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ARTICLE

A MATTER OF PROSTITUTION: BECOMING RESPECTABLE

BEVERLY BALOS* & MARY LOUISE FELLOWS**

Feminists have achieved significant antiviolenace legal reforms in the areas of domestic abuse, sexual harassment, and rape over the past three decades. These reforms, however, have reinforced old borders between the traditional categories of violence and prostitution and have constructed new borders by maintaining the distinction between worthy and unworthy women. Despite these flaws, the law reform efforts have the capacity to transform the legal and social meaning of prostitution. By adopting an approach that transcends consent or coercion and private or public, Professors Fellows and Balos use the concept of respectability to introduce an analytically powerful framework for rethinking prostitution as a paradigm of degradation and as a practice of inequality.

First, the authors explain the role these dichotomies play in maintaining social hierarchies through the discourse of respectability. Next, the authors situate the relationship among prostitution, racial and gendered cultural practices, and rights of citizenship within the degradation/respectability framework. The authors use the concept of respectability to critique previous reform efforts and to propose a possible civil rights remedy that is not dependent on the traditional concepts of consent and coercion and individual liberty. In this way, they avoid polarizing the debate and create a genuine opportunity for significant legal reform in the area of prostitution. Ultimately, the authors elaborate a theory of citizenship that undermines the degeneracy/respectability dichotomy and that does not depend on an idea of worthiness.

Representative Howard Orenstein: Mr. Chair, I listened to the testimony and it was quite compelling, and it's undeniable that there is massive coercion going on in society with terrible consequences. I guess my question would be that, is it the position of the author, of

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Parts of this Article rely on ideas and concepts developed with Professor Sherene Razack in an article previously published. See Mary Louise Fellows & Sherene Razack, *The Race to Innocence: Confronting Hierarchical Relations Among Women*, 1 J. Gender, Race & Just. 335 (1998). The authors wish to thank Margaret A. Baldwin, Martha E. Chamallas, Sumi K. Cho, Nancy L. Cook, Adrienne D. Davis, and Evelina Giobbe for their valuable comments on earlier drafts. The authors also wish to thank Andrew Holly and Sarah Jepsen for their research assistance. Finally, the authors wish to thank the University of Minnesota Law School for its support.

the proponents [of this Bill] that a woman could never, under any circumstances, actually give consent to engage in this act?¹

Representative Andrew Dawkins: [I]n the House [Minnesota House of Representatives] we wanted to make it absolutely clear that we believe that a wom[a]n acting alone without any third party involved, without any coercion involved as an adult, really does have control over her own body and does have some [control over] making decisions and we didn't want to make the statute a presumption that simple transaction of money between the john and the prostitute by itself without more would constitute a[n] act of coercion. So we carved out . . . what then [became] referred to—we should find a better [name] for it—the “innocent john” provision [of] our bill.

. . . .

Senator David Knutson: Mr. Chairman, I don't think there are any innocent johns

Representative Andrew Dawkins: Maybe I'm not quite getting it and I could be, I'm trying to listen and learn here too, but the main point that I want to convey is that I don't want to concede anywhere in our law that an adult woman who's not being coerced by any third party or any other circumstances, except for her own actions, can make a decision about her own body and I'm trying to carve that out and protect it.²

INTRODUCTION

In 1994, the Minnesota legislature considered and ultimately enacted a statute that gives a person the right to sue for damages caused by his or her being used in prostitution.³ This statute provides that

¹ Act Involving Coercion into Prostitution: Hearing on H.F. 2519 Before the House Judiciary Comm., 78th Sess. (Minn. 1994) (statement of Rep. Howard Orenstein) (transcript prepared by author, on file with the *New York University Law Review*).

² Act Involving Coercion into Prostitution: Hearing on H.F. 2519 Before the Minnesota Legislative Conference Comm., 78th Sess. (Minn. 1994) (statements of Rep. Andrew Dawkins and Sen. David Knutson) (transcript prepared by author, on file with the *New York University Law Review*).

³ Minn. Stat. Ann. §§ 611A.80-611A.88 (West Supp. 1999). Although the statute is written in gender neutral language and its provisions apply to any person coerced into prostitution, this Article focuses on women in prostitution. We limit the inquiry to women for two reasons. First, women are overwhelmingly the persons most often used in prostitution by men, and, therefore, the meaning of prostitution is very much influenced by the actions of men buying sex from women. See, e.g., Eleanor M. Miller et al., *The United States, in Prostitution: An International Handbook on Trends, Problems, and Policies* 300, 313 (Nanette J. Davis ed., 1993) (“Most prostitutes in the United States are female; most customers, male.”). Second, within a society that treats heterosexuality as the norm, the meaning and practice of prostitution is substantially different for women in prostitution and for the men who are buying sex from them than it is for transsexual persons and men who sell sex to men; therefore, the three types of prostitution require separate analysis.

procurers (including owners of escort services, saunas, and other prostitution-related businesses)⁴ and those who seek to buy sex⁵ are responsible for the injuries caused⁶ when they coerce adults into prostitution or into remaining in prostitution.⁷ Modeled after a Florida statute,⁸ this new civil cause of action grew out of the efforts of a coalition formed by the authors, their students, and a grassroots advocacy organization.⁹

See generally Sheila Jeffreys, *The Idea of Prostitution 102-15* (1997) (reviewing literature concerning transsexual and male prostitution).

Not atypically, under Minnesota law, prostitution means "engaging or offering or agreeing to engage for hire in sexual penetration or sexual contact." Minn. Stat. Ann. § 609.321(9) (West Supp. 1999). This legal definition emphasizes a woman's selling of sex and obscures the act of purchasing sex. For purposes of this Article, we will use the term to mean the market exchange of sex for money so that we remain analytically attentive to the actions of both the seller and the buyer of sex. We also include reference to the market in acknowledgment of the activity as organized, readily available, and distinguishable from other activity in which the payment of money for sex is indirect or at least less explicit and unambiguous. We use the term "money" for simplicity but intend it to encompass both money and money's worth so as not to exclude bartering situations in which sex is exchanged for shelter, drugs, or other goods or services. For a discussion of the difficulties of designing a working definition of prostitution, see Rita Nakashima Brock & Susan Brooks Thistlethwaite, *Casting Stones: Prostitution and Liberation in Asia and the United States 10-15* (1996); R. Barri Flowers, *The Prostitution of Women and Girls 5-8* (1998); see also Jane Mills, *Womanwords: A Dictionary of Words About Women 53, 54-55, 114-15, 119-20, 122-23, 129, 139-40* (1989) (describing semantic histories of prostitution-related words, such as concubine, courtesan, harlot, hooker, hussy, Jezebel, and loose, as well as others); Carole Pateman, *The Sexual Contract 195-99* (1988) (discussing prostitution's meaning as rooted in patriarchal capitalist context of nineteenth and twentieth centuries).

⁴ Throughout this Article we refer to procurers as pimps. The term "pimp" refers to one who procures sexual services for others. It is of unknown origin but may be connected with the Middle French word for a small eel, *pimpreneu* or *pimperneau*, which was also used to refer to a knave, rascal, valet, and scoundrel; alternatively, it may be related to the Middle French term *pimper*, meaning to dress up elegantly or adorn. See Barnhart *Dictionary of Etymology 795* (Robert K. Barnhart ed., 1988); *An Etymological Dictionary of the English Language 452* (Rev. Walter W. Skeat ed., 1963).

⁵ Throughout this Article we refer to the purchaser of sex as a john. We use this term because it was the invention of women in prostitution who wanted to convey the notion that the men who buy sex are indistinguishable from one another. See Jeffreys, *supra* note 3, at 3; 2 *Random House Historical Dictionary of American Slang 301* (J.E. Lighter ed., 1997).

⁶ See *infra* note 24 (describing variety of harms experienced by women in prostitution).

⁷ The statute permits those who were used in prostitution while minors to sue for damages without having to demonstrate coercion. See § 611A.81(1)(b). For further discussion of juveniles in prostitution, see D. Kelly Weisberg, *Children of the Night: A Study of Adolescent Prostitution* (1985).

⁸ Fla. Stat. Ann. § 796.09 (West 1992). Margaret Baldwin drafted and testified on behalf of the Florida statute. See Margaret A. Baldwin, *Split at the Root: Prostitution and Feminist Discourses of Law Reform*, 5 *Yale J.L. & Feminism 47, 97* (1992).

⁹ In 1992 and 1993, Women Hurt in Systems of Prostitution Engaged in Revolt (WHISPER), a grassroots organization based in the Twin Cities, which advocates for women used in prostitution, undertook a public policy initiative to develop legislative pro-

On the one hand, the statute reflects conventional understandings of tort law in that it allows an adult woman to recover damages for injuries suffered in prostitution only if she can show that she was coerced into, or into remaining in, prostitution.¹⁰ It also relies on a conventional understanding of prostitution because it presumes that a woman who freely consents to the market exchange of sex for money suffers no recoverable harm. On the other hand, the statute's expansive definition of coercion narrows the meaning of "freely given consent" in a significant way.¹¹ While the statute defines "coercion" to include traditional meanings, such as acts of physical or mental torture,¹² it also expands the term to include less overt exercises of power. For example, defining the terms of an individual's employment or working conditions in a manner that leads foreseeably to the individual's use in prostitution is deemed to be coercive, as is a promise of financial rewards, a promise of marriage, isolating an individual from others, and exploiting those who have been victims of previous sexual abuse.¹³ This broad definition of coercion narrows the statutory definition of consent, thereby enabling a woman used in prostitution to obtain recognition for harms that would otherwise remain invisible to society and the law.¹⁴

In addition, the statute limits a defendant's recourse to proof of consent to rebut evidence of coercion.¹⁵ For example, the statute provides that traditional objective criteria, such as the fact that the plaintiff consented to engage in prostitution, that the plaintiff was compensated, that the plaintiff made no attempt to flee or otherwise

posals to reform the law of prostitution. The authors collaborated with WHISPER, offering a seminar in the fall of 1993 at the University of Minnesota Law School titled "Prostitution and Public Policy," which was co-taught by Mary Louise Fellows and Evelina Giobbe, who was then director of public policy for WHISPER. The students in the seminar developed several legislative proposals. In the semester beginning in January 1994, Beverly Balos taught a legislative clinic to provide an opportunity for students who had participated in the public policy seminar to continue their work and learn about the legislative process. The students and WHISPER presented their proposals to legislators and policymakers in a public forum. Subsequently, WHISPER chose two of the proposed law reforms as priorities for their legislative efforts: (1) the creation of a civil cause of action for individuals coerced into prostitution and (2) the elimination of a "mistake of age" defense to the charge of promoting or engaging in prostitution. The students in the legislative clinic continued to collaborate with WHISPER in refining the proposals, participating in the education of legislators, and monitoring the bills as they made their way through the legislative process and were enacted into law in May 1994.

¹⁰ See Minn. Stat. Ann. § 611A.81(1)(a) (West Supp. 1999).

¹¹ See *id.* § 611A.80(2).

¹² See *id.* § 611A.80(2)(2).

¹³ See *id.* § 611A.80(2)(5), (11), (12), (14), (17).

¹⁴ See *infra* note 24 (describing variety of harms experienced by women in prostitution).

¹⁵ See Minn. Stat. Ann. § 611A.82 (West Supp. 1999).

terminate contact with the defendant, that as a condition of employment the defendant required the plaintiff to agree not to engage in prostitution, or that the defendant's place of business was posted with signs prohibiting prostitution or prostitution-related activities, do not constitute a defense to an action claiming coercion.¹⁶ This list of "acts not defenses" constrains defendants from exploiting and manipulating the conventional understanding of the doctrine of consent in a manner that would undermine the statute's definition of coercion.

As the legislative history demonstrates, the proposed civil cause of action, which embraced the typical coercion/consent framework but reconfigured the meaning of coercion and consent,¹⁷ invoked strong reactions from some legislators who expressed apprehension in allowing anyone to recover damages resulting from consensual conduct.¹⁸ Their concerns focused on fairness for the defendant and autonomy for the woman. In the context of prostitution, consent is not morally transformative in that it does not convert illegal conduct into legal conduct.¹⁹ Regardless of a woman's consent, the market exchange of sex for money remains illegal. Notwithstanding the illegality of the conduct, some legislators worried about the fairness of a law that asserts that "yes" does not mean "yes."²⁰ Other legislators

¹⁶ See *id.* § 611A.82(1), (2), (5), (7), (8).

¹⁷ The coercion/consent dichotomy is, of course, not a modern invention. See Barbara Meil Hobson, *Uneasy Virtue: The Politics of Prostitution and the American Reform Tradition* 99 (1987) (reporting that "[t]hroughout the Victorian era, discussion of the causes of prostitution centered on the voluntary-or-involuntary question").

¹⁸ See *supra* note 2 and accompanying text (quoting statements of Rep. Andrew Dawkins and Sen. David Knutson).

¹⁹ For discussion of the morally transformative nature of consent, see Alan Wertheimer, *Consent and Sexual Relations*, 2 *Legal Theory* 89, 90 (1996).

²⁰ See, for example, Representative David Bishop's statement made during deliberations of the conference committee on the bill:

What is the purpose here? [If t]he purpose of this bill is really to get at the johns and use an attack of prostitution by putting financial pressure and causes of action against johns, then say so and make it quite simple. If the purpose of the bill is all these methods of pressure, where you're pressuring here a minor or an adult into prostitution, that's a different kind of case. Then you're after the madam, procurer, pimp, the person who puts the person into prostitution. And my perception of the bill is that was what the purpose was. That's why I signed onto the bill; when it appeared that what [we were] really going to be doing was arming people with lists of patrons, johns, customers, with an opportunity to go begin a series . . . of law suits for the purpose [of suing those persons] who were customers, johns, patrons, of the prostitute. When that appeared to be the real opportunity of the bill, the cause of action of the bill, I was concerned. That's [what] I was worried about. And I think that that is the true purpose. I think the true purpose of [it] is to get at the johns and if that's the case, it ought to be honestly reported. . . . I can see attorneys getting clients to bring them their record books with names and addresses and dates and start taking tape recordings and testimony and get lined up with complaints and

adopted feminist arguments, criticizing the proposed civil cause of action for treating as victims women who were exercising agency in choosing to engage in prostitution.²¹ As one legislator explained to us in a private meeting, he did not see how he could support a woman's choice to have an abortion and, at the same time, support legislation that did not recognize her choice to engage in prostitution.

Ultimately, the legislators amended the bill to provide that the payment of money cannot by itself constitute coercion.²² For the remainder of the legislative hearings, the amendment was referred to as the "innocent john" exception.²³ Unquestionably, the exception significantly undermines the proposal's initial challenge to the consent/coercion framework.

The statute and its legislative history raise two disturbing questions: Why, in the face of extended testimony about the harms of prostitution,²⁴ did many legislators nevertheless ask whether a woman

start to process sequential collections. And I don't know if that's what we want to do. [If this is going to be] a method of attacking prostitution, I think it honestly has to be said so. [Because] that's what's going to happen when we sign the bill.

Act Involving Coercion into Prostitution: Hearing on H.F. 2519 Before the Minnesota Legislative Conference Comm., *supra* note 2.

²¹ See *supra* notes 1-2 and accompanying text (quoting statements of Reps. Howard Orenstein and Andrew Dawkins).

²² Compare S.F. 2112, 78th Sess. (Minn. 1994) (on file with the *New York University Law Review*), with Minn. Stat. Ann. § 611A.81(1) (West Supp. 1999).

²³ See *supra* note 2 and accompanying text (quoting statements of Rep. Andrew Dawkins and Sen. David Knutson).

²⁴ See Jeffreys, *supra* note 3, at 186-91, 259-63 (identifying harms to and abuse of women in prostitution).

Understanding the harms caused by prostitution requires an appreciation of the fact that most persons used in prostitution have a history of physical and sexual abuse in childhood. See Ine Vanwesenbeeck, *Prostitutes Well-Being and Risk* 21-24 (1994); Mimi H. Silbert & Ayala M. Pines, *Early Sexual Exploitation as an Influence in Prostitution*, 28 *Soc. Work* 285, 285-88 (1983) [hereinafter Silbert & Pines, *Early Sexual Exploitation*]; Mimi H. Silbert & Ayala M. Pines, *Victimization of Street Prostitutes*, 7 *Victimology* 122, 125-27 (1982) [hereinafter Silbert & Pines, *Victimization*]; Ronald L. Simons & Les B. Whitbeck, *Sexual Abuse as a Precursor to Prostitution and Victimization Among Adolescent and Adult Homeless Women*, 12 *J. Fam. Issues* 361, 363, 370-71 (1991). It is well documented that persons in prostitution frequently experience sexual and physical violence. See Kathleen Barry, *The Prostitution of Sexuality* 36 (1995); Vanwesenbeeck, *supra*, at 154-56; Melissa Farley & Howard Barkan, *Prostitution, Violence, and Posttraumatic Stress Disorder*, 27(3) *Women & Health* 37, 38 (1998); Silbert & Pines, *Victimization*, *supra*, at 127-30.

The type and severity of abuse experienced by persons used in prostitution are illustrated in a recent study in which 130 people who engaged in prostitution in San Francisco were "interviewed regarding the extent of violence in their lives and symptoms of posttraumatic stress disorder (PTSD)." Farley & Barkan, *supra*, at 37. According to the study, 82% of the respondents reported having been assaulted since entering prostitution and 68% reported having been raped since entering prostitution. See *id.* at 40-41. The study also indicates that 48% of the respondents had been raped more than five times. See *id.* at 41. In addition, it found that women and transgender persons who engaged in prostitution

could consent to engage in prostitution? Why did some of the legislators embrace reasoning that led them to support the equality of all women by recognizing the autonomy of a woman who consents to sex

were more likely than men who engaged in prostitution to experience physical assaults and were more likely to be raped. See *id.*

The same study finds a 57% prevalence of a history of childhood sexual abuse—a rate lower than that reported in other research. See *id.* at 40, 44. The authors of the study provide two possible reasons for the lower figure. They suggest that it is likely that, for respondents “in the midst of ongoing trauma,” reviewing childhood abuse was probably too painful. See *id.* at 44. “Several respondents commented that they did not want to think about their past.” *Id.* The authors also noted that many seemed profoundly uncertain as to what abuse is. See *id.* For example, the authors report that “[a] number of respondents reported having been recruited into prostitution at the age 12 or 13, but also denied having been molested as children.” *Id.*

The study indicates that 84% of the respondents reported current or past homelessness. See *id.* It also indicates that drug abuse was reported by 75% of the respondents and that 50% reported physical health problems. See *id.* According to the study, 68% of the respondents met the criteria for a diagnosis of PTSD. See *id.* at 42. The authors describe the severity of the PTSD by comparing the respondents with other population groups. See *id.* For example, the respondents had a mean PCL score (an index of PTSD severity) of 54.9, compared with a mean of 50.6 for 123 PTSD treatment-seeking Vietnam veterans and a mean of 34.8 for 1006 Persian Gulf war veterans. See *id.* The mean PCL for respondents in the study is also high when compared to mean PCL scores derived from a random sample of women who sought healthcare through a health maintenance organization. See *id.* In that survey, mean PCL scores were 30.6 for 25 women who reported a history of physical abuse in childhood, 36.8 for 27 women who reported a history of physical and sexual abuse in childhood, and 24.4 for 26 controls in the same study. See *id.* Other studies also suggest that women in prostitution generally fare less well than other women. See Vanwesenbeeck, *supra*, at 108-10. While some women in prostitution have high well-being, others have numerous health complaints, even compared to women not in prostitution but who have experienced severe trauma. See *id.*

In another recent study of women engaged in street prostitution in Glasgow, Scotland, which was conducted over a two year period, researchers found that 71.6% of the women they studied in year one and 75.4% in year two were injecting drugs. See Neil McKeganey & Marina Barnard, *Sex Work on the Streets: Prostitutes and Their Clients* 38 (1996). The researchers also found an interdependent relationship between prostitution and drug use: The women worked to finance their drug use and used drugs to enable them to work. As one woman described the experience:

If I've no' had a hit, you jus' want it over an' done with. If you've had a hit, you can stand and work nae bother, it doesnae bother you, you know what I mean. But ye see if you're strait, ye start to think about it, then things start flooding back intae your mind and you're sayin' 'I don't want to dae this', you know what I mean.

Id. at 91. For the women interviewed for this study, “[v]iolence was such a frequent occurrence within the street prostitution scene that it was almost commonplace . . . [V]iolence was reported by nearly all of the woman interviewed . . .” *Id.* at 70.

Yet another type of harm experienced concerns sexually transmitted diseases, which occur at high levels among women in prostitution. Data collected from 1963 women engaged in prostitution in New York City who participated in a program that provides HIV testing, condoms, bleach kits for cleaning needles, and HIV prevention information shows that “35.2% tested positive for HIV, 26.5% reported a history of gonorrhea, and 18.1% indicated that they had syphilis.” Adele Weiner, *Understanding the Social Needs of Streetwalking Prostitutes*, 41 *Soc. Work* 97, 99 (1996).

for money?²⁵ Underlying these questions is a more fundamental one: Would prostitution exist in a world of equality?²⁶

Our thesis is that prostitution, through the consent/coercion and private/public dualities, enforces and reinforces social, economic, and political hierarchical differences. As a way to understand prostitution's role in maintaining subordinated social categories, we focus on the distinction between unworthy/degenerate and worthy/respectable women and the two ways prostitution functions to maintain this distinction. First, prostitution functions as a paradigm for degeneracy that supports social inequalities based on class, disability, gender, race, and sexuality. Second, it functions as a practice of inequality. Through an analysis that relies on the concepts of degeneracy and respectability, we demonstrate prostitution's role in undermining efforts to move toward greater social equality and explain how prostitution in the United States supports social hierarchies wherever and however it is practiced.²⁷

²⁵ A similar debate among feminists currently is taking place regarding the question of whether prostitution should be understood as violating human rights or whether consensual or "free" prostitution should be recognized as part of the human right of women to self-determination. See Jeffreys, *supra* note 3, at 306-38 (describing debate in context of international conventions against trafficking of women and prostitution); see also *infra* notes 174-77, 184-222, 303-09 and accompanying text (discussing usefulness of consent and choice analyses when considering legal reform strategies for prostitution); *infra* text accompanying note 331 (same).

²⁶ Although others have considered the relationship of prostitution to equality, they have typically employed gender or gender and class critiques to analyze the issues. See, e.g., Martha Chamallas, *Consent, Equality, and the Legal Control of Sexual Conduct*, 61 S. Cal. L. Rev. 777, 828-30, 842-43 (1988) (discussing difficulty of envisioning prostitution in model of "egalitarian sexual conduct" due to economic and social coercion inflicted upon women); Christine Overall, *What's Wrong with Prostitution? Evaluating Sex Work*, 17 *Signs* 705, 717-22 (1992) (critiquing prostitution as classist industry). Our goal is to consider equality by looking to the interrelationship among social hierarchies. The analysis focuses on power relations and the interlocking nature of systems of oppression. See Patricia Hill Collins, *Black Feminist Thought: Knowledge, Consciousness, and the Politics of Empowerment* 222-27 (1990) (investigating significance of analyzing race, class, and gender as interlocking systems of oppression); Catharine A. MacKinnon, *Difference and Dominance: On Sex Discrimination*, in *Feminism Unmodified: Discourses on Life and Law* 32, 40 (1987) (describing "dominance approach" in which "an equality question is a question of the distribution of power").

²⁷ Prostitution has engendered considerable debate among feminists. At the center of the debate is the consent/coercion and private/public dualities. On one side are those who view prostitution as work and an expression of a woman's sexual autonomy. See *infra* notes 323-25 and accompanying text (discussing workers' rights approaches and goals). On the other side are those who view prostitution as a form of violence against women. See *infra* notes 326-30 and accompanying text (discussing antiviolence groups' approaches). The opposing views of prostitution lead to further disagreements on legal reform approaches, including the question of whether prostitution should be totally decriminalized or decriminalized only for those persons used in prostitution. See *infra* notes 323-24, 327 and accompanying text (discussing two groups' positions regarding decriminalization).

We examine consent/coercion, private/public, and degeneracy/respectability by analyzing the legal reforms that address traditional categories of violence against women, as well as the antiviolence discourses that surround them. Through our analysis of the advances in theories and reforms of the laws of domestic abuse, sexual harassment, and rape, we expose the link between prostitution and inequality. Our purpose is to show that, while reform efforts in these areas perpetuate social hierarchies because prostitution is excluded from the discourse, at the same time these reforms have the potential to disrupt social hierarchies by transforming the legal and social meaning of prostitution.²⁸

Part I describes how domestic abuse, sexual harassment, and rape are interrelated, and how prostitution figures into these forms of sexual violence and into the laws that address them. It reveals a correlation between the pervasiveness of violence and the pervasiveness of prostitution in women's lives by showing how prostitution functions as a paradigm that underlies the law of violence against women. Part II analyzes the legal reforms in the laws of domestic abuse, sexual harassment, and rape that legislatures have enacted over the past three decades. It suggests that these reforms have either reinforced familiar boundaries between traditional categories of violence against women and prostitution or have constructed new distinctions.²⁹ At the same time, however, this Part argues that efforts to reform the law can potentially transform the legal and social meaning of prostitution.

In Part III, this Article explores how degeneracy and its opposite counterpart, respectability, operate to perpetuate social inequalities, with prostitution marking the boundary between those women whom

Our analytical framework is informed by this debate, but we rely on it primarily to demonstrate that a transformation of prostitution is limited so long as it is understood either as a matter of private choice or as a matter of coercion warranting state intervention. See *infra* notes 325, 331 and accompanying text (discussing how agendas of both groups represent claims for respectability and therefore reinforce rather than disrupt social inequalities).

²⁸ The degeneracy/respectability dichotomy operates in society on two levels. Sometimes it operates unconsciously as a habit of mind. Other times people use it as an intentional strategy for pursuing respectability and distinguishing their status and conduct from the taint of degeneracy. The embeddedness of the dichotomy in contemporary thought and practices makes it difficult to dismantle. We thank Martha Chamallas for this insight.

²⁹ Throughout this Article we rely on the spatial metaphors of borders and boundaries to signify that prostitution is practiced, as well as imagined, as a transgressive act. This Article neither draws directly from spatial analysis literature nor addresses in any detail the spatial implications of prostitution. Nevertheless, our ideas are informed importantly by the study of social spaces and borders that challenge conventional understandings of the role of law found in the legal literature. See, e.g., Keith Aoki, (Intellectual) Property and Sovereignty: Notes Toward a Cultural Geography of Authorship, 48 *Stan. L. Rev.* 1293 (1996); Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 *Harv. L. Rev.* 1841 (1994).

society labels unworthy and those women whom our society and culture construct as respectable. By locating the contemporary practice of prostitution within the historical context of nineteenth-century Europe and the United States, Part III shows how prostitution enforces and reinforces hierarchical differences in modern society. Drawing on the insights of critical race feminists, this Part also analyzes the interrelationships among prostitution, racial and gendered cultural practices, and rights of citizenship within the degeneracy/respectability framework.

Having found in Part III that prostitution plays a significant role in perpetuating inequality by reinforcing cultural norms of respectability, Part IV proposes political and legal strategies that can further the goal of social equality by moving the discourse beyond the degeneracy/respectability dichotomy. The proposals include the creation of a civil rights remedy to address the inequality perpetuated by prostitution, as well as the amendment of criminal statutes so that persons used in prostitution are no longer penalized. The statutes would, however, still hold criminally liable those who purchase services from persons used in prostitution, procure others for use in prostitution, or knowingly benefit financially from a person used in prostitution. These proposals, taken together, have the potential to disrupt the degeneracy/respectability dichotomy and thereby move us closer to a world of equality. The Conclusion summarizes the reasons why reform strategies that are based on notions of respectability reinforce social hierarchies. It urges those of us who are interested in social change to develop equality strategies by elaborating a theory of citizenship that does not depend on a concept of worthiness. Otherwise, prostitution will remain a paradigmatic model of degeneracy and a practice that perpetuates inequality.

I

PROSTITUTION AND THE CONTINUUM OF VIOLENCE

This section argues that domestic abuse, sexual harassment, and rape constitute a continuum of violence against women, and that assumptions about prostitution underlie societal attitudes about these acts of violence. Recognizing how prostitution relates to traditional categories of violence against women and that it is a part of the continuum, we assert that reforming the laws of domestic abuse, sexual harassment, and rape has the potential to transfigure prostitution.³⁰

³⁰ We would include pornography and other aspects of the sex industry within the continuum of violence against women. The analysis necessary to support that position is dif-

Traditionally, crimes of violence against women are disaggregated into separate acts of violence, with specific, defining features. In contrast, the notion of a continuum of violence reflects women's lived experiences: Violence is pervasive in all the places where they live their lives—in their homes, their workplaces, and in public spaces. The continuum also makes clear the relationship between the law's assessment of women's rights to legal redress and societal and legal attitudes about prostitution. Feminists frequently criticize the manner in which the legal establishment and society scrutinize the conduct and motivations of a woman who is subjected to domestic abuse, harassment, or rape more than they scrutinize the perpetrator when determining whether the nature and severity of the harm the woman has suffered warrants legal intervention.³¹ In situations of domestic abuse, a woman is typically asked whether she provoked the violence and why she remained in the relationship.³² In cases of sexual harassment in the workplace, the questions pertain to whether the woman welcomed the conduct and why she remained in that employment.³³ In rape, the critical inquiry is whether the woman consented. This entails subsidiary questions about why she was where she was, wearing what she was wearing, and behaving the way she was behaving.³⁴

ferent from the analysis of prostitution presented here and therefore beyond the scope of this Article.

³¹ See, e.g., Catharine A. MacKinnon, *Toward a Feminist Theory of the State* 174-75 (1989) (condemning law's focus on women's consent in rape cases); Carol Smart, *Feminism and the Power of Law* 33 (1989) (noting that women's sexual history is relevant to courts in rape cases); Susan Estrich, *Rape*, 95 *Yale L.J.* 1087, 1094-95 (1986) [hereinafter *Estrich, Rape*] (noting that courts focus entirely on victim and only incidentally on defendant); Susan Estrich, *Sex at Work*, 43 *Stan. L. Rev.* 813, 827 (1991) [hereinafter *Estrich, Sex*] (criticizing scrutiny of victim's lifestyle in rape law); Lucinda M. Finley, *Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning*, 64 *Notre Dame L. Rev.* 886, 895 (1989) (noting that legal definition of rape takes "male judicial perspective" by focusing on victim's behavior); Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 *Mich. L. Rev.* 1, 6 (1991) (describing focus on women's volition in rape cases).

³² See Margaret A. Baldwin, *Strategies of Connection: Prostitution and Feminist Politics*, 1 *Mich. J. Gender & L.* 65, 71 (1993) (discussing "why did she stay" questions in domestic abuse situations); Martha R. Mahoney, *Exit: Power and the Idea of Leaving in Love, Work, and the Confirmation Hearings*, 65 *S. Cal. L. Rev.* 1283, 1287 (1992) (comparing society's focus on battered women's failure to exit abusive relationships to hearing's focus on Anita Hill's failure to discontinue working for Clarence Thomas).

³³ See Mahoney, *supra* note 32, at 1286-87 (discussing focus on Anita Hill's decision to stay in her job).

³⁴ See Smart, *supra* note 31, at 36-38 (discussing relevance of women's consent in rape trials); Ann Althouse, *Thelma and Louise and the Law: Do Rape Shield Rules Matter?*, 25 *Loy. L.A. L. Rev.* 757, 766-67 (1992) (noting courts' tendency to focus on victims' behavior); Baldwin, *supra* note 32, at 71 (criticizing litany of questions about their behavior that rape victims face); Susan Estrich, *Palm Beach Stories*, 11 *Law & Phil.* 5, 10 (1992) (discussing questions asked of rape victims that focus on women's culpability); Estrich, *Sex*, *supra*

When a woman engages in prostitution, however, no questions need be asked. Both society and the law simply presume that the woman provoked, welcomed, and consented to the conduct, given what she was wearing, where she went, and the fact that she received money.³⁵ Where the circumstances involve prostitution, the failure to ask these questions does not mean that the woman is not the focus of the inquiry. It just means that the inquiry is framed by assumptions made about a woman in prostitution.

These assumptions, which result in women who are engaged in prostitution having little or no protection under the law,³⁶ establish a paradigm for a certain type of conduct. It is against this paradigm that society and the law measure whether, when violence against women occurs, it is appropriate for civil or criminal law to intervene. The real purpose of questions like “Why didn’t she leave her partner?”; “Why didn’t she leave that job?”; “Why was she with that man?”, is to ascertain whether the woman obtained a benefit, especially an economic one. The unstated assumption is that if a woman enjoyed a benefit, she “assumed the risk” and therefore bears responsibility for the violence, leaving the alleged perpetrator less accountable for his behavior. Here, prostitution serves as the paradigm for what constitutes an undeserving claim of harm. What we had comfortably assumed to be an inquiry into the elements of domestic abuse, sexual harassment, or rape turns out to be an inquiry into how closely a woman’s behavior resembles prostitution.³⁷

note 31, at 827 (describing focus on women’s behavior in rape cases); Morrison Torrey, *When Will We Be Believed? Rape Myths and the Idea of a Fair Trial in Rape Prosecutions*, 24 U.C. Davis L. Rev. 1013, 1014-15 (1991) (discussing popular perception that women’s behavior is responsible for their victimization).

³⁵ See Chamallas, *supra* note 26, at 828-29 (describing one image of woman used in prostitution as “that of a sexually uninhibited woman who has made a rational decision to sell sexual services, given her restricted options for other high paying work” and reasoning that “[i]n the search for a refurbished concept of consent that takes into account the needs and desires of women, it is risky to ignore the fact that it is the woman herself who proposed the encounter”); Evelina Giobbe, *Prostitution: Buying the Right to Rape*, in *Rape and Sexual Assault III: A Research Handbook* 143, 159 (Ann Wolbert Burgess ed., 1991) (observing that “because an exchange of money occurs, irrespective of whether the woman herself maintains control of or benefits from this exchange, the client is given permission to use the woman in a manner that would not be tolerated in any other business or social arrangement (including marriage in some states); and the woman’s acceptance of the money is construed as her willingness to engage in such commerce”).

³⁶ See, e.g., *infra* notes 88-99 and accompanying text (discussing how women in prostitution are placed beyond protections of sexual harassment laws).

³⁷ Evelina Giobbe has said that “[p]rostitution isn’t like anything else. Rather, everything else is like prostitution because it is the model for women’s condition.” Evelina Giobbe, *Confronting the Liberal Lies About Prostitution*, in *The Sexual Liberals and the Attack on Feminism* 67, 76 (Dorchen Leidholdt & Janice G. Raymond eds., 1990) [herein-

For example, in *Meritor Savings Bank, FSB v. Vinson*,³⁸ the landmark United States Supreme Court case that recognized "hostile environment" sexual harassment as a form of sex discrimination under Title VII, the Court held that testimony about the complainant's sexually provocative speech or dress was not per se inadmissible to establish the element of unwelcomeness to the sexual advances.³⁹ The Court found that "such evidence is obviously relevant."⁴⁰ In so doing, the Court constructed its inquiry into the element of unwelcomeness as an inquiry into how closely the complainant's dress and behavior resembled the stereotypical dress and behavior of a woman in prostitution. The Court thus telegraphed an unavoidable outcome: If indeed you dress and behave like a woman engaged in prostitution, then the sexual advances will be deemed welcome and the claim of sexual harassment will fail.

The California Supreme Court in *People v. Berry*⁴¹ reversed the murder conviction of the defendant who had strangled his wife. The opinion dwells on the victim's behavior in what the court described as "a tormenting two weeks in which Rachel alternately taunted defendant . . . and at the same time sexually excited defendant."⁴² There was uncontroverted evidence that prior to the defendant's murder of his wife by strangulation, he had choked her twice, at least once to the point of unconsciousness.⁴³ The facts set out by the court also indicate that during this time the defendant's wife was in the process of leaving the defendant and had informed the defendant that she wanted a divorce.⁴⁴ Nevertheless, the court found that the victim's "long course

after Sexual Liberals]. Margaret Baldwin, in thinking about and analyzing Giobbe's statement, speaks of prostitutes and "other women":

In substance, the distinction provides a handy means of identifying appropriate female objects of punishment and contempt. To be deemed a "prostitute," whether by the state, or by a john, or by any other man for that matter, immediately targets a girl or woman for arrest, for sexual assault, for murder, or, at the very least, dismissive scorn. Victims of rape, of incest, of domestic battery, of sexual harassment, are quite familiar with this difficulty. Declared to be "whores" and "sluts" by the men who abuse them, women then confront a legal system which puts the same issue in the form of a question: was she in fact a "slut" who deserved it, as the perpetrator claims, or not-a-slut, deserving of some redress? (The outcome of this interrogation is commonly referred to as "justice.")

Baldwin, *supra* note 8, at 48.

³⁸ 477 U.S. 57 (1986).

³⁹ See *id.* at 69.

⁴⁰ *Id.*

⁴¹ 556 P.2d 777 (Cal. 1976).

⁴² *Id.* at 779.

⁴³ See *id.*

⁴⁴ See *id.*

of provocative conduct” entitled the defendant to a jury instruction on voluntary manslaughter.⁴⁵ Here the court focused on the victim’s behavior, not the defendant’s. It emphasized her relationship with another man and that she had, in the court’s view, used that relationship to “taunt” the defendant.⁴⁶ This focus permitted the court to base the degree of the husband’s culpability on the moral/good or immoral/bad behavior of the wife. By characterizing the wife’s conduct as sexually provocative, the court depicted her as immoral/bad and therefore less worthy of protection.⁴⁷ The stereotype behind this construction is that of the prostitute who, by her very nature, engages in sexually provocative behavior. The court’s reasoning is clear: A woman who engages in sexually provocative conduct behaves like a prostitute and is less worthy of the law’s protection. Further, the actions that she provokes by her behavior are, at least in part, deserved.

In addition to prostitution’s influence on the legal and social tradition of focusing on the behavior of women and its paradigmatic role as the standard by which the seriousness of charges of domestic abuse, sexual harassment, and rape is evaluated, it is bound to these other forms of violence in yet a third way. Women report acts of violence that are embedded in the images of prostitution, which are often reinforced through pornography. Survivors of domestic abuse report that their batterers use the epithets of “whore” and “slut” when beating their victims.⁴⁸ They also report being forced to look at pornography

⁴⁵ *Id.* at 780, 781.

⁴⁶ See *id.* at 779, 780.

⁴⁷ See *id.* at 779 (finding that wife’s “cumulative series of provocations” caused defendant’s “uncontrollable rage”).

⁴⁸ For example, the use of such derogatory terms is found in many cases involving domestic abuse. In *People v. Babich*, 18 Cal. Rptr. 2d 60 (Ct. App. 1993), the defendant in an assault case testified that he called the victim, a woman he had been dating off and on for several years and had lived with for part of that time, a “lying little slut and whore.” *Id.* at 62. Similarly, in *People v. District Court*, 595 P.2d 1045 (Colo. 1979) (en banc), the court relied on testimony in which “the defendant shouted at the deceased, calling her a ‘bitch, whore and slut,’” *id.* at 1046, to uphold a finding of probable cause for the prosecution under the state’s second degree murder statute against a defendant accused of killing the woman he had been living with for some time. See *id.* at 1048. Similar examples can be found in cases involving protective orders. In *Commonwealth v. Robicheau*, 654 N.E.2d 1196 (Mass. 1995), for example, the court admitted evidence concerning a previous incident in which the defendant had assaulted his wife and told his son that his mother “was nothing but a ‘f—ing slut and whore.’” *Id.* at 1198 n.4.

The use of derogatory terms and epithets is common in sexual, as well as domestic, abuse. For example, in *Fuget v. State*, 522 A.2d 1371 (Md. Ct. Spec. App. 1987), a case upholding the defendant’s conviction for committing unnatural and perverted sexual practices, sodomy, and assault and battery, the court referred to evidence indicating that the defendant and victim had previously engaged in consensual relations and that when, on the particular evening in question, the victim refused to perform fellatio, the defendant struck

and sometimes being forced to replicate the acts portrayed.⁴⁹ Survivors also report that attackers use similar epithets during rapes and sometimes throw money at them afterwards.⁵⁰

State v. Norman,⁵¹ a 1989 North Carolina Supreme Court case, demonstrates how sometimes domestic abuse can take the form of prostitution. In an unsuccessful appeal of her conviction for voluntary manslaughter of her husband, Judy Norman argued that she was entitled to have the jury consider whether the killing was done in self-defense.⁵² She presented evidence to show that she fit the profile of a

her jaw with his fist and threatened to kill her, telling the victim that "all women were whores and sluts and that they all deserved what [she] was getting." *Id.* at 1373.

⁴⁹ See The Minneapolis Hearings, in *In Harm's Way: The Pornography Civil Rights Hearings* 39, 145-47 (testimony of S.G.), 149-51 (testimony of Wanda Richardson), 152-55 (testimony of Sharon Rice Vaughn) (Catharine A. MacKinnon & Andrea Dworkin eds., 1997) (discussing connection between pornography and violence against women); Robin West, *The Feminist-Conservative Anti-Pornography Alliance and the 1986 Attorney General's Commission on Pornography Report*, 1987 *Am. B. Found. Res. J.* 681, 687-89 (describing several situations in which men forced women to replicate acts portrayed in pornography, sometimes after forcing them to look at it first).

⁵⁰ Numerous cases contain examples of attackers throwing money at rape victims after the attack, which the victims frequently refuse. In *People v. Williams*, 841 P.2d 961 (Cal. 1992), the court affirmed a conviction for two counts of rape by a defendant where the victim testified that, after forcing her to have intercourse, "the defendant offered her \$50, but she said she was not a prostitute and did not want the money." *Id.* at 963. Similarly, in *Clark v. State*, No. 02C01-9112-CR-00273, 1993 WL 188052 (Tenn. Crim. App. June 2, 1993), a rape victim testified that "the defendant . . . tore off her pants breaking the zipper and raped her, . . . and [then] put four or eight dollars in her pocket," which she threw to the ground before she fled. *Id.* at *1. Instances of attackers throwing money at sexual abuse victims occur even with child victims. See, e.g., *Collier v. State*, 711 So. 2d 458, 460 (Miss. 1998) (noting that defendant gave dollar to nine-year-old victim after fondling her vaginal area and buttocks).

In addition to throwing money, attackers also frequently use epithets during rapes. In *State v. Shipp*, 712 So. 2d 230 (La. Ct. App.), cert. denied, 724 So. 2d 775 (La. 1998), the court found that the defendant kidnapped his estranged wife, "tore off her shorts and carried her to a bedroom where he took off the rest of her clothes and raped her, telling her, 'Now you know how sluts and whores feel.'" *Id.* at 233. Similarly, in *State v. Morton*, Nos. 18682-9-II, 19090-7-II, 1998 WL 109993 (Wash. Ct. App. Mar. 13, 1998), after the police arrested the defendant for various felonies including rape, the defendant allegedly said, "Don't worry about it. Believe me it's no big deal. . . . That fucking whore, she practically invited us over to her place. . . . No big deal, anyway, she's nothing but a fucking whore. She [probably] deserved it anyway." *Id.* at *4. In another rape case, the defendant told the victim that "she 'was going to be his whore,' and that she was going to 'make him some money by selling [her] body.'" *Fuller v. State*, No. 05-92-00093-CR, 1998 WL 548709, at *2 (Tex. Ct. App. Aug. 31, 1998). For a historical analysis of the interaction of money and rape in slavery, see bell hooks, *Ain't I a Woman: Black Women and Feminism* 25-26 (1981). hooks describes how white male slaveowners and overseers provided material goods to enslaved African American women they raped, ostensibly converting a rape into an economic exchange, and how the antislavery movement masked the rape of enslaved African American women by labeling the sexual assaults acts of prostitution. See *id.* at 25-26, 33-34.

⁵¹ 378 S.E.2d 8 (N.C. 1989).

⁵² See *id.* at 9.

battered spouse to support her self-defense claim, which included testimony that the deceased frequently assaulted her, struck her with various objects, and put out cigarettes on her body.⁵³ There was also testimony that

her husband did not work and forced her to make money by prostitution, and that he made humor of that fact to family and friends. He would beat her if she resisted going out to prostitute herself or if he was unsatisfied with the amounts of money she made. He routinely called the defendant “dog,” “bitch,” and “whore,” and on a few occasions made her eat pet food out of the pets’ bowls and bark like a dog.⁵⁴

As in domestic violence and rape cases, sexual harassers frequently equate their victims to women in prostitution. It is not uncommon to find that the conduct alleged to constitute workplace sexual harassment involves references to prostitution through pornographic images.⁵⁵ In *Robinson v. Jacksonville Shipyards*,⁵⁶ for example, the male shipyard workers targeted Lois Robinson by choosing pornographic images that included women who resembled her.⁵⁷ Like the batterers, the harassers in the shipyard sent the message that Robinson deserved no respect because she was the woman in the pornography—“a whore.”⁵⁸

In recognizing that the neat, legal categories of domestic abuse, sexual harassment, rape, and prostitution do not accurately reflect

⁵³ See *id.* at 10.

⁵⁴ *Id.*

⁵⁵ See, e.g., *Harris v. City of Harvey*, 993 F. Supp. 1181, 1184 (N.D. Ill. 1998); *Mahan v. Boston Water & Sewer Comm’n*, 179 F.R.D. 49, 51 (D. Mass. 1998); *Blakey v. Continental Airlines, Inc.*, 992 F. Supp. 731, 733 (D.N.J. 1998); *Szarka v. Reynolds Metal Co.*, 17 F. Supp. 2d 115, 119 (N.D.N.Y. 1998).

⁵⁶ 760 F. Supp. 1486 (M.D. Fla. 1991).

⁵⁷ The federal district court in *Robinson* found:

[1] a picture of a nude woman with long blonde hair wearing high heels and holding a whip, [was] waved around by a coworker . . . in an enclosed area where Robinson and approximately six men were working. . . . Robinson testified she felt particularly targeted by this action because she has long blonde hair and works with a welding tool known as a whip . . . [;]

[2] a picture of a nude woman with long blonde hair sitting in front of a mirror brushing her hair in a storage area on a ship . . . [; and]

[3] pictures in the toolroom trailer aboard the *U.S.S. Saratoga*, in January 1985, including one of a nude woman with long blonde hair lying down propped up on her elbow.

Id. at 1496.

⁵⁸ In fact, Robinson was specifically labeled with that epithet in the workplace by her coworkers. See *id.* at 1499. The court found that the workplace contained abusive language written on the walls in the plaintiff’s work area. See *id.* Among the graffiti was the phrase “lick me you whore dog bitch,” which the court found “appeared on the wall over a spot where Robinson had left her jacket.” *Id.*

how women experience acts of violence, we do not intend to obscure the fact that each category of violence presents issues particular to it. Our purpose, instead, is to expose that the prostitution paradigm, its images and its threats, plays a role that is common in all categories of violence along the continuum. In turn, the continuum reveals both the pervasiveness of violence and the pervasiveness of prostitution as a paradigm in women's lives. Because different categories of violence interrelate with and support each other, legal reforms and changing societal views of one form of violence affect the law's treatment and society's understanding of the other forms of violence. For this reason, legal reforms that expand protection from violence in the areas of domestic abuse, sexual harassment, and rape have the potential to blur the boundaries between each of these forms of violence and prostitution.⁵⁹ In response, law reformers have developed strategies that seek to reinforce traditional distinctions or to construct new ones. Notwithstanding those strategies, however, law reform efforts also have the capacity to transform our legal and societal understanding of prostitution.

II

PROSTITUTION AND LAW REFORM

Concerns about the inadequacy and underenforcement of the laws of domestic abuse, sexual harassment, and rape emerged in the 1970s.⁶⁰ Over the past three decades, feminist movements, with their antecedents in the civil rights, antiwar, and Black liberation movements of the 1950s and 1960s, have operated within consciousness-raising groups, grassroots organizations, and academic institutions to gain political influence and to make violence against women a national issue.⁶¹ Major successes in state legislatures, the Congress, and

⁵⁹ See *infra* notes 73-78, 88-100, 171-80 and accompanying text (suggesting relationship between antiviolenace legal reforms and prostitution).

⁶⁰ See generally Susan Brownmiller, *Against Our Will: Men, Women and Rape* (1975) (analyzing both historical and contemporary accounts of harmful effects of rape and sexual assault); R. Emerson Dobash & Russell P. Dobash, *Women, Violence and Social Change* 36-37 (1992) (discussing national and regional activist coalitions formed in late 1970s to influence domestic violence legislation); Lin Farley, *Sexual Shakedown: The Sexual Harassment of Women on the Job* (1978) (tracing history of sexual harassment in workplace); Susan Schechter, *Women and Male Violence: The Visions and Struggles of the Battered Women's Movement* 29-30 (1982) (describing heightened political consciousness about domestic abuse in early 1970s as providing impetus for battered women's movement); William E. Nelson, *Criminality and Sexual Morality in New York, 1920-1980*, 5 *Yale J.L. & Human.* 265 (1993) (examining "cyclical movements" in law of, among other issues, homosexuality and gender-related violence from 1920 to 1980).

⁶¹ See Brownmiller, *supra* note 60, at 8-9 (describing author's view of rape as formed through informal women's groups, speakouts, and conferences); Eve S. Buzawa & Carl G.

in the courts have been achieved, resulting in a substantial overhaul of the laws on domestic abuse, sexual harassment, and rape.⁶² During this period of law reform, the issues raised, the legislative agendas established, and the laws enacted all but ignored prostitution.⁶³ That is not to say, however, that the changing legal climate has not affected prostitution and women used in prostitution.

In the sections that follow, we present the arguments used in the law reform efforts to distance women who have experienced domestic abuse, sexual harassment, and rape from women in prostitution. We also show, however, how these very efforts reveal the unavoidable relationship between prostitution and domestic abuse, sexual harassment, and rape. Foregrounding the role prostitution has played in the law reforms and the discourse surrounding them shows how the legal changes during the last three decades have the potential to transform the legal and social meaning of prostitution.

A. *Domestic Abuse*

There have been three major legal developments in domestic abuse law: the creation of civil protective orders,⁶⁴ reform of the criminal justice system to make arrest and prosecution for domestic assault more effective,⁶⁵ and the admissibility of expert testimony

Buzawa, *Domestic Violence: The Criminal Justice Response 69-70* (1990) (describing activists' role in encouraging law enforcement agencies' and officers' response to domestic violence); MacKinnon, *supra* note 31, at 84-86 (describing informal "consciousness-raising groups" through which women in 1960s and 1970s began to confront and organize around issues of inequality); Schechter, *supra* note 60, at 56-58, 69-73, 84-87 (describing how feminists, community activists, and former battered women worked together to establish shelters, support groups, and public education programs, and to advocate for legal reforms during emergence of battered women's movement in 1970s).

⁶² See Buzawa & Buzawa, *supra* note 61, at 12 (discussing domestic abuse law reform); Dobash & Dobash, *supra* note 60, at 165-70, 197-203 (same); Estrich, *Rape*, *supra* note 31, at 1133-61 (discussing rape law reform); Katherine M. Franke, *What's Wrong with Sexual Harassment?*, 49 *Stan. L. Rev.* 691, 702-04 (1997) (discussing sexual harassment law reform).

⁶³ See *infra* notes 87-94, 171-80 and accompanying text (discussing antiviolence law reforms and ways that reform agendas excluded issues involving prostitution). But see, e.g., Fla. Stat. Ann. § 796.09 (West 1992) (providing women in prostitution civil cause of action against persons who coerced them into prostitution).

⁶⁴ Since 1976, all fifty states and the District of Columbia have enacted statutes providing victims of domestic abuse with the opportunity to obtain civil restraining orders of protection against their abusers. D.C. Code Ann. § 16-1003(a) (1981); Elena Salzman, Note, *The Quincy District Court Domestic Violence Prevention Program: A Model Legal Framework for Domestic Violence Intervention*, 74 *B.U. L. Rev.* 329, 333 n.25 (1994).

⁶⁵ Reforms that have occurred in the criminal justice system include: (1) expanding the authority of the police to make arrests based on probable cause and in some jurisdictions imposing a requirement of mandatory arrest in cases of domestic assault or for violations of civil protection orders; (2) mandating police and court systems to provide greater assistance and information to victims; and (3) mandating training of criminal justice personnel.

about the battered woman syndrome in cases where women are tried for killing their abusers.⁶⁶ Advocates for change had to contend with and challenge numerous obstacles that inhered in traditional legal doctrines. For example, society and the law considered physical abuse by a husband against his wife to be a private matter, and therefore deemed it inappropriate for the state to intervene.⁶⁷ This private/public distinction contributed to a long history of court decisions that refused to recognize harm or to provide a legal remedy out of respect

See Dobash & Dobash, *supra* note 60, at 169-70; see also Buzawa & Buzawa, *supra* note 61, at 12 (noting that reforms have focused primarily on "police response to domestic violence, the handling of cases by prosecutors and the judiciary, and to a lesser extent, . . . educating the public . . . and providing state funding").

⁶⁶ Expert testimony is sometimes admitted into evidence to explain the actions of battered women who are on trial for killing their abusers. See, e.g., *People v. Humphrey*, 921 P.2d 1, 3-4 (Cal. 1996); *State v. Hundley*, 693 P.2d 475, 479 (Kan. 1985). But see *State v. Norman*, 378 S.E.2d 8, 12-13 (N.C. 1989) (finding that to take into account that defendant was battered woman would require changing requirement for self-defense that danger must be imminent). The testimony is usually characterized by a description of the "battered women's syndrome" as part of the defendant's claim of self-defense. See, e.g., *Humphrey*, 921 P.2d at 3-4. This approach is based on the work of psychologist Lenore Walker. Walker identified a three stage battering cycle and applied the concept of learned helplessness as a way of understanding the victim's responses and actions. See Lenore E.A. Walker, *Battered Women Syndrome and Self-Defense*, 6 *Notre Dame J.L. Ethics & Pub. Pol'y* 321, 330 (1992) [hereinafter Walker, *Battered Women Syndrome*]. The battering cycle consists of phase one, a period of tension building; phase two, an acute battering incident; and phase three, the period of loving contrition. See *id.* According to Walker, battered women learn that they cannot control their abusers' violence and they begin to believe they cannot influence or escape it. See Lenore E.A. Walker, *The Battered Woman* 47 (1979) [hereinafter Walker, *Battered Woman*]. Once this belief is in place, "the perception becomes reality and they become passive, submissive, 'helpless.'" *Id.*

The "battered women's syndrome" testimony is introduced to assist in judging the applicability of the defense of self-defense. Since its introduction, a number of commentators have criticized the development of the use of the "battered women's syndrome." See Phyllis L. Crocker, *The Meaning of Equality for Battered Women Who Kill Men in Self-Defense*, 8 *Harv. Women's L.J.* 121, 136 (1985) (noting inherent contradiction battered women's syndrome raises by characterizing battered women as passive in self-defense cases, yet still capable of killing their abusers, making them exceptions to group of which they are part); Christine A. Littleton, *Women's Experience and the Problem of Transition: Perspectives on Male Battering of Women*, 1989 *U. Chi. Legal F.* 23, 35-36 (suggesting that battered women's syndrome reinforces stereotypes of women as alien, incomprehensible, and unreasonable); Elizabeth M. Schneider, *Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering*, 9 *Women's Rts. L. Rep.* 195, 198-99 (1986) (arguing that despite purpose for which this expert testimony was conceived, old sex-biased stereotypes of incapacity and helplessness are replicated); Sharon Angella Allard, Note, *Rethinking Battered Woman Syndrome: A Black Feminist Perspective*, 1 *UCLA Women's L.J.* 191, 194 (1991) (arguing that battered women's syndrome relies on prevailing gender characterizations of dominant white society).

⁶⁷ See Buzawa & Buzawa, *supra* note 61, at 31; Dobash & Dobash, *supra* note 60, at 101-03; Laurie Wermuth, *Domestic Violence Reforms: Policing the Private?*, 27 *Berkeley J. Soc.* 27, 43 (1982); see also Linda Gordon, *Heroes of Their Own Lives: The Politics and History of Family Violence, Boston 1880-1960*, at 271-79 (1988) (discussing community and family reactions to domestic abuse).

for the privacy of the home.⁶⁸ In addition, advocates had to contend with the presumption that a wife always had available to her the private remedy of leaving her husband and would do so if the abuse were serious. This notion, together with the assumption that the husband's abuse was likely provoked by his wife's misbehavior, bolstered the general reluctance to make domestic abuse a public matter.⁶⁹ In arguing that the failure of the state to intervene served to legitimate the abuse, proponents of reform employed narratives that exploited traditional family values and stereotypes of white middle class women as wives and mothers.⁷⁰ For example, supporters highlighted the contrast of the criminal justice system's aggressive response to a barroom brawl between strangers and its inaction when a husband assaults his

⁶⁸ See *State v. Rhodes*, 61 N.C. 453, 454 (Phil. Law 1868) (stating that courts have been "[lo]a[th] to take cognizance of trivial complaints arising out of the domestic relations . . . because the evil of publicity would be greater than the evil involved in the trifles complained of"); *State v. Black*, 60 N.C. 262, 263 (Win. 1864) (holding that "law will not invade the domestic forum, or go behind the 'curtain'").

⁶⁹ See Gordon, *supra* note 67, at 259-60 (showing that woman-blaming responses to wife beating became more pervasive after 1930s); Minnesota Supreme Court Task Force for Gender Fairness in the Courts, 15 Wm. Mitchell L. Rev. 825, 875-77 (1989) (identifying many examples of gender-biased stereotypes involving victim blaming that have "a negative effect on the administration of justice in domestic abuse proceedings"); see also *Rhodes*, 61 N.C. at 458 (suggesting that "slight words" may be sufficient to constitute provocation of husband); *Black*, 60 N.C. at 264 (holding that where "[t]he husband, in a passion provoked by excessive abuse [by his wife], pulled her upon the floor by the hair . . . the jury ought to have been charged in favor of the [husband]").

⁷⁰ Kimberlé Crenshaw analyzes how the "[s]trategies for increasing awareness of domestic violence within the white community" have the effect of reinforcing racial stereotypes and continuing the neglect of the problem of domestic violence in communities of color. Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 Stan. L. Rev. 1241, 1258 (1991).

Countless first-person stories begin with a statement like, "I was not supposed to be a battered wife." That battering occurs in families of all races and all classes seems to be an ever-present theme of anti-abuse campaigns. . . .

Efforts to politicize the issue of violence against women challenge beliefs that violence occurs only in homes of "others." While it is unlikely that advocates and others who adopt this rhetorical strategy intend to exclude or ignore the needs of poor and colored women, the underlying premise of this seemingly universalistic appeal is to keep the sensibilities of dominant social groups focused on the experiences of those groups. . . .

. . . This strategy permits white women victims to come into focus, but does little to disrupt the patterns of neglect that permitted the problem to continue as long as it was imagined to be a minority problem. The experience of violence by minority women is ignored, except to the extent it gains white support for domestic violence programs in the white community.

Id. at 1258-60 (footnotes omitted). Antiviolence arguments emphasizing the transgressive nature of violence taking place in the home against wives and mothers depended on social hierarchies for their persuasive powers. See also *infra* notes 259-73 and accompanying text (relying on social history to show how home became site that was used to mask, as well as justify, economic exploitation, racism, and sexism).

wife in their home.⁷¹ This comparison made stark an unpleasant reality that contradicted the ideal: The dangerous barroom was made safer than the home; the dangerous stranger was made less of a threat than the husband. Advocates employed the comparison of the home and the barroom to silently establish a wife's worthiness. Even though the home was the symbol of the private domain, advocates could justify state intervention because the wife was in the home, not in the barroom, and therefore was worthy of protection. The comparison also implied that a woman who failed to fulfill her appropriate domestic role was not worthy of the state's protection. The woman least able to conform to the domestic ideal and therefore least worthy of protection was, of course, the woman in prostitution.⁷²

Reformers also relied on an idealized view of a woman's domestic role to explain why women stay in abusive relationships or why they kill their abusers. These explanations frequently relied upon society's notion of respectable motivations, such as emotional commitment to the relationship and maternal responsibility, and emphasized the complexity of a long-term intimate relationship.⁷³ Proponents of legal change emphasized loyalty, motherhood, and intimacy in chal-

⁷¹ See Buzawa & Buzawa, *supra* note 61, at 69 (noting that advocates for battered women realized that "police appeared to arrest everyone *but* domestic violence assailants" (citation omitted)).

⁷² As K. Sue Jewell explains, relying on the work of Shelby Steele, social hierarchies are reinforced when only those who can proclaim their innocence are permitted to assert that they were harmed or victimized. The distinction between worthiness and unworthiness is analogous to the innocence/guilt dyad that Jewell identifies when she writes about the institutional treatment of African American women.

It is always in the interest of those who mediate society's resources, as well as the ideas of its members, to maintain their image of innocence. In controlling resources and institutions in society the idea of image implies that the privileged and individuals positioned high on the social hierarchy of discrimination are entitled to the societal rewards that they possess and mediate. And that those with relatively meager resources can only blame themselves for occupying an economically depressed position, because it is reasoned that they lack the qualities that are necessary for greater access to societal institutions and resources. Any efforts to bring about significant social change that will have permanence in improving the status and life chances of African American women and their communities must include efforts to dispel traditional images of innocence and guilt.

K. Sue Jewell, *From Mammy to Miss America and Beyond: Cultural Images and the Shaping of US Social Policy* 13 (1993). For a further elaboration of how notions of worthiness and unworthiness perpetuate social differentiations, see *infra* Part III.

⁷³ See Littleton, *supra* note 66, at 46-47 (reasoning that battered women stay to rescue the relationship, something beyond themselves); Mahoney, *supra* note 31, at 15-17, 23 (suggesting battered women stay because of commitment to ideal of "marriage" and sense of responsibility to children); Schneider, *supra* note 66, at 211 (suggesting that expert testimony in defense of battered women who kill their abusers emphasizes woman's unique insight and ability to know and anticipate degree of violence she faces); Walker, *Battered Women Syndrome*, *supra* note 66, at 330, 332 (describing third phase of cycle of violence as

lenging the law to recognize the right of women to be free from violence. They de-emphasized economic dependency and the systemic forces that privilege male power within and without the family structure and, therefore, avoided destabilizing stereotypical gender roles.⁷⁴

Margaret Baldwin makes a similar observation when she writes of how the representations of women who are battered reinforce the legal and social boundaries that separate worthy women from women in prostitution.

The ties and insights of persistent affection are not commonly present between a prostitute and a john. . . . [T]he prostitute [does not] enjoy the tidy legal status of an otherwise socially conforming "victim." The "good woman" sex role of loyalty to intimate monogamous fidelity, while perhaps of tactical assistance in garnering sympathy for women battered by husbands, is but a tool of punishment of women in prostitution. . . .

. . . .

In the legal representation of women, . . . structural insights have largely been compressed to one line mention of women's common economic dependency on husbands in marriage At most, [feminist legal critics] "maternalize" the economic dimension, attending to the "special" economic pressures on battered women with children to support to remain in abusive marriages. Further, the economic interest of *men* in the women they control by violence, in the time-honored tradition of pimping, remains wholly uninterrogated. Of course, avoidance of the economic question also serves to maintain the "good woman" distance from the inference of prostitution⁷⁵

Baldwin correctly concludes that reformers achieved success in the area of domestic abuse by reinforcing the distinctions between respectable and disreputable women. We draw an additional conclusion from the fact that reformers policed the boundaries between "good" and "bad" women. The very need for reformers to police the boundaries of meaning between "good" and "bad" women suggests that transforming society's view of domestic abuse potentially implicates the meaning of prostitution.

Thus, reformers succeeded in gaining the state's recognition of and intervention in domestic abuse, which effectively challenges the distinction between private and public and acknowledges that a man's

loving contrition in which battered woman gets glimpse of what love and marriage could be and is thus persuaded to remain in relationship).

⁷⁴ See Gordon, *supra* note 67, at 3-4 (arguing that "family-violence policy is mainly discussed today without an historical dimension, and with its political implications hidden").

⁷⁵ Baldwin, *supra* note 8, at 73-76.

conduct in his home is a matter of public policy. But their efforts reified the distinction between “good” women who deserve the state’s assistance and “bad” women who, by implication, do not. Nevertheless, by bringing the issue of domestic abuse into the public arena, these legal reforms make the relationship between domestic violence and prostitution harder to ignore. Once the state acknowledges that male privilege exists and acts to curb it in the home, it is hard for the state to deny that male privilege exists in the marketplace. Furthermore, it is difficult for the state to refuse to address it when it results in harms to women in the market exchange of sex for money.

Although law reformers used strategies to distance the dynamics of domestic abuse from prostitution, they nevertheless established an approach to domestic violence that could be applied to prostitution. For example, it is no longer appropriate for police, prosecutors, or judges to ask: “Why did she stay?” Instead, as feminists have argued successfully, the right questions are: What benefits does the abuser obtain through violence and how do we stop it?⁷⁶ As we argued earlier, “Why did she stay?” is a question that relies on the paradigm of prostitution.⁷⁷ Because reformers established a legal discourse of domestic abuse that reduced society’s reliance on the paradigm, they created the possibility of changing the paradigm itself. Thus the right questions to ask in cases of prostitution are: What is the john buying and how do we stop it?

The prostitution paradigm operates differently for sexual harassment and rape than it does for domestic abuse because the law and society generally view domestic abuse as a physical but not a sexual harm. Therefore, reformers have not had to focus as acutely on distinguishing the conduct of survivors of domestic abuse from that of women used in prostitution.⁷⁸ In contrast, for rape and sexual harassment, which turn upon the issue of a woman’s consent, reformers have had to disassociate carefully prostitution from rape and sexual harassment. As the law of sexual violence has changed to expand the categories of prohibited conduct, the discourses surrounding those

⁷⁶ Cf. Schechter, *supra* note 60, at 314, 317-18 (discussing role of feminists and battered women’s movement in helping society to see domestic abuse as political, social problem, not private issue); R. Emerson Dobash & Russell P. Dobash, *Wives: The ‘Appropriate’ Victims of Marital Violence*, 2 *Victimology* 426, 434 (1977) (noting that “[w]e prefer to see violence used by men against women in the family as attempts to establish or maintain a patriarchal social order”); Mahoney, *supra* note 31, at 56-57 (noting that focus in domestic violence should not be woman’s acceptance of violence, but man’s attempt to regain control and dominance).

⁷⁷ See *supra* note 37 and accompanying text.

⁷⁸ See *infra* Part II.B (discussing relationship between sexual harassment and prostitution); *infra* Part II.C (discussing relationship between rape and prostitution).

changes have reinforced the boundary between prostitution, on the one hand, and sexual harassment and rape, on the other, at the same time that they have weakened it.

B. *Sexual Harassment*

Like women who are battered in the home, women who are sexually harassed at work struggle with limited choices in trying to minimize the risk of further physical and emotional harm while preserving their work life and economic security. Arguing that sexual harassment was "neither incidental nor tangential to women's inequality, but a crucial expression of it,"⁷⁹ Catharine MacKinnon set forth in 1979 a legal theory for why sexual harassment is a form of sex discrimination under Title VII of the 1964 Civil Rights Act.⁸⁰ In 1980 the Equal Employment Opportunity Commission (EEOC) promulgated regulations to Title VII defining sexual harassment and determining employer liability.⁸¹ In 1986, the Supreme Court in *Meritor Savings Bank, FSB v. Vinson*⁸² upheld the regulations, establishing that the creation of a hostile environment through sexual harassment is a form of sex discrimination.⁸³

Sexual harassment is not a new phenomenon. What is new is that since the late 1970s, some types of sexual harassment have been made illegal, workers and students have been provided limited remedies against their employers and schools for failure to establish rules, and employers and schools have developed procedures designed to prevent harassment and to respond to it when it occurs.

The private/public distinction that frames the discourse of domestic abuse also operates in the sexual harassment arena. A woman who did not remain at home, under the control of a husband or father, risked being perceived as sexually available.⁸⁴ Thus, a woman who

⁷⁹ Catharine A. MacKinnon, *Sexual Harassment of Working Women: A Case of Sex Discrimination* xi (1979).

⁸⁰ *Id.* at 208-13 (theorizing that sexual harassment is form of employment discrimination because "[s]exual harassment threatens women in their jobs. . . . When it has an impact upon fundamental employment decisions and upon the workplace atmosphere, sexual harassment is discrimination in employment" (footnote omitted)).

⁸¹ *Discrimination Because of Sex Under Title VII of the Civil Rights Act of 1964*, 45 Fed. Reg. 74,677 (1980) (codified at 29 C.F.R. § 1604.11 (1998)).

⁸² 477 U.S. 57 (1986).

⁸³ See *id.* at 66.

⁸⁴ See Andrea Dworkin, *Women in the Public Domain: Sexual Harassment and Date Rape*, in *Sexual Harassment: Women Speak Out* 1, 4 (Amber Coverdale Sumrall & Dena Taylor eds., 1992) (noting that "[t]he wife was the private woman in the private (domestic) sphere, protected inside," but "outside, the woman is public in male territory, a hands-on zone; her presence there is taken to be a declaration of availability—for sex and sexual insult"); see also Cynthia Grant Bowman, *Street Harassment and the Informal Ghettoiza-*

worked in the public marketplace to earn money was vulnerable to the charge of promiscuity because her economic activities draw her closer to the prostitution paradigm.⁸⁵ Proponents of sexual harassment law reform employed the stereotypical notion that a working woman was sexually available to show how the expectation that women would provide sex as a condition of employment or education amounted to sex discrimination.⁸⁶

Although law reform proponents do not feel the need to articulate why the law of sexual harassment should distinguish commercial sexual exploitation, including prostitution, from other types of waged work, the distinction clearly benefits respectable society. By excluding prostitution from the reach of sexual harassment law, the legal system can more easily reconcile sexual harassment with the traditional civil and criminal law principles of consent and coercion. The law has constructed prostitution as an act in which a woman initiates sex for money. Therefore, if it treats prostitution, which represents a woman's unambiguous consent, as sexual harassment, it would expose the tension between equality claims based on group harms and liberty claims based on individual rights. If the law were to view sexual harassment as an equality claim, it would not be able to use consent to determine whether discrimination occurred. Sexual harassment claims, however, are based, at least in part, on the right of individuals to be free from unwelcome, sexually based, harmful conduct in the workplace, which makes the issue of consent critical.⁸⁷

tion of Women, 106 *Harv. L. Rev.* 517, 526 (1993) (arguing that street harassment of women carries implicit and sometimes explicit message that women do not belong in public, where they draw attention by their mere appearance, but rather in private sphere at home).

⁸⁵ See Paula Giddings, *When and Where I Enter: The Impact of Black Women on Race and Sex in America* 47-49 (1984) (describing "cult of the lady" in which true woman's exclusive role was in home, resulting in women in public workplace being viewed as appropriate targets of harassment); MacKinnon, *supra* note 79, at 159 (suggesting that "[a] great many instances of sexual harassment in essence amount to solicitation for prostitution"); Baldwin, *supra* note 8, at 64-65 (demonstrating that many sexual harassment cases reveal connection between sexual harassment and prostitution by presuming sexual availability of working women to their coworkers).

⁸⁶ See MacKinnon, *supra* note 79, at 174-92; Franke, *supra* note 62, at 714-16; see also Estrich, *Sex*, *supra* note 31, at 829; B. Glenn George, *The Back Door: Legitimizing Sexual Harassment Claims*, 73 *B.U. L. Rev.* 1, 31-32 (1993).

⁸⁷ For discussions of sexual harassment focusing, in part, on the individual's right to be free of harmful conduct, see MacKinnon, *supra* note 79, at 179 (arguing that "a sex stereotype is present[,] . . . expressed through sexual harassment, that women are sexual beings whose privacy and integrity can be invaded at will"); Anita Bernstein, *Treating Sexual Harassment with Respect*, 111 *Harv. L. Rev.* 445, 450, 455 (1997) (arguing that sexual harassment can be understood as "a type of incivility or . . . disrespect" constituting "dignitary injury").

By excluding women in prostitution, law reformers can more easily advocate for a broader definition of coercion. Martha Chamallas explains:

Proponents of bans on sexual harassment argued that women had never genuinely consented to the myriad forms of sexual harassment they experienced at work. Rather than indicating genuine consent, their lack of protest reflected the considerable economic power of employers and supervisors. Women tended to tolerate or acquiesce to the milder forms of sexual harassment. What passed for consent could better be described as a grudging accommodation to the fact of women's powerlessness to change the tone of the working environment or the social conventions of the workplace.⁸⁸

Within the employment and educational context, the EEOC and the courts accepted this explanation and embraced a standard of unwanted or unwelcome sexual conduct that did not rely on a narrow meaning of coercion.⁸⁹ The EEOC and courts did not adopt a standard that would have required a complainant to demonstrate resistance.⁹⁰ The explanation for why women complied succeeded precisely because it excluded the conduct of women engaged in prostitution. Proponents used the rhetoric of "acquiescence" and "grudging accommodation" in order to attribute a woman's compliance to her powerlessness in the workplace rather than to her promiscuity.⁹¹ The law of sexual harassment thus challenges the stereotype that *all women* in the waged labor force are sexually available by giving a legal remedy to *some women* under *some circumstances*.⁹²

Margaret Baldwin's critique of current law and feminist reform efforts focuses on the segregation of women in "legitimate" work from women in prostitution.

[O]ur advocacy stresses the *distinction* between a woman's willingness to work and her willingness to have sex as part of the bargain, or to be sexualized in her status as worker: "real women" do not

⁸⁸ Chamallas, *supra* note 26, at 802 (footnote omitted).

⁸⁹ See *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 68 (1986) (distinguishing unwelcomeness from involuntary sex and affirming unwelcomeness as appropriate standard); Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(a) (1998) (defining sexual harassment as unwelcome sexual advances).

⁹⁰ See *Vinson*, 477 U.S. 57; 29 C.F.R. § 1604.11(a).

⁹¹ See Chamallas, *supra* note 26, at 802.

⁹² Cf. Pamela S. Haag, In Search of "The Real Thing": Ideologies of Love, Modern Romance, and Women's Sexual Subjectivity in the United States, 1920-40, in *American Sexual Politics: Sex, Gender, and Race Since the Civil War* 161, 164 (John C. Fout & Maura Shaw Tantillo eds., 1993) (arguing that "the aggregate identity of the sexually modern—and presumably liberated—middle-class girl initially was negotiated in the crucible of class and finally secured . . . through the demarcation of prostitution . . . from premarital sensual expression legitimized by an idealized, all-consuming love").

combine sex with money. At the outset, this may seem a quite perverse distinction to draw in the context, as sexual harassment is defined in those conditions where that combination is women's lived employment experience.⁹³

Baldwin is disheartened by advocates' unwillingness to take the "small [conceptual] step . . . to hold all prostitution to be *per se* actionable as sexual harassment, as the demand for money in the transaction shows that a woman's sexual compliance in the acts were otherwise unwanted."⁹⁴ Nevertheless the fact that she considers that it should take only a "small step" to view prostitution as a form of sexual harassment reveals that sexual harassment reforms have the potential to influence our understanding of prostitution.

The border between sexual exploitation in "legitimate" workplaces and prostitution has proven to be permeable and difficult to maintain.⁹⁵ Even as the Court in *Meritor Savings Bank, FSB v.*

⁹³ Baldwin, *supra* note 8, at 76; see also Jeffreys, *supra* note 3, at 267-68 (noting that "sex industry markets precisely the violence, the practices of subordination, that feminists seek to eliminate from the streets, workplaces and bedrooms," presenting "a formidable and increasingly significant obstacle to feminist efforts to eliminate sexual violence").

⁹⁴ Baldwin, *supra* note 8, at 76-77.

⁹⁵ One aspect of the permeability of the distinction between "legitimate" workplaces and prostitution is the role that prostitution plays within conduct that serves as a basis for sexual harassment claims. For example, many cases of sexual harassment include allegations that the defendants called plaintiffs derogatory, sexual names, including "slut," "bitch," "whore," and "cunt." See, e.g., *Ierardi v. Sisco*, 119 F.3d 183, 185, 189 (2d Cir. 1997) (affirming lower court's denial of motion for summary judgment of suit alleging that defendant subjected plaintiff to recurrent sexual harassment, including addressing her as "slut" or "bitch"); *Winsor v. Hinckley Dodge, Inc.*, 79 F.3d 996, 998, 1001 (10th Cir. 1996) (holding that defendant harassed plaintiff and called her various names, including "floor whore" and "curb whore"); *Carr v. Allison Gas Turbine Div., Gen. Motors Corp.*, 32 F.3d 1007, 1009 (7th Cir. 1994) (noting derogatory statements defendant directed at plaintiff including, "I won't work with any cunt," "whore," and "split tail"); *Huddleston v. Roger Dean Chevrolet, Inc.*, 845 F.2d 900, 902, 905 (11th Cir. 1988) (ruling that plaintiff established prima facie case based on allegations that coworkers called female employee in car dealership "bitch" and "whore"); *Maldonado v. Esmor Correctional Serv., Inc.*, No. 97-Civ.-7087, 1998 WL 516118, at *1 (S.D.N.Y. Aug. 19, 1998) (noting plaintiff's allegations that defendant's employees repeatedly made "degrading and sexist comments" to her, including "whore" and "slut"); *Mahan v. Boston Water and Sewer Comm'n*, 179 F.R.D. 49, 53-56, 57 (D. Mass. 1998) (denying motion for summary judgment of suit alleging that male coworkers made loud sucking and kissing sounds when plaintiff walked past them and that they wrote "Fucking Pig" or "Fucking Whore" in dust on her car); *Morris v. American Nat'l Can Corp.*, 730 F. Supp. 1489, 1491 (E.D. Mo. 1989) (finding that defendants' employees wrote "bitch" or "slut" on plaintiff's desk and wrote "whore" on welding screen), *aff'd in part and rev'd and remanded in part*, 941 F.2d 710 (8th Cir. 1991). Many cases involve allegations of defendants sending plaintiffs inappropriate and offensive sexual drawings or pornographic pictures and magazines. See, e.g., *Winsor*, 79 F.3d at 999 (finding that defendant sent plaintiff "notes and pictures, including pictures of gorillas and pigs with words 'bitch,' 'whore,' and 'floor whore' written on them, and a cartoon of a woman pulling up her skirt and spreading her legs"); *Mahan*, 179 F.R.D. at 53-56 (noting plaintiff's allegations that she frequently found pornographic magazines on her windshield and urine

Vinson reconstructed the meaning of consent by allowing recovery for a sexually compliant victim,⁹⁶ it was unable to abandon the conventional suspicions about the sexual availability of a woman in the waged work force. It reasoned that

[w]hile "voluntariness" in the sense of consent is not a defense to such a claim, it does not follow that a complainant's sexually provocative speech or dress is irrelevant as a matter of law in determining whether he or she found particular sexual advances unwelcome. To the contrary, such evidence is obviously relevant.⁹⁷

As we stated earlier, behind the reasoning that would find provocative speech and dress "obviously relevant" is the prostitution paradigm.⁹⁸ What the Court seems to be saying is that a woman in public is likely to welcome the sexual advances of any and all men if her speech and dress closely resemble the stereotypical conduct of women in prostitution. The relevance of her provocative conduct and the relevance of the prostitution model are presumably underscored by the fact that the sexual encounters occur within an employment context where economic benefit and detriment to the complainant are at stake. With prostitution and the sexually available woman underlying and undermining inquiries into the issue of welcomeness in sexual harassment law, efforts to distinguish sexual exploitation in the "legitimate" workplace from prostitution become counterproductive for those persons committed to sexual harassment reform.⁹⁹ The reformers' explana-

on roof of her car); *Morris*, 730 F. Supp. at 1491 (noting plaintiff found "a picture of a nude woman sitting on the edge of a bathtub and touching her breasts, with a note saying something like 'You should be doing this instead of a man's job'"). Similarly, sexual harassment victims frequently claim defendants discuss inappropriate and sexually graphic topics at work. See, e.g., *Maldonado*, 1998 WL 516118, at *1 (noting plaintiff's allegations that "employees frequented 'strip clubs' during lunch and would discuss such outings in an explicit manner in the office upon their return").

⁹⁶ See 477 U.S. 57, 73 (1986); Chamallas, *supra* note 26, at 804-06.

⁹⁷ *Vinson*, 477 U.S. at 69.

⁹⁸ See *supra* notes 38-40 and accompanying text (discussing Supreme Court's holding in *Vinson*).

⁹⁹ *Vinson*'s holding that "sexually provocative speech [and] dress" are relevant to the issue of welcomeness, see 477 U.S. at 69, is cited approvingly by the lower courts. See, e.g., *Carr*, 32 F.3d at 1011; *Burns v. McGregor Elec. Indus., Inc.*, 955 F.2d 559, 565 (8th Cir. 1992); *Swentek v. USAir, Inc.*, 830 F.2d 552, 557 (4th Cir. 1987); *Nuri v. PRC, Inc.*, 13 F. Supp. 2d 1296, 1300-01 (M.D. Ala. 1998); *Howard v. Historic Tours of Am.*, 177 F.R.D. 48, 53 (D.D.C. 1997); *Barta v. City of Honolulu*, 169 F.R.D. 132, 135 (D. Haw. 1996); *Weiss v. Amoco Oil Co.*, 142 F.R.D. 311, 315 (S.D. Iowa 1992). But see, e.g., *Gallagher v. Delaney*, 139 F.3d 338, 346 (2d Cir. 1998) (refusing to rely on *Vinson* and finding that plaintiff's sexual affair with coemployee and use of cocaine did not permit "a court to determine, as a matter of law, that a person was receptive to sexual suggestions"); *Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1464 n.5 (9th Cir. 1994) (rejecting employer's assertion that plaintiff "welcomed" employer's harassment "because she herself talked like a 'drunken sailor'"). The courts also have held that a plaintiff's past sexual conduct or sexual or sexu-

tion for why sexual harassment is a form of sex discrimination ultimately dissolves the distinction between sexual exploitation in the "legitimate" workplace and prostitution. Instead, their explanation reveals "the bond between material survival and sexual exploitation" that keeps gender oppression in place in both situations.¹⁰⁰

Further evidence of how sexual harassment jurisprudence challenges the meaning of prostitution is found in the work of Martha Chamallas, to whom we referred earlier, and Stephen Schulhofer.¹⁰¹ Both are legal theoreticians committed to the development of a legal concept of consent that protects women from sexual objectification

ally provocative activity outside the workplace is irrelevant to a claim of sexual harassment. See, e.g., *Burns v. McGregor Elec. Indus., Inc.*, 989 F.2d 959, 963 (8th Cir. 1993); *Barta*, 169 F.R.D. at 136; *Stang v. Leaseway Transp. Corp.*, No. 89-C-1443, 1990 WL 37680, at *2 (N.D. Ill. Mar. 9, 1990) (mem.); *Mitchell v. Hutchings*, 116 F.R.D. 481, 485 (D. Utah 1987); see also *Gallagher*, 139 F.3d at 346.

Since 1994, plaintiffs may be able to use Rule 412(b)(2) of the Federal Rules of Evidence, which provides that evidence offered to prove the plaintiff's other sexual behavior or the plaintiff's sexual predisposition is not admissible unless the evidence is otherwise admissible and its "probative value substantially outweighs the danger of harm . . . and of unfair prejudice to any party." Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, tit. IV, § 40141(b), 108 Stat. 1919 (found at Fed. R. Evid. 412(b)(2)). The Advisory Committee Note to Rule 412 expressly states that it was designed to exclude evidence "relating to the alleged victim's mode of dress, speech, or life-style." Fed. R. Evid. 412(b)(2) advisory committee's note. Although Rule 412 might be read as diverging from *Vinson*, see Joan S. Weiner, *Understanding Unwelcomeness in Sexual Harassment Law: Its History and a Proposal for Reform*, 72 *Notre Dame L. Rev.* 621, 637 (1997), the recent case of *Howard*, 177 F.R.D. at 53, indicates that the courts may try to reconcile the two. *Howard* held, upon a motion to compel discovery, that plaintiffs would not be compelled to "tell the defendants whether they engaged in sexual behavior with other employees." *Id.* at 51. With regard to *Vinson* the court wrote:

Nothing in this opinion is inconsistent with the Supreme Court's decision in [*Vinson*] That case hardly stands for the proposition that so long as evidence has some theoretical relationship to plaintiff's welcoming the sexual advances complained of it must be admitted. Instead, [*Vinson*] requires behavior claimed to be welcoming to be admitted only if its probative force exceeds its potential for prejudice. Thanks to Fed. R. Evid. 412(b)(2), . . . the balancing must now be performed in accordance with the more stringent requirements of the new rule.

Id. at 53; see also *Sanchez v. Zabihi*, 166 F.R.D. 500, 501-03 (D.N.M. 1996) (limiting discovery by relying on Fed. R. Evid. 412 and its relationship to Fed. R. Civ. P. 26(b), which permits "a broad range of discovery"); *Sheffield v. Hilltop Sand & Gravel Co.*, 895 F. Supp. 105, 109 (E.D. Va. 1995) (limiting admissibility of evidence based on defendant's failure to comply with procedural safeguards of Rule 412).

Rule 412, which is a "rape-shield" type evidentiary rule, does not resolve the distinction between the "legitimate" workplace and prostitution. Rather, it can be understood as reinforcing that distinction. See *infra* notes 165-68 and accompanying text (analyzing rape shield laws).

¹⁰⁰ MacKinnon, *supra* note 79, at 7.

¹⁰¹ See *supra* note 88 and accompanying text (quoting Chamallas for purpose of explaining role of consent in sexual harassment).

and sexual encounters that they experience as alienating.¹⁰² As part of a study of consent and its function in the legal control of sexual conduct, Chamallas considers the role of economic pressure as an inducement to sex.¹⁰³ After establishing that “[t]he normative theory underlying sexual harassment suits is that neither job benefits nor job detriments should be conditioned on sex,” she demonstrates that “[i]n the employment context, technical consent by a woman who is put to such an unfair choice is not regarded as effective consent,” even though “her submission also produced a corresponding benefit.”¹⁰⁴ The law finds sexual harassment “from the existence of the improper inducement alone” because the employer or those acting on behalf of the employer (e.g., supervisor or personnel director) “abused his position to secure sex.”¹⁰⁵

Chamallas then analyzes the law outside of the employment context where she finds the state unwilling to use the criminal law of rape to protect women against economic coercion¹⁰⁶ and compares that unwillingness with “the prevailing legal stance on prostitution” that holds both parties criminally liable for a market exchange of sex for money.¹⁰⁷ She concludes that “it is impossible to arrange the rules governing sexual harassment, rape, and prostitution into a coherent position on the legal status of economically coerced sex.”¹⁰⁸ She also concludes that

the law of sexual harassment has highlighted the issue of economic coercion and much effort has been directed toward identifying those sexual encounters in which the use of economic pressure is most objectionable. Equally important, there seems to be little current sentiment in active support of the practice of trading sex for economic gain.¹⁰⁹

Chamallas is reluctant to take the “small step” urged by Baldwin.¹¹⁰ In addition, later in the article Chamallas indicates that she does not view prostitution as a practice of inequality because she can imagine it being an exercise of sexual freedom “when resource equality between men and women is achieved.”¹¹¹ Nevertheless, her exploration of the

¹⁰² See Chamallas, *supra* note 26, at 814, 836; Stephen J. Schulhofer, *Taking Sexual Autonomy Seriously: Rape Law and Beyond*, 11 L. & Phil. 35, 68, 70-71 (1992).

¹⁰³ See Chamallas, *supra* note 26, at 820-30.

¹⁰⁴ *Id.* at 820.

¹⁰⁵ *Id.* at 820-21.

¹⁰⁶ See *id.* at 825-26.

¹⁰⁷ *Id.* at 826.

¹⁰⁸ *Id.* at 830.

¹⁰⁹ *Id.*

¹¹⁰ See *supra* note 95-100 and accompanying text (critiquing feminist distinction between women in “legitimate” work and women in prostitution).

¹¹¹ Chamallas, *supra* note 26, at 842.

complex nexus between sex and economic power inspired by reforms in sexual harassment law can assist us in thinking about prostitution in a new way.

Similarly, Schulhofer's study of the right to sexual autonomy shifts our perceptions of prostitution as he investigates the connection between sex and economic power and the relationship between sexual harassment, rape, and prostitution.¹¹² When Schulhofer examines the law of rape, he explains that it was designed not only to protect against forcible coercion but also to protect autonomous choice.¹¹³ By uncovering the dual purposes of existing law, he hopes to shift the debate from "how aberrant, egregious, or potentially lethal the behavior of a man may be" to "whether the preconditions for meaningful choice are present and whether behavior that may interfere with meaningful choice has adequate social justification."¹¹⁴ He ultimately proposes two groups of offenses: rape, which includes sexual contact by actual or threatened violence, and sexual abuse or sexual misconduct, which reaches nonviolent interference with freedom of choice in matters of sexual intimacy.¹¹⁵ Although he shows how the "right to sexual autonomy has clear contours that are pervasively accepted and no longer contestible in our culture,"¹¹⁶ he also acknowledges that the conventional focus on issues of force and consent requires him to explain the concept of sexual autonomy, which, he asserts, underlies the law of rape.¹¹⁷

Searching for "the core constituents of personal freedom and security that traditionally have warranted criminal law safeguards," he finds two distinct elements in the concept of sexual autonomy: (1) "the capacity to choose, unconstrained by impermissible pressures and limitations" (intellectual autonomy) and (2) "a physical boundary, the bodily integrity of the individual" (physical autonomy).¹¹⁸ As part of his efforts to make this conception of autonomy concrete, Schulhofer considers prostitution as one of several situations in which a man's exercise of economic inducements taints a woman's consent.¹¹⁹ By comparing his analysis of four different scenarios depicting sex for

¹¹² See Schulhofer, *supra* note 102, at 79-88.

¹¹³ See *id.* at 67-68.

¹¹⁴ *Id.* at 68.

¹¹⁵ See *id.* at 67, 71-93.

¹¹⁶ *Id.* at 71.

¹¹⁷ See *id.*

¹¹⁸ *Id.* at 70-71; see also Stephen J. Schulhofer, *Unwanted Sex: The Culture of Intimidation and the Failure of Law* 110-13 (1998) (describing dimensions of sexual autonomy as he conceives of it).

¹¹⁹ See Schulhofer, *supra* note 102, at 84-88.

economic benefit, we can detect how the law of sexual harassment informs his analysis of prostitution.¹²⁰

The first scenario involves a "well-compensated fashion model who accedes to sexual pressure in order to land a career-enhancing film role."¹²¹ Schulhofer, relying on the law of sexual harassment, concludes that "sexual services are never an appropriate condition of ordinary employment" and that "[o]n this basis the fashion model's freedom of choice would be improperly constrained and her acceptance of sexual intimacy would not be validly consensual."¹²² Although she can freely choose to refuse the demand, under Schulhofer's meaning of freedom of choice, she should have the option to choose "the acting role without sexual submission."¹²³

In the second scenario, the model agrees to marry a billionaire entrepreneur for purely economic reasons.¹²⁴ In the absence of an employment relationship, Schulhofer concludes that the model's preference for the billionaire's "wealth and comfort without having to submit to his sexual attentions" is not protected because the billionaire's interest in seeking sexual relations within the confines of an intimate social relationship is appropriate.¹²⁵ The billionaire's exercise of his autonomy is not an "improper interference" with the model's freedom of choice.¹²⁶

Schulhofer varies the model scenario by substituting a "needy mother of four" for the fashion model, and switching the chance of an acting role for the offer of loan forgiveness or a generic job.¹²⁷ In another variation involving the needy mother he substitutes a generic "suitor" for the billionaire and has him offering economic support in return for continuing "an ongoing sexual relationship," or threatening "to terminate a current but deteriorating relationship unless the mother complies with his sexual demands."¹²⁸ Despite these factual differences, Schulhofer's analysis stays the same: Absent an employment context, the constraints on the needy mother's freedom of choice are troubling, but nevertheless do not constitute an impermissible limitation on her autonomy.¹²⁹

¹²⁰ With slight variations, Schulhofer adopts a similar analysis of the scenarios in his recent book. See Schulhofer, *supra* note 118, at 162-65.

¹²¹ Schulhofer, *supra* note 102, at 84.

¹²² *Id.* at 85 (footnote omitted).

¹²³ *Id.*

¹²⁴ See *id.* at 85-86.

¹²⁵ *Id.* at 86.

¹²⁶ See *id.*

¹²⁷ See *id.* at 84.

¹²⁸ *Id.* at 88.

¹²⁹ See *id.* at 86, 88.

At the point that he hypothesizes “a small businessman” offering the needy mother a job conditioned on sexual compliance, he recognizes how close his scenarios come to a sex-for-money exchange when he states, “Prostitution, of course, is typically illegal, but even if it is not, her desperate situation renders the voluntariness of her consent problematic.”¹³⁰ After concluding that the employment context is sufficient to treat the conduct of the employer as illegal, he then returns to prostitution.¹³¹ Initially he asks the question whether, “in an autonomy analysis,” prostitution should be treated differently than employment conditioned on sex—that is, should the conduct be treated as illegal?¹³² Outside of a conventional employment context, Schulhofer recognizes that “both parties understand that the essence of the transaction is the exchange of money for sex.”¹³³ This distinction suggests to him that treating prostitution as legal protects a woman’s autonomous choice, but only if society “first attempt[s] to assure women the availability of ordinary employment not conditioned on sexual compliance, and an adequate safety net of welfare and child support for women unable to find work.”¹³⁴ His reasoning up to this point explains why he does not raise questions about prostitution when he discusses the fashion model scenarios in which the woman is described as economically secure. His analysis resembles Chamallas’s concerns about the inequality of material resources between men and women.¹³⁵

Schulhofer, however, does not end his discussion of prostitution here. Because he is interested in showing that his proposals regarding sexual autonomy are supported by existing legal principles, he addresses laws that view “the explicit purchase of sex as outside the legitimate prerogatives of freedom to exploit private property,” and he considers prostitution within the broader context of a legal regime that prohibits the “purchase [of] organs for transplant, babies for adoption, or . . . the gestational assistance of a surrogate mother.”¹³⁶

¹³⁰ *Id.* at 86.

¹³¹ *See id.* at 87.

¹³² *See id.* Schulhofer did not address the question of whether prostitution should be treated as a criminal offense for a woman selling sex as well as for a man who conditions the payment of money on sex. His conclusion that prostitution is an offense against a woman’s autonomy suggests that he might favor decriminalizing prostitution for the woman used in prostitution but not for the john. *See id.* at 87-88.

¹³³ *Id.* at 87.

¹³⁴ *Id.*; *see also* Schulhofer, *supra* note 118, at 165 (making similar point).

¹³⁵ *See supra* note 111 and accompanying text (suggesting prostitution could be exercise of sexual freedom if men and women had economic equality).

¹³⁶ Schulhofer, *supra* note 102, at 87. For a related analysis, *see* Margaret Jane Radin, *Contested Commodities* 132-36 (1996). Radin starts from the premise that, ideally, sexual interactions should not be commodified, meaning that sexuality should not be treated as

Schulhofer explains society's prohibitions of these transactions as reflecting two "salient" concerns: (1) "that for sellers in financial distress, monetary incentives will involve excessive pressure or will prompt short-sighted decisions that the seller will later regret"; and (2) "that certain core features of human dignity and freedom should not be the subject of market exchange."¹³⁷ Rather than dismissing these concerns as paternalistic and arguing that the law of prostitution cannot be reconciled with his definition of autonomy, Schulhofer suggests how the concerns relate to his two-prong definition of autonomy:

In effect, society constrains intellectual autonomy (freedom of choice) in order to protect physical autonomy (the integrity and corporal boundaries of the physical person). . . . [T]he male who solicits her commits an offense against her autonomy by trying to purchase a constituent of her person and her humanity that society has decided should not be "for sale."¹³⁸

Schulhofer's analysis of prostitution is at best incomplete, especially when it is considered within the context of the fashion model/ needy mother scenarios.¹³⁹ Schulhofer constructs a scenario in which a billionaire seeks sexual fulfillment in an "ongoing, intimate social relationship[]" in return for providing a fashion model "wealth and comfort" and stipulates that the fashion model agrees to marriage or cohabitation "for purely economic reasons."¹⁴⁰ He constructs a simi-

property that is the subject of market transactions. See *id.* at 132. She then argues that the current legal regime that makes the market exchange of sex for money illegal causes "harm to ideals of personhood instead of maintaining and fostering them, primarily because it exacerbates the double bind." *Id.* The double bind that Radin refers to is the practical problem of transition in which current policies may reinforce the status quo and hinder progress, but new policies in the name of progress may substantially worsen the situation. See *id.* at 123-24. She believes that the fact that "[p]oor women who believe that they must sell their sexual services in order to survive are subject to moral opprobrium, disease, arrest, and violence" causes the exacerbation. *Id.* at 132. Radin worries, however, about the effect of market rhetoric on the "discourse about sex, and in particular about women's sexuality." *Id.* at 133. For her, "the best policy solution, for now, is a regime of regulation expressing incomplete commodification," *id.* at 134, which would entail decriminalization of the sale of sexual services, the banning of pimping and recruitment, the unenforceability of prostitution contracts, and might go so far as to include the banning of advertising. See *id.* at 134-36.

Unlike Chamallas and Schulhofer, Radin does not raise the question of whether prostitution is incoherent with other feminist legal reforms or is itself a practice of inequality. Radin treats prostitution as containable within our discursive arrangements and finds it acceptable. She believes prostitution reflects a woman making the best decisions she can in difficult circumstances and exercising her autonomy. Her analysis, therefore, does not move us beyond conventional understandings of consent and coercion.

¹³⁷ Schulhofer, *supra* note 102, at 87.

¹³⁸ *Id.* at 87-88.

¹³⁹ See *supra* notes 121-35 and accompanying text (describing Schulhofer's analysis of fashion model/needy mother scenarios).

¹⁴⁰ Schulhofer, *supra* note 102, at 86.

lar scenario in which a suitor of undisclosed wealth is substituted for the billionaire and a needy mother of four is substituted for the fashion model.¹⁴¹ He justifies the legality of both types of sexual encounters based on the men's entitlement to seek sexual fulfillment in intimate relationships.¹⁴²

The obvious question is: What distinguishes the billionaire and the suitor from a john under Schulhofer's approach? One answer might be that Schulhofer is not obliged to distinguish his conclusions regarding his scenarios from his analysis of prostitution because he indicates that "the appropriate treatment of prostitution is debatable."¹⁴³ Perhaps Schulhofer is using his autonomy framework within the prostitution context to show how his theory could be used to support the current state of the law.¹⁴⁴ Even this explanation is problematic, however, because his analysis of prostitution explains why a man buying sex for money should be held criminally liable but fails to explain why a woman selling sex for money should be.¹⁴⁵

Another answer might be that the billionaire and the suitor are seeking "ongoing, intimate social relationships" while the john presumably is only seeking a brief sexual encounter.¹⁴⁶ This explanation is inadequate because Schulhofer does not address the motivations of johns when indicating that their conduct could constitute sexual abuse under his legal scheme.¹⁴⁷ It is also problematic because it leaves open an argument that brief sexual encounters that the parties enter into for the purpose of mutual sexual pleasure might be the subject of state intervention if the parties have unequal economic power.¹⁴⁸

Schulhofer's analysis remains inadequate when we shift the focus of the inquiry to what distinguishes the fashion model and needy mother from the woman in prostitution. No distinction can be made based on the facts of the economic distress likely to be experienced by women entering or continuing in prostitution, because Schulhofer hypothesized that the suitor made "sexual demands" to a "mother fac[ing] dire economic pressure."¹⁴⁹ Neither can a distinction be made between the motivations of women in prostitution and those of a fashion model or needy mother, because in the scenarios Schulhofer de-

¹⁴¹ See *id.* at 84, 88.

¹⁴² See *id.* at 86, 88.

¹⁴³ *Id.* at 87.

¹⁴⁴ See *id.*

¹⁴⁵ See *id.* at 86-88.

¹⁴⁶ *Id.* at 86.

¹⁴⁷ See *id.* at 87-88.

¹⁴⁸ See *infra* notes 185-91 and accompanying text (describing Chamallas's development of ideal regulation of sexual conduct).

¹⁴⁹ Schulhofer, *supra* note 102, at 88.

scribes both women as engaging in sex for the exclusive purpose of obtaining economic benefit.¹⁵⁰

Schulhofer's deference to the sexual autonomy of the billionaire and the suitor, but not to a purchaser of sex for money, his failure to apply his two-prong concept of sexual autonomy to the fashion model and the needy mother in the same way he applied it to a woman in prostitution, and his failure to reconcile his justification for the current law of prostitution with his analysis of his scenarios undermine his analysis of the market exchange of sex for money. These shortcomings may account for Schulhofer abandoning his analysis in his recent book.¹⁵¹ On reconsideration he concludes that a "man who propositions a prostitute is not necessarily *coercing* her" because even though the proposal is illegal, it "does not interfere with her options, limited though they may be."¹⁵² Despite the analytical problems in Schulhofer's earlier analysis and his implicit rejection of it later, his serious engagement with the issue of prostitution demonstrates how the law of sexual harassment highlights the link between a woman's economic survival and sexual exploitation, and creates the possibility of transforming the prostitution paradigm so that it can no longer be used as it was in *Meritor Savings Bank, FSB v. Vinson*.¹⁵³

Both Chamallas and Schulhofer find that they must consider prostitution in their respective investigations of the role of consent and economic pressure when evaluating the legality of sexual encounters. They understand that the legal recognition that sexual harassment is a form of sex discrimination means that a woman receiving an economic benefit does not, by itself, negate the harm and, in fact, is evidence of her lack of meaningful choice. Their work is persuasive evidence that the law of sexual harassment has the potential to change the meaning of prostitution.

C. Rape

There have been two major legal developments in the law of rape during the last three decades: (1) the modification of the legal definitions of consent and force and (2) the introduction of rape shield laws.¹⁵⁴ Rape reform advocates have developed strategies to challenge a number of myths surrounding the crime of rape, which include

¹⁵⁰ See *id.* at 86, 88.

¹⁵¹ See Schulhofer, *supra* note 118, at 165-66.

¹⁵² *Id.*

¹⁵³ 477 U.S. 57 (1986). See *supra* notes 38-40, 95-99 and accompanying text (discussing *Vinson's* holding that complainant's sexually provocative speech or dress is not irrelevant as matter of law in determining whether he or she found sexual advances unwelcome).

¹⁵⁴ See *infra* notes 165-70 and accompanying text (explaining rape reform measures).

the belief that rape is perpetrated by abnormal and deviant men,¹⁵⁵ that charges of rape are untrustworthy because the women making them are likely to be seeking revenge or concealing their own promiscuity,¹⁵⁶ and that women say no when they really mean yes.¹⁵⁷ Understanding that the social myths and legal definitions of rape served to maximize men's sexual access to women at the cost of women's bodily integrity,¹⁵⁸ proponents criticized the entire criminal process from the legal definition of rape, to police investigations and arrest and prosecutorial policies, to defense tactics at trial.¹⁵⁹ Reform efforts resulted in the elimination of the statutory requirements that the state prove that a complainant physically resisted her attacker and present corroboration of her testimony.¹⁶⁰ These requirements were blatant examples of how the law reflected the myth of the "lying woman," and how it concentrated on the complainant's conduct, deflecting attention from the behavior of the perpetrator.

At the core of the feminist critique of the law of rape is the legal meaning of consent and its relationship to force.¹⁶¹ By eliminating the legal requirement that women can only prove their lack of consent by presenting evidence that they resisted the perpetrator, the law and society have had to reconsider the distinction between consensual and nonconsensual sex and to reexamine the relationship between force and consent.¹⁶² The law continues to grapple with the roles of consent

¹⁵⁵ See Torrey, *supra* note 34, at 1022-23.

¹⁵⁶ Cf. MacKinnon, *supra* note 31, at 181; Torrey, *supra* note 34, at 1014-15.

¹⁵⁷ See MacKinnon, *supra* note 31, at 175; Torrey, *supra* note 34, at 1014-15.

¹⁵⁸ See Brownmiller, *supra* note 60, at 311-12; MacKinnon, *supra* note 31, at 172-76; Torrey, *supra* note 34, at 1013-19, 1025-40.

¹⁵⁹ See Smart, *supra* note 31, at 34-43, 48-49; Estrich, *Rape*, *supra* note 31, at 1094-1132, 1169-78; Torrey, *supra* note 34, at 1040-61. But see Crenshaw, *supra* note 70, at 1298-99 (critiquing both feminist and antiracist challenges to rape as based on male-centered approach to racism and white-centered approach to sexism so that each fails adequately to address rape of Black women); Jennifer Wriggins, *Rape, Racism, and the Law*, 6 *Harv. Women's L.J.* 103, 133-40 (1983) (arguing that feminist analysis of rape law is only partially applicable to Black women).

¹⁶⁰ See Chamallas, *supra* note 26, at 799 & n.101. But see Torrey, *supra* note 34, at 1041-45 (demonstrating how doctrine of prompt complaint embodies rape myths and how it continues to play role in investigation and prosecution of rape charges).

¹⁶¹ See MacKinnon, *supra* note 31, at 172-83; Smart, *supra* note 31, at 36-38; Estrich, *Rape*, *supra* note 31, at 1121-32, 1154-56; Robin West, *A Comment on Consent, Sex, and Rape*, 2 *Legal Theory* 233, 233-34, 236-40 (1996).

¹⁶² See MacKinnon, *supra* note 31, at 173, 177 (indicating that "[r]ape cases finding insufficient evidence of force reveal that acceptable sex, in the legal perspective, can entail a lot of force" and that "[e]ven when nonconsent is not a legal element of the offense, juries tend to infer rape from evidence of force or resistance"); Estrich, *Rape*, *supra* note 31, at 1131 (positing that "[t]he consent standard, like the force standard, . . . emerges as another means to protect men against unfair convictions by giving them full and fair warning that their (forceful) advances constitute an unwelcome rape rather than a welcome, or at least accepted, seduction"); West, *supra* note 161, at 240-43 (analyzing two reform movements

and force because there is no societal consensus about whether rape should be defined so that any degree of force, regardless of its severity, is permissible if consent exists, or whether it should be defined so that, even in the absence of force, anything less than affirmative, freely given consent, is ineffective.¹⁶³ The law reform debates center on the sexual autonomy of both women and men, whether it is appropriate for the state to intervene in private sexual conduct, and the state's responsibility to protect women's bodily integrity within a society based on inequality.¹⁶⁴

Although the law of rape is still in transition, the debates about what constitutes consent and force are taking place in an environment in which it is less acceptable to demand that a complainant explain why she was where she was, wearing what she was wearing, and behaving the way she was behaving. The rape shield laws certainly have contributed to the changing legal landscape. These laws, which have been widely enacted, generally limit the admissibility of a rape complainant's prior sexual conduct with any person other than the defendant.¹⁶⁵ The statutes vary in the degree to which they restrict the admissibility of such evidence.¹⁶⁶ They were designed to combat the

inspired by feminist critiques of rape, one advocating removal of consent requirement and other advocating removal of force requirement).

¹⁶³ See MacKinnon, *supra* note 31, at 174-78; Estrich, *Rape*, *supra* note 31, at 1121-32; West, *supra* note 161, at 240-43.

¹⁶⁴ See, e.g., MacKinnon, *supra* note 31, at 169 (arguing that "laws of rape, abortion, obscenity, and sex discrimination . . . are integral to sexual politics because the state, through law, institutionalizes male power over women through institutionalizing the male point of view in law"); Chamallas, *supra* note 26, at 841-43 (arguing for egalitarian perspective that expands choices actually available to women while "impos[ing] legal burdens only on those encounters" that are "exploitive and nonmutual"); Estrich, *Rape*, *supra* note 31, at 1182 (arguing "that consent should be defined so that 'no means no.' And the 'force' or 'coercion' that negates consent ought to be defined to include extortionate threats and deceptions of material fact."); Schulhofer, *supra* note 102, at 67-68 (suggesting that rape law's emphasis on violent compulsion has obscured importance of autonomy and "constrained thinking about the proper reach of criminal prohibition to protect it").

¹⁶⁵ See, e.g., Alaska Stat. § 12.45.045 (Michie 1998) (prohibiting evidence of complaining witness's previous sexual conduct unless relevant and probative value outweighs danger of "undue prejudice," "confusion," or "unwarranted invasion of the privacy of the complaining witness"); Ark. Code Ann. § 16-42-101 (Michie 1994) (prohibiting evidence of prior sexual conduct of victim unless it meets certain tests); Colo. Rev. Stat. § 18-3-407 (1998) (presuming as irrelevant "specific instances of the victim's or a witness' prior or subsequent sexual conduct, opinion evidence of the victim's or a witness' sexual conduct, and reputation evidence of the victim's or a witness' sexual conduct" with certain exceptions); Minn. Stat. Ann. § 609.347 (West Supp. 1999) (prohibiting introduction of evidence of "victim's previous sexual conduct" except in certain limited circumstances).

¹⁶⁶ Rape shield laws do not always protect the complainant from the introduction of evidence regarding her past sexual activity. Many of the statutes have exceptions that allow the introduction of such evidence. For example, the Minnesota statute allows evidence tending to show "a common scheme or plan of similar sexual conduct . . . [if] the judge . . . find[s] that the victim made prior allegations of sexual assault which were fabricated."

assumption that a complainant is untrustworthy, as well as the assumption that a woman who consented to sex in the past is likely to have consented to sex again.¹⁶⁷ The laws also reflect advocates' continuing efforts to shift the focus of the rape inquiry away from the question of whether the complainant was worthy of protection, toward questions regarding the defendant's behavior.¹⁶⁸ The growing willingness of prosecutors to pursue nonstranger rape charges,¹⁶⁹ and the increase in criticism of the law's unwillingness to treat sex obtained through economic pressure or deception as criminal,¹⁷⁰ demonstrate that, as the legal concepts of consent and force continue to evolve, feminist challenges to the law of rape and the myths underlying it will have a significant effect on the terms of the debate.

At the same time that the rape reform initiatives extend the law's protection to a larger group of women, they reinforce the boundary

Minn. Stat. Ann. § 609.347(3) (West Supp. 1999). It also allows evidence to be admitted of the "victim's previous sexual conduct with the accused." *Id.* Finally, "[w]hen the prosecution's case includes evidence of semen, pregnancy, or disease . . . , evidence of specific instances of the victim's previous sexual conduct is admissible solely to show the source of the semen, pregnancy, or disease." *Id.* The Colorado statute has similar exceptions. See Colo. Rev. Stat. § 18-3-47(1) (1998). The Alabama statute also allows evidence of the victim's past sexual behavior with the accused. See Ala. Code § 12-21-203 (1995).

Susan Estrich has concluded:

[T]he guarantees of state rape shield laws are not ironclad. . . . [T]he statutes present a very mixed picture. Some are just plain poorly drafted and provide only illusory protections. And even some of the better ones contain loopholes which defense attorneys, in today's environment, may be able to use to swallow the rule.

Estrich, *supra* note 34, at 21 (footnotes omitted). For cases considering the application of rape shield laws to defendants' efforts to introduce evidence of a victim's prior prostitution activities, see *infra* note 180.

¹⁶⁷ See Estrich, *supra* note 34, at 22 (noting that "[w]hen the bulk of the rape shield statutes were passed, the focus of attention for law reformers . . . was the almost indiscriminate use of a woman's sexual history and sexual reputation both to discredit her testimony and to prove that she had consented"); Harriet R. Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 Minn. L. Rev. 763, 764-65 (1986) (describing "impetus behind nationwide reform of evidentiary law applicable to rape prosecutions that swept through state legislatures and Congress in mid-1970's" (footnote omitted)).

¹⁶⁸ See Galvin, *supra* note 167, at 793-95 (describing police's, doctors', and courts' responses to rape victims).

¹⁶⁹ See Chamallas, *supra* note 26, at 800 (noting that, as part of rape law reform effort, "pressure [was] also . . . put on law enforcement personnel and district attorneys to investigate and prosecute 'date' and 'acquaintance' rapes"); Estrich, *supra* note 34, at 5 (noting "powerful signs of the change in our understanding of rape" as demonstrated by prosecutions of rape cases).

¹⁷⁰ See Chamallas, *supra* note 26, at 810-11 (describing "feminist critique of consent in laws governing sexual conduct" to include defining nonconsensual sex as induced by "superior economic strength" and "sex induced by deception"); Schulhofer, *supra* note 102, at 84-93 (analyzing appropriateness of criminal sanctions for economically induced sexual relationships and relationships characterized by deception).

between worthy women and women in prostitution.¹⁷¹ By excluding evidence of their prior sexual history, the rape shield laws legally construct rape complainants as worthy women, thereby preserving the category of unworthy women. In addition, it is widely accepted that testimony about a complainant's prior sexual history with the defendant is exempted from rape shield laws, a factor that further reinforces the worthy woman/unworthy woman distinction.¹⁷² The exception implies that a woman is less at risk of being charged with promiscuity and unworthiness if evidence about her sexual activity is limited to only one man. She can be viewed as sexually discriminating and therefore worthy.¹⁷³

Within the consent/force debates, some reformers have tried to secure protections for a woman's bodily integrity through a "no means no" standard¹⁷⁴ while others have gone further and embraced a "yes means yes" standard.¹⁷⁵ Both standards place prostitution beyond the

¹⁷¹ Although Susan Brownmiller recognized that prostitution "institutionalizes the concept that it is man's monetary right, if not his divine right, to gain access to the female body," and that "the false perception of sexual access as an adjunct of male power and privilege . . . fuel[s] the rapist mentality," Brownmiller, *supra* note 60, at 392, she did not see that advocating for a legal reform that would bar evidence of a rape survivor's sexual history except for "[p]rior consensual intercourse between the complainant and the defendant," *id.* at 386, contributed to the making of, in her words, "a cooperative class of women, set aside" to perform sexual services, *id.* at 392.

¹⁷² See *supra* note 166 and accompanying text.

¹⁷³ Baldwin explains the lack of feminist critique of the exception in rape shield laws that allow the admission of evidence pertaining to past sexual conduct with the defendant by connecting the rape reform strategies to reforms in domestic violence laws. See Baldwin, *supra* note 8, at 70-71. She observes that a critique of the rape shield exception would be contrary to the strategy feminists have used on behalf of battered women. The representation of battered women via the battered women's syndrome seeks an expansion of the representation frame to include emotional history; psychological consequences of serial battery; and the lack of social recognition, support, and material alternatives battered women confront. See *supra* note 66 and accompanying text (discussing battered women syndrome). As Baldwin argues, this representation is in sharp contrast to the "freeze-frame, miniaturist portrait of the rape victim generally constructed under the shield rules." *Id.* at 71. The exception for past sexual conduct with the defendant serves the function of reducing the tension between the two conflicting antiviolence strategies. See *id.* at 70-71.

¹⁷⁴ See Estrich, Rape, *supra* note 31, at 1127-32 (arguing that, for nonconsent requirement to contribute to women's autonomy, victim's verbal assertion of "no" must be taken seriously); see also MacKinnon, *supra* note 31, at 174-75 (questioning role of consent in rape law and arguing that "[i]f rape laws existed to enforce women's control over access to their sexuality, as the consent defense implies, no would mean no, marital rape would not be a widespread exception, and it would not be effectively legal to rape a prostitute" (footnote omitted)); Schulhofer, *supra* note 102, at 41-45 (explaining limitations to "no means no" reform strategy).

¹⁷⁵ See Lynne N. Henderson, What Makes Rape a Crime?, 3 Berkeley Women's L.J. 193, 216-18 (1987-1988) (reviewing Susan Estrich, *Real Rape* (1987)) (criticizing Estrich's focus on verbal "no" as reliable objective indicator of nonconsent); see also Schulhofer,

reach of the law's protection of bodily integrity. In the name of sexual autonomy, a strategy focused on consent means that the law need look no further than a woman's "yes" and should respect a woman's "no." The problem with relying exclusively on a consent analysis to protect bodily integrity is that it prevents serious inquiry about women in prostitution who are deemed to say yes all the time.¹⁷⁶ Baldwin argues that reformers' emphasis on consent is the means by which some women can maintain their distance from women in prostitution. She writes, "Prostitutes, of course, say 'yes' a great deal. Our threshold commitment to the dismissal of a woman's 'no' as the talismanic violation of rape both renders prostitution beyond the pale of our rape reforms and, praise be, prostitutes as the women we are not."¹⁷⁷

Although the proponents of rape reforms can be portrayed accurately as attempting to expand the protections of the bodily integrity of worthy women at the expense of women in prostitution, the rape discourse that has evolved over the last three decades regarding women's bodily integrity nevertheless has the potential to transform our understanding of the market exchange of sex for money. One justification for the rape shield laws is that a woman's bodily integrity is not protected if prior consent to sex is used as a proxy for consent to the sexual conduct at issue.¹⁷⁸ A similar concern presumably underlies the prosecution of nonstranger rape cases.¹⁷⁹ The state begins to meet its obligation to protect a woman's bodily integrity when it refuses to treat the fact that a woman found herself in a sexually vulner-

supra note 102, at 42 (raising difficulty of determining "when the circumstances are sufficiently constraining to invalidate ostensible consent").

¹⁷⁶ See Baldwin, supra note 8, at 69; see also MacKinnon, supra note 31, at 175 (arguing that concept of consent in rape law does nothing to enhance sexual autonomy of women used in prostitution).

¹⁷⁷ Baldwin, supra note 8, at 69; see also Sherene Razack, *From Consent to Responsibility, from Pity to Respect: Subtexts in Cases of Sexual Violence Involving Girls and Women with Developmental Disabilities*, 19 L. & Soc. Inquiry 891, 922 (1994). Through studies of sexual assault cases involving girls and women with developmental disabilities, Razack shows how the consent framework reinforces categories of subordination and how each of us has an investment in maintaining sexual violence as it is currently understood. Razack urges antiviolence reformers to abandon "disengagement tactics" emphasizing vulnerability of women with disabilities and to instead work toward having their stories told "as stories of injustice." *Id.*

¹⁷⁸ See Galvin, supra note 167, at 798-99 (describing evolution of laws as based on both "instrumentalist arguments" that restrictions on use of prior sexual history would aid complainants in enforcing rape laws, as well as modern social acceptance of premarital sex); see also *Commonwealth v. Joyce*, 415 N.E.2d 181, 186 (Mass. 1981) (noting that "[r]eformers have argued that inquiries into the sexual history of the rape complainant chills her willingness to testify" and that "reputation evidence is only marginally, if at all, probative of consent").

¹⁷⁹ See Chamallas, supra note 26, at 800.

able position as a proxy for consent. In the wake of these legal changes, evidence of promiscuity no longer serves a probative function with regard to a woman's consent or her credibility.

When legal inquiry focuses on the harm of a woman's bodily integrity and rejects reputational evidence of her promiscuity, the shift in the discourse modifies the social status of "prostitute." If a person's status is based on her sexual conduct, but such conduct no longer has probative power in a legal setting, her designation as a "prostitute" can no longer short-circuit an inquiry into the question of harm to her bodily integrity. The meaning of "prostitute" is altered. This is illustrated in a series of recent court decisions that refused to allow a defendant to show consent or to attack the complainant's credibility through the introduction of evidence of a complainant's prostitution activities with others.¹⁸⁰ Not only do the legal changes make possible the prosecution of a man for the rape of a woman who has engaged in sex for money, but it also creates a discourse within which it is possi-

¹⁸⁰ See, e.g., *United States v. Saunders*, 943 F.2d 388, 392 (4th Cir. 1991) (stating "it is intolerable to suggest that because the victim is a prostitute, she automatically is assumed to have consented with anyone at any time"), cert. denied, 502 U.S. 1105 (1992); *Williams v. State*, 681 N.E.2d 195, 200 (Ind. 1997) (holding that evidence offered that victim on prior occasions "had committed acts of prostitution" was properly excluded because evidence was offered simply to show that victim had consented in past "in the hope the inference will be drawn that she consented here"); *State v. Johnson*, 944 P.2d 869, 879 (N.M. 1997) (holding that "when a defendant characterizes an alleged rape or other criminal sexual conduct as an act of prostitution, evidence of prior acts of prostitution is not necessarily material and probative"). But see, e.g., *People v. Slovinski*, 420 N.W.2d 145, 153 (Mich. Ct. App. 1988) (holding that "evidence of alleged prostitution is probative on the issue of consent if the fact that a complainant has engaged in intercourse for money has any tendency to make it more probable that the complainant consented to the sex act in issue"); *State v. Williams*, 487 N.E.2d 560, 563-64 (Ohio 1986) (holding that evidence of complainant's reputation as prostitute was admissible because proffered evidence was more than mere impeachment of witness's credibility but went to negate implied establishment of element (consent) of crime charged).

Defendants may still be able to introduce evidence of a complainant's prostitution activities if they can demonstrate some special relevancy, such as motive to fabricate or pattern of conduct by the victim. See, e.g., *Johnson v. State*, 632 A.2d 152, 160 (Md. 1993) (holding that evidence that complainant had exchanged sex for drugs in past was admissible in order for defendant to establish that he was falsely accused because victim did not get cocaine she was promised); *Commonwealth v. Joyce*, 415 N.E.2d 181, 184-85 (Mass. 1981) (holding, in ruling on whether defendant could introduce evidence at trial that complainant had been charged previously with prostitution to show that allegation of rape may have been motivated by complainant's desire to avoid further prosecution, that rape shield statute did not prohibit admission of "evidence of specific instances of a complainant's sexual conduct in situations when that evidence is relevant to show complainant's bias"); *Winfield v. Commonwealth*, 301 S.E.2d 15, 20 (Va. 1983) (explaining that defendant may show that victim engaged in "a distinctive pattern of past sexual conduct, involving the extortion of money by threat after acts of prostitution, of which her alleged conduct in [a particular] case [is] but an example").

ble for society to reconsider the implications of a woman's bodily integrity when she engages in sex for money.

When Lynne Henderson writes about the phenomenological differences between violent and nonviolent sexual abuse, she describes how the act of rape erases the self. "Rape denies that you are a *person*, that you *exist*. In contrast, lovemaking affirms your existence, and *undesired* sex at least does not completely *deny* your personhood. . . . [W]omen experience total helplessness and obliteration during rape. When a woman's *existence does not matter*, intercourse becomes rape."¹⁸¹ In her articulation of the harm of rape, she shows how disregard for bodily integrity results in the denial of a woman's personhood. As she focuses on the terror of a single life-threatening sex act, she leaves no room to engage in a debate about whether a woman's reputation or prior sexual conduct is relevant.

Henderson's description of the harm of rape as a denial of personhood provides a model for examining the harms of prostitution. Her language of "obliteration" can be helpful in describing the harm of multiple and repetitive sexual encounters with johns.¹⁸² Henderson's description of a sexual act where "a woman's existence just does not matter"¹⁸³ facilitates an understanding of how money buys away a woman's existence and how the status of "prostitute" systematically makes a woman's existence not matter.

In this light, redefining consent to mean that "no means no" or that "yes means yes" effectively precludes the possibility of treating prostitution as sexual violence.¹⁸⁴ Nevertheless, the debate over the meaning and significance of consent in rape can illuminate our understanding of prostitution. Chamallas, for example, proposes that legal rules aimed at protecting bodily integrity and autonomy should not interfere with the parties' abilities to make mutual choices to engage in sexual conduct for the purpose of "sexual pleasure or emotional intimacy," but that laws should regulate sexual conduct that is not mutual in terms of choice or purpose.¹⁸⁵ Chamallas's ideal merges liberty and equality concerns.¹⁸⁶ By including notions of individual choice, sexual desire, and intimacy in her proposal, she builds on liberalism and its commitment to limited state control and individual auton-

¹⁸¹ Henderson, *supra* note 175, at 226.

¹⁸² See *id.* For a discussion of the harms of prostitution that is similar to Henderson's observations, see Jeffreys, *supra* note 3, at 268-73.

¹⁸³ Henderson, *supra* note 175, at 226 (emphasis omitted).

¹⁸⁴ See *supra* notes 161-64, 174-77 and accompanying text (discussing role of consent in law of rape).

¹⁸⁵ See Chamallas, *supra* note 26, at 784, 836-39.

¹⁸⁶ See *id.* at 836-39.

omy.¹⁸⁷ She narrows the legitimate purposes of sexual conduct to “sexual pleasure or emotional intimacy”¹⁸⁸ and introduces the concept of mutuality, in response to the reality that heterosexual sex has historically been a site of patriarchal domination where women’s sexual needs and desires were subordinated to men’s.¹⁸⁹ Chamallas persuasively argues that “sexual encounters engaged in for emotional and physical gratification may be characterized as the most egalitarian kind of sexual encounters” because (1) “men and women are regarded as possessing an equal capacity to experience sexual pleasure and emotional intimacy” and (2) sex with one or the other of these goals “seems more capable of avoiding the dangers of sexual objectification which feminists have identified as a chief mechanism by which male supremacy is established and maintained.”¹⁹⁰ Mutuality promotes equality in sexual encounters because unless it is present “the encounter is not dependent on the reciprocal response of the parties . . . [and] increases the chance that the sex will be an alienating experience for both parties and will perpetuate the sexual objectification of women.”¹⁹¹

Acknowledging that the feminist contention that “liberalism’s primary concern . . . with limiting governmental coercion” makes it “incapable of producing equality for women,”¹⁹² Chamallas puts forward a “tentative hypothesis . . . that moral sex is . . . sexual conduct in which both parties have as their objective only sexual pleasure or emotional intimacy, whether or not [the sex is] tied to procreation.”¹⁹³ Chamallas’s definition of moral sex thus seems to exclude prostitution. The john may be seeking sexual pleasure, but for the woman engaged in prostitution, even if we assume—contrary to a substantial body of empirical evidence—that she obtains sexual pleasure from the encounter, her primary objective is to obtain money.¹⁹⁴ Of course,

¹⁸⁷ See *id.* at 793-94.

¹⁸⁸ *Id.* at 784.

¹⁸⁹ See *id.* at 839-40.

¹⁹⁰ *Id.* at 839.

¹⁹¹ *Id.* at 841.

¹⁹² *Id.* at 783.

¹⁹³ *Id.* at 784.

¹⁹⁴ See, e.g., Barry, *supra* note 24, at 31-32 (reporting on study documenting how women disassociate from sex engaged in for money); Brock & Thistlethwaite, *supra* note 3, at 183, 186-87 (reporting how women in prostitution separate sexual intimacy in their personal lives from having sex for money); Jeffreys, *supra* note 3, at 219-21 (reporting on studies indicating that women do not engage in prostitution for sex). But see Vern Bullough & Bonnie Bullough, *Women and Prostitution: A Social History* 309 (1987) (summarizing data from study conducted by group of researchers organized by Kinsey group indicating that, of women in prostitution interviewed, “approximately 80 percent reported having orgasms at least occasionally” with clients and that they reported that they engaged in

this definition of moral sex is problematic because it suggests that the john is pursuing moral sex but the woman engaged in prostitution is not. Chamallas's notion of mutuality can address this concern.¹⁹⁵ The market exchange of sex for money is not moral sex on the part of the john either because it is "not premised on mutuality," given the different character of each participant's aims.¹⁹⁶

When elaborating on the egalitarian ideal of sexual conduct and distinguishing it from the traditional view, which is based on the marital status of the parties, and from the liberal view that equates individual choice with sexual freedom, Chamallas explicitly addresses prostitution.¹⁹⁷ She concludes that the difference between the liberal and egalitarian perspective on prostitution is that liberals fail to consider the limited choices available to women in prostitution whereas egalitarians would only accept that prostitution is an expression of a woman's sexual freedom in a world of resource equality between men and women.

[N]o convincing liberal argument can be made against prostitution because it is possible to view prostitution as expressing the sexual autonomy of the individual prostitute and the data are unpersuasive that prostitution causes harm to third parties.

The egalitarian perspective, in contrast, is most reluctant to equate individual choice with sexual freedom and is consciously directed toward expanding the choices actually available to women. For example, the egalitarian view does not conclude that because prostitutes initiate sexual encounters, prostitution necessarily furthers the sexual freedom of women. Because prostitution may be a choice of last economic resort for many women, the egalitarian is as likely to see it as the degrading artifact of sexual inequality as the expression of women's liberty. Insofar as genuine sexual freedom depends on sexual equality, full legal approval for prostitution may be appropriate only when resource equality between men and women is achieved.¹⁹⁸

Rather than critiquing the liberal view through her analysis to argue that sexual autonomy exercised for purposes other than "sexual

prostitution "because it offered a good income, an opportunity to meet interesting people, was comparatively easy, was fun, and gave sexual pleasure").

¹⁹⁵ See Chamallas, *supra* note 26, at 784:

My tentative hypothesis is that moral sex is coming to be identified with sexual conduct in which both parties have as their objective only sexual pleasure Sex used for more external purposes, such as financial gain . . . is regarded as exploitative and immoral, regardless of whether the parties have engaged voluntarily

¹⁹⁶ See *id.* at 841.

¹⁹⁷ See *id.*

¹⁹⁸ *Id.* at 841-42.

pleasure or emotional intimacy"¹⁹⁹ is likely to perpetuate inequality, Chamallas embraces the conventional meaning of sexual autonomy. It matters to Chamallas that a woman initiates a sexual encounter, and she seems reluctant to challenge the import of a woman saying "yes" to sex. She thus privileges a conventional liberal understanding of sexual autonomy in a way that seems inconsistent with her own ideal of "moral sex." As this contradiction demonstrates, it is difficult for any conventional consent framework to change people's understanding of prostitution. Chamallas's reluctance to challenge the liberal understanding of sexual autonomy as it applies to prostitution, however, does not detract from the ability of her definition of "moral sex" as mutual sexual conduct to expose the way in which prostitution is a practice of inequality.

Feminist critiques of the role of "consent" in rape law are also helpful in developing a new understanding of prostitution. Schulhofer, in addressing the problem of how the law of rape should treat a woman's silence, observes that traditional rape law equates silence with consent because the law is "centered on protect[ing women] from forcible coercion."²⁰⁰ Schulhofer explains that the legal meaning of nonconsent as resistance to forcible coercion is, in the context of rape, readily perceived by the legal system as revulsion, which is unlikely to be expressed through silence.²⁰¹ Schulhofer appreciates, however, that silence is ambiguous: It might express "emphatically negative, enthusiastically positive, indifferent, uncertain, or ambivalent" feelings toward sexual conduct.²⁰² In this light, he argues, the ambiguity of silence leads to the conclusion that intercourse "in the face of verbal objections, ambivalence, or silence is intercourse without consent, and it represents a clear offense against the physical autonomy of the person."²⁰³ He concludes that, "[e]ven in the complete absence of force, such behavior is 'nonviolent sexual misconduct' and should be punished as such."²⁰⁴

Once Schulhofer shows how the law, in order to protect an individual's bodily integrity, must do more than protect a woman from abhorrent sexual conduct, prostitution no longer clearly represents an instance of consensual sex. Although he initially assumes that ambi-

¹⁹⁹ *Id.* at 784.

²⁰⁰ Schulhofer, *supra* note 102, at 67, 73. For a similar discussion of silence, see Schulhofer, *supra* note 118, at 267-73.

²⁰¹ See Schulhofer, *supra* note 102, at 73 ("The very conception of rape implied coercing someone to do something repugnant.").

²⁰² *Id.*

²⁰³ *Id.* at 77.

²⁰⁴ *Id.*

guity exists as to a woman's feelings where the "response to a sexual initiative is neither clearly affirmative nor clearly negative,"²⁰⁵ more recently, he discusses a woman's initiation of sex as potentially coercive under some circumstances.²⁰⁶ He does not go so far as to say that the meaning of a woman's agreement to, and even initiation of sex, becomes ambiguous when the consent is conditioned on an exchange of money.²⁰⁷ By extension, the analysis in his article and book, however, suggests that the meaning of the initiation of sex by a woman in prostitution is ambiguous both because the practice of prostitution occurs within an oppressive and exploitative social and economic regime, but also because the commercial nature of the exchange raises the possibility that the woman may be "emphatically negative, . . . indifferent, uncertain, or ambivalent" about the sex but "enthusiastically positive" about the money.²⁰⁸ Accordingly, Schulhofer's approach to the meaning of silence can be applied more broadly to encompass the harm to bodily integrity that occurs in prostitution, even when the woman consents to or initiates sexual contact.

Robin West also questions the practice of legitimating consensual sex by examining the contexts within which women say "yes" to sex.²⁰⁹ She observes that "[i]t is a non sequitur, but a disturbingly common one, to argue from the premise that some act is bad because it is non-consensual, to the conclusion that the same act, if consensual, is therefore good."²¹⁰ As she goes on to explain, just because theft is bad, does not mean that all bargains are good.²¹¹ Just because rape is bad because it is nonconsensual does not mean that "consensual sex—*all of it*—must be good because it is consensual."²¹² She expands on her observation when she writes that "in a cultural climate that valorizes individualism, decries paternalism, and worries obsessively about the totalitarian implications of *any* form of collective action" it is difficult not to believe that there is value created by a consensual exchange.²¹³ Within the context of sex she notes that it is extremely difficult to see the harms caused by the "habit" of legitimation because both the con-

²⁰⁵ *Id.* at 73.

²⁰⁶ See Schulhofer, *supra* note 118, at 150-51 (arguing that woman is coerced even when she initiates sex in situations in which employer provides benefits, knowing that victim is afraid of not receiving them if she does not participate in corrupt system).

²⁰⁷ See *id.* at 165 ("[P]roposals to exchange sex for money are obviously illegitimate. But the man who propositions a prostitute is not necessarily *coercing* her.").

²⁰⁸ Schulhofer, *supra* note 102, at 73.

²⁰⁹ West, *supra* note 161, at 247.

²¹⁰ *Id.*

²¹¹ See *id.*

²¹² *Id.*

²¹³ *Id.* at 248.

duct and the harm from it are “private and privatized.”²¹⁴ West does not suggest that consensual sex should be the subject of the criminal law, nor does she reconsider the specific role that consent plays in prostitution. Nevertheless, her observation introduces a different perspective for evaluating prostitution by looking to alternative markers of value.²¹⁵

West’s response to the contemporary analysis of the law of rape that analogizes rape to property crimes also potentially recasts the meaning of a market exchange of sex for money.²¹⁶ She challenges the analogy because it blurs the distinction between property and sex and between market transactions and sexual intimacy.²¹⁷ As she states, “[i]t may be that we should criminalize some forms of fraudulently or coercively obtained sex. But the reason we should do so is surely not that only by so doing can we better protect our autonomous right to sell it at the highest price and to the highest bidder.”²¹⁸ She resists the property crime analogy because she does not believe that the harm of rape consists in taking from women something that “we should be free to keep to ourselves, to trade, or to give away, and [that], as is the case with anything else we own, it is equally violative of our autonomy when we are forced to part with it against our will.”²¹⁹ She explains that “[t]he commodification of some aspect of our world or being in large part means that we are willing to separate our selves from that which is commodified.”²²⁰ The experience of holding back the self to benefit from “[t]hat which is traded, given, or disposed of, or sold” is consciously different from the experience of “‘hav[ing] sex,’ or ‘mak[ing] love,’ [where] at least ideally, we do not hold our ‘self’ back in this way.”²²¹ Although West refrains from analyzing prostitution, other than to indicate it reflects the commodifica-

²¹⁴ *Id.* at 248-49.

²¹⁵ For a discussion of choice and prostitution, see Barry, *supra* note 24, at 33; Jeffreys, *supra* note 3, at 128-60; Pateman, *supra* note 3, at 190-93, 200-18; Janice G. Raymond, *Sexual and Reproductive Liberalism*, in *Sexual Liberals*, *supra* note 37, at 103, 105-11.

²¹⁶ See Robin L. West, *Legitimizing the Illegitimate: A Comment on Beyond Rape*, 93 *Colum. L. Rev.* 1442 (1993) (commenting on Donald A. Dripps, *Beyond Rape: An Essay on the Difference Between the Presence of Force and the Absence of Consent*, 92 *Colum. L. Rev.* 1780 (1992)).

²¹⁷ See West, *supra* note 161, at 247 (“[T]here is something amiss with the argument that we should criminalize nonconsensual sex for the same reasons that we criminalize all non-consensual takings.”); West, *supra* note 216, at 1447-51 (“[R]ape in which the only demonstrable violence is the violence of penetration, . . . [and rape] aggravated by the use of violence . . . are experienced, and typically described, as more like spiritual murder than either robbery or larceny.”).

²¹⁸ West, *supra* note 161, at 247.

²¹⁹ *Id.*

²²⁰ West, *supra* note 216, at 1451.

²²¹ *Id.*

tion of sex and to urge us not to accept it as representing “normal” sexual experiences,²²² she insists that we look beyond the model of property and property crimes to find the harm in rape. West’s view of rape provides the framework for analyzing, likewise, the harm of prostitution by looking beyond the models of the marketplace and theories about the unjust allocation of material resources.

Thus far, Part II has examined legal reforms that address violence against women and has proposed that these changes in the law, as well as the discourse surrounding them, have the potential to transform the legal and social meaning of prostitution. What remains to be answered is why the transformation has not occurred and, indeed, why the potential for change is largely unrecognized. In the Part that follows, we examine why prostitution is perceived to be an intractable problem and remains virtually untouched by the legal reform movements and conclude that women who have not been prostituted, as well as society as a whole, have a stake in perpetuating the taint of degeneracy that is attached to women in prostitution.

Our conclusion relies on the work of critical race feminists, who show that the law reforms addressing violence are limited in their effectiveness because they focus almost exclusively on sex oppression and ignore other forms or sites of oppression.²²³ They also show how the choice/coercion and private/public dichotomies mask social hierarchical arrangements and practices. The relationship between prostitution, racial and gendered cultural practices, and rights of citizenship that is revealed through critical race feminist literature can be theorized in a new way by viewing it through the lens of degeneracy and respectability. From the perspective of the degeneracy/respectability dichotomy, prostitution reveals itself to be paradigmatic of all forms of inequality and not merely a marketplace transaction between unequal parties in which money is exchanged for sex. Part III explores how degeneracy and its counterpart, respectability, operate in our society to maintain inequality, and how prostitution delineates the distinction between those persons who are labeled as unworthy and those who are constructed as respectable. Invoking the analytical methods of critical race feminists, we contend that the exclusion of prostitution from antiviolence reform efforts is not an oversight, but rather an effective strategy for pursuing respectability, thereby entrenching structures of dominance in society.

²²² See West, *supra* note 161, at 247; West, *supra* note 216, at 1449 & n.36.

²²³ See *infra* notes 225-50 and accompanying text (describing work of critical race feminists who show how antiviolence efforts fail to address adequately implications of race in violence against women).

III
PROSTITUTION AND THE DEGENERACY/
RESPECTABILITY DICHOTOMY

Critical race feminists have criticized reforms of the laws concerning violence against women because they fail to address the underlying cultural practices that devalue women of color and make them unworthy of protection.²²⁴ Their assessment that the laws neglect the synergistic impact that degrading racial and gendered stereotypes have on women of color is pertinent to the reasons why prostitution has been excluded from reform efforts.

Kimberlé Crenshaw explores “the race and gender dimensions of violence against women” for the purpose of showing how “feminist and antiracist discourses have failed to consider intersectional identities such as women of color.”²²⁵ In her evaluation of rape reforms, especially the rape shield laws, she describes the “sexualized images of African Americans” that shape cultural beliefs and how those sexualized images operate in a gendered way to equate African American women with “bad” women.²²⁶ As Crenshaw states:

Blacks have long been portrayed as more sexual, more earthy, more gratification-oriented. These sexualized images of race intersect with norms of women’s sexuality, norms that are used to distinguish good women from bad, the madonnas from the whores. Thus Black women are essentially prepackaged as bad women within cultural narratives about good women who can be raped and bad women who cannot.²²⁷

She concludes that “[r]ape law reform measures that do not in some way engage and challenge the narratives that are read onto Black women’s bodies are unlikely to affect the way cultural beliefs oppress Black women in rape trials.”²²⁸ Crenshaw’s critique makes evident how the “sexualized images” of African American women depend on the prostitution paradigm.²²⁹

²²⁴ See *infra* notes 225-41 and accompanying text (discussing writings of two critical race feminists, Kimberlé Crenshaw and Sumi Cho, as well as contributions of other commentators).

²²⁵ Crenshaw, *supra* note 70, at 1242-43.

²²⁶ *Id.* at 1271.

²²⁷ *Id.*

²²⁸ *Id.* For a further discussion of images symbolizing African American womanhood, see Jewell, *supra* note 72, at 35-47, 55-56 (analyzing varying and contradictory images of African American women and how images were used to support institution of slavery in United States).

²²⁹ See Crenshaw, *supra* note 70, at 1271; see also Angela Y. Davis, *Women, Race & Class* 182-83 (1981) (giving example of how sexual outrages perpetrated against enslaved women were used to justify viewing African American women in post-Civil War era as “promiscuous and loose” (footnote omitted)); hooks, *supra* note 50, at 24-26 (describing

Sumi Cho reveals the “racialized (hetero)sexual harassment” experienced by Asian Pacific and Asian Pacific American women in the workplace, similarly basing her thesis on historical and contemporary sexualized images and stereotypes.²³⁰ Cho looks to the “[m]ilitary involvement in Asia, colonial and neocolonial history, and the derivative Asian Pacific sex tourism industry” to account for the stereotypes of Asian Pacific women that have, in turn, been “internationally transferred” to “apply to women both in and outside of Asia” through the “mass media and popular culture.”²³¹ As she explains, the racialized ascriptions to Asian Pacific women as “exotic, hyper-erotized, masochistic, [and] desirous of sexual domination”²³² serve a “‘model minority’ function” within a patriarchal culture that resists the implications of gender equality.²³³ “Asian Pacific women are particularly valued in a sexist society because they provide the antidote to visions of liberated career women who challenge the objectification of women.”²³⁴ Cho directly addresses the prostitution paradigm when she critiques an article published in *Gentleman’s Quarterly* by Tony Rivers, which refers to the “‘Hong Kong hooker with a heart of gold’” of the 1960 film, *The World of Suzie Wong*.²³⁵ She concludes that the “cultural backdrop of converging racial and gender stereotypes in which the model minority meets Suzie Wong, so to speak” results in Asian Pacific and Asian Pacific American women being “especially susceptible to racialized sexual harassment.”²³⁶

Cho’s critique of current law parallels Crenshaw’s²³⁷ in that “new . . . frameworks that integrate race and gender should be devel-

rapes of enslaved women and how white slaveowners and overseers placed women in “role of prostitute[s]” by giving them items of clothing and such).

²³⁰ Sumi K. Cho, *Converging Stereotypes in Racialized Sexual Harassment: Where the Model Minority Meets Suzie Wong*, 1 *J. Gender Race & Just.* 177, 181 (1997).

²³¹ *Id.* at 193; accord Brock & Thistlethwaite, *supra* note 3, at 5-6 (discussing growth of sex tourism in Asia that is “directly tied to the Vietnam War”); see also Katharine H.S. Moon, *Sex Among Allies: Military Prostitution in U.S.-Korea Relations 2* (1997) (explaining how “Korean women working as prostitutes in military camptowns have been inseparably tied to the activities and welfare of the U.S. military installations [in Korea] since the early 1950s” and focusing “on the role of the women as instruments in the promotion of two governments’ bilateral security interests”); Sandra Pollock Sturdevant & Brenda Stoltzfus, *Disparate Threads of the Whole: An Interpretive Essay*, in *Let the Good Times Roll: Prostitution and the U.S. Military in Asia* 300, 321-27 (Sandra Pollock Sturdevant & Brenda Stoltzfus eds., 1992) (describing pervasiveness of prostitution near and around United States military installations throughout Asia and how military masculinity is expressed through racial misogyny reflected in buying of sex).

²³² Cho, *supra* note 230, at 191.

²³³ *Id.* at 192.

²³⁴ *Id.* (footnote omitted).

²³⁵ *Id.* at 193-94 (citation omitted).

²³⁶ *Id.* at 194.

²³⁷ See *supra* notes 70, 225-29 and accompanying text (discussing Crenshaw’s work).

oped to account for the multi-dimensional character of harassment that occurs and is challenged across races, social classes, and borders."²³⁸ She insists that "[t]o understand the uniqueness" of injuries resulting from the "synergy of race and gender," the law must adopt "more nuanced conceptions of the victims' and the harassers' subjecthoods."²³⁹ She also advocates that the law "incorporate a fuller conception of workplace power relations, so that the synergistic effects of race and gender are given the consideration they warrant."²⁴⁰ The law's inadequacy, as Cho understands it, is that it fails to take into account the fact that Asian Pacific American women "and women of different racial backgrounds possess subjectivities that are not coterminous with an essentialized Western female subjectivity."²⁴¹

In light of their analyses that current law reforms do not address the lived experiences of women of different racial backgrounds, Cho and Crenshaw call for further law reform that will disrupt racialized and sexualized stereotypes. Theirs is part of a broader challenge to a jurisprudence that affords protection only to those women identified as worthy and denies it to those who are not. Patricia Hill Collins's work is instrumental in revealing that the stereotypes are not exogenous to the developing law of violence against women but inseparable from established legal and cultural practices. In her analysis of prostitution, she observes that "[t]he prostitution of Black women [in the American antebellum South] allowed white women to be the opposite; Black 'whores' make white 'virgins' possible."²⁴² According to Collins, the making of the worthy woman happens by imagining what the worthy woman is not, which means that the worthy/unworthy distinction itself is a practice of dominance.²⁴³ As she states, "[t]he creation of Jezebel, the image of the sexually denigrated Black woman, has been vital in sustaining a system of interlocking race, gender, and class oppression."²⁴⁴

Collins recognizes that sexual denigration operates within each form of oppression.²⁴⁵ By embracing an analytical framework that

²³⁸ Cho, *supra* note 230, at 209 (footnote omitted).

²³⁹ *Id.* at 210.

²⁴⁰ *Id.* at 211.

²⁴¹ *Id.* at 210.

²⁴² Collins, *supra* note 26, at 175-76.

²⁴³ See *id.* at 174-76 (identifying role of domination in characterizing Black women as "victims" or "pets").

²⁴⁴ *Id.* at 174.

²⁴⁵ See *id.* at 165-67 (considering restrictive and repressive link between sexuality and power hierarchies by race, gender, and class). We can see this in her analysis of the "connection between race, gender, and sexuality." *Id.* at 175. Relying on Sander Gilman's analysis of the exploitation of Sarah Bartmann, the so-called "Hottentot Venus," she links "the icon of the Black woman with the icon of the white prostitute" that developed in

emphasizes the interlocking systems of race, gender, and class oppression, Collins uncovers the vital role played by the discourse of degeneracy. Prostitution marks the boundary between worthy and unworthy women within the discourse of degeneracy that holds in place oppressive systems.

The work of critical race feminists, such as Cho, Collins, and Crenshaw, reveals how the antiviolence movement's efforts are complicit in, rather than disruptive of, social hierarchies,²⁴⁶ because they have been based on constructing the harmed woman as an innocent and worthy victim, which is to say she is constructed as "not an unworthy agent"—not a woman in prostitution.²⁴⁷ In order for society and the law to recognize a worthy (respectable) category, they must first recognize its opposite; that is to say, the unworthy (degenerate) woman must be defined and identified.²⁴⁸ The worthy/unworthy divide, as critical race feminists understand, implicates and supports all forms of inequality. Within the worthy victim/unworthy agent dichotomy, women in prostitution, as well as women linked to prostitution through the discourse of degeneracy, have to be excluded from the reach of traditional antiviolence law reform efforts, as their inclusion may serve to undermine those efforts.²⁴⁹

nineteenth-century Europe. *Id.* (citing and discussing Sander L. Gilman, *Black Bodies, White Bodies: Toward an Iconography of Female Sexuality in Late Nineteenth-Century Art, Medicine, and Literature*, 12 *Critical Inquiry* 204, 237 (1985)). While alive, Bartmann, an African woman, was exhibited with little clothing. See Collins, *supra* note 26, at 168. To her European audiences she "represented deviant sexuality." *Id.* After her death, the French placed on display in Paris "her genitalia and buttocks." *Id.* (citing Gilman, *supra*, at 213). Collins, quoting Gilman, concludes that

the white prostitute symbolized the sexualized woman. The [white] prostitute represented the embodiment of sexuality and all that European society associated with it: disease as well as passion. . . . "[I]t is this uncleanness, this disease, which forms the final link between two images of women, the black and the prostitute. Just as the genitalia of the Hottentot were perceived as parallel to the diseased genitalia of the prostitute, so to the power of the idea of corruption links both images"

Id. at 175 (altered from original) (quoting Gilman, *supra*, at 237); see also Lynda Hart, *Fatal Women: Lesbian Sexuality and the Mark of Aggression* 119-20 (1994) (discussing Gilman and extending his analysis that "black woman and the prostitute merged by the late nineteenth century" by suggesting "that the lesbian was also subsumed within this merger" and arguing that "[if] not quite made entirely synonymous, the prostitute, the black woman, and the lesbian were nonetheless drawn together to form a triad onto which the white male patriarch's terror of sexuality was projected").

²⁴⁶ See *supra* notes 70, 237-41 and accompanying text (discussing implications of racial stereotyping on effectiveness of antiviolence law reforms).

²⁴⁷ See *supra* notes 72, 75, 166, 171-73 and accompanying text (discussing how worthiness/unworthiness distinction has affected antiviolence reforms).

²⁴⁸ See Collins, *supra* note 26, at 176 ("Black 'whores' make white 'virgins' possible.").

²⁴⁹ But see Minn. Stat. Ann. §§ 611A.80-611A.88 (West Supp. 1999), in which the state legislature enacted a civil cause of action on behalf of juveniles and persons coerced into

The possibility of transfiguring the way in which prostitution is perceived by society and by the law depends, therefore, on recognizing how it functions to maintain the degeneracy/respectability dichotomy.²⁵⁰ Prostitution operates in two related ways to enforce and reinforce the dichotomy. One way is as a paradigm of degeneracy that supports social inequalities based on class, disability, gender, race, and sexuality. The analysis of stereotyping that is found in the work of critical race feminists demonstrates the pervasive nature of the paradigm and how it functions to maintain dominant social arrangements.²⁵¹ The second way prostitution operates to sustain the dichotomy is as a practice of inequality.

In order to comprehend prostitution as a paradigm of degeneracy and a practice of inequality, it must be examined within the historical context of nineteenth-century Europe and the United States.²⁵² This period represents an important historical moment for the formulation of hierarchical structures that have persisted in contemporary times.²⁵³ It is the period in which the European middle class first legitimated its power and began to consolidate it within liberal demo-

prostitution. See *supra* notes 3, 7-23 and accompanying text (discussing statutory scheme and some of its legislative history). The fact that the statute precluded recovery for consenting adult women, however, supports the view that harms to an unworthy woman remain beyond the scope of antiviolenace law reforms. See Minn. Stat. Ann. § 611A.81(1) (West Supp. 1999).

²⁵⁰ The language of respect and respectability recently has emerged in the legal literature. Anita Bernstein advocates our rethinking the harm of sexual harassment by replacing the doctrine of reasonableness with one of respect. See Anita Bernstein, *An Old Jurisprudence: Respect in Retrospect*, 83 *Cornell L. Rev.* 1231, 1239 (1998) (defending proposed "respectful person standard" as able to "bring[] common sense to the doctrine, . . . educate judges—and everyone else in the workplace—incrementally and without bombast"); Bernstein, *supra* note 87, at 450-51, 482-506 (describing respect standard and explaining benefits as compared to reasonableness standard). Randall Kennedy relies on a "politics of respectability" as a strategy for achieving race neutrality in the criminal law. See Randall Kennedy, *Race, Crime, and the Law* 17-21 (1997) (discussing merits and potential excesses of "politics of respectability"). The related legal scholarship on shaming is also relevant to notions of degeneracy and respectability. See, e.g., Stephen P. Garvey, *Can Shaming Punishments Educate?*, 65 *U. Chi. L. Rev.* 733, 743-62 (1998) (taking critical look at shaming model of punishment); Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 *U. Chi. L. Rev.* 591, 594-605 (1996) (identifying expression of social condemnation as purpose of punishment). It is neither useful for our purposes, nor within the scope of this Article, to discuss this emerging scholarship. It is possible, however, that the meaning of respect, degeneracy, respectability, and shame as used and understood in contemporary legal discourse may well prove to be a source of contention in the future.

²⁵¹ See *supra* notes 225-50 and accompanying text (describing operation of gender and racial stereotyping).

²⁵² The authors are indebted to Sherene Razack for her insights regarding the concept of respectability in the nineteenth century.

²⁵³ See 1 Michel Foucault, *The History of Sexuality: An Introduction* 17-35 (Robert Hurley trans., Vintage Books 1978); David Theo Goldberg, *Racist Culture: Philosophy and the Politics of Meaning* 43-46 (1993); Anne McClintock, *Imperial Leather: Race, Gen-*

cratic states.²⁵⁴ Sustained by colonial capitalism, the making of the middle class as a class distinct from the aristocracy, the working class, and colonized populations necessitated the social constructions of class, gender, and race, which currently define contemporary American society.²⁵⁵

Social historians agree that early in the nineteenth century, within the context of an emerging urban capitalism and the growing influence of Evangelical Christian religion in both England and the United States, respectability became closely associated with work ethic, good character, independence from patronage, sobriety, chastity, and dedication to family.²⁵⁶ The middle class distinguished itself from the aristocracy, the working class, and others by striving to achieve the attributes of respectability, thereby relegating those who lacked these attributes to the degenerate category. Respectability itself had no independent social meaning; it was defined by way of contrast to bad

der and Sexuality in the Colonial Context 21-61 (1995); Mary Louise Pratt, *Imperial Eyes: Travel Writing and Transculturation* 9-10 (1992).

For a description of the practices of prostitution in the United States during the seventeenth and eighteenth centuries, see Ruth Rosen, *The Lost Sisterhood: Prostitution in America, 1900-1918*, at 1-4 (1982) (suggesting that prostitution was not viewed as either occupation or status until industrialization and urbanization of nineteenth century).

²⁵⁴ See Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* 80-111 (1983); Ann Laura Stoler, *Race and the Education of Desire: Foucault's History of Sexuality and the Colonial Order of Things* 96-97 (1995).

²⁵⁵ We recognize the dangers inherent in transposing to North American soil the making of the European elite in the nineteenth century. Although the histories of European and North American nations differ, a powerful argument can be made for their interconnectedness both in the nineteenth century and today. With European empires expanding to link vast sections of the globe, nineteenth-century imperialism laid the groundwork for today's global political economy. See Edward W. Said, *Culture and Imperialism* 6-8 (1993) (discussing role of empires in laying "the groundwork for what is in effect now a fully global world" and noting that, by 1914, Europe laid claim to roughly 85% of globe). As Edward Said observes, "in Europe itself at the end of the nineteenth century, scarcely a corner of life was untouched by the facts of empire." *Id.* at 8. "The American experience," he continues, "was from the beginning founded upon" imperialism; as the century progressed, the extermination of native peoples, the enslavement of Africans, and the displacement of populations the world over through American interventions, both direct and indirect, continued apace. *Id.* Although legitimating ideologies vary from one period to the next, and from one locale to another, they all bear the hallmarks of these arrangements, which are rooted in imperialism.

²⁵⁶ See Leonore Davidoff & Catherine Hall, *Family Fortunes: Men and Women of the English Middle Class, 1780-1850*, at 108-13, 180-92 (1987) (discussing evangelical conceptions of gender roles, work ethic, and family relations); E. Anthony Rotundo, *American Manhood: Transformations in Masculinity from the Revolution to the Modern Era* 20 (1993) (identifying perceived need to control male aggression in individualistic age); Gail Bederman, "Civilization," the Decline of Middle-Class Manliness, and Ida B. Wells's Antilynching Campaign (1892-94), in 52 *Radical Hist. Rev.* 5, 6 (1992) ("Middle-class constructions of both manliness and womanliness centered around willful control of sin." (footnote omitted)).

character, patronage, drunkenness, promiscuity, and profligacy. To become respectable meant to reject these degenerate forms of behavior.

George Mosse elaborates on how the intellectual construct of middle class respectability, the term that described the ordered, self-regulating state of middle class homes and persons, came to distinguish middle class life.

Through respectability, they [the middle class] sought to maintain their status and self-respect against both the lower classes and the aristocracy. They perceived their way of life, based as it was upon frugality, devotion to duty, and restraint of the passions, as superior to that of the "lazy" lower classes and the profligate aristocracy.²⁵⁷

Mosse asserts that degeneracy emerged as the antithesis to respectability in the late nineteenth century once national survival began to be defined in terms of physical and moral health and manliness became the term that described those able to possess these qualities.²⁵⁸

In the second half of the nineteenth century the distinctions between women and men, private and public, and home and workplace intensified within intellectual thought and through material practices.²⁵⁹ The marketplace became characterized as harsh, crude, and

²⁵⁷ George L. Mosse, *Nationalism and Sexuality: Respectability and Abnormal Sexuality in Modern Europe* 5 (1985).

²⁵⁸ See *id.* at 34. Degeneracy, for Benedict Augustin Morel, who first formulated the concept in medical terms in 1857, is a process of destruction that is brought on by "moral and physical poison." See *id.* at 34-35. Mosse writes:

This deviance from the norm, as Morel called it, could be brought about by such poisons as alcoholism and the use of opium, by debilitating diseases like malaria, but also by the social environment, a nervous temperament, diseased moral faculties, or inherited bodily and mental weakness. Several of these poisons usually combined in order to begin the relentless process of degeneration.

Id. at 35 (footnote omitted). For further discussion of the different views of degeneracy within the development of sexology in the late nineteenth century, see generally Lawrence Birken, *Consuming Desire: Sexual Science and the Emergence of a Culture of Abundance, 1871-1914*, at 65-67 (1988). Birken situates sexology within "the larger history of Western thought," *id.* at 15, showing how the concept of degeneration reflected class, gender, and race differentiations at the turn of the century, see *id.* at 72-91, as part of his larger argument that "sexology simultaneously furthered and resisted the extensions of the concept of citizenship." *Id.* at 76 (footnote omitted).

²⁵⁹ Thomas Laqueur, in his historical study of the changing meaning of sex, demonstrates how, in the nineteenth century, prostitution became "*the* social evil, a particularly disruptive, singularly threatening vice" with a social context in which the boundaries between "home and economy, private and public, self and society" were "sharply drawn." Thomas Laqueur, *Making Sex: Body and Gender from the Greeks to Freud* 230-32 (1990). As Laqueur shows, prostitution historically had "been regarded as wicked and detrimental to the commonweal." *Id.* at 230. He also details the various explanations over the centuries for the belief that women in prostitution were barren. See *id.* at 230-32. In the nineteenth century, however, when "[s]ociety seemed to be in unprecedented danger from the market place," he argues that society and the sexual body became intertwined within the

brutish, while the home became characterized as clean, orderly, and a haven for social and moral graces.²⁶⁰ The separate spheres made it possible for a man to earn respect through self-control and good character by looking to his home, wife, and children, leaving him free to lust for power and wealth in the marketplace.²⁶¹ Not coincidentally, the barbaric marketplace became a justification for virtuous women to remain in the home and not compete with men by entering into the public arenas of the workplace, education, or politics.²⁶² This era is frequently referred to as either the “cult of the lady” or the “cult of domesticity.”²⁶³

The middle class home—the emblem of respectability—required a gender hierarchy and a colonial economic order to finance it. A

“claim that sex for money . . . bears no fruit.” *Id.* at 232. Laqueur summarizes his thesis that the nineteenth-century cultural meaning of the “trope of the barren prostitute,” *id.* at 232, reflected marketplace anxieties when he writes:

The paradoxes of commercial society that had already plagued Adam Smith and his colleagues, the nagging doubts that a free economy might not sustain the social body, haunt the sexual body. Or, the other way around, the perverted sexual body haunts society and reminds it of its fragility, as it had done in other ways for millennia.

Id. at 233.

²⁶⁰ See, e.g., Giddings, *supra* note 85, at 47-49 (describing nineteenth-century perception of women who worked outside home); Rotundo, *supra* note 256, at 254 (portraying male attempts to dominate marketplace by “stressing gender contrasts” and “the harsh world of economic and political struggle”).

²⁶¹ Elaine Showalter examines how the practice of drawing rigid boundaries was a response to a range of *fin de siècle* cultural insecurities.

In periods of cultural insecurity, when there are fears of regression and degeneration, the longing for strict border controls around the definition of gender, as well as race, class, and nationality, becomes especially intense. If the different races can be kept in their places, if the various classes can be held in their proper districts of the city, and if men and women can be fixed in their separate spheres, many hope, apocalypse can be prevented and we can preserve a comforting sense of identity and permanence in the face of that relentless specter of millennial change.

Elaine Showalter, *Sexual Anarchy: Gender and Culture at the Fin de Siècle* 4 (1990).

²⁶² See Rotundo, *supra* note 256, at 254 (“As women tried to enter the rough arena of money and power, men defended their turf by stressing gender contrasts . . .”); see also Mary Romero, *Maid in the U.S.A.* 52-53 (1992) (emphasizing how ideology of separate spheres in eighteenth and nineteenth centuries in United States accentuated dependence of wife’s social position on husband’s and how social position, in turn, determined differences in structure of women’s homemaking activity).

²⁶³ See, e.g., Giddings, *supra* note 85, at 47-49; Romero, *supra* note 262, at 53-58; see also Barbara Welter, *The Cult of True Womanhood: 1820-1860*, in 18 *Am. Q.* 151, 151 (1966); cf. Gerda Lerner, *The Lady and the Mill Girl: Changes in the Status of Women in the Age of Jackson, 1800-1840*, in *A Heritage of Her Own: Toward a New Social History of American Women* 182 (Nancy F. Cott & Elizabeth H. Pleck eds., 1979). As Diane Roberts forcefully demonstrates with regard to the distinctions between the meaning of cult of the lady in the North and in the South, it is a mistake to use the concept of the cult of the lady as if it were monolithic in either its practices or effect. See Diane Roberts, *The Myth of Aunt Jemima: Representations of Race and Region* 107-09 (1994).

number of discursive arrangements sustained these interconnections. As Ann Laura Stoler argues in her examination of Michel Foucault's work, "nineteenth century bourgeois sexuality . . . was situated on an imperial landscape where the cultural accoutrements of bourgeois distinction were partially shaped through contrasts forged in the politics and language of race."²⁶⁴ Thus, colonizers defined a "healthy bourgeois person" only in contrast to that person's racial opposite. This practice, honed in colonial territories, was eventually brought home and was projected onto the working class.²⁶⁵ Victorian society explicitly racialized the cult of the lady when it "stigmatized as specimens of racial regression" women who transgressed the boundaries of respectability.²⁶⁶

As Collins's work makes clear,²⁶⁷ prostitution within Victorian boundary making was an emblem of contamination.²⁶⁸ To say it was

²⁶⁴ Stoler, *supra* note 254, at 5.

²⁶⁵ See *id.* at 5-7. Anne McClintock shows the crucial relation between middle class domesticity and empire. See McClintock, *supra* note 253, at 42. In contrast to bourgeois males, Victorian iconography featured women as primitive and archaic; the female body itself was thought to inhabit anachronistic space, space inherently out of time with modernity. See *id.*

²⁶⁶ *Id.* McClintock elaborates further on racialized stigmatization:

By the latter half of the nineteenth century, the analogy between race and gender degeneration came to serve a specifically modern form of social domination, as an intricate dialectic emerged—between the domestication of the colonies and the racializing of the metropolis. In the metropolis, the idea of racial deviance was evoked to police the "degenerate" classes—the militant working class, the Irish, Jews, feminists, gays and lesbians, prostitutes, criminals, alcoholics and the insane—who were collectively figured as racial deviants, atavistic throwbacks to a primitive moment in human prehistory, surviving ominously in the heart of the modern, imperial metropolis.

Id. at 43.

²⁶⁷ See *supra* notes 242-45 and accompanying text (discussing Collins's writings regarding prostitution).

²⁶⁸ See Hobson, *supra* note 17, at 110-11 (quoting writers on prostitution reasoning that "[a] women [sic] is of more delicate organization than a man, finer strung, of more refined essence, so she can be lower, more degraded and viler, when she sinks" and describing woman in prostitution as "a social pest carrying contamination and foulness of every quarter" (citing William Acton, *Prostitution* 119 (MacGibbon and Kee Ltd. 1968) (1857); Sydney Southworth, *9 Friend of Virtue* 146 (1846)); see also Marilyn Wood Hill, *Their Sisters' Keepers: Prostitution in New York City, 1830-1870*, at 16-25 (1993) (describing how prostitution "became the symbol of what was perceived as the social and moral disintegration of society," and describing how at mid-century it was treated as "the social evil," by moral reformers and by "a new breed of researcher-writers [including William Acton and William Sanger] who broached . . . [prostitution] in the manner of scientific investigators" (footnote omitted)).

Rosen attributes "the polarized images" of prostitution in history—"the innocent victim or the sinister polluter"—to "racial, ethnic, and class prejudices" in which "the innocent victim" was embodied in the white, native-born young rural woman, while "the sinister polluter" evoked the image of "a lower-class nonwhite or immigrant woman." See Rosen, *supra* note 253, at 47, 49; see also Hobson, *supra* note 17, at 35-36 (describing how

antithetical to the lady and the home is to understate its role in marking degeneracy.²⁶⁹ Prostitution represented not just the streets but the metropolis's "sewers."²⁷⁰ As Leonore Davidoff indicates, the home in

records for arrests for prostitution during the mid-1800s in various cities in United States indicate bias based on interaction of race and ethnicity and class); *infra* note 269 (discussing images of prostitution).

²⁶⁹ During the mid-eighteenth century, "prostitute" came to be conceived as a social status and no longer a reference to conduct alone. See Amanda Anderson, *Tainted Souls and Painted Faces: The Rhetoric of Fallenness in Victorian Culture* 48-49 (1993).

The distinction between the woman in prostitution and the lady was complex because it embraced the dual images of "the fallen angel" and the "evil temptress or siren of vice." Hobson, *supra* note 17, at 72. From the 1830s until the twentieth century, popular novels depicted the fallen woman as an innocent victim, which might have influenced both social and political perceptions of prostitution. See *id.* at 70-72. As Hobson reports, however, the literary themes "did not negate the deep-seated prejudice and condemnation of society toward sexually deviant women" and in fact "[t]he sentimentalized accounts of fallen women in popular literature led to greater censure of women who did not fit the passive-victim model." See *id.* at 72.

A further complication is that while the boundary between the status of women in prostitution and "ladies" was substantial, it was not impenetrable. As Rosen reports, female reformers operating in the 1840s and 1850s within voluntary organizations to "rescue" women in prostitution "came to recognize the precariousness of their own social and economic position as women, and thus to articulate feelings of identification between themselves and prostitutes." Rosen, *supra* note 253, at 8. She gives examples of leaders emphasizing "the similarities of all women, each within 'a hair's breadth' of being the other" and notes that the reformers' publications "repeatedly challenged the socially upheld distinctions between madonnas and magdalens and declared their solidarity with all women." *Id.* at 8-9 (footnote omitted); see also Hobson, *supra* note 17, at 49-50 (describing how female moral reformers "constructed a sexual politics around prostitution" in which they understood that "women were bound together not only by their shared experiences but also by common grievances against men's sexual aggression, both outside and inside marriage" with effect of transforming in 1830s and 1840s "the social and political meanings of prostitution").

²⁷⁰ See Leonore Davidoff, *Worlds Between: Historical Perspectives on Gender and Class* 105 (1995).

This analysis is further supported by the work of Thomas Laqueur who explains prostitution's status as "*the* social evil" by looking to the relation between sex and capitalism. See Thomas W. Laqueur, *Sexual Desire and the Market Economy During the Industrial Revolution*, in *Discourses of Sexuality: From Aristotle to AIDS* 185 (Domna C. Stanton ed., 1992). He argues that within the industrial revolution,

there was . . . a deep and pervasive understanding that economic rationality alone could not motivate capitalism and market behavior. There was more to industrialism than science in the service of progress. Passion and desire were integral to the new order, and there was no clear conceptual boundary between its sexual and economic manifestations.

Id. at 186. Desire was at the core of the perceived problems of sex and social mobility according to Laqueur.

A market economy, and especially an industrial economy, is predicated on social openness, on the notion that the satisfaction of desire—for goods, services, prestige—through labor is beneficial to both the individual and society. It stands in stark opposition to a society of ranks and orders in which convention and sumptuary legislation are meant to keep desire in check. But once the genie of desire is let out, how is it to be restrained when its attention turns to

the nineteenth century came to mean much more than a place where a family resided.²⁷¹ What it represented was determined in part by its relationship to prostitution, which Victorians “visualized” as inhabiting “the ‘Nether Regions’ of society.”²⁷²

Prostitutes, who were seen as the potential source of both physical and moral contagion for middle-class men, were also cast into this region [the imagined Nether Region]. Defenders of prostitution saw it as a necessary institution which acted as a giant sewer, drawing away the distasteful but inevitable waste products of male lustfulness, leaving the middle-class household and middle-class ladies pure and unsullied. None of the inhabitants of this twilight zone could ever aspire to be included in the ‘body politic’ but had to be hidden and controlled wherever possible.²⁷³

sex? A free labor and free exchange were to be sought after; one of free love was clearly not.

Id. at 205. Laqueur expands on this point when he provides examples of discourses in which “working-class sexuality represents the exhilarating yet also terrifying liability, flux, and movement of a capitalist economy and rapid industrialization” and concludes that “[t]he problem is not the democratization of access to sex but of access to respectable social position and authority. It is as if unbounded upward mobility pollutes the social and specifically the sexual body.” Id. at 209. It is within this context, that prostitution was called upon to guard the “sharply drawn” boundaries “between home and economy, between public and private, self and society.” Id. at 213. When “[s]ociety seemed to be in unprecedented danger from the marketplace,” it called upon old tropes of “the barren prostitute” and “other biological defects and dangers . . . [that] are in this context not warnings against undue sexual pleasure or inadequate sublimation but rather representations of the dangers of withdrawal from family and other supposed shelters from money.” Id. (footnote omitted); see also Laqueur, *supra* note 259, at 230-33 (analyzing prostitution in similar manner).

²⁷¹ See Davidoff, *supra* note 270, at 9 (“[D]omesticity as a concept as well as the home as an actual space were coined and elaborated beyond recognition on a much wider scale and further down the social hierarchy than ever before, in the countryside as well as in towns. By the second quarter of the nineteenth century it became a central part of the new morality propagated by the Evangelical movements within both the Established and Non-conformist churches . . .”).

²⁷² Id. at 105.

²⁷³ Id.; see also Simone de Beauvoir, *The Second Sex* 102 (H.M. Parshley trans. & ed., 1989) (referring to St. Augustine and St. Thomas who compared relationship of prostitutes to city with relationship of sewers to palace). Alain Corbin expresses similar views about the necessity of prostitution in his discussion of the regulation of prostitution in France in the mid-nineteenth century and the influence of the views of Alexandre Parent-Duchâtelet, a physician and social investigator. See Alain Corbin, *Women for Hire: Prostitution and Sexuality in France After 1850*, at 4 (1990). Parent-Duchâtelet regarded prostitution as an “indispensable excremental phenomenon that protects the social body from disease” and believed that the real risk from prostitution was its “temporary character” that could lead to a woman who had been in prostitution “gain[ing] access to our homes.” Id. at 4 (footnote omitted). Similarly, in the early 1800s, William Collier, an urban missionary, referred to an area of Boston that society recognized as a place where public prostitution occurred as an “insidious serpent” in a household surrounded by opulence, literature, and “every external accomplishment.” See Hobson, *supra* note 17, at 14 (footnote omitted).

Social histories of the nineteenth century further reveal prostitution's prominent role in maintaining order in the community by exploring the complex interactions among the medical, legal, and military establishments in perpetuating and regulating prostitution in the name of a healthy military.²⁷⁴ The Contagious Diseases Acts (C.D. Acts), promulgated in England in the mid-nineteenth century "to control the spread of venereal disease among enlisted men in garrison towns and ports,"²⁷⁵ authorized police who suspected a woman of being a "common prostitute" to subject her to an internal examination and, if they found she had a venereal disease, to "intern[] her in a certified lock hospital . . . for a period not to exceed nine months."²⁷⁶ She could only avoid the sanitary and penal requirements by refusing to comply and subjecting herself to a trial in which she had the burden of proving that she was "virtuous."²⁷⁷ As Judith Walkowitz explains, the C.D. Acts reflected "a new enthusiasm for state intervention into the lives of the unrespectable poor. Both prostitutes and enlisted men were members of the social 'residuum,' the casual laboring poor who inhabited the 'nether regions' of society."²⁷⁸

²⁷⁴ See generally Judith R. Walkowitz, *Prostitution and Victorian Society: Women, Class, and the State* (1980). The Contagious Diseases Acts (C.D. Acts), promulgated in 1864, 1866, and 1869, and repealed in 1886, were the product of a public debate about prostitution begun over a decade earlier by the publication in 1857 of William John Acton's book on prostitution. See Acton, *supra* note 268. Acton was a medical doctor who made proposals in his text for the regulation of prostitution and prevention of venereal diseases. See Peter Fryer, Introduction, in Acton, *supra* note 268, at 7-13. For a related study of the dramatic change in the policing of prostitution that occurred in the nineteenth century in Paris, see generally Jill Harsin, *Policing Prostitution in Nineteenth-Century Paris* (1985).

The link between the military and prostitution is longstanding and unabated. See Brock & Thistlethwaite, *supra* note 3, at 70-80, 91-99, 111-14. For further analysis of the British military and its role in prostitution as England expanded and maintained its empire, see *id.* at 137 ("The expanded military required by England for its wars of expansion and maintenance of its empire employed this population of dislocated women as sex workers."). For a contemporary view of the military's approach to sexually transmitted diseases, specifically AIDS, see Sturdevant & Stoltzfus, *supra* note 231, at 310-13.

²⁷⁵ Walkowitz, *supra* note 274, at 1 (footnote omitted); cf. Hobson, *supra* note 17, at 165-83 (describing intense anxiety about venereal disease in United States during World War I and serious threat prostitution represented to war effort); Rosen, *supra* note 253, at 51-53 (reporting on antiprostitution movement in United States during Progressive Era and demonstrating that fear of venereal disease from prostitution was real even if basis for it was suspect).

²⁷⁶ Walkowitz, *supra* note 274, at 1-2.

²⁷⁷ *Id.* at 2.

²⁷⁸ *Id.* at 3 (footnote omitted); see also Rosen, *supra* note 253, at 9-11 (describing failure of campaigns beginning in 1870s to regulate prostitution in larger cities of United States and indicating how opponents used examples of regulation in Europe and British C.D. Acts to "appeal to nativistic prejudice by asserting that regulation of prostitution was tantamount to an acceptance of 'polluted' European values" and also to show that they were "practically unworkable").

From a military standpoint, prostitution served two purposes related to the ideology of the home. Military reforms at the time embraced a "policy to create a professional bachelor army and navy without family ties or local identities."²⁷⁹ As members of the degenerate working class, enlisted men presumably were viewed as undeserving of a life that could include home and family. Given its policy, military authorities saw prostitution as necessary to meet the sexual needs of the enlisted men.²⁸⁰ They also thought prostitution addressed military preparedness by "curb[ing] homosexuality in the ranks."²⁸¹ Concern about homosexuality presumably had as much to do with middle class Victorians' "deep-seated social fears and insecurities" as it did with military unit cohesion.²⁸²

Although prostitution served military disciplinary goals, it was also perceived as a serious social problem involving disease and disorderliness.²⁸³ Both the military and local civilian officials embraced the C.D. Acts as a means of protecting the healthy vigor of the enlisted men, while at the same time controlling "the unrespectable civilian poor" in the community.²⁸⁴ The fact that the enlisted men were not subject to medical examination undermined the attempt of the C.D. Acts to address the public health problems related to prostitution. Walkowitz reports that "an earlier attempt to institute periodic examination among soldiers had failed because enlisted men violently objected and officers feared that compulsory examination would lead to the demoralization of their men."²⁸⁵

The double standard of "[s]pecial controls [being] . . . placed on the female body" but not the male's led to the women engaged in prostitution being "identified as the primary source of disease and pollution."²⁸⁶ It also resulted in a class of "'sexually deviant'[,] . . . 'fallen women,'" which justified male sexual access.²⁸⁷ Walkowitz's study forcefully demonstrates that, within the late nineteenth-century garrison towns of England, women in prostitution were exploited to

²⁷⁹ Walkowitz, *supra* note 274, at 4.

²⁸⁰ See *id.*

²⁸¹ *Id.* at 4. The view of prostitution as a preventative for homosexuality continued through the twentieth century. See Jeffreys, *supra* note 3, at 37-41 (presenting views of Harry Benjamin and R.E.L. Masters, who argued that prostitution prevented homosexuality because it allowed young men to gain confidence in heterosexual relations).

²⁸² Walkowitz, *supra* note 274, at 4.

²⁸³ See *id.* at 3-4.

²⁸⁴ *Id.* at 4.

²⁸⁵ *Id.* at 3.

²⁸⁶ *Id.* at 4-5; see also Mary Lyndon Shanley, *Feminism, Marriage, and the Law in Victorian England, 1850-1895*, at 85-86 (1989) (describing feminists' critique of sexual double standard reflected in C.D. Acts).

²⁸⁷ Walkowitz, *supra* note 274, at 5.

reinforce military orderliness, community standards, heterosexuality, and class and gender distinctions. Nineteenth-century society viewed the women as a “primary source of disease and pollution,”²⁸⁸ and their treatment was emblematic of a larger pattern of class, gender, and sexual oppression that was encompassed by the degeneracy/respectability ideology.²⁸⁹

While prostitution in the nineteenth century can be viewed as paradigmatic of degeneracy, it also functioned as a practice of inequality. This is exemplified by the prostitution of Chinese women in California in the last half of the nineteenth century. An examination of this history reveals how economic exploitation, racism, and sexism played their part in preserving the ideology of “the home,” family, and respectability. The discovery of gold in 1848 brought a migrant labor force of Chinese men to work in the California mines.²⁹⁰ While patriarchal Chinese customs contributed to the creation of this labor force, Lucie Cheng finds that an “[e]qually, if not more important, [reason] was the racist hostility of white society.”²⁹¹ She reports that “American capitalists paid low wages to Chinese men to deter their women from crossing the Pacific,” and she found evidence that some whites “advocated the importation of more Chinese laborers and not their

²⁸⁸ *Id.*

²⁸⁹ Walkowitz further notes:

Pollution became the governing metaphor for the perils of social intercourse between the “Two Nations”; it assumed heightened scatological significance in a society where the poor seemed to be living in their own excrement, and where the first programmatic attempt to deal with urban social problems was in the realm of sanitary engineering. Literally and figuratively, the prostitute was the conduit of infection to respectable society. She was nonetheless an object of class guilt as well as fear, a powerful symbol of sexual and economic exploitation under industrial capitalism.

Id. at 4; see also Hobson, *supra* note 17, at 139-64 (discussing Progressive Era in United States and its “[w]ar on [p]rostitution”); David J. Pivar, *Purity Crusade: Sexual Morality and Social Control, 1868-1900*, at 255-77 (1973) (discussing purity reform movement in United States with goal of abolishing prostitution); Rosen, *supra* note 253, at 38, 40 (describing public response to prostitution during Progressive Era as “an unprecedented hysteria and panic” attributable to anxiety created by “the rapid commercialization, urbanization, and industrialization” that was marked “by the influx of immigrant populations, the migrations of blacks to the North, the changes in family and class structure, the new roles for women, the challenges to Victorian morality, the glorification of market values, and the breakdown of community life”); Carolyn Strange, *Toronto’s Girl Problem: The Perils and Pleasures of the City, 1880-1930*, at 89-115 (1995) (describing construction of and approaches to prostitution in Toronto of social purity advocates and Progressives during late 1800s and early 1900s).

²⁹⁰ See Lucie Cheng Hirata, *Free, Indentured, Enslaved: Chinese Prostitutes in Nineteenth-Century America*, 5 *Signs* 3, 5-6 (1979) (examining prostitution of Chinese women in nineteenth-century American West).

²⁹¹ *Id.* at 7.

women so they would not establish a permanent population here.”²⁹² Denying Chinese laborers the ability to make homes not only maximized the profits of the mine operators but also reinforced racial differences. Other white Californians, relying on racial and gender biases, sought to preserve their own middle class homes by advocating “the importation of more Chinese prostitutes who could meet the sexual demands of Chinese men and thus lessen the threat they perceived to white womanhood.”²⁹³

In nineteenth-century California, prostitution was an essential component of industrialization. As Jacqueline Baker Barnhart concluded after completing her study of prostitution between 1849-1900 in San Francisco:

What is clear in looking at the many economic sectors of a nineteenth-century city like San Francisco is that prostitution was not a separate economic subculture. . . . It was a large-scale and widely ramified business based, like all businesses, upon financial gain, and the profits from prostitution were woven intricately throughout society’s business and social community.²⁹⁴

Indeed, in the nineteenth century, prostitution made a contribution to economic development because of its class, gender, and racial implications, and not despite them.²⁹⁵ Furthermore, the sexual and economic

²⁹² *Id.*

²⁹³ *Id.* For a discussion of the effect of stereotyping in the late nineteenth century that led to the assumption that all Chinese women on the Pacific Coast were prostitutes, see Sucheng Chan, *The Exclusion of Chinese Women, 1870-1943*, in *Entry Denied: Exclusion and the Chinese Community in America, 1882-1943*, at 94, 95, 97 (Sucheng Chan ed., 1991).

For a description of the nature and extent of trafficking in women for purposes of prostitution in the United States during the late nineteenth and early twentieth centuries, see Rosen, *supra* note 253, at 112-35. For a history of the enactment and enforcement of the White-Slave Traffic (Mann) Act, ch. 395, 36 Stat. 825 (1910) (codified as amended at 18 U.S.C.A. §§ 2421-2423 (West Supp. 1999); 18 U.S.C. § 2424 (Supp. III 1997), the federal statute first enacted in 1910 to address the trafficking of women, see David J. Langum, *Crossing over the Line: Legislating Morality and the Mann Act* (1994). See generally Sietske Altink, *Stolen Lives: Trading Women into Sex and Slavery* (1995) (providing historical and contemporary investigation of global traffic in women for prostitution).

²⁹⁴ Jacqueline Baker Barnhart, *The Fair but Frail: Prostitution in San Francisco 1849-1900*, at 81 (1986). For a discussion of the economic interests and the commercialization of prostitution in many United States cities at the turn of the century, see Rosen, *supra* note 253, at 69-85. For a discussion of how the sex industry is currently used in economic development in Asia, see Brock & Thistlethwaite, *supra* note 3, at 114-20.

²⁹⁵ See *supra* notes 290-93 and accompanying text (discussing Cheng’s study of prostitution of Chinese women in nineteenth century on West Coast of United States). Rosen assists us further in seeing the “important place” and “vital social functions” served by women in prostitution who were typically “characterized as outcasts with no place in society” during the early twentieth century. Rosen, *supra* note 253, at 6 (footnotes omitted).

Economically, prostitution was a source of income to the police, to procurers, madams, doctors, politicians, and liquor interests. Politically, it upheld gender

exploitation of Chinese women in the nineteenth century has continuing vitality in today's social arrangements.²⁹⁶

Prostitution functions as a paradigm of degeneracy and as a practice of inequality in the late twentieth century because the degeneracy/respectability dichotomy that thrived in nineteenth-century society has continuing vitality.²⁹⁷ Respectability in the twentieth century marks the boundaries between those who are included in the body politic and those who are not, just as it did in the nineteenth century.²⁹⁸ As long as it continues to determine who has a rightful claim to protection by the laws and thus to full citizenship, respectability remains important in uncovering practices of domination.²⁹⁹

and class divisions. The singling out of a caste of *degraded* women served as an object lesson and a threat to other women. The specter of the whore was always before them as a reminder of what they might become or how they might be treated if they failed to live up to the angel image or lived outside of male protection. For men, prostitution upheld the double standard, the polarized images of women as angelic or monstrous, but in neither case fully human, and the ideology that women existed to serve men. The association of prostitution with lower-class, immigrant, and nonwhite populations served to divide women from one another. It also justified the low ranking of these populations in the social hierarchy. The visible association of brothels with lower-class neighborhoods and customers, which made it seem as if lower-class men had recourse to prostitutes whereas upper-class men did not, and the association of sexual indulgence with weakened health and ambition, provided one rationalization for poverty, unemployment, and disease among the poor.

Id. at 6-7 (emphasis added).

²⁹⁶ See supra notes 230-41 and accompanying text (discussing Cho's work regarding stereotyping of Asian Pacific and Asian Pacific American women in late twentieth century).

²⁹⁷ See Jeffreys, supra note 3, at 7-34 (summarizing efforts of feminist activists working against prostitution in late nineteenth century through World War II and describing how they found themselves relying on concepts of consent and respectability); see also Regina G. Kunzel, *Fallen Women, Problem Girls: Unmarried Mothers and the Professionalization of Social Work 1890-1945*, at 10-25 (1993) (describing maternity home movement in which organizations during World War I shifted their "rescue work" with prostitutes to care of unmarried mothers). Kunzel further shows that prostitution remained the focus of social work. See id. at 18-19 (noting how organizations constructed unmarried mothers as "at the foot of the precipice" of "abyss" of prostitution (footnote omitted)). The threat of prostitution "underlined the precariousness of female respectability and the stakes involved in its maintenance" and remained essential "to the construction of a new boundary that divided good women from bad." Id. at 19. Evangelical workers relied on stories "of male sexual irresponsibility and aggressiveness and female vulnerability and victimization" to describe the plight of unmarried mothers. See id. at 20 (footnote omitted). For a further discussion of the institutionalization of women in prostitution in the nineteenth century, see Hobson, supra note 17, at 118-30.

²⁹⁸ See Mosse, supra note 257, at 133-52, 181-91. In his study, Mosse traces the importance of respectability in his study of National Socialism from its origins up to World War II, and concludes, "What began as bourgeois morality in the eighteenth century, in the end became everyone's morality." Id. at 191.

²⁹⁹ Cf. Rosen, supra note 253, at 49 (concluding that Progressive Era reformers understood prostitution within crisis world view that compelled them to impose order "by rein-

forcing older moral boundaries and defining who should remain within and without the body politic"). In using the construct of respectability to chart domination, however, we must be wary of positing a straightforward correspondence between the hierarchical arrangements of the nineteenth century and those of the twentieth. As Anita Levy writes, the contemporary task is to trace the nineteenth century middle class power that has in the twentieth century "vanished into commonsense norms of self and identity." Anita Levy, *Other Women: The Writing of Class, Race, and Gender, 1832-1898*, at 5 (1991). In other words, the practices of domination that established the middle class in the nineteenth century have become everyone's morality today. Although the goal of identifying hierarchies remains constant across time and location, the arrangements that mark the distinction between respectability and degeneracy—thus maintaining the dominant group—change from one period to the next and from one locality to another.

One example of particular "arrangements" making the distinction is found in the penal practices in the early part of the twentieth century. During the Progressive Era, a scientific approach to social engineering, combined with the establishment of female reformatories for the purpose of "rehabilitating" women in prostitution led to "prostitutes [becoming] one of the first mass populations to be tested for hereditary and genetic defects." Rosen, *supra* note 253, at 21. Rosen reports that "[b]y 1913, twelve states had laws that permitted the sterilization of criminals, idiots, the feeble-minded, imbeciles, syphilitics, moral and sexual perverts, epileptics, and rapists." *Id.* The "reforms" of this period lead Rosen to conclude that "[s]uch legislation, like the reformatories and prisons in which prostitutes were housed, reflected a society that increasingly associated degeneracy with poverty and gradually sought means to control the sexual behavior of the poor." *Id.* at 21-22. She also suggests that the term "feeble-minded" did not indicate mental deficiency so much as it indicated the woman's "refusal or failure to conform to middle-class values and behavioral patterns." *Id.* at 23; see also Hobson, *supra* note 17, at 190-93 (describing use of diagnostic label of "feeble-mindedness" in nineteenth and twentieth centuries and its implications for women in prostitution).

Dorothy Roberts's use of the concepts of private choice and deviancy to explain the nexus between citizenship and domination provides persuasive evidence of the continuing relevance of the degradation/respectability divide. See Dorothy E. Roberts, *The Priority Paradigm: Private Choices and the Limits of Equality*, 57 U. Pitt. L. Rev. 363 (1996). In her critical analysis of liberty and equality jurisprudence from the 1896 Supreme Court case of *Plessy v. Ferguson*, 163 U.S. 537 (1896), to the Court's contemporary approach, she demonstrates how the discourse of privacy and autonomy maintains racial hierarchies and delimits citizenship rights for some while enhancing them for others. See Roberts, *supra*, at 368-75. Although she does not use the terms of degeneracy or respectability, her argument that in the 1990s, "liberalism's professed commitment to personal liberty turns out to safeguard massive institutional inequality" demonstrates the persistent correlation between respectability and domination. *Id.* at 375.

Roberts observes that, "[a]fter a civil war and the Reconstruction . . . white Americans relied on the Constitution's protection of their liberty to safeguard their position of power." *Id.* at 369. She demonstrates this not on the basis of the Supreme Court's holding or majority opinion in *Plessy*, which affirmed a state's power to make legal distinctions based on race, but by quoting Justice Harlan's dissent:

"The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth, and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage, and holds fast to the principles of constitutional liberty."

Id. at 369-70 (emphasis added in original) (quoting *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting)). Roberts then demonstrates how contemporary jurisprudence continues in the tradition of "hold[ing] fast to liberty at the expense of racial equality." *Id.* at 370. The liberal tradition of limited government intervention to "protect[] citizens against imposition of state orthodoxy, . . . means that the definition of liberty must set aside certain

The persistence of nineteenth-century distinctions between degradation and respectability and their relationship to the family as a politicized institution can be seen in the neglect by mainstream society and politics of the economic and social problems found in urban African American communities. Dorothy Roberts finds the source for the distancing of African Americans by white Americans in the “family’s political role.”³⁰⁰ By designating “the private family as the exclusive setting for caring relations between people,” and embracing “the private family as . . . [the] model for social accountability,” historical racial separation continues to influence social policies because it remains “difficult—if not impossible—for most white Americans to imagine blacks as part of their family.”³⁰¹ For Roberts, the private sphere, which is symbolized by the family, accounts for why, in the late 1990s “[w]hites find it difficult to see the fate of the cities as a shared interest because improving the lives of thousands of black urban poor does not seem to be in their private interest.”³⁰²

claims to substantive equality.” *Id.* The accepted consequence of this liberal philosophy is that “[i]nequality is the price we may have to pay for freedom.” *Id.* at 371 (footnote omitted).

³⁰⁰ *Id.* at 397.

³⁰¹ *Id.* (footnote omitted). Roberts analyzes how the privileging of liberty over equality is accomplished in part by a conceptual segregation of “private choices” from the “unjust social structures” that determine and form those choices. See *id.* at 395-96. With regard to the economic and social problems found in urban African American communities, she argues that “[s]eparating private choices from social power thus facilitates the view of blacks as an expendable population.” *Id.* at 398 (footnote omitted).

³⁰² *Id.* at 397-98 (footnote omitted). Roberts shows how personal choice is the basis for the “belief in black responsibility for the effects of racism” and “the long-standing ideology that blames the poor, because of their dependence mentality, deviant family structure, and other cultural depravities, for their poverty.” *Id.* at 386 (footnote omitted). Commenting on *Rogers v. American Airlines, Inc.*, 527 F. Supp. 229 (S.D.N.Y. 1981), Roberts argues that “[c]ourts have frequently disregarded the racially disproportionate effect of employment practices if the disadvantaged employees *could have chosen* to abide by the rules.” Roberts, *supra* note 299, at 386 (emphasis added) (footnote omitted). In *Rogers*, the court rejected a Black woman’s claim against her employer who prohibited her from wearing “an all-braided hairstyle” while working. *Rogers*, 527 F. Supp. at 231. Roberts, quoting Paulette Caldwell, shows how the rhetoric of “private choices” keeps subordination in place.

The *Rogers* decision illustrates how courts require black employees to assimilate their choices to whites’ cultural expectations in order to keep their jobs. Paulette Caldwell’s reaction to reading about the decision emphasizes this denigration of black people’s private choices and culture:

“Whether motivated by politics, ethnic pride, health, or vanity, I was outraged by the idea that an employer could regulate or force me to explain something as personal and private as the way that I groom my hair. I resented the implication that I could not be trusted to choose standards appropriate for the workplace and that my right to work could be conditioned on my disassociation with my race, gender, and culture. Mostly I marveled with sadness that

Roberts's critique of political and jurisprudential approaches that privilege individual autonomy, choices, and privacy over social justice claims corroborates our view that the distinctions of consent/coercion, private/public, and degeneracy/respectability mask inequality and, in particular, mask prostitution as a practice of inequality.³⁰³

These sets of dualities, which gained particular intensity in the nineteenth century and have been redefined in the late twentieth century by evolving social, political, and cultural practices, underlie many antiviolence reforms.³⁰⁴ As we have shown in our discussion of antiviolence law reforms, the home continues to represent respectability, while prostitution continues as a paradigm of degeneracy.³⁰⁵ Advocates for reforms of the domestic abuse laws established a wife's worthiness by placing her in the home and by emphasizing her loyalty, motherhood, and intimacy.³⁰⁶ Their challenge that the law recognize the right of women to be free from violence was framed as a story about respectable women, which left in place the underlying structure of inequality.³⁰⁷ Thus for a woman to claim that she was a worthy victim, she had to prove her respectability, which required her to distance herself and her situation from prostitution.

Reform proponents needed a slightly different strategy to argue for sexual harassment laws in the workplace where they were unable to rely on the image of the good woman in her haven, the home. Accordingly, reformers adopted a discourse that divided women into those who were engaged in legitimate work, as opposed to those who were engaged in prostitution.³⁰⁸ Heightened attention to the meaning of consent led to the development of notions of "acquiescence" and "grudging accommodation" to allow for legal attribution of a woman's compliance to her powerlessness in the workplace and not to her pro-

something as simple as a black woman's hair continues to threaten the social, political, and economic fabric of American life."

Roberts, *supra* note 299, at 387 (quoting Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 *Duke L.J.* 365, 367). In focusing on Caldwell's response to *Rogers*, Roberts traces private choice to degeneracy and domination.

³⁰³ See, e.g., Roberts, *supra* note 299, at 374-75, 379-80, 389-99.

³⁰⁴ See *supra* notes 60-66 and accompanying text (discussing antiviolence reforms).

³⁰⁵ See *supra* notes 67-72 and accompanying text (discussing role that home plays in identifying worthy victim).

³⁰⁶ See *supra* notes 67-72 and accompanying text (discussing domestic abuse law reforms and how advocates justified need for those reforms).

³⁰⁷ See *supra* notes 73-75 and accompanying text (discussing how antiviolence reforms of domestic violence law reinforced social hierarchies).

³⁰⁸ See *supra* notes 87-100 and accompanying text (discussing how proponents for reform of sexual harassment law avoided providing protection for women used in prostitution).

miscuity.³⁰⁹ Rather than seriously threatening the structure of inequality, the success of a woman's claim for respectability in the workplace depended on leaving the degeneracy/respectability dichotomy unchanged.

At first glance, rape law reform would seem to have seriously undermined the degeneracy/respectability dichotomy. As we discussed above, however, although the rape reform initiatives extended the law's protection to a larger group of women, they reinforced the boundary between worthy women and women in prostitution through the rape shield laws and the definition of consent.³¹⁰ Law reforms attempted to ensure that worthy women could be found outside the home; nevertheless, when women are subjected to violence on the streets, the law still places their virtue in question.

The antiviolence movement's use of strategies that pursue respectability is wholly understandable as part of a late twentieth-century culture that reinforces the ideology of respectability through home and family, and the ideology of degeneracy through prostitution.³¹¹

The recent efforts to "clean up" the Times Square area in New York City demonstrate how our culture continues to police the boundaries between respectable middle-class homes and families and the degenerate streets represented by prostitution and related activities. Since the mid-nineteenth century, Times Square has been a favorite site for prostitution and sex-oriented businesses,³¹² and, as recently as 1992, the block of Forty-second Street between Times Square and Eighth Avenue was "known mainly for sex, drugs and crime."³¹³ But the arrival of the Disney store and the New Victory Theater, along with new zoning regulations, have transformed the area into a family-oriented entertainment district.³¹⁴

The 42d Street and Times Square that are now taking shape will be a new kind of urban form, a sort of mall brought to the

³⁰⁹ See *supra* notes 89-91, 96-97 and accompanying text (discussing how reforms changed meaning of consent).

³¹⁰ See *supra* notes 171-73 and accompanying text (discussing how rape shield laws exclude evidence of complainant's prior sexual history, thereby reinforcing distinction between worthy and unworthy women); *supra* notes 174-77 and accompanying text (discussing how "no means no" standard and "yes means yes" standard exclude women in prostitution from law's protection).

³¹¹ See *infra* notes 359-61 and accompanying text (describing prevailing legal and social views on prostitution, including its portrayal in arts, literature, and popular media).

³¹² See N.R. Kleinfeld, *It's Not Easy to Push Sex into the Shadows*, N.Y. Times, Mar. 1, 1998, § 1, at 29.

³¹³ Paul Goldberger, *The New Times Square: Magic that Surprised the Magicians*, N.Y. Times, Oct. 15, 1996, at C11.

³¹⁴ See *id.*

sidewalks. . . . It will have stores, theme restaurants, legitimate theaters for live productions, movie theaters, hotels and tourist attractions like Madame Tussaud's wax museum, all aimed at attracting the members of the middle class who once gave American cities their density, but for the last generation have stayed away in droves.

The blocks of Times Square just north of 42d Street have already been filling up with stores and theme restaurants, and they are thronged with people who seem to crave the notion of urban energy in a clean, controlled environment—a theme park version of the city itself.³¹⁵

City planners and commercial enterprises had to remove sex-oriented entertainment and prostitution from Times Square in order to create a family-oriented environment reminiscent of suburbia, which is the contemporary metaphor for orderliness, family, and home.³¹⁶

Within a broader historical context of racial exclusion, it is clear that the “revitalization” of Times Square perpetuates social hierarchies. Regina Austin, who expands on David Nasaw's studies of public amusements in the late nineteenth and early twentieth centuries,³¹⁷

³¹⁵ Id.

³¹⁶ David Nasaw, in his study “of public amusements in the late nineteenth and early twentieth centuries and their decline and fall in the post-World War II decades,” connects Disney with suburbia when he describes the “new species of amusement resort, the suburban or exurban theme parks modeled on Disneyland in Anaheim, California.” David Nasaw, *Going Out: The Rise and Fall of Public Amusements* 2, 254 (1993). Situating the park far from the center of Los Angeles with no mass transit connections assured a predominantly white, middle- and upper-class clientele.

Unlike the older amusement parks, Disneyland and the theme parks were clean, secure, and orderly. . . . [T]he theme parks were situated off major highways, “surrounded by buffer zones of vegetation,” or as in Anaheim, by a twenty-foot earthen wall. Their entrances were not simply inconspicuous. They were . . . almost deliberately obscured from public view as if announcing that the space within did “not wish to be a part of the city.”

Id. at 254 (footnote omitted). Judith A. Adams, emphasizing Disneyland's location as an arrangement designed to “isolate[] it from the unruly and poorer elements of the urban population,” reports that recent statistics about the demographic makeup of visitors to Disney World reveal that “2 percent [of its visitors] are laborers, 3 percent are black, and 2 percent are Hispanic.” Judith A. Adams, *The American Amusement Park Industry: A History of Technology and Thrills* 164, 146 (1991). Restrictive zoning rules, recently upheld by the courts, were designed to make Times Square and other areas of the city family friendly. See *Hickerson v. City of New York*, 146 F.3d 99, 103 (2d Cir. 1998) (holding that where plaintiffs had received full and fair opportunity to litigate constitutionality of zoning restrictions under New York Constitution, in which underlying issues were identical to those for First Amendment claim, doctrine of collateral estoppel barred litigation of First Amendment claim in federal court), cert. denied, 119 S. Ct. 795 (1999); *Buzzetti v. City of New York*, 140 F.3d 134, 144 (2d Cir.) (finding that city zoning ordinance that regulated adult entertainment establishments did not violate equal protection clause), cert. denied, 119 S. Ct. 54 (1998); *Stringfellow's of N.Y., Ltd. v. City of New York*, 694 N.E.2d 407 (N.Y. 1998) (upholding amendments to city zoning ordinances against First Amendment challenge).

³¹⁷ See Nasaw, *supra* note 316.

concludes that “the respectability, and thereby the profitability, of places of commercialized mass entertainment and amusement, be they movie palaces or world’s fair pavilions, have long been based on the inclusion of *white women* among their patrons and the exclusion of *all blacks*, regardless of gender or class.”³¹⁸ She observes that

[f]rom the mid-1800s to the civil rights era (if not beyond), prohibitions against or on blacks’ participation enhanced the status of mass forms of leisure by countering the moral and material concerns of the bourgeoisie, which favored leisure consistent with domesticity and educational enrichment and feared association with persons who were vulgar and rowdy. The exclusion or restricted inclusion of blacks, who were assigned the role of indecent, disreputable “other,” made possible the creation of audiences that were heterogeneous and democratic as to gender and class, insofar as whites were concerned. It allowed for the uniting of white Americans—native-born and immigrant, middle-class and poor—in a common experience of luxury in leisure venues under an umbrella of white privilege that generated conduct characterized by decency and goodwill.³¹⁹

The discourse surrounding the Times Square renewal efforts demonstrates that the “bourgeoisie[’s]” fear of “association with persons who [are] vulgar and rowdy” persists.³²⁰ The commercial success for the area depends on practices that reinforce inequalities by strengthening the boundary between respectability and degeneracy.

By placing degeneracy and respectability in their historical context and showing the continuing power of this dichotomy in contemporary society, we sought to demonstrate how prostitution enforces and reinforces the boundary between them and how the pursuit of respectability entrenches social structures of domination. To trace the interconnectedness of prostitution, respectability, and inequality, however, is insufficient for the project of transforming prostitution. The possibility for society to change its understanding of prostitution depends upon political and legal strategies that further the goal of equality by moving beyond the degeneracy/respectability dichotomy.

³¹⁸ Regina Austin, “*Not Just for the Fun of It!*”: Governmental Restraints on Black Leisure, Social Inequality, and the Privatization of Public Space,” 71 S. Cal. L. Rev. 667, 695-96 (1998) (emphasis added) (footnote omitted).

³¹⁹ Id. at 696 (footnotes omitted).

³²⁰ Id.

IV
PROSTITUTION AND STRATEGIES FOR
ACHIEVING EQUALITY

The degeneracy/respectability dichotomy explains, at least in part, why the law of prostitution has remained virtually unchanged during the last three decades while feminist antiviolenace law reform initiatives have enjoyed considerable success.³²¹ As we have already shown, the approaches taken by the reformers in the areas of domestic abuse, sexual harassment, and rape portray the victims of violence as respectable women.³²² This strategy effectively places women in prostitution beyond the reach of these reform efforts. It may also explain why advocates for prostitution reform have been unsuccessful, for the most part, in persuading feminist groups to give reform of prostitution laws a high priority. Although prostitution reform advocates do not share one view of the value and meaning of prostitution and have no single shared agenda for reform, they do share the goal of achieving respectability for women in prostitution.

Prostitution reformers generally fall into two groups: those who believe that prostitution provides a livelihood for women and seek to improve the conditions of their work, and those who seek the eventual elimination of prostitution through antiviolenace laws. The first group approaches prostitution through a rights-based framework that identifies a woman in prostitution as a worker who deserves fair compensation and safe working conditions.³²³ They seek to decriminalize

³²¹ See *supra* notes 72-75, 87-94, 176-80 and accompanying text (discussing exclusion of prostitution from antiviolenace law reforms).

³²² See *supra* notes 72-75, 87-94, 171-73 and accompanying text (discussing strategies used by advocates of antiviolenace reforms to show victims of violence as worthy women).

³²³ See Hobson, *supra* note 17, at 215-19 (describing European Union movement within prostitution in 1970s and how it spawned political activist groups and unions in United States); Holly B. Fechner, Three Stories of Prostitution in the West: Prostitutes' Groups, Law and Feminist "Truth," 4 *Colum. J. Gender & L.* 26, 37-38 (1994) (describing "liberal feminist" efforts to gain recognition for prostitution as work deserving of equal working rights).

The published positions of rights-based groups can be found in *Good Girls, Bad Girls: Sex Trade Workers and Feminists Face to Face* (Laurie Bell ed., 1987); *Sex Work: Writings by Women in the Sex Industry* (Frédérique Delacoste & Priscilla Alexander eds., 2d ed. 1998) [hereinafter *Sex Work*]; *A Vindication of the Rights of Whores* (Gail Pheterson ed., 1989); *Whores and Other Feminists* (Jill Nagle ed., 1997). For other writers who have embraced their view, see Shannon Bell, Reading, Writing, and Rewriting the Prostitute Body (1994); Valerie Jenness, Making it Work: The Prostitutes' Rights Movement in Perspective (1993); Roberta Perkins, Working Girls: Prostitutes, Their Life and Social Control (1991); Drucilla Cornell, A Defense of Prostitutes' Self-Organization, 1 *Cardozo Women's L.J.* 121 (1993); Joan Nestle, Lesbians and Prostitutes: A Historical Sisterhood, in *Sex Work, supra*, 247; Barbara Sullivan, Feminism and Female Prostitution, in *Sex Work and Sex Workers in Australia* 253 (Roberta Perkins et al., eds., 1994); see also Mary Joe Frug, Postmodern Legal Feminism 131-38 (1992) (expressing doubt about legalizing prostitution

prostitution, to unionize women in prostitution, and to counteract the stigma of prostitution by portraying it to the public as dignified work and a sophisticated business.³²⁴ This rights-based agenda directly challenges the taint of degeneracy that is traditionally associated with prostitution; it is a claim for respectability.³²⁵

The second group of reformers include those advocates with whom we have collaborated to develop legislative initiatives.³²⁶ They view prostitution as an intractable form of violence against women that should therefore be included in the broader antiviolence reform project that has changed the laws of domestic abuse, sexual harassment, and rape.³²⁷ They endorse the repeal of all laws criminalizing persons used in prostitution, but call for the enhancement of criminal penalties for pimps and johns.³²⁸ Like their rights-based counterparts, they seek to educate the public; their goal, however, is to inform the public about the harms of prostitution. They also provide educational groups for women in prostitution.³²⁹ By locating prostitution along the continuum of violence against women, and analogizing it to domestic abuse and marital rape, reformers invoke the discourse of the “worthy victim” that has shaped the antiviolence reform efforts during

in manner that would improve working conditions under which women engage in prostitution within discussion building on proposition that law constructs women as terrorized, sexualized, and maternalized); Kate Millett, *The Prostitution Papers* (1976) (providing stories and views on prostitution of two women who had been in prostitution and stories and views of two women who had listened to stories and tried to make sense of them in their own lives). Many rights-based groups advocate decriminalization of prostitution. See, e.g., *id.* at 10-11 (expressing support for COYOTE (Call Off Your Old Tired Ethics), while recognizing that decriminalization alone is not enough); *id.* at 10-11, 30-31 (expressing view that prostitution is private matter in introduction, but suggesting, in other parts of book, complexity of meaning and harms caused by prostitution that mere decriminalization would not address).

³²⁴ See Fechner, *supra* note 323, at 38-42.

³²⁵ Laurie Shrage extends the respectability claim further by positing that “if prostitution were sufficiently transformed to make it completely nonoppressive to women, though commercial transactions involving sex might still exist, prostitution as we now know it would not.” Laurie Shrage, *Should Feminists Oppose Prostitution?*, 99 *Ethics* 347, 359 (1989); see also Laurie Shrage, *Moral Dilemmas of Feminism: Prostitution, Adultery, and Abortion* 86, 94-95 (1994). Sheila Jeffreys traces the influence of “queer theory” on the prostitutes’ rights movement, which leads to a construction of prostitution as a liberatory sexual practice. See Jeffreys, *supra* note 3, at 92-127.

³²⁶ See *supra* note 9.

³²⁷ See Hobson, *supra* note 17, at 221-22; Fechner, *supra* note 323, at 48. The published positions of this group can be found in Kathleen Barry, *Female Sexual Slavery* (1979); Barry, *supra* note 24; Andrea Dworkin, *Right-Wing Women* (1983); Giobbe, *supra* note 37. For other writers who have embraced their view, see Jeffreys, *supra* note 3; Pateman, *supra* note 3, at 189-218; Carole Pateman, *Defending Prostitution: Charges Against Ericsson*, 93 *Ethics* 561 (1983).

³²⁸ See Fechner, *supra* note 323, at 48.

³²⁹ See *id.* at 51-52.

the last three decades.³³⁰ While we, the authors, have worked to further these reform efforts, we appreciate the theoretical problem that underlies this approach. The problem we identify is that the persuasiveness of the argument that women in prostitution should be protected by antiviolence laws relies upon the worthiness/unworthiness distinction that supports the legal and social construction of the other forms of violence against women.

In retrospect, we recognize that the civil cause of action, which allows women coerced into prostitution to sue their pimps and johns, remains within the degeneracy/respectability dichotomy.³³¹ We do not want to underestimate, however, the impact of the statute as a challenge to the dichotomy. The statute's recognition of the harms suffered by women in prostitution and its bestowal on them of the citizenship right to seek redress for those harms undermine the prevailing view of prostitution and the notion of respectability itself. Nevertheless, the law's reliance on the dualism of consent and coercion potentially reinforces social structures of domination.

Identifying this connection between respectability and dominance led us to rethink the strategic agenda for transforming prostitution. Prostitution reform must be made part of a broader liberation movement that is cognizant of all forms of oppression. By shifting the framework of analysis toward the degeneracy/respectability divide, we hope to reveal that prostitution functions to perpetuate hierarchical relations. This insight, that practices of inequality are configured through an ideology of degeneracy and respectability, establishes a

³³⁰ See *Giobbe*, supra note 35, at 151-59 (drawing parallels between experience of prostitution and experiences of marital rape and domestic abuse). See supra notes 72-75, 87-94, 171-73 and accompanying text (discussing role of worthy victim in antiviolence reform efforts).

³³¹ See supra notes 3-23 and accompanying text (describing civil cause of action and some of its legislative history). For a parallel historical analysis, see *Hobson*, supra note 17, at 75, in which *Hobson* argues that the "passive-victim thesis" found in the popular literature and in the moral reform journals "channeled the debate on prostitution away from adverse social and economic structures toward cruel seducers and evil agents." As a consequence, prostitution appeared not "as a social system that flowed from the economic and social dependence of women," but "as an aberrant or capricious set of circumstances that drove a woman off course from her natural life patterns." *Id.* Although *Hobson* sees the harm of prostitution exclusively through a gender lens, the central point of her argument—that reliance on coercion obscures the subordinating structures kept in place by prostitution—remains pertinent. The analysis of *Linda Hirshman* and *Jane Larson* demonstrates how the statute risks reinforcing the distinction between women who consented and those who were coerced. The authors support the civil cause of action, but argue that criminalizing the "fully voluntary choice of an adult woman to work as a prostitute, and the choice of an adult man to patronize her amounts to a significant restraint on the liberty of both parties." See *Linda R. Hirshman & Jane E. Larson, Hard Bargains: The Politics of Sex* 288-89 (1998).

unified theoretical underpinning for many movements that are pursuing social change. Because current social arrangements give subordinated groups in society a stake in striving for respectability and not surrendering whatever respectability each of them may have achieved, efforts to collaborate and build coalitions generally have encountered resistance and frequently have failed.³³²

Regina Austin examines the structural problems of working toward a strategy of collaboration and coalition building. She describes how conduct deemed deviant by the dominant community interferes with building strong social connections within subordinate groups. She explains how the fear of loss of respectability is made manifest in the "black community's" repudiation of black women in prostitution.³³³ The repudiation permits the community to "proclaim[] the distinctiveness and the worthiness of those [women] who do not" engage in such conduct.³³⁴ As she argues, this strategy responds directly to the racialized and sexualized stereotypes that operate in the dominant society: "[T]he reality [is] that the stereotype of the loose black woman, or Jezebel, is so pervasive, black women who consider themselves *respectable* are especially likely to be inhibited from identifying with black prostitutes."³³⁵

³³² For example, several theorists address the historical legacy of slavery and sexuality. Patricia Hill Collins suggests that the historical legacy of white women's complicity in the sexual exploitation of slave women impacts on the relationship between African American and white women, which continues to be framed by the web of sexual politics that seduce white women with an artificial sense of specialness and vest them with the power to sustain that illusion. See Collins, *supra* note 26, at 189-92; see also Davis, *supra* note 229, at 173 (noting that "Black women have been conspicuously absent from the ranks of the contemporary anti-rape movement"). But Susan Schechter suggests that

[b]y acknowledging the significance of personal ties and connections to other movement organizers and time spent building these relationships, activists [in the battered women's movements] formed coalitions centered in norms of non-competition that might well serve as models for other political struggles.

The battered women's movement has brought together women of all classes and races, and in doing so, compels its participants to confront issues of diversity among women.

Schechter, *supra* note 60, at 319; cf. Dobash & Dobash, *supra* note 60, at 24, 57 (noting that different types of feminist groups "have sometimes formed coalitions and at other times created divisions within the movements," but also recognizing that one stated aim of battered women's movement was coalition building (footnote omitted)).

³³³ See Regina Austin, "The Black Community," Its Lawbreakers, and a Politics of Identification, 65 S. Cal. L. Rev. 1769, 1773-74, 1793-94 (1992).

³³⁴ *Id.* at 1772.

³³⁵ *Id.* at 1793 (emphasis added). Austin is attempting to develop a theory and practice that breaks the constraints of the construct of deviancy that leads members of the Black community to disidentify with each other. See *id.* at 1772-74, 1815. She suggests ways that "straight" women could valuably learn from "street" women to produce "a vibrant black female community." *Id.* at 1796. A "politics of identification," according to Austin, can lead to "the black community" establishing a "legal agenda" that "would . . . make the

Elsewhere, Austin analyzes the case of *Clark v. American Broadcasting Co.*,³³⁶ in which Ruby Clark, a Black woman, sued the American Broadcasting Company (ABC) for defamation because, as part of a news program on street prostitution, she was portrayed in such a way that could lead viewers to believe that she was a woman in prostitution.³³⁷ While acknowledging the harm experienced by Clark, Austin examines the implications of her having to distinguish herself from Black women in prostitution in order to prevail in her suit.³³⁸ She observes that all the Black women presented in the program

shared white society's devaluation of black women's sexuality although it affected them differently. It compelled the black prostitutes to stroll the streets in search of customers, subjected those who were not prostitutes to unwelcome public overtures, and rendered the portly matron . . . a neuter object, respectable but out of the game.³³⁹

legal system more sensitive to the social connection that links 'the community' and its lawbreakers and affects black assessments of black criminality." *Id.* at 1815. Austin goes on to conceive of a community that "acknowledges that some, but not all, lawbreakers act out of a will to survive and an impulse not to be forgotten, and it admires them for this even though it concludes that their acts ought not to be emulated." *Id.* Finding this common ground, the community would, according to Austin, "advocate changes in the criminal justice system and in other institutions of the dominant society in order to increase the lawbreakers' chances for redemption," *id.*, meaning not only atonement but also rescue. *Id.* at 1815-16.

³³⁶ 684 F.2d 1208 (6th Cir. 1982), cert. denied, 460 U.S. 1040 (1983).

³³⁷ See *id.* at 1211, 1213.

³³⁸ See Regina Austin, *Black Women, Sisterhood, and the Difference/Deviance Divide*, 26 *New Eng. L. Rev.* 877, 884 (1992).

³³⁹ *Id.* at 885 (footnote omitted). Austin further observes:

They all have an interest in opposing the full range of negative categorizations of black women's sexuality. They all would have gained from an attack on the attempts of white men (including the cruising johns and ABC) to restrict black women's sexual expression and to label it in ways dictated by the white men's purposes.

Id. Austin goes on to argue, however, that a "vibrant and affirmative community" needs to be based on more than efforts to "unite against a common enemy." *Id.* at 886. As she states:

[a] genuine sisterhood would be a modern moral community, one in which political positions and ethical stances are constructed by the sisters as a matter of "common sense, ordinary emotions, and everyday life." It may be time to recognize that the only true communities of black females are voluntary associations of women who are bound by shared economic, political, and social constraints and find strength, economic support, and moral guidance through affective, face-to-face engagement with each other.

Id. at 887 (quoting Alan Wolfe, *Whose Keeper?: Social Science and Moral Obligation* 211 (1989)). Austin is urging "black women . . . to challenge the appraisals of black female deviants, whether they are based on the standards of the dominant society or those prevailing in the black community." *Id.* at 879. Although she recognizes the risks, she suggests that "[i]n the name of a 'black sisterhood,' a 'community' within 'the community,' we might

As Austin reveals, coalition and collaboration have a greater likelihood of success when undertaken with the insight that where one person claims respectability, he or she becomes complicit in another person's subordination. In other words, any claim for respectability reinforces systemic inequality. This framework for discussion, in which a claim for respectability is understood as a claim for dominance, allows for collaboration with groups working to reconstruct economic, social, and political arrangements. Coalition building on these terms may have more potential than legal reform alone to transform the meaning of prostitution and to benefit the lives of women in prostitution.³⁴⁰ Within a collaborative effort based on the degeneracy/respectability framework, both the argument that prostitution is symptomatic of other economic and social inequalities³⁴¹ and the argument that prostitution causes or contributes to other economic and social inequalities³⁴² lose force. Causal analysis gives way to an appreciation of the complexity of discursive arrangements holding interrelated hierarchies in place.

While the goal of collaborating with diverse groups dedicated to achieving social justice is of utmost importance, it is also essential to consider how the law should treat prostitution. Our approach to reforming the law of prostitution is to redefine it as a social practice perpetuating inequality. This reform involves changing the criminal law and treating prostitution as a discriminatory practice. First, state statutes should be amended so as no longer to penalize persons used in prostitution. Criminal penalties, however, should continue for those who purchase sex, procure others for use in prostitution, or knowingly derive financial benefit from the proceeds of a person used in prostitution. States' civil rights laws should define as acts of illegal discrimination the purchase of sex for money, the procurement of others to engage in a market exchange of sex for money, and the practice of knowingly benefiting financially from the earnings or proceeds of a person used in prostitution.³⁴³ This kind of legal reform provides

respond to female deviance with understanding, support, or praise based on the distinctive social, material, and political interests of black women." *Id.*

³⁴⁰ Cf. Nicola Lacey, *Unspeaking Subjects: Feminist Essays in Legal and Social Theory* 221-49 (1998) (arguing that contemporary legal studies cannot achieve ethical ideals it sets out for itself without more robust interaction with other discourses).

³⁴¹ See *supra* notes 111, 136 and accompanying text (discussing treating prostitution as symptom of other inequalities).

³⁴² See *supra* notes 333-39 and accompanying text (discussing treating prostitution as cause of other inequalities).

³⁴³ Cf. Catharine A. MacKinnon, *Prostitution and Civil Rights*, 1 *Mich. J. Gender & L.* 13, 29 (1993) (proposing use of federal civil rights law, 42 U.S.C. § 1985(3) (1994), for women in prostitution to sue for conspiracy to deprive them of their civil rights). For criticism of the use of a rights analysis to achieve equality goals, see Elizabeth Kingdom,

a woman in prostitution the right to file a complaint with a state civil rights agency. The agency would be required by law to treat this discrimination complaint on the same footing as it would treat any other complaint. Additionally, the complainant would have the right to pursue a private cause of action in civil court.

There is precedence for this approach in the Violence Against Women Act (VAWA),³⁴⁴ which makes a crime of violence that is motivated by gender discrimination a civil rights violation.³⁴⁵ The reform we propose, however, differs from VAWA in three important ways. First, VAWA creates only a private cause of action and thereby obscures the important governmental interest in furthering equality.³⁴⁶ Second, it focuses exclusively on gender discrimination³⁴⁷ and therefore, contrary to our proposal, fails to recognize that practices of inequality implicate and support all forms of discrimination. Third, unlike our proposal that equates prostitution with discrimination, it does not recognize domestic abuse and rape as perpetuating gender domination, but rather requires further evidence that the perpetrator was motivated by gender animus.³⁴⁸ The reason for the differences is that our proposal grows out of the broader strategy of undermining the degeneracy/respectability dichotomy and the inequalities it holds in place.

By treating prostitution as a civil rights violation, our proposal transforms the buying of sex from a transgressive act that reinforces the dichotomy to a discriminatory act that undermines it. It makes real the theoretical connection between respectability and inequality. It also takes seriously the interconnectedness of systems of inequality by recognizing that prostitution is supported by, and in turn supports, other forms of discrimination: Prostitution is not a separate category of subordination so much as it is a practice that embodies all social hierarchies.

The civil rights proposal also provides a legal framework for transcending the constraints of the consent/coercion and private/public dichotomies that currently dominate legal discourse and sustain the

What's Wrong with Rights? Problems for Feminist Politics of Law 1-6, 79, 130-31 (1991); Smart, *supra* note 31, at 138-59. But see John O. Calmore, *Critical Race Theory*, Archie Shepp, and *Fire Music: Securing an Authentic Intellectual Life in a Multicultural World*, 65 S. Cal. L. Rev. 2129, 2212-19 (1992) (recognizing power as well as limits of rights analysis and advocating "a strategy of rights [that] can enhance African-American life in the quest for resource mobilization and collective identity").

³⁴⁴ 42 U.S.C. §§ 13,931-14,040 (1994).

³⁴⁵ See *id.* § 13,981.

³⁴⁶ See *id.* § 13,981(c).

³⁴⁷ See *id.* § 13,981(a)-(d)(1).

³⁴⁸ See *id.* § 13,981(e)(1).

degeneracy/respectability divide. The antidiscrimination law does not recognize as a defense the plaintiff's "consent" to a discriminatory practice. For example, when a plaintiff seeks employment with an employer who is known to engage in discriminatory hiring practices, or applies to an educational institution that is known to discriminate in its admissions criteria, it is highly unlikely that a court would uphold the legitimacy of the discriminatory practices based on the plaintiff's initiation of the discriminatory act by applying for employment or admission. In the same way, the fact that a woman initiated the "discriminatory act" of prostitution does not negate the harm, nor should it be taken as proof of equality between the parties.³⁴⁹

The benefits of this proposed legal reform do not come without potential costs. For example, it is difficult to predict whether creating the new category of prostitution as discrimination will reinforce, rather than dismantle, the subject status of "prostitute." The status exists now, however, in the absence of a civil rights claim. To argue that providing a woman in prostitution a remedy for a harm reinforces that harm suggests that her interests reside in maintaining the status quo—an entirely suspect proposition. More importantly, the proposal reduces the risk of reinforcing the status of "prostitute," and enhances the possibility of dismantling it, by defining discrimination as the act of purchasing sex for money, rather than by defining it in terms of the status of the woman.

A second concern that the proposal raises is its reliance on the state to develop the civil rights claim. There is the risk that the state

³⁴⁹ A study of men who buy sex reports that the men "repeatedly stress[] the attraction of a woman whom one could ask to do anything." McKeganey & Barnard, *supra* note 24, at 53. The researchers concluded that for most of the men they interviewed, "the prostitute seemed to be no more than the sex she sold." *Id.* A quote from one of the men interviewed is typical: "[Y]ou've got a bit more dominance, you've got the money in your pocket, then you've got the dominance over them." *Id.* This ruthless admission of a purchaser of sex is tangible evidence in support of the civil rights proposal, as well as the need for the law to recognize that consent is more likely to obscure inequality rather than correct it. Other statements showing the typicality of the respondents' views about what they thought they were buying, include:

It's easier to ask a prostitute to do things because she's there to service you, you know you're paying her for the service. It's like going to have your car done, you tell them what you want done, they don't ask, you tell them you want so and so done and if they don't do it, fair enough, you go down the road to someone else.

Id.

It was just the fact that here were women who would do anything, you know that was required, no bones about it plus the fact that there was no commitment at all. You know, it was for a specific purpose that you became involved, then it was over and you could go back to work. If you wanted another one it was just a matter of going along making your choice and so on.

Id. at 52.

will distort the purposes of the proposal and pursue limited, and perhaps even detrimental, ends.³⁵⁰ That risk is heightened by the continuing vitality of the degeneracy/respectability dichotomy. In recognition of the potential for the law to be misused and distorted, the civil rights proposal relies on women in prostitution to decide when they are harmed and whether they want to turn to the state to pursue their claims. An additional benefit is that the proposed reform enables a woman with few resources to pursue her claim through the existing state civil rights administrative process.

A third question that the proposal must address to be viable is whether well-established civil rights jurisprudence can address adequately the harms of prostitution. The problem here is that existing statutes and court decisions seldom recognize the interrelationship among different forms of discrimination and require, instead, that claimants choose one form of discrimination or another.³⁵¹ The degeneracy/respectability framework shows that prostitution is not, exclusively, based upon sex discrimination, but implicates discrimination based on class, race, and sexuality as well. For the law to provide a remedy for the harm caused by the purchase of sex for money, it must take into account how prostitution perpetuates all forms of discrimination. In light of this, the civil rights proposal does not depend on the claimant's membership in any specific protected class, or on having any particular status. Thus the risk that the law will fail to redress all the harms of prostitution is reduced because the claim is based on an act—purchasing sex for money—that crosses socially subordinated categories.

³⁵⁰ Cf. Lacey, *supra* note 340, at 91-95 (discussing range of problems created by feminists relying on "the state as the main source of political/regulatory power"); MacKinnon, *supra* note 343, at 29-30 (discussing disadvantages for women of having to rely on state under criminal justice system and advantages for women being able to pursue on their own their civil rights under 42 U.S.C. § 1985(3) (1994), which creates cause of action allowing persons to sue alleging conspiracy to deprive them of civil rights).

³⁵¹ See Martha Chamallas, *Jean Jew's Case: Resisting Sexual Harassment in the Academy*, 6 *Yale J.L. & Feminism* 71, 85 n.83 (1994) (noting that "traditional structure of Title VII cases may have obscured racial issues" in sexual harassment claim brought by Chinese woman because plaintiff is "forced to choose whether to litigate the case as a case of racial or sexual harassment" and "there is no distinctive cause of action under Title VII designed for women of color . . . who are subjected to racist and sexist behavior" (citation omitted)); Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 *U. Chi. Legal F.* 139, 149-50 (arguing that many discriminating employment experiences Black women face are not recognized by traditional definitions of race and gender discrimination).

A final concern is whether by using civil rights laws that provide an individualized, as opposed to a group-based remedy,³⁵² the proposal fails to address the harms of prostitution experienced by subordinated groups.³⁵³ Although a jurisprudence based on group mindedness might offer important opportunities to disrupt the degeneracy/respectability dichotomy, it would be a mistake to think that an individually based claim has no far-reaching social effects. The anti-violence reforms that we discussed earlier led to the recognition of legal rights and remedies for individuals who, because of their group membership, were previously silenced by the law.³⁵⁴ The reforms' effects went well beyond securing the safety of women in their homes, the workplace, or on the street; they challenged existing discursive arrangements and have significantly influenced contemporary economic, political, and social relations. While it is difficult to predict the far-reaching effects of civil rights claims based on prostitution, it is clear that the law's current posture on prostitution is untenable because it leaves existing hierarchical relationships intact.

Prostitution, as currently configured within the criminal justice system, is viewed as a threat to family life and the home.³⁵⁵ To decriminalize the activities of a woman engaged in prostitution, and to accord her the rights of citizenship through a civil rights remedy, is to remove the woman's conduct from the realm of moral opprobrium. The purpose of these changes is to reconfigure the crime from one in which all parties to the market exchange of sex for money are transgressing the norms of family and home, to one in which those persons who support and perpetuate the purchase of another person for sex are undermining society's commitment to equality.

The effect of these reforms will be to immunize women in prostitution from criminal liability and provide them with the opportunity to pursue legal remedies. There is no doubt that our proposals will meet with objections from those advocates for women in prostitution who will argue that, by treating the purchase of sex as a crime and an

³⁵² United States law generally resists recognizing group harms or remedies. See Austin, *supra* note 338, at 885 n.40 (explaining that "[g]roup defamation claims brought on behalf of large groups are disfavored in part because they essentially attack political points of view and opinions" (citation omitted)); Roberts, *supra* note 299, at 396, 403 (arguing that preference for individual liberty separated from social power leads to preference for private remedies over collective solutions and advocating for "an understanding of liberty and equality that accounts for group oppression" (footnote omitted)).

³⁵³ Cf. Lacey, *supra* note 340, at 91 (critiquing proposals to provide individualized, as opposed to group-based, remedy for women harmed by pornography).

³⁵⁴ See *supra* Part II (discussing law reforms to domestic violence, sexual harassment, and rape laws).

³⁵⁵ See *supra* notes 312-20 and accompanying text (discussing sterilization of urban space).

act of discrimination, these legal reforms interfere with a woman's right to make a living in prostitution.³⁵⁶ Others are likely to disagree with our approach because it rejects the view that prostitution is an expression of sexual autonomy.³⁵⁷ Their arguments are particularly attractive because they seem to be reflecting and respecting women's choices. They can only advocate for a woman's right to engage in prostitution, however, by denying her the right to claim that prostitution is an act of inequality that harmed her. They cannot claim they are expanding and not limiting women choices and neither can we. Arguing about which approach expands or limits choices, however, reflects a misunderstanding of the respectability analysis. The significance of the analysis is that it moves beyond the rhetoric of choice and coercion. What the analysis of the degeneracy/respectability dichotomy demonstrates is that a discourse based on choices, which is nothing more than a restating of the consent/coercion and private/public divides, reinforces existing hierarchical relations.³⁵⁸ Until we recognize the harm of pursuing respectability, what reformers may intend as a strategy to respect women's choices may do little more than perpetuate subordination.

CONCLUSION

Currently, the prevailing legal and social view of prostitution is that it is a victimless crime of immoral conduct³⁵⁹ that can be tolerated

³⁵⁶ See *supra* notes 9, 25 and accompanying text (describing position of some groups advocating on behalf of women in prostitution).

³⁵⁷ See Bell, *supra* note 323, at 108-09, 135 (describing prostitutes' rights discourse as linking sex knowledge and power so that "positioning of sex workers as 'sex experts' moves prostitutes . . . to being the owners and producers of sexual knowledge" and prostitutes' rights movement as constructing "prostitution as an active expression of women's sexuality"); Lars O. Ericsson, *Charges Against Prostitution: An Attempt at a Philosophical Assessment*, in *Sex, Morality, and the Law* 87, 101 (Lori Gruen & George E. Panichas eds., 1997) (arguing that "we must liberate ourselves from those mental fossils which prevent us from looking upon sex and sexuality with the same naturalness as upon our cravings for food and drink [and that] . . . we may have something to learn from prostitution in this respect"); International Committee for Prostitutes' Rights World Charter and World Whores' Congress Statements, in *Sex Work*, *supra* note 323, at 305, 310 (affirming "the right of all women to determine their own sexual behavior, including commercial exchange, without stigmatization or punishment" (emphasis omitted)); Veronica Monét, *Sedition*, in *Whores and Other Feminists*, *supra* note 323, at 217, 221 ("Sex in general and sex for money really is something that a fully feminist woman can choose to engage in. And that choice can liberate, empower, and raise her self-esteem."); Rosemarie Tong, *Prostitution*, in *Sex, Morality, and the Law*, *supra*, at 107, 118 (describing various analyses of prostitution, including "existentialist feminists" who view prostitute as "an exceptional woman who dares to challenge the sexual mores of her society").

³⁵⁸ See *supra* Part III (discussing relationship among consent, privacy, and inequalities).

³⁵⁹ See, e.g., Donna Laframboise, *Our Laws Won't Stop Prostitution*, *Toronto Star*, Dec. 18, 1995, at A17, available in 1995 WL 6031168 (describing prostitution as victimless

as long as it does not disrupt business districts or quiet neighborhoods.³⁶⁰ Our society, in its literature, science, performing arts, advertising, and media, simultaneously romanticizes and demonizes a woman who is engaged in prostitution.³⁶¹ Society constructs her as a powerful entrepreneur in the marketplace exercising her autonomy, as well as an immoral repository for disease and corruption. Both these constructions immunize the purchaser of sex from serious legal scrutiny.³⁶² It is this popular conception of prostitution that makes it both a potent marker of the boundary between degeneracy and respectability and a practice of inequality.

We began this Article with excerpts from the legislative history of a Minnesota statute creating a civil cause of action giving persons in

crime); Clarence Page, *Hugh Grant's Saga Ripe with Intrigue*, *Entertainment Value*, *Fresno Bee*, July 13, 1995, at B5, available in Lexis, News Library, FRESNO file (same); Tom Puleo, *Runner-Up Won't Quit Field Just Yet*, *Hartford Courant*, Oct. 2, 1998, at B1, available in 1998 WL 20772662 (same); Bill Wallace et al., *Hallinan Takes Slim Lead in District Attorney Race*, *S.F. Chron.*, Dec. 13, 1995, at A1 (same); Arthur Drache, *Revenue Poised to Broaden Its Definition of Couple*, *Fin. Post*, Sept. 8, 1998, at 23 (describing prostitution as immoral); Fred Reed, *No Easy Answers Except One: Sex Sells*, *Wash. Times*, July 6, 1998, at C2 (same). But see Deborah L. Rhode, *Who Is the Criminal?*, *Nat'l L.J.*, Sept. 25, 1995, at A21 (arguing that prostitution is "falsely portrayed" as victimless crime).

³⁶⁰ See, e.g., Debra Franco, *Police Aid in Reclaiming East Platte Avenue: Patrols Target "Unwanted Element" on 1-Mile Strip*, *Colo. Springs Gazette*, Jan. 10, 1999, available in 1999 WL 6186108 (describing business owners' and area residents' organizing to reclaim neighborhood "from prostitutes and drug dealers"); Deborah Holton, *Neighbors Prepare to Battle Sex Superstore in SW Portland*, *Portland Oregonian*, Jan. 12, 1999, at B5 (reporting residents are expressing concern about neighborhood decline by presence of prostitution activity and sexually oriented businesses); Reed, *supra* note 359, at C2 (observing that "[d]ecent people in the region are sick of the girls" and that "they cause actual traffic jams"); Paul Shukovsky, *Neighbors Uniting to Fight Aurora Prostitution Drug, Sex Activities on Streets Described*, *Seattle Post-Intelligencer*, Jan. 12, 1999, at B1, available in 1997 WL 6579666 (reporting of neighbors complaining to city officials and police "of vice permeating their neighborhood").

³⁶¹ See Hobson, *supra* note 17, at 235; see also Brock & Thistlethwaite, *supra* note 3, at 9, 30, 178-79. Brock & Thistlethwaite note that "the romanticization of prostitutes in Christian cultures is magnified in most Hollywood versions of prostitution." *Id.* at 9. They further observe that these sexist stereotypes are compounded by racism that finds its legacy in such cultural and media stereotypes of the prostitute as Suzy Wong and Miss Saigon and portrayals in the mainstream media of African American women as always available for sex. See *id.* at 9, 30, 178-79. A third image of a woman in prostitution built on the coercion/consent framework is that of the "innocent" victim who is tricked or coerced into the life of prostitution. See Rosen, *supra* note 253, at 46-47 (reporting that Progressive Era reformers presented woman engaged in prostitution "as one of two polarized images: the innocent victim or the sinister polluter"). The influence of psychoanalytic theory on the images and construction of prostitution in the twentieth century cannot be underestimated. See generally Hobson, *supra* note 17, at 184-89 (describing how psychoanalysis reinforces gender and class distinctions and places prostitution outside of discourse of social justice).

³⁶² See Jeffreys, *supra* note 3, at 214-19 (explaining how assumptions about "natural" male sexual urges places john beyond social, including academic, scrutiny).

prostitution the right to sue for damages.³⁶³ The legislators assumed that prostitution was an exclusively gendered issue and demonstrated their commitment to protecting gender equality by honoring a woman's consent in recognition of her sexual autonomy.³⁶⁴ Their views of prostitution and their analysis of gender equality, however, can be understood as part of the practices that maintain inequality when seen through the lens of degeneracy and respectability. The civil cause of action, as well as other antiviolence reforms, reinforces social hierarchies by pursuing strategies of respectability. Nonetheless, they have the potential to transform our understanding of prostitution and to undermine the degeneracy/respectability dichotomy that prostitution embodies. The dichotomy not only explains the inadequacies of antiviolence law reforms, it also explains why those inadequacies seem inevitable. The identification of the home, cleanliness, and health with respectability, and of the streets, filth, and disease with degeneracy, establishes a value system in which only some persons are deemed worthy. In this system, to relinquish a claim to respectability is to relinquish the rights of full citizenship that deem women to be worthy of protection from harm. Until we can develop equality strategies and a theory of citizenship that do not depend on a concept of worthiness, prostitution as a paradigmatic model of unworthiness and as a practice of inequality will continue to mark the degeneracy/respectability divide and reinforce social hierarchies. The analysis of degeneracy and respectability transforms the meaning of prostitution and demands that each of us attend to the words of W.H. Auden, who wrote, "All we are not stares back at what we are."³⁶⁵

³⁶³ See *supra* notes 3-21 and accompanying text (describing statute and some of its legislative history).

³⁶⁴ See *supra* note 21 and accompanying text (describing some of statute's legislative history).

³⁶⁵ W.H. Auden, *The Sea and the Mirror* ch.1 (Prospero to Ariel), in *Collected Poems* 311, 313 (Edward Mendelson ed., 1976).