all the opportunities possible to have a safe and happy work environment. These aims are achieved relatively well under the strict regulation and enforcement of The Netherlands prostitution laws.

The goal of rooting co-morbid illegal activity has also not been achieved through legalization and regulation. Amsterdam is actually closing about half the their sex shops in the red light district because of connections with organized crime.<sup>73</sup> According to Amsterdam’s mayor in 2008, “Big crime organizations are involved here in trafficking

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<sup>69</sup> *Id.*

<sup>70</sup> Although intravenous drug use is the strongest predictor of HIV among prostitutes, regular condom use still has a substantial impact.

<sup>71</sup> Miles, *supra* note 3, at 27.

<sup>72</sup> Janice Raymond, *Ten Reasons for Not Legalizing Prostitution and a Legal Response to the Demand for Prostitution*, 2 JOURNAL OF TRAUMA PRACTICE 324 (2003).

<sup>73</sup> David Charter, *Half of Amsterdam’s Red-Light Windows Close*, TIMES (LONDON), December 27, 2008.

women, drugs, killings, and other criminal activities.” In order to deal with it he claims that they are reducing the sex industry’s bloated size in order to manage it better.<sup>74</sup> Whether these efforts have been effective is yet to be seen. But what is clear is that regulation and inspections have not been able to keep up with the size of the industry, perhaps necessitating stricter rules or more ubiquitous enforcement. Although crime centered around prostitution has not been abated, it has been asserted that crime committed by the prostitutes themselves are significantly diminished in a legalized state.<sup>75</sup> The illegality of prostitution forces it underground which is what drives further criminality by the prostitutes, under the view “I’m in this far already, might as well go a bit further.”<sup>76</sup>

The last goal of legalization was the improvement of the situation of prostitutes and the regulation of brothels to prohibit the exploitation of their employees. This has been accomplished in a variety of ways. Street prostitutes are often provided free condoms, safe monitored areas to work, and even opportunities to talk to social workers.<sup>77</sup> They are afforded the full protections of the law and can generally without bias report crimes against them. By law they are required to be given good working conditions and enjoy the benefits of being a part of legal society. In essence they have been handed the ability to resist coercion, violence, and exploitation, a significant step forward.

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<sup>74</sup> Marlise Simons, *Amsterdam Tries Upscale Fix for Red-Light District Crime*, N.Y. TIMES, February 24, 2008.

<sup>75</sup> Cooper, *supra* note 11, at 105.

<sup>76</sup> *Id.*

<sup>77</sup> Even free coffee. Patrick Jackson, *How the Dutch Protect their Prostitutes*, B.B.C. NEWS, December 19, 2006.

Whether you believe the radical feminists argument that all prostitution is by definition exploitation, and that legalization undermines women's ability to exit the profession, one cannot ignore the fact that under the Dutch system women are provided more resources to improve their situations and enjoy a happier, safer, and cleaner life. Reported involuntary prostitution and prostitution by minors has been dramatically reduced and remains low.<sup>78</sup> Trafficked women are provided amnesty, protection and often offered permanent residency<sup>79</sup>. Despite criticisms the Dutch system has achieved some of its goals to the benefit of all.

Finally estimates put prostitution as 5% of the Dutch Gross Domestic Product<sup>80</sup> (GDP).<sup>81</sup> That is a lot of taxable money otherwise unavailable when prostitution is illegal. This money and the additional money saved in not prosecuting prostitutes gives the Government the extra funds needed to provide inspections and all services provided under their regime, and then some.

### **The Swedish Model**

Sweden has taken a unique and simple approach to prostitution. They have made it illegal only to purchase sex, where selling it is legal. Therefore only the john may be prosecuted. Sweden's approach was brought about by policy makers tipping their hat to

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<sup>78</sup> Siegel, *supra* note 59, at 2.

<sup>79</sup> M.N.F.A., *supra* note 46, at 7.

<sup>80</sup> Gross Domestic Product is a measure of total output of an economy, everything produced by all the people (does not include illegal activity).

<sup>81</sup> Suzanne Daley, *New Rights for Dutch Prostitutes, but No Gain*, N.Y. TIMES, August 12, 2001.

feminists. They argued in line with Janice Raymond, that all prostitution is a form of violence against women.<sup>82</sup>

The system has three prongs with the aim of stopping prostitution. First Pimping and Pandering is illegal in all forms; including assisting in prostitution in any form, advertising, securing, etc. The laws huge grasp is meant to extend to anyone possibly involved in the activity, except the prostitutes themselves. Its grasp is matched by its teeth and has possible sentence of 8 years<sup>83</sup> in prison.<sup>84</sup> Secondly their law requires tenants and owners of premises to remove or evict those involved in prostitution. This effectively prohibits brothels or any form of renting rooms to someone thought to be prostituting. These laws are obviously intended simply to make it more difficult for prostitutes to sell sex. The third law, the centerpiece of their system, is that the *purchase* of prostitution is illegal. This includes any sexual service for nearly any compensation. The penalty for violation is a fine or up to a year in prison.<sup>85</sup>

The system may have achieved some of its goals. According to some studies, street prostitution has declined up to 75%<sup>86</sup> since implementation of the above laws.<sup>87</sup> It has also apparently reduced the amount of, scope, and profitability of traffickers in the

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<sup>82</sup> Susan Dodillet & Peter Östergren, *The Swedish Sex Purchase Act: Claimed Success and Documented Effects*. 1 Conference paper presented at the Hague international workshop, March 3, 2011.

<sup>83</sup> Perhaps not toothy enough for some, but still far in excess of most countries anti-pimping laws.

<sup>84</sup> Primoratz, *supra* note 4.

<sup>85</sup> It is argued that the penalty against purchasers has little or no teeth. In its first year only 234 johns were convicted. The police apparently have great difficulty in prosecution without the prostitutes' testimony. Their testimony would obviously be to their detriment, as it would help reduce available clientele. Hindle, *supra* note 26, at 21.

<sup>86</sup> Similar Italian laws have supposedly decreased prostitution by 70%. See *Italian Prostitutes Protest at Clampdown*, MARIE CLAIRE, May 17, 2007.

<sup>87</sup> Hindle, *supra* note 26, at 21.

country.<sup>88</sup> While these accomplishments are laudable, their validity and real effect are in question.

The Swedish system may have had an impact on reducing prostitution and reducing traffickers. Whether these affects are real or if they have simply changed the face of prostitution is questionable.. The goal of the Swedes was to help eliminate prostitution altogether but their system was not necessarily designed to help the situation of the prostitutes. According to a report by the Norwegian<sup>89</sup> Ministry of Justice:

*The Swedish street prostitutes experience a tougher time. They are more frequently exposed to dangerous clients, while the serious clients are afraid of being arrested. Prohibition will never be able to stop the purchase and sale of sex. It could only make conditions worse for the prostitutes. They have less time to assess the client as the deal takes place very hurriedly due to fear on the part of the client. They (the prostitutes) are exposed to violence and sexually transmitted diseases. If the client demands unprotected sex, many of the prostitutes cannot afford to say no. Harassment by the police has increased and the clients no longer provide tip-offs about pimps, for fear of being arrested themselves. The social workers working on the streets have problems reaching them. They (the prostitutes) use pimps for protection.<sup>90</sup>*

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<sup>88</sup> Gunilla Ekberg, *The Swedish Law That Prohibits the Purchase of Sexual Services*, 10 VIOLENCE AGAINST WOMEN 1200 (2004).

<sup>89</sup> Norway recently adopted a system substantially similar to that of Sweden. They conducted studies of the Swedish system in order to determine its efficacy.

<sup>90</sup> Dodillet & Östergren, *supra* note 82, at 23.

Mere decriminalization of the sale of prostitution may only have had the effect of driving prostitution further underground. It has not vanished but solicitation has merely changed venue from the street to the Internet and other less noticeable locations.<sup>91</sup> It is also argued that the reduced demand has created an environment of more desperate prostitutes. They are more likely now to acquiesce to not using condoms or other dangerous conduct, rather than lose a potential needed customer.<sup>92</sup> Also evidence has shown that although the laws have made it less likely normal non violent johns to seek a prostitutes services, it has not done so violent johns. Therefore the ratio of violence has increased further exacerbating the danger under which prostitutes operate.<sup>93</sup> In addition to these more tangible effects, Swedish prostitutes have identified as feeling an amplified social stigma after the new laws. They feel they are less respected and feel more hunted by police.<sup>94</sup> This less tangible outcome combined with the very harmful effects described above are indicative of a system that has not improved the lives of those it sought to protect; and that a fresh approach is required.

### **Discussion**

“The catch and release system works for recreational fishing, but it has no effect on prostitution.” Said another way, our ecclesiastic system has failed to address most of

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<sup>91</sup> Hindle, *supra* note 26, at 22.

<sup>92</sup> Dodillet & Östergren, *supra* note 82, at 23.

<sup>93</sup> SWEDISH MINISTRY OF JUSTICE AND THE POLICE, PURCHASING SEXUAL SERVICES IN SWEDEN AND THE NETHERLANDS 22 (2004), *available at* [http://www.regjeringen.no/upload/kilde/jd/rap/2004/0034/ddd/pdfv/232216-purchasing\\_sexual\\_services\\_in\\_sweden\\_and\\_the\\_nederlands.pdf](http://www.regjeringen.no/upload/kilde/jd/rap/2004/0034/ddd/pdfv/232216-purchasing_sexual_services_in_sweden_and_the_nederlands.pdf).

<sup>94</sup> Dodillet & Östergren, *supra* note 82, at 23.

the negative aspects of the sale of sex. The American system is based upon flawed concepts and morality decisions, generally neither being based in real life fact nor poised to help with the reality under which many prostitutes maintain a dire existence. Reform must look beyond broad bans on ‘immoral’ conduct and must address sex for what it is; something that will always exist in its puritan form and its commercial forms.

In order to address the numerous concerns inherent in the trade, a multifaceted approach is needed. One must also recognize that a complete legalization of prostitution Dutch style would be abhorrent to the puritanical. With this in mind, the plan proposed below will still have the goal of reducing prostitution. This goal will still be subservient to real world concerns below. It must resolve problems with STD’s, trafficking, criminal enterprise, drugs, exploitation, and the girls/guys individual lives. With the successes and failures of the American, Dutch, and Swedish systems we can begin to formulate effective regulation aimed at alleviating these issues, while placating some of the misgivings the American public would have of a more liberal regime. A broad overview of the proposed plan is to make the sale of sex,<sup>95</sup> legal, in most circumstances; meanwhile the purchase of sex would remain illegal in most.

First, in line with feminist commentators and the Swedish model, the sale of non-coercive sex must not be illegal in most cases. In other words the prostitute themselves must not be punished by any law save certain circumstances. I propose to establish a licensing<sup>96</sup> system for all prostitutes.<sup>97</sup> It would be easily and readily available subject

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<sup>95</sup> Exploitive practices such as pimping are not protected under this regime.

<sup>96</sup> This is also in part due to the need to tax.

<sup>97</sup> This type of system was rejected in Holland because of privacy concerns. They also found that mandatory testing for all prostitutes (brothels still required to test)



only to a health and drug test.<sup>98</sup> The license would be renewable at an interval of the legislatures choosing; most likely a slowly descending scale where renewal becomes more frequent as the system matures and prostitutes become more comfortable with it.<sup>99</sup>

Curable diseases will be treated and will not be a barrier to renewal. If prostitutes are found to have an incurable disease their license will be denied. In this circumstance however it becomes critically important to afford the prostitute with resources to help them escape the trade. These resources will be similar to those offered to all sex workers described herein. Positive drug test results will similarly result in denial of the license subject to the prostitute completing rehabilitation.<sup>100</sup> Sex workers will be free to go regardless of whether their application is denied. They will however run the risk of arrest if they are found to be prostituting without the license. If they are arrested for no license and found using drugs they should be given the choice between jail or rehabilitation in the case of first or other early offenses, with an escalating penalty regime for subsequent offenses.<sup>101</sup>

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was a violation of privacy. Although it does offend certain feminist critiques as well, it does seem to correlate with reductions.

<sup>98</sup> Drug testing is critical as intravenous drug use is a huge predictor HIV. Additionally a large proportion of prostitutes do so because of a drug addiction. Testing and free rehabilitation will achieve the goals of both STD reduction and of the number of prostitutes. Van Veen, *supra* note 9, at 718.

<sup>99</sup> Licensing systems are not studied well enough to fully decide their efficacy, countries such as Austria have their own licensing system that has worked, other countries such as Australia however have shunned such a system claiming prostitutes get checked for STD's more often than the system would require anyway. They have had equal success in reduced STD rates. Ronald Weitzer, *Legalizing Prostitution, Morality Politics in Western Australia*. 49 BRITISH JOURNAL OF CRIMINOLOGY 101 (2009).

<sup>100</sup> To be paid for by via tax revenue made from prostitutes.

<sup>101</sup> A system similar to that discussed in Carlton, *supra* note 7.

The only other restrictions will be placed upon brothels, which must have much more stringent standards. Brothels will have a zoning restriction,<sup>102</sup> similar to that of sex shops in New York City.<sup>103</sup> They will be required much like Dutch brothels to be licensed and subject to a multitude of health and safety regulation. They must be regularly checked for cleanliness, including STD checks for workers.<sup>104</sup> They must be regularly<sup>105</sup> checked for violations such as exploitive practices,<sup>106</sup> condom use, license checks, and checking for the presence of criminal enterprise. Violation of the system by either prostitute or brothel must also be strictly dealt with to ensure compliance with all applicable rules.<sup>107</sup>

While the sale of sex will be legal generally, the purchase of it will be illegal, outside of licensed brothels. This will follow Sweden's lead and their purported dramatic reduction in prostitution.<sup>108</sup> Although Sweden does not permit brothels it is hoped that in combination with the availability of legal brothels, the law should have the affect of reducing prostitution even more successfully. The biggest criticism of the Swedish system is that all it did was drive prostitution even further underground. In combination with legal brothels this fear maybe circumvented and it may have the desired affect of

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<sup>102</sup> The legislature may also wish to use a zoning restriction on non-brothel prostitutes, making the sale of sex illegal even with a license.

<sup>103</sup> For a more comprehensive view of both possible restrictions, actual restrictions and some of their legal histories, *see* NEW YORK DEP'T OF STATE OFFICE OF GENERAL COUNCEL, MUNICIPAL REGULATION OF ADULT USES, *available at* <http://www.dos.ny.gov/cnsl/lu03.htm>.

<sup>104</sup> Brothel workers will be held to a much more frequent testing cycle due to the ease of locating them and their assumed cooperation.

<sup>105</sup> Additionally random checks will likely be a necessity.

<sup>106</sup> This will include how the prostitutes are treated, their conditions, and checking for other indicia of coercion, and particularly of trafficking.

<sup>107</sup> Siegel & Daalder, *supra* note 59, at 2.

<sup>108</sup> Hindle, *supra* note 26, at 21.

also actually decreasing prostitution (outside very regulated brothels). The problems associated with those prostitutes who do still go underground should also be somewhat alleviated via the social help programs and the licensing scheme. It will also have the ancillary benefit Sweden enjoys in bringing street prostitutes to the Internet to solicit, an environment far superior in both safety and bargaining power.<sup>109</sup> Finally pimping, sex trafficking,<sup>110</sup> and other coercive profiting from sex workers must be very harshly punished and vigorously investigated. This will be to further discourage the exploitation of women and should in turn decrease the population of prostitutes as well as relieve the situation in which the individual prostitute finds herself.

Although these measures should help by themselves, they should be combined with social programs if we are to make a truly sizeable dent in both the size of the prostitute population as well as improve the conditions of those that remain. These programs specifics are beyond the scope of this paper but in general they must be designed and targeted at drug rehabilitation, counseling, and job skills classes and must all be available for free, paid for through the taxation of prostitution.

Under this proposed system, prostitution would stop being a black hole into which law enforcement throws money at, and turn into a source of revenue to fund workable social programs. First this system would save the police countless man-hours that could be used to stop violent offenders and traffickers. It would save millions in prosecutorial and prison expenses. Finally it would generate huge tax revenue. In the Netherlands

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<sup>109</sup> This mainly benefits low end street prostitutes who prior would have had limited bargaining power and its attendant consequences; It is acknowledged however that the very poorest sex workers may not be able to benefit from this.

<sup>110</sup> This in particular should be subject to huge penalties including lengthy prison sentences.

prostitution accounts for 5% of GDP in America in 2010 was \$14.6 Trillion.<sup>111</sup> Even if American prostitution only accounts for 1% of GDP, that is still over \$146 Billion in extra taxable monies. Money that could be well spent financing the licensing and inspection of brothels and prostitutes as well the above programs in an effort, unlike criminalization, that may actually achieve social goals.

Viewed objectively and without much bible thumping this system would yield a fairer, safer, and cleaner system for both sex workers and the public at large. It would address many of the social problems associated with prostitution in a unique way. One that both acknowledges the inevitability of prostitution, and that is designed and guided by the principles of science and feminism. Only in this way can we truly cure many of the problems of prostitution.

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<sup>111</sup> THE WORLD BANK, WORLD DEVELOPMENT INDICATORS (2011).