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Regulating Sex Work: Assimilationism, Erotic Exceptionalism and the Challenge of Intimate Labor

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Regulating Sex Work: Erotic Assimilationism, Erotic Exceptionalism, and the Challenge of Intimate Labor

Adrienne D. Davis*

Most commentators on sex markets focus on the debate between abolitionists and those who defend and support professional sex work. This Article, instead, looks at debates within the pro-sex-work camp, uncovering some unattended tensions and contradictions. Some within this camp stress the labor aspect, urging that sex markets perpetuate a “vulnerable population” of workers and should be regulated like other forms of risky and/or exploited labor. In this view, sex work would be assimilated into existing labor regulatory frameworks. Others, though, take a more antiregulatory stance. They exceptionalize this form of labor, arguing that because it is sexual it should be exempt from state scrutiny and interference, claims that can quickly sound libertarian. While both camps agree that professional sex work should be decriminalized, when turning from the criminal to the regulatory perspective, erotic assimilationists and erotic exceptionalists could not be more opposed. The Article contends that neither of these views is satisfactory. Sex work could very well be legalized and regulated—if we have the political and

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moral will to do so. Ultimately, this Article breaks hard with erotic exceptionalism and slightly less so with erotic assimilationism to explore a regulatory structure that might govern sex markets. While many sex work regulations could fit into the current legal frameworks that govern workplaces, I contend that there are unique characteristics of sex work that make it much harder to assimilate into current regulatory regimes, especially in the controversial realm of antidiscrimination law.

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“[J]ust what *is* so unique about sex-work?”¹

INTRODUCTION

Much of Western Europe is currently in the grips of a revolution in how sex work is understood and regulated. Begun in Sweden, the strong trend is to criminalize the purchase of sex, but not its sale. What is becoming known as “the Swedish model” rests on the work of anti-sex-work feminists who have successfully framed sex markets as a gendered species of human trafficking that denies women full citizenship. With Norway, Iceland, France, and most recently the entire European Parliament endorsing it, the Swedish model of asymmetric criminalization appears poised to become the dominant one in Western Europe.

In contrast to these heated debates over changing the regulation of sex markets, the United States seems locked in, and indeed largely satisfied, with its own antiquated model of complete criminalization. Some feminist scholars, self-described sex market abolitionists, hope to move the United States’ criminal model toward the Swedish one; indeed, some have been active in the European abolitionist movement. What of the other side in the United States—those who advocate for professional sex and sex markets? While abolitionist feminists have developed the Swedish model, evolving ever more refined regulatory visions and accompanying conceptual frameworks, the pro-sex-work camp appears to be in regulatory stall. This may be a product of devoting most of their analytic energy to engaging with abolitionists and neglecting the development of a commensurate regulatory vision.

Even determining the legal status of prostitution—just one of the contested forms of sex work—is complicated. While some countries completely criminalize prostitution, in most it has some sort of legally liminal status, in which some aspects are criminalized and others are not.² Importantly, many jurisdictions differentiate between prostitution itself (i.e., selling sex or operating an establishment in which prostitution occurs, including brothels) and

1. Heidi Tinsman, *Behind the Sexual Division of Labor: Connecting Sex to Capitalist Production*, 17 YALE J. INT’L L. 241, 241 (1992).

2. ProCon.org is a website that surveyed a hundred countries, seeking to be “inclusive of major religions, geographical regions, and policies towards prostitution.” *100 Countries and Their Prostitution Policies*, PROCON.ORG (Apr. 1, 2015), <http://prostitution.procon.org/view.resource.php?resourceID=000772>; see also ELAINE MOSSMAN, INTERNATIONAL APPROACHES TO DECRIMINALISING OR LEGALISING PROSTITUTION (2007), <http://www.justice.govt.nz/policy/commercial-property-and-regulatory/prostitution/prostitution-law-review-committee/publications/international-approaches>. Germany exemplifies how difficult it can be to discern the status of prostitution. Some set Germany’s legalization date at 1927, when the country passed its Law for Combating Venereal Diseases. Others, though, insist that the relevant date is the 2002 passage of the Prostitution Act because prior to that, although prostitution was legal under the German Constitution, both regulations and court decisions restricted the legal and social welfare rights of prostitutes because prostitution was considered in violation of Germany’s *moral* code.

“pimping” (defined variously as “assistance” or “living off the earnings of prostitution,” “controlling prostitution for gain,” or “exploitative” or “coercive” behavior).³ In one study, thirty-eight of the one hundred countries surveyed currently completely criminalize prostitution.⁴ In every country that criminalizes prostitution, brothel ownership and pimping likewise are illegal.⁵ Liability and penalties vary by country and, within some countries, by jurisdiction.⁶ In seven countries, prostitution, brothels, and pimping all are legal.⁷ Another forty countries have partially decriminalized sex work,

3. Rationales differ. Some jurisdictions target brothels and pimping to prevent “organized” prostitution. Others are concerned about trafficking or gender equality. *See, e.g.*, MOSSMAN, *supra* note 2.

4. PROCON.ORG, *supra* note 2. These include China, Egypt, North and South Korea, Jamaica, Afghanistan, Slovenia, Romania, Kenya, and South Africa. *Id.*

5. In China, prostitution is criminalized “as a social practice that abrogates the inherent rights of women to personhood.” *Id.* Taiwan, on the other hand, legalized prostitution in 2009. Another primary rationale is to combat trafficking. *See, e.g.*, U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT 22 (2004), www.state.gov/documents/organization/34158.pdf (“The United States Government takes a firm stand against proposals to legalize prostitution because prostitution directly contributes to the modern-day slave trade and is inherently demeaning.”); Nicholas Kulish, *Bulgaria Moves Away from Legalizing Prostitution*, N.Y. TIMES (Oct. 5, 2007), http://www.nytimes.com/2007/10/05/world/europe/05iht-bulgaria.4.7773739.html?pagewanted=all&_r=0 (“The Bulgarian government Friday abruptly reversed its longstanding move toward legalizing prostitution, part of a broader trend in Europe to make prostitution illegal as a way to combat sexual trafficking.”).

6. In Egypt, the penalty for prostitutes is three to thirty-six months in prison and/or a fine. Law No. 10 of 1961 (On the Combating of Prostitution), <http://www.refworld.org/docid/5492d8784.html> (last visited July 20, 2015). Some countries impose only fines; others differentiate punishment by gender or by role, that is, prostitutes and customers. For instance, in Bangladesh, prostitution is legal for women over eighteen, but male prostitution is illegal. 2008 *Human Rights Report: Bangladesh*, U.S. DEP’T OF STATE (2009), <http://www.state.gov/j/drl/rls/hrrpt/2008/sca/119132.htm>. And Sweden is emblematic of Iceland and Norway in criminalizing the purchase, but not the sale of sex. General Penal Code (Act No. 19 of 1940) (Iceland), eng.innanrikisraduneyti.is/laws-and-regulations/nr/119; General Civil Penal Code §§ 202, 224 (Act No. 10 of 1902) (Norway), www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/NOR_penal_code.pdf; BROTTSBALKEN [BRB] [PENAL CODE] 6:8 (Swed.). In both the United States and Australia, penalties differ by jurisdiction. Susan Pinto et al., *Prostitution Laws in Australia*, TRENDS & ISSUES IN CRIME & CRIM. JUST., May 1990, at 1; *see also* Barbara Sullivan, *When (Some) Prostitution Is Legal: The Impact of Law Reform on Sex Work in Australia*, 37 J.L. & SOC’Y 85 (2010).

7. These seven are Ecuador, Germany, Greece, Indonesia, the Netherlands, New Zealand, and Venezuela. STRAFGESETZBUCH [STGB] [PENAL CODE], § 181a, *translation* at www.gesetze-im-internet.de/englisch_stgb/index.html (Ger.); ARTIKEL 273f SR (Neth.), *translation* at ec.europa.edu/anti-trafficking/sites/antitrafficking/files/art_273_dutch_criminal_code_en_1.pdf; Prostitution Reform Act 2003 (N.Z.), www.legislation.govt.nz/act/public/2003/0028/latest/DLM197815/html; Nicholas Watt, *Greek Economy Up 25% - with a Little Help from Prostitutes*, GUARDIAN (Sept. 29, 2006, 7:16 PM), www.theguardian.com/world/2006/sep/30/nicholaswatt.mainsection; 2008 *Human Rights Report: Ecuador*, U.S. DEP’T OF STATE (Feb. 25, 2009), www.state.gov/j/drl/rls/hrrpt/2008/wha/119158.htm; 2008 *Human Rights Report: Indonesia*, U.S. DEP’T OF STATE (Feb. 25, 2009), www.state.gov/j/drl/rls/hrrpt/2008/wha/119040.htm; 2008 *Human Rights Report: Venezuela*, U.S. DEP’T OF STATE (Feb. 25, 2009), www.state.gov/j/drl/rls/hrrpt/2008/wha/119177.htm; *see also* PROCON.ORG, *supra* note 2. As in jurisdictions that have criminalized sex work, jurisdictions that have legalized it embrace different rationales. For instance, Argentina’s Constitution provides, “The private actions of men which in no way offend public order or morality, nor injure a third party, are only reserved to God and are exempted from the authority of judges.” CONSTITUCIÓN ARGENTINA [Constitution] art. 19 (Arg.).

otherwise known as “restricted legality.” In addition to the brothel/pimping differentiation,⁸ countries can restrict legality by geography,⁹ gender,¹⁰ jurisdiction,¹¹ “role” (that is, buying or selling),¹² sex act,¹³ and the type and degree of state involvement.¹⁴ Finally, the “status” of being a prostitute can

8. For instance, in several countries prostitution and brothel ownership are legal, but pimping is not. *See, e.g.*, CÓDIGO PENAL [C. PEN.] art. 141 (Colom.), www.refworld.org/docid/3dbd1fd94.html; CÓDIGO PENAL arts. 168–173 (Costa Rica), www.wipo.int/edocs/lexdocs/laws/es/cr/cr072es.pdf; WOMEN’S CHARTER ch. 353, s. 140 (rev. Oct. 31, 2009) (Sing.), *translation at* statutes.agc.gov.sg/aol/home.w3p; SCHWEIZERISCHES STRAFGESETZBUCH [STGB] [CRIMINAL CODE] Dec. 21, 1937, SR 311.0 art. 195, *as amended* Jan. 1, 2015 (Switz.); Criminal Code, Law Nr. 5237, art. 227 (Sept. 26, 2004) (Turkey), *translation at* www.wipo.int/edocs/lexdocs/laws/en/tr/tr113en.pdf. Other countries criminalize both brothels and pimping. As noted above, in no country is pimping legal if brothel ownership is not. *See supra* notes 2, 5, and accompanying text.

9. Several countries ban prostitution from “public” places. France and Canada both explicitly restrict prostitution to “private” places and make solicitation in public places illegal. *See, e.g.*, Criminal Code, R.S.C. 1985, c C-46, s. 213 (Can.); CODE PÉNAL [C. PÉN.] [PENAL CODE] art. 225-10-1 (Fr.). The United Kingdom recently replaced its “kerb crawling” provisions with ones banning street or public solicitation. Sexual Offenses Act 2003, c. 42, § 51A. Other countries, such as Singapore, take the opposite approach, limiting prostitution to designated “red-light districts.” WOMEN’S CHARTER, *supra* note 8, s. 140.

10. Some countries engender the criminalization or liability for prostitution. In Bangladesh, female prostitution is legal but male prostitution is not. *2008 Human Rights Report: Bangladesh*, *supra* note 6. In Egypt, the man, assumed to be the customer, is considered a witness and is exempt from punishment in exchange for testifying against the prostitute, assumed to be a woman. Law No. 10 of 1961 (Criminal Code), *al-Waqā’i’ al-Misrīyah* (Egypt).

11. In Mexico and Australia, prostitution is left to the individual states, although it is criminalized in the former and legal in the latter. *See Australian Federal and State Legislations*, COAL. AGAINST TRAFFICKING IN WOMEN AUSTL., <http://catwa.org.au/?q=legislation> (last visited Sept. 2, 2015); *Videoteca Jurídica Virtual*, INSTITUTO DE INVESTIGACIONES JURÍDICAS, <http://www.juridicas.unam.mx> (last visited Sept. 2, 2015). The United States leaves the status of prostitution to the individual states, but it is criminalized everywhere except for eleven rural counties in Nevada, with populations of less than 700,000. NEV. REV. STAT. § 244.345.8 (2014). Between 1980 and 2009, “indoor” prostitution was legal in Rhode Island because of an unintentional legislative loophole. During that time, no statute explicitly prohibited or criminalized it. The State enacted new legislation criminalizing all prostitution in November 2009. 2009 R.I. Pub. Laws 185–186, 11 R.I. GEN. LAWS § 11-34.1 (2014). Some municipal jurisdictions such as San Francisco intermittently contemplate decriminalization. San Francisco, Cal., Proposition K (defeated Nov. 4, 2008), <http://www.smartvoter.org/2008/11/04/ca/sf/prop/K>; *see also* Sylvia A. Law, *Commercial Sex: Beyond Decriminalization*, 73 S. CAL. L. REV. 523, 583–85 (2000) (discussing San Francisco and New Jersey Task Forces as case studies of local reform); Carol Leigh, *A First Hand Look at the San Francisco Task Force Report on Prostitution*, 10 HASTINGS WOMEN’S L.J. 59, 66–67 (1999) (discussing San Francisco Task Force recommendations to suspend enforcement of state laws against prostitution and redirect resources to services for sex workers and enforcing nuisance laws).

12. In some countries, selling sex is legal but buying it is criminalized. This is the case in Iceland, Norway, and Sweden. *See supra* note 6. These countries recently introduced this differentiation, influenced in large part by sex work advocacy groups. PRABHA KOTISWARAN, *DANGEROUS SEX, INVISIBLE LABOR: SEX WORK AND THE LAW IN INDIA* 7, 14, 16, 35 (2011).

13. For instance, Japan criminalizes only intercourse; other sexual acts are legal. KEIHŌ [PEN. C.] 1907, 182 (Japan).

14. In Turkey, the brothels are state owned, and it is illegal to shelter a person for prostitution. Criminal Code, Law Nr. 5237 (Sept. 26, 2004) (Turkey), *translation at* www.wipo.int/edocs/lexdocs/laws/en/tr/tr113en.pdf.

influence the worker's other rights and capabilities, almost uniformly negatively.¹⁵

Despite the complexity of how countries impose and implement criminalization, the overwhelming majority of them have a narrow vision of regulatory options. These options are limited to either complete criminalization or some variation on decriminalization. Those jurisdictions that have moved from decriminalization to active legalization through regulation¹⁶ mainly confine regulations to mandating age limits, health requirements, and registration for sex workers.¹⁷ Very few countries have followed the erotic exceptionalist call to decriminalize prostitution without enacting any other accompanying regulation.¹⁸ The absence of positive laws appears to be a regulatory vacuum rather than an intentional alignment with exceptionalism.¹⁹

15. For instance, in Turkey, "sex workers cannot be married and their children are barred from occupying high rank in the army or police, or marrying persons of such rank, although they can work in other areas of government service." PROCON.ORG, *supra* note 2. In the United States, prostitution can preclude an alien from obtaining a visa. 8 U.S.C. § 1182(a)(1)(D) (2012) (naming as ineligible for a visa anyone who "is coming to the United States solely, principally, or incidentally to engage in prostitution, or has engaged in prostitution within 10 years of the date of application for a visa, admission, or adjustment of status").

16. "Legalization involves complete decriminalization coupled with positive legal provisions regulating one or more aspect of sex work businesses." Janet Halley et al., *From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism*, 29 HARV. J.L. & GENDER 335, 339 (2006) (emphasis omitted). This decriminalization/legislation distinction is certainly not limited to sex work debates; one of my earlier works analyzes this distinction in polygamy debates. *See generally* Adrienne D. Davis, *Regulating Polygamy: Intimacy, Default Rules, and Bargaining for Equality*, 110 COLUM. L. REV. 1955 (2010) (disagreeing with many polygamy advocates who urge decriminalization but not full legalization and regulation).

17. Compare Latvia, REGULATIONS TO LIMIT PROSTITUTION (Apr. 2, 2001), <http://prostitution.procon.org/sourcefiles/LatviaRegsToLimitProstitution2001.pdf> (requiring monthly health check); Netherlands, OVERHEID.NL, www.overheid.nl (last visited Sept. 2, 2015) (prostitutes must be over eighteen and register and pay taxes, and clients must be over sixteen); Singapore, WOMEN'S CHARTER, *supra* note 8, s. 140 (requiring mandatory health checks and that prostitutes be sixteen years or older and confine their work to designated districts); and Switzerland, SCHWEIZERISCHES STRAFGESETZBUCH [STGB] [CRIMINAL CODE] Dec. 21, 1937, SR 311.0 art. 195, *as amended* Jan. 1, 2015 (Switz.) (requiring prostitutes to register with city and health authorities and get regular health checks). Other countries impose far more intrusive requirements and restrictions. In Turkey and Greece, health checks can be as often as twice a week, and in Turkey, workers must carry an identity card indicating the dates of his or her health checks. Criminal Code, Law Nr. 5237, art. 227 (Sept. 26, 2004) (Turkey), *translation at* www.wipo.int/edocs/lexdocs/laws/en/tr/tr113en.pdf. Costa Rica has minimal requirements: prostitutes must be over eighteen years old and carry a health card showing how recently they had a medical checkup. CÓDIGO PENAL arts. 168–173 (Costa Rica), www.wipo.int/edocs/lexdocs/laws/es/cr/cr072es.pdf.

18. *See, e.g.*, PROCON.ORG, ENGLISH TRANSLATION OF BRAZIL'S LABOR AND EMPLOYMENT MINISTRY PRIMER ON SEX PROFESSIONAL (undated), <http://prostitution.procon.org/sourcefiles/BrazilLaborAndEmploymentMinistryPrimerOnSexProfessional.pdf>.

19. Some countries do not address or define prostitution at all, leaving its status unclear. This is the case in long-standing nations such as Bulgaria, Indonesia, and Spain, as well as newer ones. *See, e.g.*, PROCON.ORG, PENAL CODE (undated), <http://prostitution.procon.org/sourcefiles/BulgariaCriminalCode.pdf>; DPA News, *Spain Divided over Semi-Legal Prostitution*, DIGITAL J. (Aug. 29, 2007),

The lone country that has not only decriminalized but added positive regulatory laws is New Zealand, whose Occupational Health and Safety Agency has issued a comprehensive set of guidelines for the sex industry.²⁰

In sum, the regulatory imagination seems extraordinarily constrained. What would an approach look like that takes professional sex (prostitution and other forms) seriously as work, while simultaneously confronting the real and high vulnerability its workers' experience?

While most commentators on sex markets focus on the debate *between* abolitionists and advocates for sex work, this Article largely ignores this intractable fight. Instead, it focuses its attention on debates within the pro-sex-work camp, uncovering some tensions and contradictions that have been largely overlooked and underattended in the scholarship. Some within this camp stress the labor aspect, urging that sex markets perpetuate a "vulnerable population" of workers and should be regulated like other forms of risk and/or exploited labor. In this view, sex work would be assimilated into existing regulatory frameworks. Others, though, take a more antiregulatory stance. They exceptionalize this form of labor, arguing that because it is sexual it should be exempt from state scrutiny and interference, claims which can quickly sound libertarian. While both camps agree that professional sex work should be decriminalized, when turning from the criminal to the regulatory perspective, erotic exceptionalists and erotic assimilationists could not be more opposed. Sex work could very well be legalized and regulated—if we have the political and moral will to do so. Ultimately, this Article breaks hard with erotic exceptionalism and slightly less so with erotic assimilationism to explore a regulatory structure that might govern sex markets. While many sex work regulations could fit into the current legal frameworks that govern workplaces, this Article contends that there are unique characteristics of sex work that make it much harder to assimilate into current regulatory regimes, especially in the controversial realm of antidiscrimination law.

In the end, the Article shows that, while the abolitionist position is a well-developed one, the pro-sex-work camp does not seem to have evolved as far, perhaps because the rich but theoretically contradictory views would lead to contradictory regulatory policies. This Article attempts to tease out the limits of all of these views in their pure form, and instead proposes a hybrid model that could support a thick regulatory structure to govern sex markets. Airing out these stalled feminist debates will allow advocates for commercial sex to

<http://www.digitaljournal.com/article/221703>; *Indonesia*, U.S. DEP'T OF STATE (Mar. 11, 2008), <http://www.state.gov/j/drl/rls/hrrpt/2007/100521.htm>.

20. OCCUPATIONAL SAFETY & HEALTH SERV., A GUIDE TO OCCUPATIONAL HEALTH AND SAFETY IN THE NEW ZEALAND SEX INDUSTRY (2004) [hereinafter HEALTH AND SAFETY IN THE NEW ZEALAND SEX INDUSTRY], <http://www.business.govt.nz/worksafe/information-guidance/all-guidance-items/sex-industry-a-guide-to-occupational-health-and-safety-in-the-new-zealand/sexindustry.pdf>.

produce robust regulatory models that can compete with abolitionism and the Swedish model.

This Article attempts two interventions into the sex-work debate. The first intervention is a conceptual one, shifting the focus from disputes between abolitionists and sex-work advocates to uncovering contradictions and ambivalences within the pro-sex-work camp. It gives significant attention to these latent tensions, arguing that they have created regulatory stall. Too often feminist scholars gloss over the contradictions within the pro-sex-work camp and their accompanying regulatory implications. The second is a governance move, comparing sex work to other types of work to consider to what extent various risks and injuries of sex work, physical and otherwise, could be ameliorated by legalization—that is, by appropriate state regulation. Put simply, the Article’s goal is to launch a conversation about whether the sex workplace really is like the factory floor. This intervention pairs two regulatory claims: one contends that risk reduction is best served by correlating regulation with institutional form, or what I call sexual geography, which I do not anticipate will be that controversial.²¹ The other claim, which tackles discrimination from the demand side, that is, through the erotic preferences that comprise sex markets, should be provocative to many.

Ultimately, this Article represents an effort to break the feminist pro-sex work position out of an impasse. The debate over sex work can be characterized in terms of “first-generation” and “second-generation” arguments. First-generation debates centered on whether feminists should support or oppose sex work. Second-generation debates delve deeper into questions of how sex work should be regulated, or why it shouldn’t be regulated. Increasing global attention to sex trafficking has resulted in the anti-sex-work position becoming more and more refined, evolving into contemporary abolitionism.²² At the same time, the pro-sex-work camp appears to remain stuck in a set of first-generation claims. I do not mean to be dismissive or critical of feminist jurisprudence or theory; after all, we would not understand sexual harassment as sex discrimination, marital rape as rape, or domestic violence as criminal assault without feminism. Yet, in the arena of sex work, the feminist regulatory imagination remains stuck, unable to recognize the latent tension between assimilationism and erotic exceptionalism, let alone move beyond it. I call for a quick and purposeful move into second-generation issues, beginning with the recognition of the sheer complexity of legalizing or decriminalizing sex work. As the Article shows, there is no one monolithic market for sex work, which is perhaps unintentionally envisioned by assimilationists. Rather, the question is which market and which of a thousand regulatory switches to throw.

21. See *infra* Part III.

22. See *infra* notes 32, 35, 37, 44, and accompanying text for discussion of feminist abolitionism.

Nor is this debate only of interest to feminists. Rather, its focus on regulatory strategies and political tradeoffs also engages workplace law, antidiscrimination law, and regulatory effects more broadly, including questions of substitution effects and endowments. In this sense, the Article tackles several aspects of the administrative state and its regulatory tentacles. In particular, it links together questions of institutional form with risk abatement and raises what will almost certainly be a provocative set of questions about the limits of antidiscrimination law.

Because the Article is exploring the discourse and feasibility of sex as labor, my terminology is tailored to suit the discourse. Accordingly, I use the terms professional sex, sexual commerce, transactional sex, commercial sex, and sex markets interchangeably. In particular, professional sex can be contrasted with the “amateur” sex, in which most of us engage, involuntary sex trafficking, and, at a mid-point between the two, “survival sex,” in which sex is transacted, typically without meaningful capacity and often directly for drugs.²³ I avoid the term “commodified sex,” as a nod to the argument that much sex and intimacy is commodified, sometimes in ways that are far more mercenary than in formal sex markets.²⁴ On the demand side, rather than johns or solicitors, I call consumers of paid sexual services customers, patrons, and clients, self-consciously adopting the “customer” language to confront and show how a full embrace of market logic and norms *can be* unsettling. The denomination “customer” suggests the possible legitimacy of their preferences for different kinds of sexual services, a controversial contention that I take up in Part III of this Article.

23. Survival sex can be traded for any basic subsistence needs, including housing, food, and money. The key distinction between survival sex and professional sex is, respectively, the immediacy of the trade versus the labor generating a source of income, however regular or irregular. *See, e.g.,* Jody M. Greene et al., *Prevalence and Correlates of Survival Sex Among Runaway and Homeless Youth*, 89 AM. J. PUB. HEALTH 1406, 1406 (1999) (“‘Survival sex’ refers to the selling of sex to meet subsistence needs. It includes the exchange of sex for shelter, food, drugs, or money.”); UNAIDS INTER-AGENCY TASK TEAM ON GENDER & HIV/AIDS, FACT SHEET: HIV/AIDS, GENDER AND SEX WORK (2006), www.unfpa.org/hiv/docs/factsheet_genderwork.pdf (“Women and men who have occasional commercial sexual transactions or where sex is exchanged for food, shelter or protection (survival sex) would not consider themselves to be linked with formal sex work. Occasional sex work takes place where sex is exchanged for basic, short-term economic needs and this is less likely to be a formal, full-time occupation.”). Many professional sex workers distinguish their labor from that of survivalists. *See, e.g.,* ELIZABETH BERNSTEIN, TEMPORARILY YOURS: INTIMACY, AUTHENTICITY, AND THE COMMERCE OF SEX 44–47 (2007).

24. Of course, one can argue that sex between intimates outside of markets is transactional and so forth. These would be species of what Viviana Zelizer calls “nothing-but” arguments that deny any meaningful distinction between sex work and non-market intimacy. *See* VIVIANA A. ZELIZER, THE PURCHASE OF INTIMACY 207 (2005); *see also infra* note 88 and accompanying text. Because I do think sex performed in markets is different, and in need of different regulation, than sex outside of markets, I resist this effort to collapse the two and employ different language. On the other side, abolitionists, of course, will reject my language of voluntary markets. *See, e.g.,* SHEILA JEFFREYS, THE INDUSTRIAL VAGINA: THE POLITICAL ECONOMY OF THE GLOBAL SEX TRADE 8–9, 15–37 (2009) (arguing feminist embrace of language of labor and voluntarism to characterize sex work normalizes injuries of prostitution and capitulates to “economic ideology of neo-liberalism”).

The Article proceeds in three parts. Part I explores the discourse and debate over professional sex, teasing out latent, unexplored tensions among advocates of professional sex as labor. It summarizes the abolitionist position, often identified as the dominant feminist position. It then turns its attention to sex work advocates, exploring the discourse in detail to reveal a contradiction between those who emphasize the *sexual* part of sex work to exempt it from state regulation, versus those who emphasize the *labor* part of sex work and see this as a way to demand *greater* state regulation of sexual commerce. While both camps view “work” as a legitimizing lens, they ultimately envision starkly different, even contradictory, relationships between sexual commerce and the state. In the end, while both may urge decriminalization, what I call assimilationists and erotic exceptionalists are quite opposed.

Part II shows how the assimilationist rhetoric of sex as “just” labor can be overly simplistic and terribly misleading. From a policy perspective, insisting that commercial sex merely be assimilated into legal work invokes a single, idealized workplace that ignores the starkly different manifestations of work and its regulation in post-industrial global economies. This Part explores how employment, labor, and discrimination law regulate the various hazards, risks, conflicts, and disputes that arise in the modern workplace. In the process, it exposes the complete diversity of work and its regulation. Although assimilationists’ claims rest on a monolithic vision of how “work” is regulated, their claim to a universal workplace or regulatory structure is a miscue from how labor law actually functions. Workplace regulation today is varied, differential, instrumental, and deeply contested.

The final third of the Article then turns its attention to whether sex work *could be* effectively regulated, once we break from both assimilationism and exceptionalism. Part III completes the break and tackles the regulatory question in three moves. First, it stresses the extent to which sex workplaces are *not* like most workplaces. *Most* workplaces are not characterized by the particularities of sex work this Part identifies: the culture of alcohol and drinking and drugs; the homosocial “mob” context; the blurred line between renegotiations and sexual assaults; a similarly blurred line between on-site/off-site (or on-duty/off-duty) identities; and employer expectations of “free” services that can combine to make commercial sex more dangerous for workers than most other forms of labor. Crucially, the danger is coming largely from customers and management, rather than from machines or mine collapse. Second, this Part analyzes the ways that sexual services differ from *each other*, thereby posing radically different regulatory challenges. I propose using a “sexual geography” approach to categorize and regulate sex work according to the *risk* different institutional geographies pose to worker health and safety. Third, this Part delves into one key aspect of sex work that would prove tough—perhaps impossible—to regulate: discrimination in customers’ preferences. Many assimilationists find the idea of sex employers empowering patrons’ racial or

other bodily preferences offensive; they urge that it constitutes impermissible discrimination. This Article questions whether racial discrimination can be distinguished from gender and other forms of discrimination in sex markets. I pursue this inquiry to show that assimilationists' embrace of antidiscrimination laws results from an exclusive focus on labor and an analytical neglect of the demand side of erotic markets. Ultimately, Part III concludes that the assimilationist "sex work is just work" mantra overlooks characteristics of sex work that distinguish it from other forms of work, and the corollary regulatory issues that sex work poses.

In the end, this Article hopes to break scholarly advocacy for sex markets out of the first-generation debate of defending against abolitionism and into a second-generation set of debates over what regulation should look like. It adopts a hybrid version of primarily erotic assimilationism but with some exceptionalism, to recommend a set of policies. My true goal, though, is to provoke not only feminists but also labor, administrative, and racial scholars to push back and, in the process, articulate their own conceptual and governance models.

I.

DISCOURSES OF SEXUAL LABOR: ABOLITIONISM, ASSIMILATIONISM, AND EXCEPTIONALISM

Sex work is not alone in generating legal, political, and social controversy. The commodification of activities conventionally associated with women—care, sex, and reproduction—has long generated debate and controversy,²⁵ especially among those whose first principles are feminist.²⁶ While subject to much critique, care activities have long been heavily commodified;²⁷ however, much of this activity is unregulated, or, more

25. As Viviana Zelizer observes:

Intimate care sentimentalizes easily, for it calls up all the familiar images of altruism, community, and unstinting, noncommercial commitment. From there it is only a step to a notion of separate spheres of sentiment and rationality, thence to the hostile worlds supposition that contact between the personal and economic spheres corrupts both of them.

ZELIZER, *supra* note 24, at 207 (2005); *see also* RETHINKING COMMODIFICATION: CASES AND READINGS IN LAW AND CULTURE (Martha M. Ertman & Joan C. Williams eds., 2005); Kimberly D. Krawiec, *Show Me the Money: Making Markets in Forbidden Exchange* (Duke Pub. Law & Legal Theory Paper No. 228, 2009), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1327893 (characterizing these as "forbidden markets").

26. That is, those committed to sex equality, gender and sex as axes of distributive justice, and destabilizing the sex/gender system. There are, of course, many contested definitions of feminism. I adopt and build on Gayle Rubin's classic formulation that feminism is dedicated to destabilizing the sex/gender system. Gayle Rubin, *Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality*, in PLEASURE AND DANGER: EXPLORING FEMALE SEXUALITY (Carole S. Vance ed., 1984) (discussing sexuality as a political force similar to gender that is used to create and maintain hierarchies of power and oppression of nonconformists).

27. *See generally* Deborah Stone, *For Love Nor Money: The Commodification of Care*, in RETHINKING COMMODIFICATION, *supra* note 25, at 271.

precisely, occurs in what Elizabeth Emens has called a “litigation-free zone.”²⁸ Reproduction is currently in a gray area of commodification and regulation, with increased technological capacities generating much debate over the legitimacy of such markets and their regulation.²⁹ The last of the troika, commodified sex, and more specifically, sex markets, is the subject of this Article, and has been particularly contentious.³⁰

Although commodification pervades sexual intimacy,³¹ social condemnation of sexual labor has a long history.³² Sex markets are diverse, and so is the states’ treatment of them. Almost everywhere in the United States,

28. Describing what she calls “intimate discrimination,” Emens says:

[It] should remain a litigation-free zone. But this does not mean it should be, or could be, a law-free zone. On the contrary, law should take account of its role in intimate discrimination at a structural level and work to eliminate burdens and biases that currently shape who has access to intimate relationships and on what terms.

Elizabeth F. Emens, *Intimate Discrimination: The State’s Role in the Accidents of Sex and Love*, 122 HARV. L. REV. 1307, 1311 (2009) (emphasis omitted).

29. For example, contrast Michigan, where statutes prohibit enforcement of surrogacy contracts and parenthood defaults to the birth mother, against California, where both the judiciary and legislature provide mechanisms to enforce such agreements. Compare MICH. COMP. LAWS § 722.857 (2014) (penalties of up to five years in prison for participants in a gestational surrogacy arrangement involving compensation), with *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993) (enforcing the surrogacy contract and holding that the couple that initiated the creation of the child are the intended and legal parents). See also CAL. FAM. CODE § 7961 (2012) (regulating “surrogacy facilitator[s]” and payment/escrow procedures). For discussion of the legitimacy of surrogacy agreements, see, for example, Karen Busby & Delaney Vun, *Revisiting the Handmaid’s Tale: Feminist Theory Meets Empirical Research on Surrogate Mothers*, 26 CAN. J. FAM. L. 13, 49 (2010) (presenting empirical data to challenge claims about the vulnerability and exploitation of women who agree to gestate pregnancies for others); Seema Mohapatra, *Achieving Reproductive Justice in the International Surrogacy Market*, 21 ANNALS HEALTH L. 191 (2012) (responding to rise of reproductive tourism); Elizabeth S. Scott, *Surrogacy and the Politics of Commodification*, 72 LAW & CONTEMP. PROBS. 109, 111 (2009) (noting how the “moral panic” about commodification sparked by Baby M has dissipated over time); Marjorie Maguire Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Equality*, 1990 WIS. L. REV. 297. Elizabeth Bartholet condemns reproductive technology in different terms, as devaluing children in need of adoption. ELIZABETH BARTHOLET, *FAMILY BONDS: ADOPTION, INFERTILITY, AND THE NEW WORLD OF CHILD REPRODUCTION* 30–38 (1999).

30. Kathy Abrams provides a good summary of the “sex wars” of the 1980s and 1990s and their effects on law. Kathryn Abrams, *Sex Wars Redux: Agency and Coercion in Feminist Legal Theory*, 95 COLUM. L. REV. 304, 307–24 (1995).

31. See generally RETHINKING COMMODIFICATION, *supra* note 25; ZELIZER, *supra* note 24.

32. In explaining the widespread repugnance of commodified intimacy, including sex work, Zelizer notes that it is rarely the actual commodification of intimacy that troubles us, as economics plays a large role in intimacy, but the “payment systems” that are employed. ZELIZER, *supra* note 24, at 28. In the case of professional sex, or cash for sex, abolitionists condemn the mixing as what Zelizer calls “hostile worlds.” See *id.* at 20–29. This “hostile worlds” approach, which “frequently involve[s] questions of justice,” rests on and reinforces the idea of “intimacy as a fragile flower that withers on contact with money and economic self-interest.” *Id.* at 5, 40. Opposition to sex work often rests on the belief that “intimacy corrupts the economy and the economy corrupts intimacy.” *Id.* at 3. Prostitution is a classic example of economics corrupting intimacy. Ironically, Zelizer contends that the contamination hypothesis draws on nineteenth-century ideologies of domesticity and separate spheres, which have been much criticized by feminists. See *id.* at 22–24.

purchase of actual sex is currently criminalized,³³ but filming and distribution of sex acts (i.e., pornography), erotic performances which may include sexual acts performed on customers (e.g., lap dances), erotic massages, and sexual interactions that do not involve touching (e.g., internet and phone sex) are all legal. While sex markets and their regulation are diverse, the stigma associated with them is not. Neither commodified reproduction nor commodified care entail the social and moral reprobation that commodified sex does.³⁴

For all of this—the political controversy, the complexity of how different sex markets are defined and regulated, the connection to other areas of engendered commodification—one might imagine that the scholarly debate over regulating sex work would be highly evolved. Yet, this Part of the Article shows that, while feminist opponents of sex markets have developed increasingly refined theoretical analyses and policy recommendations, those who advocate for sex markets remain seemingly stuck in a regulatory stall. This Part starts by summarizing the first-generation debate, then focuses its attention on the pro-sex-work camp, elaborating its sophisticated defenses of sex markets, but showing how, unlike their abolitionist counterparts' unified regulatory claims, sex work advocates' analytic positions lead to contradictory regulatory outcomes.

A. *The First-Generation Debate over Professional Sex*

Interestingly, many self-identified feminists join conservatives in opposing legal markets for sex. However, while conservatives typically target both the sale and purchase of sex, many feminists urge an asymmetric model that would criminalize only its purchase.³⁵ In addition, while conservatives

33. The United States leaves the status of prostitution to the individual states, but it is criminalized everywhere except for eleven rural counties in Nevada, with populations of less than 700,000. *See supra* note 11 and accompanying text. Although prostitution is itself illegal, Zelizer notes that “in practice courts and judges have not maintained a simple dichotomy of legitimate, nonmonetary sexual relations versus illegal monetized prostitution.” ZELIZER, *supra* note 24, at 148. Instead, they carefully parse how and when commodified relations are permitted within intimate connections. *See id.* at 148–51.

34. While people debate the ethics of commodified care work, critics do not generally condemn care providers as immoral, unethical, criminal people. Similarly, most tend to see reproductive surrogates as themselves victims of reproductive markets and the wealthy. Sex workers, however, are often viewed as immoral, bad people. *See, e.g.*, BERNSTEIN, *TEMPORARILY YOURS*, *supra* note 23, at 7 (“[P]rostitution has . . . been the paradigmatic example of the moral difficulties that ensue when bodily attributes are commodified for a wage.”); *see also* Martha C. Nussbaum, “*Whether from Reason or Prejudice*”: *Taking Money for Bodily Services*, 27 J. LEGAL STUD. 693 (1998) (comparing prostitution to other forms of labor to question extreme opposition to prostitution.).

35. *See, e.g.*, Janie A. Chuang, *Rescuing Trafficking from Ideological Capture: Prostitution Reform & Anti-Trafficking Law & Policy*, 158 U. PA. L. REV. 1655, 1669 (2010) (“Meanwhile, whether because they are victims of male patriarchy or because they are victims of social deviance, women prostitutes should not be penalized themselves but instead should be the target of rescue and rehabilitation efforts.”); Michelle Madden Dempsey, *Sex Trafficking and Criminalization: In Defense of Feminist Abolitionism*, 158 U. PA. L. REV. 1729, 1776–77 (2010). This is the model adopted by Sweden. *See supra* notes 6, 12, and accompanying text.

typically condemn professional sex in moral terms, feminists do so in a different register. For instance, many feminists characterize commercial sex as abusive of women³⁶ and a human rights violation.³⁷ They reject it as a legitimate form of labor; it is an inherently “degraded exchange.”³⁸ Instead they seek its prohibition and eradication. Legal scholar Catharine MacKinnon³⁹ and philosopher Carol Pateman⁴⁰ both focus on the installation of patriarchal

Complicating this argument, though, Levitt and Dubner observe that “most governments prefer to punish the people who are supplying the goods and services rather than the people who are consuming them,” even though the resulting scarcity inevitably raises prices, which “entices more suppliers to enter the market.” They speculate that a more effective mechanism would be to target demand in a different way: if “men convicted of hiring a prostitute were sentenced to castration, the market would contract in a hurry.” STEVEN D. LEVITT & STEPHEN J. DUBNER, *SUPERFREAKONOMICS: GLOBAL COOLING, PATRIOTIC PROSTITUTES, AND WHY SUICIDE BOMBERS SHOULD BUY LIFE INSURANCE* 25 (2009).

36. One of the most famous opponents, Kathleen Barry, explains:

This misogyny, the use of prostitutes to act out one’s contempt for the lower and degraded sex, is the single most powerful reason why prostitution has always been considered a cultural universal—the oldest profession, the indestructible institution, the necessary social service. It intersects with the domination of women at all levels of society.

KATHLEEN BARRY, *FEMALE SEXUAL SLAVERY* 137 (1984); *see also* KATHLEEN BARRY, *THE PROSTITUTION OF SEXUALITY* 24, 37 (1995) (“[W]hile pornographic media are the means of sexually saturating society, while rape is paradigmatic of sexual exploitation, prostitution, with or without a woman’s consent, is the institutional, economic, and sexual model for women’s oppression.”); JEFFREYS, *supra* note 24, at 1 (“[T]his growing market sector [of prostitution] needs to be understood as the commercialization of women’s subordination”); Andrea Dworkin, *Prostitution and Male Supremacy*, Speech at the University of Michigan Law School Symposium: *Prostitution: From Academia to Activism* (Oct. 31, 1992) (rejecting prostitution as male dominance).

37. “The abolitionist position treats all prostitution as a problem of human rights, to be condemned uncompromisingly, like slavery, and never to be equated with acceptable practices like work, or with legitimating ideas like consent and contract.” Jane E. Larson, *Prostitution, Labor, and Human Rights*, 37 U.C. DAVIS L. REV. 673, 680 (2004).

38. Elizabeth Bernstein, *What’s Wrong with Prostitution? What’s Right with Sex Work? Comparing Markets in Female Sexual Labor*, 10 HASTINGS WOMEN’S L.J. 91, 109 (1999). Some contend that legalizing sex markets “effectively places the government in the role of pimp.” Carrie Benson Fischer, *Employee Rights in Sex Work: The Struggle for Dancers’ Rights as Employees*, 14 LAW & INEQ. 521, 552 (1996); *see also* Shulamit Almog, *Prostitution as Exploitation: An Israeli Perspective*, 11 GEO. J. GENDER & L. 711, 736 (2010) (“The Victoria government, apparently motivated by the profits brought in by the prostitution market, is ignoring the accumulating evidence regarding the sorry situation of women in the ‘sex industry,’ the growing violence towards them and the normalization of this violence.”); Anne McClintock, *Sex Workers and Sex Work: Introduction*, 37 SOC. TEXT 1, 5 (1993) (“Under legalization . . . [t]he state becomes a licit pimp . . .”).

39. “Women are prostituted precisely in order to be degraded and subjected to cruel and brutal treatment without human limits; it is the opportunity to do this that is exchanged when women are bought and sold for sex.” Catharine A. MacKinnon, *Prostitution and Civil Rights*, 1 MICH. J. GENDER & L. 13, 13 (1993); *see also* CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 168 (1989) (“Because the stigma of prostitution is the stigma of sexuality is the stigma of the female gender, prostitution may be legal or illegal, but so long as women are unequal to men and that inequality is sexualized, women will be bought and sold as prostitutes, and law will do nothing about it.”); CATHARINE A. MACKINNON, *WOMEN’S LIVES, MEN’S LAWS* 159 (2005) (“Perhaps when women in prostitution sustain the abuse of thousands of men for economic survival for twenty years, this will, at some point, come to be understood as nonconsensual as well.”).

40. “When women’s bodies are on sale as commodities in the capitalist market, the terms of the original contract cannot be forgotten; the law of male sex-right is publicly affirmed, and men gain

power in the prostitution contract. Kathleen Barry puts it more strongly: “The sex men buy in prostitution is the same sex that they take in rape—sex that is disembodied, enacted on the bodies of women who, for the men, do not exist as human beings.”⁴¹ Legal philosopher Margaret Radin makes a different point: commodified sex cannot co-exist with our aspirations for its decommodified form.⁴² These insightful and influential feminists conclude that the injuries and harms of commercial sex warrant its continued criminalization, and many contend the state does not do enough to eradicate it.⁴³ Indeed, for some, ending prostitution is “feminist abolitionism.”⁴⁴ Some female abolitionists limit their criticisms to prostitution, while others offer all-encompassing criticisms of commercial sex more generally.

Since the 1990s, the rise of human trafficking and sex trafficking in particular has only heightened feminist abolitionism. Abolitionist feminists have joined forces with human rights activists to draw attention to the spread of sex trafficking around the globe. They have successfully created policy in much of Western Europe that criminalizes the purchase of sex, but not its sale, using a model that the sellers of sex are victims, while purchasers are criminals. Analytically, this model aligns perfectly with antitrafficking initiatives, which similarly criminalize traffickers but not their victims. Abolitionists have successfully persuaded European governments to view all sex workers as the

public acknowledgment as women’s sexual masters—that is what is wrong with prostitution.” CAROLE PATEMAN, *THE SEXUAL CONTRACT* 208 (1988); *see also* Laurie Shrage, *Should Feminists Oppose Prostitution?*, 99 *ETHICS* 347, 347 (1989) (“[M]ost feminists find the prostitute’s work morally and politically objectionable. In their view, women who provide sexual services for a fee submit to sexual domination by men, and suffer degradation by being treated as sexual commodities.”).

41. BARRY, *PROSTITUTION OF SEXUALITY*, *supra* note 36, at 37.

42. *See* MARGARET JANE RADIN, *CONTESTED COMMODITIES* 132–36 (1996); *see also* ELIZABETH ANDERSON, *VALUE IN ETHICS AND ECONOMICS* 150–58 (1993) (arguing commodified sex has negative influences on gratuitous sex); Elizabeth S. Anderson, *Is Women’s Labor a Commodity?*, 19 *PHIL. & PUB. AFF.* 71 (1990); Margaret Jane Radin, *Market-Inalienability*, 100 *HARV. L. REV.* 1849, 1915–17 (1987) (characterizing prostitution as a double bind where both commodification and non-commodification can be harmful).

43. *See* Bernstein, *What’s Wrong*, *supra* note 38, at 93 (“Radical feminists usually have argued that legalization is the state’s official endorsement and the ultimate patriarchal expression of ‘the traffic in women.’”).

44. *See, e.g.,* Dempsey, *supra* note 35, at 1733 (“Feminist abolitionism, as I understand it, is action taken in an effort to end sex trafficking that is motivated by a belief that such trafficking harms women in ways tending to sustain and perpetuate patriarchal structural inequalities.”). Dempsey emphasizes “the ways in which feminist abolitionism is importantly distinct from conservative and reactionary flavors of abolitionism.” *Id.* at 1739. Elizabeth Bernstein provides a comprehensive and insightful discussion of the neo-abolitionist advocacy movement. *See* Elizabeth Bernstein, *Militarized Humanitarianism Meets Carceral Feminism: The Politics of Sex, Rights, and Freedom in Contemporary Antitrafficking Campaigns*, 36 *SIGNS* 45 (2010) (arguing feminist and religious evangelical abolitionists are united not just by conservative sexual ideals but also by shared commitments to carceral paradigms of justice and militarized humanitarianism as the main mode of state engagement); Elizabeth Bernstein, *The Sexual Politics of the “New Abolitionism,”* 18 *DIFFERENCES* 128 (2007) (focusing on the converging factors underpinning the neo-abolitionist movement).

equivalent of trafficked persons. In sum, opposition to sex markets has a long and rich feminist pedigree. And their arguments are becoming more analytically refined and honed as abolitionists engage with the antitrafficking movement.

In contrast, the pro-sex work view has evolved into several distinct, but often overlapping theories that argue for the legitimacy of professional sex. Some advocates do so from a sex positive perspective, suggesting that “[t]he arguments that sex workers are making to assimilate their work into the wage market appeal to a sexualized femininity that is something other than a choice between criminalized and maternalized sex or a choice between terrorized and maternalized sex.”⁴⁵ Relatedly, some contend that decriminalized sex exchanges have the potential to subvert patriarchy, challenging the social mechanisms by which some women are socially slotted and raised to be “good girls.”⁴⁶ In this conceptualization, commercial sex becomes a “category of radical sexual identity.”⁴⁷ Others argue that all women bargain and “work” for sex, a claim that dates back to nineteenth-century critiques of the dichotomy between marriage and prostitution as a false one.⁴⁸ Still others root their

45. Mary Joe Frug, *A Postmodern Feminist Legal Manifesto (An Unfinished Draft)*, 105 HARV. L. REV. 1045, 1059 (1992); see also WENDY CHAPKIS, LIVE SEX ACTS: WOMEN PERFORMING EROTIC LABOR 30 (1997) (prostitution can be a “site[] of ingenious resistance and cultural subversion”); Aziza Ahmed, *Feminism, Power, and Sex Work in the Context of HIV/AIDS: Consequences for Women’s Health*, 34 HARV. J.L. & GENDER 225, 230 (2011) (citing Carole S. Vance, *Pleasure and Danger: Toward a Politics of Sexuality*, in PLEASURE AND DANGER 1 (Carole S. Vance ed., 1992)); Rosalind Dixon, *Feminist Disagreement (Comparatively) Recast*, 31 HARV. J.L. & GENDER 277, 282 (2008) (“Sex-positive feminists challenge the premises of dominance feminism. They argue that while sex might in some cases be a source of danger for women, it is also a potentially important site of pleasure, fulfillment, and even power.” (footnotes omitted)); Carisa R. Showden, *Theorising Maybe: A Feminist/Queer Theory Convergence*, 13 FEMINIST THEORY 3, 11 (2012) (linking feminism and queer theory to call for a “modest sex positivism” that can support prostitution).

46. Bernstein, *What’s Wrong*, *supra* note 38, at 112 (discussing the sex work advocacy group COYOTE, and concluding that while “there is nothing transgressive about one who has been socially born and raised to be a ‘bad girl’ and remaining one . . . COYOTE’s members were born and raised to be ‘good girls,’ and as prostitutes, they have arguably crossed a certain line”).

47. *Id.*

48. This argument has a long pedigree, dating back to nineteenth-century gender activists and earlier. See, e.g., MARY WOLLSTONECRAFT, A VINDICATION OF THE RIGHTS OF WOMAN WITH STRICTURES ON POLITICAL AND MORAL SUBJECTS 338 (1796) (calling marriage “legal prostitution”); NAT’L WOMAN SUFFRAGE ASS’N, REPORT OF THE INTERNATIONAL COUNCIL OF WOMEN 285 (1888) (“[W]hen prostitution ceases inside of marriage it will disappear outside.”); see also JEFFREYS, *supra* note 24, at 40–44 (offering genealogy of feminists’ equations of marriage with prostitution). More recent invocations include PATEMAN, *supra* note 40, at 123 (“The husband’s conjugal right is the clearest example of the way in which the modern origin of political right as sex-right is translated through the marriage contract into the right of every member of the fraternity in daily life.”), and Prabha Kotiswaran, *Wives and Whores: Prospects for a Feminist Theory of Redistribution*, in SEXUALITY AND THE LAW: FEMINIST ENGAGEMENTS 283 (Vanessa E. Munro & Carl F. Stychin eds., 2007). Elizabeth Bernstein’s ethnography of prostitutes found this sentiment alive and well. According to one San Francisco sex worker: “All fucks are tricks anyway, and you’re always doing it for the money. If you sleep with your husband and later he gives you \$50, it amounts to the same thing.” BERNSTEIN, TEMPORARILY YOURS, *supra* note 23, at 51. A classic example linking marriage’s mercenary element with prostitution comes from Jenny Livingston’s documentary on drag queens in

support for sex markets in liberalism, arguing that women should have the agency to determine their own trade-offs after discerning and evaluating their options.⁴⁹ In fact, one sociologist finds that, ironically, prostitution may be the first time some women feel empowered regarding sex, including to refuse it.⁵⁰ Those who embrace what they conceive of as erotic autonomy criticize criminal law for labeling sex workers as sex *offenders*, despite the consent of both parties.⁵¹ Most recently, some advocates for transactional sex have made

New York City: “I feel like, if you’re married? A woman, in the suburbs, a regular woman, if you want your husband to buy a washer and dryer set, I’m sure she’d have to go to bed with him, to give him something he wants, to get what she wants. So, in the long run, it all ends up the same way.” PARIS IS BURNING (Venus Xtravaganza 1990); *see also* ZELIZER, *supra* note 24, at 125 (describing how some professional sex workers view nonprofessionals as gullible). A slightly different view is expressed by Laura Kipnis, who, in a chapter titled “Love’s Labors,” contends that normative, marital love and intimacy entails a significant amount of emotional labor and participation in an ongoing commerce of affect. LAURA KIPNIS, AGAINST LOVE: A POLEMIC 18–27 (2003); *cf.* JEFFREYS, *supra* note 24, at 38–61 (showing from the abolitionist side how child, forced, and trafficked marriages can literally be prostitution).

49. One activist/scholar contends that feminist opposition to sex work flies in the face of feminism’s insistence on women’s agency in other matters regarding their bodies:

This hypocrisy is evident in the abortion debate. Many feminists champion a woman’s right to choose—as long it is abortion that is being discussed. But let someone suggest that women have a right to sell their bodies and suddenly these women no longer advocate choice. Prostitution must be the same issue for feminists as abortion. It is the right to choice. Both involve the right of a woman to control what happens to her body. If one claims self-ownership as the basis of a woman’s right to choose an abortion, then the logical implication of such ownership cannot be limited to abortion. If a woman owns her body, she should be able to choose to do with it what she will.

Norma Jean Almodovar, *For Their Own Good: The Results of the Prostitution Laws as Enforced by Cops, Politicians and Judges*, 10 HASTINGS WOMEN’S L.J. 119, 122 (1999) (footnotes omitted). Kathy Abrams offers a wonderfully nuanced discussion of women’s “partial agency” in these and related contexts. Abrams, *supra* note 30, at 350–76.

50. Bernstein, *What’s Wrong*, *supra* note 38, at 105 (“Prostitution may, nevertheless, be experienced by some of these women as both an economically and sexually liberating option. Given the range of economic and sexual alternatives in a society in which female sexuality is already appropriated, in which rape, incest, and forced sex with boyfriends have been the routine litany of their coming of age, prostitution may ironically be the first time that they have experienced the notion of “consent” as at all meaningful.” (footnotes omitted)); *see also* BERNSTEIN, TEMPORARILY YOURS, *supra* note 23, at 180 (“[F]or many women, the quid pro quo of cash for sex made sex work *less* morally troubling than other economic options, and *more* personally empowering than other forms of heterosexual intimacy.”). This dynamic holds true for dancers, as well. *See, e.g.*, Bernadette Barton, *Dancing on the Möbius Strip: Challenging the Sex War Paradigm*, 16 GENDER & SOC’Y 585, 590–91 (2002) (quoting dancers’ descriptions of feeling empowered by their work).

51. *See, e.g.*, Almodovar, *supra* note 49, at 123 (“It is the continued threat of arrest, extortion and forced sex with the police that is more emotionally damaging—and violative of human rights and dignity—than the exchange of money for otherwise lawful activity. Therein lies the true source of degradation and absence of choice. For mutually agreed upon financial transactions it should not matter to anyone outside the relationship how many times sexual activity occurs, or with how many sexual partners.”); Law, *supra* note 11, at 526 (“The exchange of sexual services for money is the only form of consensual adult sexual activity that is systematically subject to criminal sanctions in the United States at the end of the twentieth century.”). In this sense, they invoke *Lawrence v. Texas*-like analyses over the scope of sexual autonomy and what the state should criminalize. But, I point out that sex offenders can be forced to register, which then entails state and private surveillance, significant social stigma, and restricted movement.

arguments from the “demand” side, pointing out that sex markets may be the only chance that the disabled and other sexually marginalized groups have for non-autoerotic sex.⁵²

Finally, some make anti-exceptionalism arguments, that professional sex is just like any other form of labor and should be respected and regarded as such. Of course, these arguments are not mutually exclusive, and there is significant overlap.⁵³ Moreover, the increasing international attention to human trafficking has deepened the stakes for both sides. The rise of both sex trafficking and antitrafficking advocacy has put substantial pressure on the pro-sex work position. Many abolitionists make persuasive cases that “voluntary” commercial sex cannot be meaningfully disaggregated from sex trafficking.⁵⁴ Abolitionists’ denial of a sphere of autonomous sexual transactions has caused the opposing camp to double-down on their claims that commercial sex can legitimately be labor. The remainder of this Article will explore the discourse of professional, transactional sex as legitimate labor, uncovering its theoretical sophistication, but also showing that, unlike abolitionists, this camp is in regulatory stall.

B. *The Sex-as-Labor Claim*

Grounded in labor discourse, the term “sex worker” originated in the 1970s to legitimate professional sex in the face of the then-dominant feminist thought that objected to prostitution as exploitation and sought to abolish it and “rescue” the women who engaged in it.⁵⁵ Unlike earlier reform efforts, based on tolerating prostitution either to preserve men’s sexual privilege or to end women’s victimization, the new discourse of sex-as-labor emerged from the prostitutes’ rights social movement.⁵⁶ Sex work emerged in this context as “a

52. See *infra* Part III.C.2. These arguments that intimate markets empower people with disabilities is also the case for commodified reproduction, or surrogacy. See generally JOHN A. ROBERTSON, CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES (1994) (arguing for a “right” to use assisted reproduction for those who cannot otherwise reproduce); Lindsey Coffey, *A Rights-Based Claim to Surrogacy: Article 23 of the Convention on Rights of Persons with Disabilities*, 20 MICH. ST. INT’L L. REV. 259 (2012).

53. In particular, erotic autonomy overlaps with labor discourse.

54. See *supra* note 44 for sources summarizing abolitionism and trafficking.

55. The term is attributed to Carol Leigh, an activist for prostitutes and member of COYOTE. Oliver J. McKinstry, *We’d Better Treat Them Right: A Proposal for Occupational Cooperative Bargaining Associations of Sex Workers*, 9 PA. J. LAB. & EMP. L. 679, 683 n.18 (2007). Many credit the 1975 strike of prostitutes in France as the start of a movement to conceive of sex bargainers’ rights in the language of labor. Sylvia Law, however, documents an earlier strike in Hawaii during World War II, in which prostitutes used their alliances with the military to resist and renegotiate legal restrictions and police surveillance. Law, *supra* note 11, 563–64. For a comparison of the relative weakness of the prostitute rights movement with the more successful contemporaneous gay and abortion rights movements, see generally Ronald Weitzer, *Prostitutes’ Rights in the United States: The Failure of a Movement*, 32 SOC. Q. 23 (1991).

56. See, e.g., Leigh, *supra* note 11, at 59 (“The current movement includes a recognition of the rights of prostitutes to autonomy and self-regulation.”). For discussion of “rescue” criticisms of prostitution, see, for example, BERNSTEIN, TEMPORARILY YOURS, *supra* note 23, at 8–10.

term that suggests we view prostitution not as an identity—a social or psychological characteristic . . . often indicated by ‘whore’—but as an income-generating activity or form of labor.”⁵⁷ Elizabeth Bernstein adds that while “prostitute” connotes “shame, unworthiness or wrongdoing,” in contrast, the term “sex-worker” implies “an alternative framing that is ironically both a radical sexual identity (in the fashion of queer activist politics) and a normalization of prostitutes as ‘service workers’ and ‘care-giving professionals.’”⁵⁸ More recently, these advocates also derive their sex-as-labor claim from human rights discourse, which guarantees choice of occupation as a right.⁵⁹

Others embrace the term “sex worker” to invoke more than just an occupational association. For instance, influential theorist and activist Kamala Kempadoo endorses “sex worker,” but analytically substitutes “gender” for “sex.” In her view, the denomination sex worker “insists that working women’s common interests can be articulated within the context of broader (feminist) struggles against the devaluation of ‘women’s’ work and gender exploitation within capitalism.”⁶⁰ Relatedly, some urge the term to call attention to the multiplicity of people—cisgender, transgender, heterosexual, gay or queer, etc.—who sell sex.⁶¹ Thus, some adopt “sex worker” to invoke identitarian or coalitional discourses and critiques.

Overwhelmingly, though, those who endorse the sex worker rubric do so to embrace a discourse of transactional sex as legitimate labor. Hence, the website for *Live Nude Girls Unite!*, a documentary about erotic dancers’ efforts to organize, takes care to proclaim: “This site is about a labor film.”⁶²

Yet, among those who advocate professional sex-as-labor there is a deep split, the implications of which have gone largely unnoticed. Universally, the sex-as-labor contingent urges decriminalization of professional sex, contending

57. Kamala Kempadoo, *Introduction: Globalizing Sex Workers Rights*, in *GLOBAL SEX WORKERS: RIGHTS, RESISTANCE, AND REDEFINITION 3* (Kamala Kempadoo & Jo Doezema eds., 1993).

58. Bernstein, *What’s Wrong*, *supra* note 38, at 111.

59. Perhaps unsurprisingly, both sides use human rights frameworks. While sex work advocates urge a right to work and privacy guarantees, abolitionists invoke a different set of norms against sexual discrimination, state-sanctioned patriarchy, and rights to be free from inter-personal violence. The dominant human rights agencies have taken a strong stand against forced prostitution and trafficking, but have largely remained neutral on the question of prostitution itself. *See, e.g.*, HUMAN RIGHTS WATCH, *THE HUMAN RIGHTS WATCH GLOBAL REPORT ON WOMEN’S HUMAN RIGHTS 196–99* (1995); Nussbaum, *supra* note 34, at 710 (noting human rights organizations have focused attention on forced sexual labor and also on alleviating material conditions that give rise to prostitution).

60. Kempadoo, *supra* note 57, at 8; *see also* Tinsman, *supra* note 1, at 241, 245 (contending “sex is central to the way in which all women are exploited in all types of work” and hence “all types of women’s work should be treated alike under the law”).

61. *See* McKinstry, *supra* note 55, at 683–84.

62. LIVE NUDE GIRLS UNITE, <http://web.archive.org/web/20050511032019/http://www.livenudegirlsunite.com/index.html> (last visited Aug. 3, 2015) (accessed by searching the Wayback Machine internet archive).

that criminalization results in stigmatization, marginalization, and punishment.⁶³ They observe that the long-standing criminalization of markets for sex has invited both organized crime and police corruption, while also heightening the vulnerability and isolation of those who transact sex.⁶⁴ Criminalizing prostitutes' labor also serves as an obstacle to their reporting sexual assaults, enforcing their consensual contracts for transactional sex, and even accessing public health services.⁶⁵ While they unanimously endorse lifting criminal bans on professional sex, sex-as-labor advocates disagree upon whether there is a further role for the state in regulating this market. Frequently, this is cast as a disagreement between those who limit their arguments to calls for decriminalization and those who urge full legalization and regulation.⁶⁶ Scholars tend to overlook, however, the extent to which these positions actually embed contradictory views of sexual labor itself.

1. Decriminalization, or Erotic Exceptionalism

Emblematic of the decriminalization-without-regulation position, feminist theorist Anne McClintock states: "A central tenet of the prostitution movement is the demand that sex workers be given the right to exchange sexual services on *their* terms and on *their* conditions, not on the terms of the state, the police, pimps, male managers, or clients."⁶⁷ Indeed, she contends "most prostitutes

63. Prabha Kotiswaran points out how criminal, prohibitory laws are fetishized by both sides of the decriminalization debate. "While the normative status of sex work remains deeply contested, abolitionists and sex work advocates alike display an unwavering faith in the power of criminal law; for abolitionists, strictly enforced criminal laws can eliminate sex markets, whereas for sex work advocates, decriminalization can empower sex workers." Prabha Kotiswaran, *Born unto Brothels—Toward a Legal Ethnography of Sex Work in an Indian Red-Light Area*, 33 LAW & SOC. INQUIRY 579, 579. In sum, "[b]oth camps thus view the criminal law as having a unidirectional repressive effect on the sex industry." *Id.* at 613. *But see* Nussbaum, *supra* note 34, at 708 ("Criminalization and regulation are not straightforwardly opposed; they can be closely related strategies.").

64. Kathleen Barry notes that:

Separating women from their neighborhoods into distinct red-light districts and brothels [as a result of the Contagious Diseases Acts] identified the women as prostitutes more specifically and thereby made their ability to leave prostitution much more difficult. . . . In turn, this social and geographic isolation facilitated the criminal organization of prostitution, compete with pimps, procurers, and organized brothels.

BARRY, PROSTITUTION OF SEXUALITY, *supra* note 36, at 111.

65. *See, e.g.*, Kate DeCou, *U.S. Social Policy on Prostitution: Whose Welfare Is Served?*, 24 NEW ENG. J. CRIM. & CIV. CONFINEMENT 427, 438–39 (1998) ("[D]ue to criminalization, prostitutes on the street are isolated from health and social services.").

66. On the distinction between decriminalization and full legalization, see *supra* note 16.

67. McClintock, *supra* note 38, at 2. McClintock also claims, "Removing sex workers' fundamental right to choose—whether to work, how to work, when to work, and where to work—is a flagrant infringement of their basic working rights, their integrity, and their humanity, not a universal and inherent feature of the sexual exchange." *Id.* at 6 (emphasis omitted); *see also* Chi Mgbako & Laura A. Smith, *Sex Work and Human Rights in Africa*, 33 FORDHAM INT'L L.J. 1178, 1193 (2010) ("Sex workers' ability to control their lives is most undermined by state regulations that criminalize, penalize, stigmatize, and therefore isolate sex workers, rendering them unable to counter harassment and abuse.").

regard legalization as legalized abuse.”⁶⁸ In this view, not only criminalization, but also legalizing regulations lead to sex workers’ further vulnerability and social isolation. In its strongest form, these arguments embrace decriminalization but oppose the regulation and protectionism full legalization would entail.⁶⁹ For instance, the World Charter for Prostitutes’ Rights insists that “[i]t is essential that prostitutes can provide their services under the conditions that are absolutely determined by themselves and no one else.”⁷⁰ The International Prostitute Rights organization is more specific, stating, “There should be no law which implies systematic zoning of prostitution. Prostitutes should have the freedom to choose *their place of work* and residence.”⁷¹ In sum, this camp opposes state regulation, arguing that the only role of government in sex work is to enforce workers’ contracts and respond to their complaints of assault.

Parsed more finely, this camp claims professional sex is just like any other labor in that it should not be subject to criminal bans and should instead be a matter of individual choice, but, because it is *sex*, it should be exempt from any government regulation or supervision, such as zoning, licensing, or public health protocols. While modern labor contracts are intensely regulated, to this camp, the sexual contract remains exceptional. In effect, it operates as erotic exceptionalism.⁷²

Of course, such insistence on complete workplace autonomy is unrecognizable to most working adults. But several ideological positions can account for this set of exceptionalist arguments. Most obviously, erotic exceptionalism reconciles easily with a classical freedom of contract

68. A recent call has gone up from some quarters for the legalization rather than the decriminalization of sex work. But most prostitutes regard legalization as legalized abuse. Despite its benign ring, legalization places prostitution under *criminal* instead of *commercial* law, where it is tightly curtailed by the state and administered by the police. McClintock, *supra* note 38, at 4.

69. See, e.g., Fischer, *supra* note 38, at 526 (arguing that regulations and restrictions within the sex industry demonstrate that the “legal system succeeds in simultaneously legitimizing and condemning the industry”).

70. INT’L COMM. FOR PROSTITUTES’ RIGHTS, WORLD CHARTER FOR PROSTITUTES’ RIGHTS (1985), reprinted in 37 SOC. TEXT 183, 183 (1993). Activist and writer Norma Almodovar puts the case even more bluntly: “Decriminalization would . . . repeal all existing criminal codes applying to non-coercive adult commercial sex activity. *It would require no new legislation to deal with harmful effects of prostitution, as there are already plenty of laws which cover problems outside the realm of personal choice.*” Almodovar, *supra* note 49, at 132 (emphasis added) (footnote omitted).

71. WORLD CHARTER FOR PROSTITUTES’ RIGHTS, *supra* note 70, at 183 (emphasis added). They also oppose public health regulations of sex work. “Since health checks have historically been used to control and stigmatize prostitutes, and since adult prostitutes are generally even more aware of sexual health than others, mandatory checks for prostitutes are unacceptable unless they are mandatory for all sexually active people.” *Id.* at 184.

72. In an earlier article, I discuss sexuality exceptionalism. See Adrienne D. Davis, *Bad Girls of Art and Law: Abjection, Power, and Sexuality Exceptionalism in (Kara Walker’s) Art and (Janet Halley’s) Law*, 23 YALE J.L. & FEMINISM. 1, 44–47 (2011) (labeling Janet Halley’s urge that the left/liberals “take a break from feminism” as “sexuality exceptionalism”). Hence, I label the sex work decriminalization position as erotic exceptionalism, both to distinguish it from my earlier work and to use the term “erotic” as it is often used in reference to sex work businesses.

perspective, in which the state has little role to play beyond enforcing agreements between consenting adults.⁷³ This view, that the state should not intervene in otherwise voluntary agreements, also aligns with constitutional and social sexual privacy norms. Indeed, implicit in these strong-form claims for a completely deregulated sex market is the decisional privacy ideology that both constitutional norms and political liberalism often associate with sex.⁷⁴ Rooted in *Griswold v. Connecticut*, and most recently elaborated in *Lawrence v. Texas*, decisional privacy casts sex and reproduction as within a sphere of intimacy liberty into which government should not intrude.⁷⁵

Others express their concerns in a more explicitly feminist register; in language that echoes that of the strongest abolitionists, Anne McClintock insists, “[l]egalizing female prostitution serves only to put women more firmly under male control.”⁷⁶ Liberalism similarly promotes autonomy, consent, and choice within this sphere, construing these as the definitive principles that guarantee sexual and reproductive rights.⁷⁷ Drawing on these strong legal and

73. See Gregg Aronson, *Seeking a Consolidated Feminist Voice for Prostitution in the US*, 3 RUTGERS J.L. & URB. POL’Y 357, 365 (2006) (“[COYOTE] regard[s] prostitution as a contract between two consenting adults, and believe[s] that these contracts should be respected by law like other legitimate contracts.”). COYOTE does want sex professionals to be recognized as workers, that is, to be able to enforce their contracts and to unionize. But it objects to any positive regulation.

74. Although much-criticized, the legal protection for women’s sexual autonomy that emerged in the 1960s and 1970s was grounded in constitutional privacy doctrine. See *supra* note 55. More recently, constitutional protections for sexual minorities have similarly been articulated in the language of privacy. See *Lawrence v. Texas*, 539 U.S. 558 (2003). Cultural and social norms of sex as part of private and not public life supported this, as well.

75. The plurality opinion in *Griswold v. Connecticut*, upholding married couples’ rights to contraception, discusses privacy in both spatial terms (that is, the marital bedroom) and decisional terms (that is, married couples making decisions about their private lives together). 381 U.S. 479, 484–85 (1965). This decisional logic was elaborated in *Eisenstadt v. Baird*, which extended *Griswold*’s holding to unmarried individuals. 405 U.S. 438, 453 (1972) (“If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”). *Roe v. Wade* further developed the constitutional ideology of decisional privacy, although it shifted the grounding to the Fourteenth Amendment’s protection of due process. 410 U.S. 113, 152–53 (1973). In declaring criminal bans on sodomy unconstitutional, *Lawrence v. Texas* extended the decisional privacy logic into the explicitly sexual arena. 539 U.S. at 562. Like *Griswold*’s majority opinion, Justice Kennedy’s opinion noted both the decisional and the spatial dimensions of privacy. Sodomy laws, he wrote, “touch[] upon the most private human conduct, sexual behavior, and in the most private of places, the home.” *Id.* at 567.

Hence, sex work activist Norma Almodovar proclaims, “A woman’s body belongs to herself and not to the government. The individual’s rights to own, use and enjoy her body in any manner that she deems appropriate, as long as she does not violate the rights of others has long been protected in this country.” Almodovar, *supra* note 49, at 132. Discussing the California Constitution, Almodovar notes it “explicitly grants a right to privacy, and although this right is not absolute, it should be interpreted to say that as long as no coercion is involved, any private consenting adult activity is none of the government’s business. But this is apparently not the case when private activity involves money!” *Id.* at 129 (citations omitted).

76. McClintock, *supra* note 38, at 4; see also *supra* notes 36–38 and accompanying text.

77. See, e.g., Nussbaum, *supra* note 34, at 706 (arguing that “the issue of choice is the really important one”). Sylvia Law uses the principle of consent to impose some interesting limits on the

cultural norms, the International Prostitute Rights charter “affirms the right of all women to determine their own sexual behavior, including commercial exchange, without stigmatization or punishment.”⁷⁸ This view of sex work thus embraces a hybrid position, often characterizing commercial sex as labor while simultaneously invoking the legal and social autonomy and privacy that typically cloak sex.

Finally, at least some exceptionalist arguments are better understood as antistatist in nature, rather than as claims to state-sponsored legal privacy or liberal autonomy. The antistatist argument is that the state has rarely acted in the interests of sex workers; instead, it has acted almost uniformly against them.⁷⁹ These views align forcefully with gender theorist Wendy Brown’s critiques of leftist calls for regulations as “wounded attachments.”⁸⁰ Brown

professional sex-as-labor position. While interviewing welfare rights organizers in Nevada, Law learned that some of them feared that if sex work were fully legalized, the government would require it as a condition of receiving need-based entitlement programs. Law, *supra* note 11, at 600–01. Law grounded an exemption of sex work from universal requirements to labor in liberalism:

A society could address this paradigm conflict by saying that the norm of authentic consent, generally applicable to sexual relations, should control and that people should not be forced to engage in commercial sex, as a condition of subsistence. Even if commercial sex is legal, many women regard it as inconsistent with their deepest sense of self and inconsistent with moral and religious principles. We should recognize that choice with respect to sexual relationships is so integral to individual identity and integrity that sex should not be compelled, even if it could provide subsistence to a person who would otherwise depend on the state.

Id. at 590; *cf.* Kotiswaran, *supra* note 63, at 581 (“[T]he feminist critique [is] that this work position is undertheorized, with the result that it falls back on the liberal discourse around choice, consent, work, and the market.” (citations omitted)).

78. WORLD CHARTER FOR PROSTITUTES’ RIGHTS, *supra* note 70, at 305, 310.

79. Consider, for example, the experiences of sex professionals working in legal jurisdictions in Nevada:

Under Nevada’s regulatory system, the “pimp/prostitute” relationship is redefined. It is clear that the only kind of prostitute who is legal and protected is the licensed brothel prostitute. Equally clear is that individual pimps controlling a number of prostitutes are replaced by a small number of legal brothel owners who are closely monitored by the government. The only legal pimps then become these limited numbers of brothel owners who have direct links with the local government. Some might consider this arrangement to mean that the state becomes the pimp by exploiting and abusing prostitutes through the system of licensed brothels.

Micloe Bingham, *Nevada Sex Trade: A Gamble for the Workers*, 10 YALE J.L. & FEMINISM 69, 93 (1998) (citing KATHLEEN BARRY, FEMALE SEXUAL SLAVERY, *supra* note 36, at 106).

80. WENDY BROWN, STATES OF INJURY: POWER AND FREEDOM IN LATE MODERNITY 52 (1995); *see also* JANET HALLEY, SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM (2006) (contending that feminist alliances with the state have produced “governance feminism” which is often antagonistic to pro-sex interests); Wendy Brown & Janet Halley, *Introduction*, in LEFT LEGALISM/LEFT CRITIQUE 1, 5 (Wendy Brown & Janet Halley eds., 2002) (“[T]he left’s current absorption with legal strategies means that liberal legalism persistently threatens to defang the left we want to inhabit, saturating it with anti-intellectualism, limiting its normative aspirations, turning its attention away from the regulatory norms it ought to be upending, and hammering its swords into boomerangs.”). For further critiques, see Davis, *Abjection, Power, and Sexuality Exceptionalism*, *supra* note 72 (criticizing some of Halley’s arguments as sex exceptionalism).

contends that left liberalism should maintain a healthy suspicion of the state, not embrace positions that enhance and increase state power.⁸¹ Accordingly, this view would find pro-sex work advocates who see salvation in greater regulation as misguided at best, and, at worst, complicit with state oppression sex workers and sex markets.⁸²

These different exceptionalist views—anti-statism, decisional privacy, and autonomy—are each seductive rationales for stark deregulationism. Yet, when erotic exceptionalism enters markets, its claims to conduct commerce free from government intervention or regulation can begin to sound a lot like libertarianism, an economically conservative ideology very dissonant from the sex radical position sex work advocates view themselves as inhabiting.

2. *Legalization, or Erotic Assimilationism*

Unlike exceptionalists, a second group of sex work advocates urges not only decriminalized, but fully legalized and regulated markets for sex. This camp views sex workers as deeply vulnerable to exploitation and risk and, accordingly, envisions an active role for the state in regulating sex markets and workplaces.⁸³ “Like traditional prostitutes, women working in the legal sex industry have been treated as though they are not entitled to the same legal protections as other ‘socially accepted’ workers.”⁸⁴ Monica Moukalif adds,

81. Perhaps implicit in the antistatist view is the radical claim articulated above—that all sex, and particularly normative, marital sex, has an economic dimension. (Similarly, both feature affective labor.) Hence sex work should not be regulated the same way that marital sex work is not regulated; commodified sex is no more commercial than other forms of non-market sex. *See supra* notes 32, 34, and accompanying text.

82. In contrast with antistatist views that associate sexual pleasure with the state “staying its hand,” Kathy Abrams notes “agency, in contrast, is rich with potential legal associations.” Abrams, *supra* note 30, at 351.

83. Indeed, sex workers are a classic vulnerable population. According to the UCLA nursing school, “[t]he term ‘vulnerable populations,’ refers to social groups with increased relative risk (i.e. exposure to risk factors) or susceptibility to health-related problems. . . . VPs are often discriminated against, marginalized and disenfranchised from mainstream society.” *Who Are Vulnerable Populations?*, CTR. FOR VULNERABLE POPULATIONS RESEARCH, <http://nursing.ucla.edu/site.cfm?id=388> (last visited Aug. 3, 2015). According to legal feminist Martha Fineman:

[the vulnerability framework is] an alternative to traditional equal protection analysis; it is a ‘post-identity’ inquiry in that it is not focused only on discrimination against defined groups, but concerned with privilege and favor conferred on limited segments of the population by the state and broader society through their institutions. As such, vulnerability analysis concentrates on the structures our society has and will establish to manage our common vulnerabilities. This approach has the potential to move us beyond the stifling confines of current discrimination-based models toward a more substantive vision of equality.

Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1, 1 (2008).

84. Fischer, *supra* note 38, at 551; *see also* JO BINDMAN, REDEFINING PROSTITUTION AS SEX WORK ON THE INTERNATIONAL AGENDA 32 (1997) (“Their vulnerability to human and labour rights violations is greater than that of others because of the stigma and criminal charges widely attached to sex work.”); Adrienne Couto, *Clothing Exotic Dancers with Collective Bargaining Rights*, 38 OTTOWA L. REV. 37, 47–48 (2006) (noting that if not viewed as criminals, sex workers are at the very least considered to maintain “‘deviant’ lifestyles, roles and identities”).

“organizing around decriminalization is part of organizing for better occupational health and safety.”⁸⁵ These advocates view professional sex work as not meaningfully different from other forms of marginalized and vulnerable labor. For instance, Moukalif “constructs a margins-oriented labor lens and then applies it to sex labor discourse,” in the process showing how “[p]rostitutes are organizing and advocating in ways that could be beneficial to all marginalized workers.”⁸⁶ This camp thus urges assimilating sex work into our existing, heavily regulated labor and employment law regime.⁸⁷

Decriminalization alone would empower sex workers to access courts to enforce their contracts with customers and third-party intermediaries alike.⁸⁸ A second important benefit, not immediately linked to work itself, is that decriminalization would enable sex workers to access more social support services.⁸⁹ Beyond decriminalization, however, assimilationists seek active regulation of sex workplaces.

Influential legal feminists Sylvia Law, Jane Larson, and Martha Nussbaum all embrace versions of this assimilationist view. Jane Larson contends:

[C]ommercial sex workers, like other part-time, self-employed, and contingent workers, confront problems of economic and social

85. Monica R. Moukalif, *See No Evil: Applying a Labor Lens to Prostitute Organizing*, 20 HASTINGS WOMEN'S L.J. 253, 271 (2009).

86. *Id.* at 253.

87. Akin to hostile worlds and abolitionism, intimacy theorist Viviana Zelizer offers a framework to understand assimilationism as well. If hostile worlds proclaims the intrinsic incompatibility of economics and intimacy, another approach rejects this primitive dualism by proffering a single, prior principle that purports to “actually explain[] what is going on” through a powerful rhetorical device Zelizer calls “nothing-but.” ZELIZER, *supra* note 24, at 29. In this view, “the ostensibly separate world of intimate social relations . . . is nothing-but a special case of some general principle,” typically economic rationality, culture, or politics. *Id.* Akin to how hostile worlds pervade abolitionism, nothing-but logic is rampant in assimilationism, as advocates proclaim professional sex to be “nothing but” work or labor, thereby staving off serious inquiries of how sex work might be distinctive from other forms of labor and from “amateur” sex and, hence, in need of special consideration and regulation. (Zelizer characterizes Kathleen Barry as exemplifying “nothing-but” power and patriarchy; in contrast, I would locate Barry within the hostile worlds camp.) *See id.* at 28–32. In the end, Zelizer rejects both hostile worlds and nothing-but ideologies: “As long as we cling to the idea of hostile worlds we will never recognize, much less explain, the pervasive intertwining of economic activity and intimacy. Yet nothing-but reductionism fails to allow for the distinctive properties of coupling, caring, and households.” *Id.* at 288. She offers as an alternative framework “connected lives” or “differentiat[ed] . . . ties,” which focuses on how people “create connected lives by differentiating their multiple social ties from each other, marking boundaries between those different ties by means of everyday practices, sustaining those ties through joint activities . . . but constantly negotiating the exact content of important social ties.” *Id.* at 32.

88. *See* Michèle Alexandre, *Sex, Drugs, Rock & Roll and Moral Dirigisme: Toward A Reformation of Drug and Prostitution Regulations*, 78 UMKC L. REV. 101, 116 (2009) (“It is long settled legal doctrine that illegal contracts are unenforceable. Consequently, persons who enter into illegal drug or sexual transactions are incapable of seeking legal protection in the event of breach of the underlying contract. This incapacity renders the most vulnerable members of those transactions subject to abuse and victimization.” (footnotes omitted)).

89. *See, e.g.,* DeCou, *supra* note 65, at 438–39.

insecurity that are particularly acute in fields, like commercial sex, where most of the workers are women. It seems more likely that such problems would be addressed through measures applicable to all workers, and extended to commercial sex workers if commercial sex were legal, rather than through special programs for commercial sex workers.⁹⁰

Jane Larson views prostitution as a “laboratory” to determine “what makes certain voluntary labor so dangerous or so exploitative as to violate the worker’s human rights.”⁹¹ Finally, legal philosopher Martha Nussbaum combines an assimilationist approach with the straightforward liberal feminist emphasis on choice to make a case for legalized sex work as a constrained or bounded autonomy claim.⁹² In sum, contrary to erotic exceptionalists, the assimilationist camp contends sex work is truly no different than other forms of marginalized, vulnerable, and risky labor. Rebellious against the privacy rubric that many exceptionalists invoke to cloak labor that is sexual, assimilationists advocate full legalization and assimilation of sex work into our current regulatory regime.

C. Summary

Ironically, abolitionism appears to have been analytically galvanized by the anti-sex-trafficking movement, while the pro-sex-work camp is stagnating, perhaps because there are so many theoretical strands that could yield vastly different regulatory implications. While both pro-sex-work camps view the labor framework as a way to access legitimacy and power for workers in the sex industry, unlike abolitionists, there is a split—a contradiction even—within the movement. For erotic assimilationists, “worker” empowerment stems from full legalization. Seeking to intervene in the oppression and exploitation of a highly vulnerable population, they envision the full integration of sex workers into the existing labor and employment regulatory regime. Erotic exceptionalists, on the other hand, embrace the labor lens from a classic freedom of contract perspective—that the state should not interfere in otherwise voluntary agreements. Unrecognizable to modern democratic

90. Law, *supra* note 11, at 599 (footnote omitted); *see also* Moukalif, *supra* note 85, at 258 (“[T]he issues that affect sex work are essentially labor issues common to all marginalized workers.”).

91. Larson, *supra* note 37, at 676.

92. Nussbaum, *supra* note 34, at 696 (“[A] fruitful debate about the morality and legality of prostitution should begin from a twofold starting point: from a broader analysis of our beliefs and practices with regard to taking pay for the use of the body and from a broader awareness of the options and choices available to poor working women. . . . Most, though not all, of the genuinely problematic elements turn out to be common to a wide range of activities engaged in by poor working women, and the second inquiry will suggest that many of women’s employment choices are so heavily constrained by poor options that they are hardly choices at all. I think that this should bother us and that the fact that a woman with plenty of choices becomes a prostitute should not bother us, provided that there are sufficient safeguards against abuse and disease, safeguards of a type that legalization would make possible.”). In this sense, revulsion against payment for bodily services results from class biases.

marketplaces, this claim seeks its support in constitutional and cultural sexual privacy norms, liberalism's emphasis on autonomy, choice, consent, and leftist anti-statism. In sum, erotic exceptionalists, insisting on a regulatory exemption for sex work, claim that it is just like any other consensual sexual act. Erotic assimilationists, embracing a deeply regulatory stance, say it is just like any other work.

Although the anti-sex-trafficking movement helped feminist abolitionists to refine and thicken their arguments, the pro-sex-work camp is still unevolved. In contrast, this latent contradiction between assimilationist and exceptionalist discourses of professional sex—whether sex work is just like *sex*, or just like *work*—has caused the pro-sex-work camp to stall out in first-generation arguments that largely limit themselves to arguing the legitimacy of the work. The remainder of this Article tries to push through into a robust second-generation discussion about regulation and what it might look like.

Of course, both camps might disavow their rhetoric when engaged in actual policy implementation. Both erotic exceptionalists and erotic assimilationists might embrace a middle ground of compromise when called into on-the-ground negotiations. But that is exactly what this Article is calling for—a move beyond the first-generation rhetorical standoffs into serious second-generation engagement over how regulations and policy can be crafted to achieve the goals of those who advocate for sex work and sex markets.

II.

TESTING EROTIC ASSIMILATIONISM

At bottom, the erotic assimilationist invocation of sex as *just like any other work* is a recognition claim—that sex professionals should be considered legitimate laborers with the protections of the “applicable domestic and international legal standards relating to labor and human rights.”⁹³ In an effort to push through to second-generation regulatory debate, this Part explores this set of claims within the context of the relevant state and federal law. Assimilationists expect that legalizing and regulating sex work as work will lead to: (1) benefits that legal employees may access, including the right to unionize; (2) protections from workplace hazards, such as lighting issues, malfunctioning equipment, and sexual/physical violence; and (3) recourse against discrimination. Part II will examine how each of these three expectations meets up with the realities of the regulations that currently govern these workplace problems. Accordingly Part II.A compares the full-time employee benefits that assimilationists seek to the threshold test sex workers must pass in order to be considered “full-time employees,” rather than part-time employees or independent contractors. Part II.B examines common

93. Audrey Macklin, *Dancing Across Borders: 'Exotic Dancers,' Trafficking, and Canadian Immigration Policy*, 37 INT'L MIGRATION REV. 464, 493 (2003).

workplace hazards and discusses how the Occupational Safety and Health Administration (OSHA) and worker's compensation laws might mitigate those hazards. Part II.C unpacks how antidiscrimination provisions, such as Title VII or the Americans with Disabilities Act, might apply to various types of discrimination that pervade sex workplaces. By exposing the diversity of workplaces and their regulation, this Part complicates the assimilationist claim.

A. *Full-Time Employee Benefits and Collective Bargaining*

Assimilationists seek recognition of sex workers as legal employees, a prerequisite to accessing a host of benefits. While all workers are entitled to work in conditions defined as safe by OSHA and can collect workers' compensation, only those recognized legally as employees have access to basic employment benefits, including unemployment and health insurance, retirement, and social security, minimum wage, and overtime.⁹⁴ A second crucial entitlement limited to those workers classified as employees is the right to unionize and collectively bargain for improved working conditions.⁹⁵ Rather than relying solely on the state to enforce minimal, universal benefits, collective action and bargaining allow workers to craft terms and conditions of employment that are tailored to their needs.⁹⁶ Some benefits and collective bargaining rights are available only to full-time employees. Many employers avoid liability for full benefits or exposure to unionization by hiring workers on a part-time basis. As vexing as this is for all workers, as discussed in Part III, the full-time requirement may present special challenges for some sex workers.

To be eligible for these basic benefits and to be able to unionize, workers need to pass a threshold test and be recognized legally as employees rather than independent contractors. Employee tests vary according to the statute with the National Labor Relations Act, Fair Labor Standards Act, ERISA,⁹⁷ Social Security Act, and workers' compensation statutes all adopting different tests. With the exception of § 1981, the same holds true for discrimination law.⁹⁸ The

94. In fact, the requirement of full-time work could raise challenges in sex workplaces. Depending on how sex work is organized, the forty-hour a week requirement could be difficult for some workers to meet.

95. National Labor Relations Act, 29 U.S.C. § 157 (2012) ("Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively . . .").

96. MARION CRAIN ET AL., *WORK LAW: CASES AND MATERIALS* 946 (2d ed., 2010) ("[U]nions have often played a critical role in raising and negotiating over issues of health and safety. Because they implicate working conditions, safety issues are a mandatory subject of bargaining in a unionized workplace, and employers are therefore obligated to provide safety information upon the union's request. . . . In addition, unions frequently negotiate for improved safety measures, or alternatively, higher wages to compensate for the risks, through the collective bargaining process.")

97. See, e.g., *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323–24 (1992) (including these factors for assessing employee status: skill, source of tools, location, duration of relationship, rights to assign, discretion, method of payment, incorporation of work into hiring party's regular work, provision of benefits, and tax treatment).

98. Because § 1981's language is not limited to employees, Danielle Tarantolo urges that it could become a broad remedy for workers in private workplaces. Danielle Tarantolo, *From*

Americans with Disabilities Act and the Age Discrimination in Employment Act both limit protection from discrimination to those classified legally as employees. Although the language of Title VII states that “individuals” are protected from discrimination in law, courts still distinguish between employees and independent contractors, restricting protection to the former. While the various statutory and legal tests are diverse, all entail a substantial assessment of the allocation of control over work between the employer and the worker.⁹⁹ Across these distinct employee jurisprudences, what employers share in common are their efforts to characterize workers as independent contractors rather than employees to lessen costs and liability.

Neither prostitutes, whose work is illegal everywhere except for a few counties in Nevada, nor many dancers, whose employers often classify them as independent contractors, qualify for these benefits under federal and state laws.¹⁰⁰ In addition, in the parts of Nevada where prostitution is legal, brothel owners often classify prostitutes as independent contractors.¹⁰¹ Similarly, sex professionals, especially dancers, have sought to unionize, although with little success.¹⁰² Still, many assimilationists continue to urge collective action through unionization as sex workers’ best chance to achieve decent working conditions.¹⁰³

Employment to Contract: Section 1981 and Antidiscrimination Law for the Independent Contractor Workforce, 116 YALE L.J. 170 (2006). She notes, though, that in order for § 1981 to emerge as an effective remedy, several procedural and doctrinal obstacles would need to be overcome, including that it only applies to racial discrimination, its inability to reach disparate impact claims, its restriction to private causes of actions, and similarly the fact that it only reaches private employers. *Id.*

99. Judicial interpretation has contributed significantly to the thick “employee” jurisprudence, elaborating the various tests, including common law agency, economic realities, and reasonable basis.

100. The current case law is split on whether to classify dancers as employees. Compare *Reich v. Circle C. Inv., Inc.*, 998 F.2d 324 (5th Cir. 1993) (holding that topless dancers are employees under the FLSA), and *Yard Bird, Inc. v. Va. Emp’t Comm’n*, 503 S.E.2d 246, 251 (Va. Ct. App. 1998) (finding that exotic dancers were employees for the purposes of unemployment compensation, despite the existence of an “Independent Contractor Agreement”), with *Lewis v. L.B. Dynasty, Inc.*, 732 S.E.2d 662, 663 (S.C. Ct. App. 2012) (holding that the South Carolina Workers’ Compensation Commission did not err in finding that an exotic dancer was an independent contractor and not an employee).

101. See, e.g., Law, *supra* note 11, at 561 (“Brothel owners typically regard women as independent contractors and do not provide them with health insurance, workers’ compensation, unemployment insurance, vacation pay, or retirement benefits.”).

102. In addition to the challenges of organizing an itinerant and relatively powerless group of workers, pro-union sex workers encounter resistance from unions themselves, which, though desperate for new members, still often reject sex traders as illegitimate workers. See, e.g., Law, *supra* note 11, at 599 (“Where women have sought to organize a union, they have been rebuffed by established labor organizations.”); Margot Rutman, *Exotic Dancers’ Employment Law Regulations*, 8 TEMP. POL. & C.R. L. REV. 515, 553 (1999) (“Exotic dancers, because they are a stigmatized group of women, often have problems finding outside labor support or unions that will allow them to join.”).

103. As Sylvia Law notes, “One of the most effective ways for commercial sex workers to promote decent working conditions and protect themselves from violence, abuse, and health and safety hazards, is to work in a collective context.” Law, *supra* note 11, at 598; see also Sarah Chun, *An Uncommon Alliance: Finding Empowerment for Exotic Dancers Through Labor Unions*, 10 HASTINGS WOMEN’S L.J. 231 (advocating unionization as best route to empowerment for exotic

Thus, assimilationists view recognition of sex work as legitimate labor as the first step toward the basic but significant rights that inure to some workers. However, in order to access this set of benefits, sex work must not only be legalized, but also recognized as employment, and not independent contracting. And for some benefits workers must be full-time employees.

In sum, assimilationists lay claim to labor discourse to access greater regulation and protection for sex workers. They anticipate that recognizing sexual labor as legitimate work will give sex professionals protection from hazardous working conditions and degrading discriminatory practices, as well as basic access to benefits and rights, including wage and hour legislation, unionization, and collective bargaining, which inure only to those workers classified as employees. The rest of this Section compares the primary protections that erotic assimilationists demand to the realities of the regulatory regimes that they seek access to.

B. Mitigating and Compensating Workplace Hazards

Even more often than demands for basic employee benefits, charges of unabated risks and hazards pervade assimilationist arguments to legalize and regulate professional sex as work.¹⁰⁴ The two dominant forms of risk that most endanger sex workers are injuries or illnesses from working conditions and violence. Sex professionals often work in unsanitary workplaces that expose them to infection and other health risks.¹⁰⁵ Dancers are at risk of both accidents and chronic injuries from poor lighting, disrepair of equipment, and dancing in high heels.¹⁰⁶ And, of course those workers that exchange body fluids with

dancers). Others are more skeptical, however. Margot Rutman observes that as a result of the first successful effort to unionize a dance club, the Lusty Lady, the dancers got “one sick day and one holiday The union contract is impressive because it exists despite the challenges that the exotic dancers faced, but generally, the contract fails to offer work benefits comparable to those of other more established unions.” Rutman, *supra* note 102, at 555.

104. As Monica Moukalif observes, “Occupational health and safety is the major organizing point for prostitutes and other sex labor activists.” Moukalif, *supra* note 85, at 270.

105. Dancers complain that employers do not properly sanitize the stage poles and floors, club furnishings, and props with which their bare genital areas come into contact. Moreover, lap dancing requires intimate contact with customers and their clothing, over which employers have less control. Constant exposure to body fluids and unsanitized surfaces puts dancers at high risk for infection and disease. Prostitutes often work in unclean hotels, brothels, or worse, in cars, on the street, or in alleys. See, e.g., Eleanor Maticka-Tyndale et al., *Exotic Dancing and Health*, 31 *WOMEN & HEALTH* 87, 95, 99 (2000); see also INT’L COMM. FOR PROSTITUTES’ RIGHTS, STATEMENT ON PROSTITUTION AND HEALTH (1986), reprinted in *A VINDICATION OF THE RIGHTS OF WHORES* 142 (Gail Pheterson ed., 1989) (“Criminalization of prostitutes for purposes of public health is unrealistic and denies human rights to healthy work conditions. As outlaws, prostitutes are discouraged, if not forbidden, to determine and design a healthy setting and practice for their trade. . . . [Criminalization] forces prostitutes into medically unhygienic, physically unsafe and psychologically stressful work situations.”).

106. ELEANOR MATICKA-TYNDALE, *SEX TRADE ADVOCACY & RESEARCH, EXOTIC DANCING IN ONTARIO: HEALTH AND SAFETY* 7–8 (2004), <http://web2.uwindsor.ca/courses/sociology>

clients are at risk of sexually transmitted diseases, which many mischaracterize as a moral issue and not one of occupational health.¹⁰⁷ The second major axis of risk is violence. Sex professionals—dancers, masseuses, and prostitutes—all have significantly higher rates of assault, rape, and even murder than other workers. Importantly, customers are not the only people who physically and sexually assault sex workers; club and brothel owners and operators, pimps, bartenders, bouncers, and other employees often physically and sexually assault them as well.¹⁰⁸ Moreover, sex workers experience higher rates of assault from their own intimate partners. The statistics bear out that stakeholders in sex markets—customers, co-workers, and employers—feel entitled to physically abuse the workers, making sex work among the most dangerous forms of labor.¹⁰⁹ Erotic assimilationists call for regulators to develop and mandate standards to protect sex workers' health and safety.

One of the most significant transformations of twentieth-century American employment law was the increasing liability of employers for protecting employees from workplace hazards. Workplace health and safety are regulated primarily through two sets of doctrine: state workers' compensation laws and the federal regulations and guidelines enacted by the Occupational Safety and Health Act of 1970 (OSH Act).¹¹⁰

Workers' compensation is, in effect, a state-based insurance system that covers injuries stemming from "accidental injuries" that "arise out of" or "in the course of" employment.¹¹¹ Originally inspired by industrial accidents, the

/maticka/star/pdfs/exotic_dancing_in_ontario_final_report.pdf (noting that dancers spend eight hours or more in high heels, which can cause injuries to their feet).

107. Moukalif, *supra* note 85, at 270 ("HIV/AIDS and STD prevention and education are central to sex labor organizing.").

108. Law, *supra* note 11, at 533 ("Women who provide commercial sex, particularly streetwalkers, are subject to violence. Many studies of women who work the street report that 80 percent have been physically assaulted during the course of their work. Women who provide commercial sex are often the victims of rape. They are murdered, perhaps at a rate forty times the national average. Police systematically ignore commercial sex workers' complaints about violence and fail to investigate even murder. Indeed, police officers rape and beat sex workers, and are rarely prosecuted for their wrongdoing. Customers, pimps, police and other men inflict these harms on women." (footnotes omitted)); see also COUNCIL FOR PROSTITUTION ALTERNATIVES, HANDBOOK (1995); LEVITT & DUBNER, *supra* note 35, at 29 ("Most of the violence by johns is when, for some reason, they can't consummate or get erect." (quoting Sudhir Venkatesh)); MIMI H. SILBERT, SEXUAL ASSAULT ON PROSTITUTES: FINAL REPORT (1980) (detailing high rates of assault among sex workers). Even their own intimate partners assault them at higher rates.

109. Shelley Cavalieri, *Between Victim and Agent: A Third-Way Feminist Account of Trafficking for Sex Work*, 86 IND. L.J. 1409, 1440 (2011). Sylvia Law points out that "[s]ince the 1980s there have been dramatic changes in the legal and social understanding of violence against women in the United States. These new understandings, laws, practices and services have not been extended to commercial sex workers." Law, *supra* note 11, at 572.

110. Pub. L. No. 91-596, 84 Stat. 1590 (codified as amended at 29 U.S.C. §§ 651–678 (2012)). Approximately half of the states also have plans, encouraged and supervised by the federal OSH Act.

111. CRAIN, WORK LAW, *supra* note 96, at 955. (describing different states' statutory language). There are some federal iterations as well. See, e.g., Federal Employees' Compensation Act,

system has two signal features.¹¹² It limits employer liability,¹¹³ and, in exchange, injured workers do not have to prove employer fault.¹¹⁴ Workers' compensation transforms workplace liability questions from ones of employer fault and causation (and accompanying common law tort defenses)¹¹⁵ to worker need. While there is significant variance across states, these statutes now cover most workplaces, providing workers with a safety net.¹¹⁶

Operating alongside state workers' compensation statutes are federal health and safety regulations, which are aggregated under OSHA.¹¹⁷ Unlike workers' compensation, which functions primarily as an insurance scheme, labor reformers and Congress conceived the OSH Act explicitly to deter risk and achieve safer workplaces.¹¹⁸ Indeed, the prophylactic stress of OSH Act-type hazard *prevention* stems in part from the failure of workers' compensation to provide adequate ex post protection. Although criticized by employers and

5 U.S.C. §§ 8101–8193 (2012) (federal employees); Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901–950 (2012) (ship, harbor, and railroad employees).

112. Initially, workers' compensation was designed to address industrial accidents. As legal historian John Fabian Witt observes, "Nineteenth-century observers believed both that the number of accidental injuries was increasing and that the cause of the increase was the mechanization of production." JOHN FABIAN WITT, *THE ACCIDENTAL REPUBLIC: CRIPPLED WORKINGMEN, DESTITUTE WIDOWS, AND THE REMAKING OF AMERICAN LAW* 27 (2004). Coal mining and railroads topped the list for workplace accidents, followed by logging, bricklaying, and masonry. These industrial accidents devastated not only workers, but also their families. "Work accidents, it seemed, threw the ambiguous status of the industrial worker into bold relief, compelling victim and observer alike to ask hard questions about the relationships among capital, labor, and the public." *Id.* at 38. Of course, as part of the title of Witt's book, *Crippled Workingmen and Destitute Widows*, suggests, this was all intensely gendered. The jobs that dominated the public and regulatory imagination as "dangerous" were ones limited to male workers. Similarly, the ideal of a worker who would provide the sole or primary "family wage" was imagined to be a male head of household. Hence, in its initial formulation, workers' compensation was actually legally and culturally conceived as *workman's* compensation. *Id.* at 2.

113. Importantly, actual loss is not part of the equation, and in the vast majority of states neither punitive damages nor emotional pain and suffering are available. "[T]he concepts of punishment and deterrence that lie behind punitive damages are absent from the system." CRAIN, *WORK LAW*, *supra* note 96, at 954. In addition, the exclusivity of remedies rules limit employees to workers' compensation claims, barring them from bringing claims through tort suits, which could yield much greater awards.

114. Instead, an administrative agency addresses claims, typically more rapidly and inexpensively than litigation would. *See, e.g.*, CRAIN, *WORK LAW*, *supra* note 96, at 953 (stating that it is a "fundamental compromise—no fault compensation in exchange for limited liability").

115. *Id.* at 946 (describing how fellow-servant rule, assumption of risk, and contributory negligence operated as employer defenses to liability for workplace injuries).

116. "[T]he various state laws vary greatly in their details on such issues as what types of injuries are compensable and how benefit levels are determined." *Id.* at 953.

117. Congress created OSHA in 1970 and charged it with "promulgating regulations, inspecting workplaces, and prosecuting violations of its regulations and standards." *Id.* at 1000. Operating within the Department of Labor, OSHA oversees private workplaces, regulating "more than 110 million workers in more than eight million workplaces." *Id.* at 1001. In addition, states are authorized to enact their own OSHAs, using the federal statute as a floor. *Id.*

118. Of course, as an insurance scheme, workers' compensation, too, has some deterrence function. Employee payouts affect employers' contributions, thus giving them incentives to reduce injuries.

workers alike,¹¹⁹ OSHA is credited with helping to reduce the number of annual workplace fatalities from seventy thousand to approximately five thousand in the last decade.¹²⁰

Together, workers' compensation and the OSH Act are the primary mechanisms for achieving healthy and safe workplaces. Some OSH Act regulations—for instance, those that require appropriately placed exit signs and fire extinguishers—are fairly universal, translating well into enforceable regulations across workplaces. Yet, in most cases workers receive vastly different degrees and types of protection through these regulations, depending on their workplace, the work they do, and the types of workplace risks that they confront. For example, under the OSH Act, workers receive the most comprehensive protection from unpredictable, single-incident workplace risks, which are often industrial injuries of the variety that animated the initial workers' compensation system.¹²¹ After a single-incident injury, workers' compensation provides medical benefits to cover rehabilitation, as well as benefits to cover temporary and permanent loss of income.¹²² However, beyond these single-incident injuries, there remains significant uncertainty regarding what kinds of worker injuries are covered and when. “In particular, coverage of occupational diseases, repetitive stress injuries and mental injuries have [sic] proven controversial.”¹²³ Hence, even miners, whose workplace hazards inspired some of the first workplace regulations, have found it more difficult to recover for black lung and related chronic diseases than for incident-related injuries.¹²⁴

119. “Today OSHA is perhaps best known for being one of the most criticized of all federal agencies, certainly the most criticized agency that regulates the workplace.” CRAIN, WORK LAW, *supra* note 96, at 1000. OSHA's goal is to “assure so far as possible every working man and woman in the Nation safe and healthful working conditions.” 29 U.S.C. § 651(b) (2012). However, because of the political difficulties it faces in enacting new regulations, “OSHA has promulgated far fewer permanent standards than was originally contemplated, and it often relies on other means to enforce its statutory mandate.” Instead, OSHA “commonly relies on . . . [its] general duty clause” or temporary standards in lieu of enacting specific regulations. CRAIN, WORK LAW, *supra* note 96, at 1001, 1004–05.

120. CRAIN, WORK LAW, *supra* note 96, at 939.

121. *See supra* note 112. For instance, OSHA has developed adequate standards to address worker risk posed by machines and other equipment typically found in factories and manufacturing workplaces.

122. As noted above, these benefits are paid according to a pre-determined schedule, and workers receive only partial compensation. *See supra* note 113.

123. CRAIN, WORK LAW, *supra* note 96, at 955. After decades of struggle, workers won the inclusion of “disease” in workers' compensation statutes, yet, “those suffering from work-related diseases still face considerable hurdles” in obtaining benefits. *Id.* at 955.

124. The first two workers' compensation statutes were for miners. Arthur Larson, *The Nature and Origins of Workmen's Compensation*, 37 CORNELL L.Q. 206, 231 (1952). OSHA, meanwhile, has struggled to gain authority over this type of chronic workplace risk. In the 1990s, the agency tried to establish ergonomic standards to address repetitive-motion injuries, but was hindered by a powerful employers' lobby and a hostile Congress. CRAIN, WORK LAW, *supra* note 96, at 1004–05. After the Bush Administration rescinded its ergonomic standard, the Department of Labor issued guidelines for discrete industries. *Id.*

In addition, both workers' compensation statutes and the OSH Act have developed categories of inclusion and exclusion. Most relevant to sex work are exclusions of injuries stemming from violence. For instance, professional athletes playing contact sports are statutorily or functionally excluded from workers' compensation in many states. Although these athletes are frequently injured and disabled from working, legislators and courts, "lobbied heavily by sports team owners,"¹²⁵ have concluded that this category of workers does not warrant coverage because the "deliberate" nature of the physical contact meant injuries were not "unexpected."¹²⁶ In these workplaces, e.g., football and boxing, regulations are designed to minimize injury through equipment specifications and codes of conduct that govern the workers, but they also exclude injuries from compensation. In this sense, injury is a tolerated and uncompensated residuum of the activity.¹²⁷ These categorical exclusions are most apparent, however, when it comes to one workplace hazard targeted by sex work assimilationists: nonconsensual violence.¹²⁸

Over two million workers are victims of workplace violence each year.¹²⁹ In fact, homicide, not cave-ins or machine malfunctions, is the fourth leading cause of workplace fatalities and the leading cause of death for women workers.¹³⁰ OSHA is nominally charged with protecting workers from violence

125. Stephen Cormac Carlin & Christopher M. Fairman, *Squeeze Play: Workers' Compensation and the Professional Athlete*, 12 U. MIAMI ENT. & SPORTS L. REV. 95, 108 (1994).

126. Palmer v. Kan. City Chiefs Football Club, 621 S.W.2d 350, 356 (Mo. Ct. App. 1981); see also Frederic Pepe & Thomas P. Frerichs, *Injustice Uncovered? Worker's Compensation and the Professional Athlete*, in SPORTS AND THE LAW: MAJOR LEGAL CASES 18, 19 (Charles E. Quirk ed., 1996) (noting misconception that all professional athletes are overpaid and arguing that professional athletes need same legal protection as ordinary working people precisely because they do not earn large salaries); Rachel Schaffer, *Grabbing Them by the Balls: Legislatures, Courts, and Team Owners Bar Non-Elite Professional Athletes from Workers' Compensation*, 8 AM. U.J. GENDER SOC. POL'Y & L. 623 (2000); Carlin & Fairman, *supra* note 125, at 112 (noting how both workers' compensation statutes and their own contracts limit professional athletes' claims for injury); 2 LAW OF PROFESSIONAL AND AMATEUR SPORTS § 15.04 (Gary A. Uberstine ed., 1991) (contrasting temporary disability benefits and permanent disability benefits).

127. Duncan Kennedy uses "tolerated residuum" to describe how the law under-regulates sexual violence and harassment, thereby benefitting heterosexual men. DUNCAN KENNEDY, *SEXY DRESSING ETC.: ESSAYS ON THE POWER AND POLITICS OF CULTURAL IDENTITY* 134-38 (1993).

128. I characterize it as nonconsensual to distinguish it from the consensual violence in contact sports.

129. "Workplace violence is any act or threat of physical violence, harassment, intimidation, or other threatening disruptive behavior that occurs at the work site. . . . Nearly 2 million American workers report having been victims of workplace violence each year." *Safety and Health Topics: Workplace Violence*, U.S. DEP'T OF LABOR, <http://www.osha.gov/SLTC/workplaceviolence> (last visited Aug. 5, 2015).

130. BUREAU OF LABOR STATISTICS, NATIONAL CENSUS OF FATAL OCCUPATIONAL INJURIES IN 2009 n.137 (2010); see also ERIKA HARRELL, U.S. DEP'T OF JUSTICE, SPECIAL REPORT: WORKPLACE VIOLENCE, 1993-2009, at 1 (Mar. 2011), <http://bjs.ojp.usdoj.gov/content/pub/pdf/wv09.pdf> ("In 2009, approximately 572,000 nonfatal violent crimes (rape/sexual assault, robbery, and aggravated and simple assault) occurred against persons age 16 or older while they were at work or on duty, based on findings from the National Crime Victimization Survey (NCVS). This accounted for

in the workplace. Although the agency does not have specific standards for workplace violence, its general duty clause imposes a broad obligation on employers to guarantee their employees a safe working environment.¹³¹ However, as numerous critics have pointed out, “there has been virtually no enforcement of this duty with regard to workplace violence.”¹³² Indeed, workplace violence seems to fall through the regulatory cracks. As with other workplace hazards, risk of violence is not equally distributed across workplaces—workers in health care, service jobs, and late night retail, i.e., convenience stores, are the most vulnerable to workplace violence.¹³³ Convenience stores also share with sex businesses a particular form of violence: sexual assault. OSHA has issued specific guidelines and recommendations for three of these high-risk industries, health care and social service workplaces, taxi driving, and late-night retail stores. However, the guidelines remain advisory only, and no workplace is subject to mandatory rules from OSHA with regard to violence prevention.¹³⁴

In the absence of effective deterrence from OSHA, workers’ compensation has emerged as the “primary compensatory remedy” for workplace violence.¹³⁵ While OSHA has issued guidelines covering only three

about 24% of nonfatal violence against employed persons age 16 or older. Nonfatal violence in the workplace was about 15% of all nonfatal violent crime against persons age 16 or older.”)

131. The general duty clause states: “Each employer . . . shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.” 29 U.S.C. § 654 (a)(1) (2012).

132. Sheryl L. Erdmann, Note, *Eat the Carrot and Use the Stick: The Prevalence of Workplace Violence Demands Proactive Federal Regulation of Employers*, 43 VAL. U. L. REV. 725, 727 (2009) (footnote omitted); see also CRAIN, WORK LAW, *supra* note 96, at 726–27 (“The Occupational Safety & Health Administration . . . holds employers to a general duty to shield employees from hazards and injury. However, there has been virtually no enforcement of this duty with regard to workplace violence.” (footnote omitted)). In addition, in 1995 there was an administrative law ruling that strict liability would not be imposed on employers for hazards that were not recognized by the employers’ industry. *Id.* at 726–27 n.47.

133. For homicide, “most of the victims work in retail trade, security services, or transit services occupations.” Jane Lipscomb et al., *Perspectives on Legal Strategies to Prevent Workplace Violence*, 30 J.L. MED. & ETHICS 166, 166 (2002). On the other hand, “[t]he majority of non-fatal workplace injuries occur in settings in which the victim and the attacker are in a custodial or client-caregiver relationship, such as in health care or social services.” *Id.* These statistics also vary according to geography. Susan L. Pollet, *Violence in the Workplace: Are Employers Legally Responsible?*, 22 WESTCHESTER B.J. 133, 138 (1995) (“For instance, in New York City, the workers at greatest risk from violence were taxi drivers and grocery store workers.”).

134. OSHA, OSHA 3148-01R, GUIDELINES FOR PREVENTING WORKPLACE VIOLENCE FOR HEALTH CARE AND SOCIAL SERVICE WORKERS (2015), <https://www.osha.gov/Publications/osh3148.pdf>; OSHA, OSHA 3153-21R, RECOMMENDATIONS FOR WORKPLACE VIOLENCE PREVENTION PROGRAMS IN LATE-NIGHT RETAIL ESTABLISHMENTS (2009), <http://www.osha.gov/Publications/osh3153.pdf>; OSHA, FACT SHEET: PREVENTING VIOLENCE AGAINST TAXI AND FOR-HIRE DRIVERS (2010), www.osha.gov/Publications/taxi-driver-violence-factsheet.pdf.

135. Robert S. Goldberg, *Victims of Criminal Violence in the Workplace: An Assessment of Remedies in the United States and Great Britain*, 18 COMP. LAB. L.J. 397, 399 (1997) (footnote omitted).

high-risk industries, workers' compensation statutes facially cover 90 percent of workers for violence. Yet, state systems have developed their own doctrinal exclusions, which disproportionately affect many workers at highest risk. For instance, while late-night retail is a high-risk industry, many courts have denied workers' compensation claims for convenience store assaults as not meeting the requirements that injuries "arise out of" or "in the course of employment."¹³⁶ Moreover, there is no statutory recovery for emotional suffering, which can severely limit relief.

Ironically, the gender dynamics of violence exacerbate the problem, making women's injuries more likely to be excluded from workers' compensation. Men workers are more likely to be assaulted by strangers; women workers by someone they know. Because the "arising out of employment" requirement bars "private" or "personal" assaults, which courts construe as including both stalkers and domestic violence, women victims of workplace violence are more likely to be excluded from relief.¹³⁷ The same is true for another gendered form of violence prevalent in both sex businesses and convenience stores: sexual assault.¹³⁸ Like assaults deemed "personal," many courts have found that workplace rapes do not "arise from the employment" and, hence, are exempt from workers' compensation benefits.¹³⁹ Moreover, a rape victim may not suffer the kind of lasting physical impairment required for workers' compensation benefits, and the emotional suffering and trauma many sexual assault victims do experience is excluded.¹⁴⁰

In the end, the workplace hazard many sex workers fear most, violence, and specifically sexual assault, is ineffectively and sporadically regulated by existing law. OSH Act does not reach it, and workers' compensation has effectively declined to insure these workers.¹⁴¹

136. See, e.g., CRAIN, WORK LAW, *supra* note 96, at 974–75. In some jurisdictions, this has become a categorical exclusion. See, e.g., Goldberg, *supra* note 135.

137. Goldberg, *supra* note 135.

138. "For time of day, the 1990 National Crime Victimization Survey reports that seventy-one percent (71%) of rapes occur at night which is consistent with our finding of eight-nine [sic] percent (89%) occurring [sic] at night." *Convenience Store Security Report*, NACS ONLINE (July 1, 2007), <https://web.archive.org/web/20120918213148/http://www.nacsonline.com/NACS/Resources/Research/Pages/ConvenienceStoreSecurity.aspx> (accessed by searching the Wayback Machine internet archive).

139. It is an interesting question whether courts would be more likely to conclude that sexual assaults in *sex workplaces* meet the link to employment.

140. See, e.g., *Doe v. Purity Supreme, Inc.*, 664 N.E.2d 815 (Mass. 1996) (holding that rape victim's claims against employer for negligence, assault and battery, intentional infliction of emotional distress, and negligent infliction of emotional distress were barred by the exclusive remedy provision).

141. Other state and federal regulations have stepped into this regulatory void to target some of the most dangerous workplaces. For instance, responding to a massive increase in violence against workers at all-night convenience stores, Florida passed the Convenience Business Security Act, which imposed security obligations on stores that had experienced a violent incident. 1992 Fla. Laws 1026, FLA. STAT. §§ 812.1701–175 (2015). Florida's statute has emerged as a model for other states. Ann E. Phillips, *Violence in the Workplace: Reevaluating the Employer's Role*, 44 BUFFALO L. REV. 139, 146–47 ("The success of the [Gainesville, FL] ordinance has prompted more than 260 communities

In sum, not all work or workers are treated alike when it comes to risk. Some workplace injuries are the object of both deterrence and compensatory regulation, but workers susceptible to other kinds of risk continue to struggle for legal attention and intervention. This differential is particularly noteworthy with regard to workplace violence. Some industries enjoy special, targeted regulation to ameliorate workplace violence. However, some of the most hazardous workplaces are also those where the risk of violence is largely unregulated or the injury is not compensable. Hence, the assimilationist invocation of an ideal “workplace” is a miscue when it comes to health and safety regulation. It does not account for the highly differential regimes and rules. Equally important, absent specific guidelines, it is very likely that given the nature of the risk and its gendered dimensions, hazards of sex work would largely fall outside the scope of both deterrence and compensatory regulation.

C. Employee Antidiscrimination Protections

Finally, erotic assimilationists anticipate that the legalization of sex work would bring access to discrimination law. Legal norms have shifted in the last fifty years to hold employers liable for discriminatory practices, including, of course, disparate treatment and sexual harassment. Indeed, these workplace discrimination laws have been crucial engines for social equality over the last half century. Assimilationists want access to this set of rules.¹⁴²

nationwide to request copies of the law for conducting their own studies.” (citing Dale D. Buss, *Combating Crime; Small Businesses Take Safety Pre-cautions*, NATION’S BUS., Mar. 1, 1994, at 19)). Similarly, the State of Washington passed a statute that imposes certain obligations on health care employers to prevent workplace violence. 1999 Wash. Sess. Laws 1923, WASH. REV. CODE §§ 49.19.005–.070 (2015). Violence against workers at abortion clinics led both the federal government and the State of California to enact clinic access laws that give law enforcement “a clearer mandate to prosecute anti-abortion violence.” Carol Ness, *Attacks on State Abortion Clinics Most in Nation*, SFGATE (July 9, 2001, 4:00 AM), <http://www.sfgate.com/news/article/Attacks-on-state-abortion-clinics-most-in-nation-2900439.php>. Finally, some commentators have responded to the regulatory void by urging a return to the common-law system as the best option for victims of workplace violence.

142. Of course, not every assimilationist is optimistic about legalization and assimilation. Regarding dancers, Margot Rutman’s extensive analysis of how bona fide occupational qualifications interact with statutory protections leads her to conclude that “[e]ven if ordinary employment law protections were available to exotic dancers, many benefits would be negated by unique factors within the industry.” Rutman, *supra* note 102, at 536. For instance, most dancers already earn above minimum wage, and, in those instances in which dancers have succeeded in classifying themselves as employees, employers often restructure the relationship to maintain the same level of compensation. *See, e.g.*, Chun, *supra* note 103, at 234–35 (“Dancers at one San Francisco club successfully challenged the twenty-five dollar ‘stage fees.’ In response, the club reclassified the dances performed at ‘property’ of the club and charged dancers a one hundred fifty dollar commission for using club ‘property.’” (footnotes omitted)); Rutman, *supra* note 102, at 536 (“Wages are not necessarily beneficial to dancers because the form of compensation is mostly derived from the performance of private dances, which is revenue for the club if dancers are classified as employees.” (footnote omitted)).

1. *Sexual Harassment*

Discrimination against sex workers takes two forms: sexual harassment and disparate treatment. With regard to the former, women working in sex markets are routinely subject to a degree and form of gendered harassment that is exceptional compared to other contemporary U.S. workplaces. Those with whom sex professionals interact at work—customers, employers, and other employees—can treat them with contempt, frequently using misogynist slurs and epithets.¹⁴³ Ironically, then, the stakeholders within this market sector reinforce its image as filled with immoral, sexually promiscuous women who are not entitled to the basic human respect or dignity accorded other workers.

Assimilationists contend that this behavior, much of it intensely gendered, comprises illegal sexual harassment under Title VII's antidiscrimination provisions. In 1986, the U.S. Supreme Court recognized that sexual harassment comprised impermissible sex discrimination under Title VII.¹⁴⁴ This included both quid pro quo (i.e., conditioning terms and conditions on sex), and creating a hostile work environment (i.e., holding employers liable for failing to prevent unwelcome sexual advances, including from customers).

While facially a universal norm, commentators dispute whether there should be different standards for sex workplaces. In support of the universalism norm, Ann McGinley argues that “[a] business that creates a risk of serious harassment should develop systems to prevent and correct harassing behavior.”¹⁴⁵ Some commentators agree with McGinley that even within sexualized workplaces workers should be entitled to be free from unwelcome sexual behavior.¹⁴⁶ Others, though, urge that sex workplaces should be excluded or held to a lower standard.¹⁴⁷

2. *Disparate Treatment*

Assimilationists also identify a second axis of discriminatory behavior that sex professionals need protection from: disparate treatment. A pointed critique of sex markets is that they erect hierarchies along the lines of race and other forms of body capital. Hence, one study of prostitution found women sorted along lines of race, with white, Asian, and lighter-skinned black women dominating the higher-end “strolls” and darker-skinned and older women

143. Barton, *Dancing on the Möbius Strip*, *supra* note 50, at 591–92, 596–97; Law, *supra* note 11.

144. See, e.g., *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986) (finding workplace sexual harassment to be a violation of Title VII's prohibition on sex discrimination).

145. Ann C. McGinley, *Harassment of Sex(y) Workers: Applying Title VII to Sexualized Industries*, 18 YALE J.L. & FEMINISM 65, 98 (2006).

146. See *infra* notes 275–290 and accompanying text for discussion of the debate over sexual harassment liability in sexual workplaces.

147. See *infra* notes 277–278 and accompanying text.

relegated to less lucrative, as well as more harassing and dangerous ones.¹⁴⁸ Similarly, as the *Live Nude Girls Unite!* documentary describes, racial minorities in the dancing industry have fewer opportunities, and less remunerative ones, than white dancers. Siobhan Brooks's recent study of three dance clubs in New York and Oakland found:

When women of color are working in predominately White clubs that offer more security and are located in areas with higher property values, they often are paid less than their White counterparts, marginalized as token hires, or employed in lower-tier job positions. Women of color working in clubs predominately employing people of color, may make good money, but are subject to unjust working conditions, customer expectations that services will be cheaper, and unsafe neighborhood spaces¹⁴⁹

Thus, racial groups have very different “erotic capital,” and this translates into very different work opportunities in sex markets.¹⁵⁰ Assimilationists such as Brooks explain this disparity. She observes that “[r]acism against Black women in this industry is usually viewed as normal because, like other appearance-based industries (such as modeling, acting), the sex industry is based on ideas of customer taste and preference.”¹⁵¹ She contends that racialized desire in the erotic industry is no less socially constructed than in other areas of social interaction,¹⁵² and it should be considered impermissible

148. Bernstein, *What's Wrong*, *supra* note 38, at 103 (“The predominantly White, Asian and light-skinned Black women on the crowded and brightly lit Geary-Mason stroll command the highest prices. They are young, slim and expensively dressed; their tightly-fitted [sic] suits, sweater sets and fur or leather coats code them for a relatively upscale market. Physically, only their shorter-than-average skirts, “big hair” and heavy makeup set them apart from many of the dressed-up female tourists or theater and restaurant goers who walk past them, and the differences may be quite subtle.” (footnotes omitted)). Bernstein’s article then gives the pricing structures per class.

149. SIOBHAN BROOKS, UNEQUAL DESIRES: RACE AND EROTIC CAPITAL IN THE STRIPPING INDUSTRY 3–4, 101 (2010). She finds that clubs where women of color are concentrated have the worst terms and conditions, including higher stage fees, more harassment, and coerced prostitution. See also Tanya Katerí Hernández, *Sexual Harassment and Racial Disparity: The Mutual Construction of Gender and Race*, 4 J. GENDER, RACE & JUST. 183, 204–16 (2001) (discussing how sexual harassment is racialized in the sex tourism industry).

150. By erotic capital, Brooks means the extent to which desire is inflected by historical structures of subordination. BROOKS, *supra* note 149, at 6 (“[Erotic capital is] a form of capital that is related across bodies, and what gives bodies value based on a socially constructed ideal model of beauty/attractiveness held by the dominant culture, that is recognized and accepted by the general public.”); see also Adam Isaiah Green, *The Social Organization of Desire: The Sexual Fields Approach*, 26 SOC. THEORY 25 (2008).

151. BROOKS, *supra* note 149, at 99.

152. In sex work, as elsewhere, these consumer preferences mirror broader systems of oppression. Brooks observes, “My research shows that contrary to the notion that male customer taste is objective, it is carefully socially constructed through club marketing techniques, as well as the media at large, which overproduces images of White and mixed-race people as sexually desirable.” *Id.* at 100. And, of course, the same identity characteristics that put these workers at the bottom of the consumer preference ladder also make them the most economically vulnerable—that is, they are more likely to experience adverse economic shocks and have less cushion to absorb them.

employment discrimination.¹⁵³ While less visible in the assimilationist discourse, presumably older sex workers and disabled ones experience discrimination in mainstream markets for sex.¹⁵⁴

Assimilationists anticipate that recognizing transactional sex as work will bring sex professionals access to antidiscrimination laws, especially racial discrimination law. Several federal laws curb the extent to which employers can discriminate against their workers: Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating in hiring, promotion, termination, training, and other employment terms on the basis of race, sex, religion, color, or national origin.¹⁵⁵ Passed shortly after Title VII, the Age Discrimination in Employment Act of 1967 bars employment discrimination against workers aged forty or older.¹⁵⁶ The final piece of employment discrimination legislation came in 1990, with the Americans with Disabilities Act, a broad mandate prohibiting discrimination, including in the workplace.¹⁵⁷ Finally, § 1981 of the 1866 Civil Rights Act also offers protections from racial discrimination, but it is limited, especially in its protection only from private employers' discrimination.¹⁵⁸ Taken together, these antidiscrimination laws sharply limit the extent to which employers can indulge their preferences and biases, and—equally crucial—the preferences and biases of their customers.

153. *Id.*; see also Rutman, *supra* note 102, at 534 (“Despite the seemingly obvious requirement that dancers be attractive, Title VII protections still adhere to prevent discrimination against protected classes.”).

154. In fact, the propensity for marginalizing older dancers was one point of contention at the Lusty Lady. LIVE NUDE GIRLS UNITE! (First Run Features 2000). Margot Rutman speculates: “Obese exotic dancers might be protected under the ADA from discrimination in some instances.” Rutman, *supra* note 102, at 534 n.165.

155. Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. § 2000e (2012)). Within this doctrine, courts recognize both disparate treatment and disparate impact claims. The former bars intentional acts of discrimination while the latter extends Title VII to hold employers liable for policies that have a disproportionate impact on one group and cannot be justified by a valid business necessity. See, e.g., *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971) (holding employer’s refusal to accept applications from women with pre-school-age children constituted disparate treatment based on sex); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (establishing disparate impact).

156. Pub. L. No. 90-202, 81 Stat. 602 (codified as amended at 29 U.S.C. §§ 621–634 (2012)).

157. Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101–12213 (2012)). The Act requires employers to make “reasonable accommodations” for employees with disabilities.

158. Section 1981 provides:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

14 Stat. 27 (codified as amended at 42 U.S.C. § 1981 (2012)). Although § 1981 was the first law to prohibit discrimination in employment, for historical reasons, litigants opt for Title VII’s protections in far greater numbers. See Tarantolo, *supra* note 98 (describing origins of § 1981, explaining its historic and contemporary limitations, and urging a more expansive interpretation of its protections).

Importantly, courts do not treat all categories of discrimination the same, carving significant exceptions into some legislation, but not all. Although regulated under different statutory regimes, in age, religion, national origin, and sex discrimination cases, employers can defend against charges of disparate treatment by showing that the contested selection criteria is a bona fide occupational qualification (BFOQ).¹⁵⁹ When employers assert this defense, they are arguing that the contested criterion is essential to the success of their business. Classic BFOQ's include mandated retirement ages for bus drivers and airline pilots and actions taken to ensure the "authenticity" of a service or product, typically associated with religion and national origin.¹⁶⁰

In particular, authenticity reaches gender, as filmmakers can hire men to play male parts and women to play female ones.¹⁶¹ Discrimination theorists point out the illogic of this as "the very essence of this job is to be something one is not" and that "good acting is often defined as the ability to pull off a role quite different from the actor's own identity."¹⁶² Yet the EEOC Guidelines explicitly authorize sex discrimination in casting insofar as it is "necessary for the purpose of authenticity or genuineness."¹⁶³

Beyond authenticity, gender has developed its own, complex jurisprudence of bona fide occupational qualifications, which is especially apparent in the service sector. Service workers are the last stage, after design,

159. The corollary exemption under disparate impact claims is business essence.

160. Hence, the Catholic Church can hire only Catholics (and men) as priests, and Chinese restaurants can hire Chinese chefs. *But see* Stacey M. Brandenburg, *Alternatives to Employment Discrimination at Private Religious Schools*, 1999 ANN. SURV. AM. L. 335 (arguing, inter alia, that 42 U.S.C. § 2000e-1(a) (1994), the section allowing for religious exemptions to employment discrimination in Title VII, should be repealed); Jane Rutherford, *Equality as the Primary Constitutional Value: The Case for Applying Employment Discrimination Laws to Religion*, 81 CORNELL L. REV. 1049 (1996) (arguing that equality, as described in the Fourteenth Amendment, is the most important component of the Constitution, and that antidiscrimination laws like Title VII should be enforced even against religious institutions). Consistency, however, is required. Hence, a Chinese restaurant that hired French, Italian, and Japanese chefs could not then exclude Mexican applicants.

161. *See infra* note 187.

162. Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 12 n.23 (1995); Russell K. Robinson, *Casting and Caste-ing: Reconciling Artistic Freedom and Antidiscrimination Norms*, 95 CALIF. L. REV. 1, 31–32 (2007).

163. EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.2(a)(2) (2014). However, the reverse is not true. An actor with a non-concealable disability probably would not be cast to play a non-disabled person. In addition, actresses often struggle to work around pregnancy. In what is probably the most famous case, actress Hunter Tylo received a jury award of \$4.8 million for her pregnancy discrimination suit for being fired from *Melrose Place*. Many speculate the jury was influenced by the fact that producer Aaron Spelling had accommodated previous pregnant actresses on the same show, including lead actress Heather Locklear. *Would-Be 'Melrose' Actress Wins Nearly \$5 Million Award*, CNN INTERACTIVE (Dec. 22, 1997), <http://www.cnn.com/SHOWBIZ/9712/22/melrose.lawsuit>.

production, and distribution, in satisfying and fulfilling customer needs.¹⁶⁴ For instance, unlike manufacturing, where customers typically differentiate among products, in service work, customers can develop strong preferences for specific kinds of workers or characteristics.¹⁶⁵ Employers develop and exploit these preferences to market their businesses in ways the law has deemed both legitimate and illegitimate.¹⁶⁶

In a series of 1970s cases, for example, courts rejected employer efforts to justify discriminatory treatment practices based on gender stereotypes, including both nurturing and “sexual titillation.”¹⁶⁷ Most famously, faced with airlines’ efforts to limit the position of flight attendant to young, “attractive” women, courts held that their exclusions of men, as well as their subjecting women but not men to weight restrictions and other grooming, age, and marital status requirements, violated Title VII.¹⁶⁸ Other cases used a similar logic to

164. “[S]ervice sector employers are more dependent upon front-line employees’ loyalty and willingness to go the extra mile to further the firm’s mission than manufacturing employers because service businesses offer no tangible product; the firms’ service *is* the product, and it cannot be separated from the workers who provide it.” CRAIN, WORK LAW, *supra* note 96, at 65.

165. Kimberly A. Yuracko, *Private Nurses and Playboy Bunnies: Explaining Permissible Sex Discrimination*, 92 CALIF. L. REV. 147, 164 (2004) (“Two types of customer preferences define each business: preferences for products and preferences for people. . . . Businesses are also shaped, however, by customer preferences for certain types of employees or service providers. Customer preferences to have certain services provided by employees of a particular sex may . . . be grounded in (1) a belief that individuals of one sex are superior in all or particular activities to individuals of the other sex, (2) socially, or perhaps biologically, conditioned feelings of discomfort at having certain services performed by an individual of a particular sex, (3) a desire to experience or avoid sexual titillation, or (4) a sense of socially or aesthetically appropriate gender roles.”); *see also* Amy Kapczynski, Note, *Same-Sex Privacy and the Limits of Anti-Discrimination Law*, 112 YALE L.J. 1257 (2003). Of course, many businesses may use their workers to try to link their products to an idea or image. Frequently, this is an effort to turn a product into a service. The Saturn car exemplifies this. An essential component of “the Saturn difference” was the company’s “breakthrough customer experience,” which was predicated on having “having a team of people who were committed to both their customers’ needs and one another’s success.” Kevin Smith, *What Car Brands Can Learn From Saturn’s Rise and Fall*, ADVERTISING AGE (Mar. 9, 2009), <http://adage.com/article/cmo-strategy/car-brands-learn-gm-s-saturn-experience/135027>; David Hanna, *How GM Destroyed Its Saturn Success*, FORBES (Mar. 8, 2010), <http://www.forbes.com/2010/03/08/saturn-gm-innovation-leadership-managing-failure.html>.

166. Dianne Avery and Marion Crain describe employer efforts to differentiate their business and create consumer loyalty through the “brand.” *See, e.g.*, Dianne Avery & Marion Crain, *Branded: Corporate Image, Sexual Stereotyping, and the New Face of Capitalism*, 14 DUKE J. GENDER L. & POL’Y 13, 84 (2007) (“In entering new gaming markets outside the orb of Las Vegas and the Strip, Harrah’s, like other casino operators, has struggled to negotiate delicately the boundary between commercially viable sexiness and unpalatable (if not clearly illegal) sexual exploitation of female service workers.”); *see also* Marion Crain, *Managing Identity: Buying Into the Brand at Work*, 95 IOWA L. REV. 1179 (2010) (describing how employers use “brand” to induce worker loyalty in absence of traditional incentives such as retirement benefits and job security).

167. According to Kimberly Yuracko, who coined the term, “In sexual titillation-based cases employers argue that they must discriminate on the basis of sex in hiring to provide customers with the type of sexual arousal their businesses promise.” Yuracko, *supra* note 165, at 155–56.

168. *See, e.g.*, *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385 (5th Cir. 1971) (holding airline could not exclude men from position of flight attendant); *Wilson v. Sw. Airlines Co.*, 517 F. Supp. 292 (N.D. Tex. 1981) (holding that being a woman was not a BFOQ for flight attendants or

limit employers' discriminatory practices. Yet, the sex discrimination BFOQ remains robust. Courts have upheld gender as a valid criterion in hiring nurses who work in labor and delivery rooms, nursing home attendants who bathe and dress patients, restroom attendants, and, in some cases, for prison guards.¹⁶⁹ Courts cite as the relevant factor the employer's reasonable regard for its patrons' privacy.¹⁷⁰

Unlike the decisional privacy that underlies some erotic exceptionalism, this is what we might think of as spatial privacy.¹⁷¹ If decisional privacy in constitutional jurisprudence typically focuses on control over sexual and reproductive acts, spatial privacy privileges desires to have services provided by workers of the same sex. For women, spatial privacy is often articulated in the language of vulnerability—that they feel physically and/or sexually threatened by men working in women's prisons, restrooms, or locker rooms, or that they feel exposed, literally and figuratively, during childbirth and find comfort in same-sex nurses.¹⁷² In contrast, when men claim spatial privacy it is often in different terms—they forego the language of safety and vulnerability in favor of desires to bond with other men or find sanctuaries for behavior that might offend women.¹⁷³ At bottom, whether misguided or not, these preferences are rooted in the cultural norms and comforts of homosociality.¹⁷⁴

ticket agents and finding Southwest's single-sex hiring practices to be sex discrimination); *Laffey v. Nw. Airlines*, 366 F. Supp. 763 (D.D.C. 1973) (holding, inter alia, that rules prohibiting eyeglasses for female flight attendants and height and weight restrictions applied only to female flight attendants violated Title VII); *Sprogis v. United Air Lines, Inc.*, 308 F. Supp. 959 (N.D. Ill. 1970) (holding that a requirement that female flight attendants be unmarried was sex discrimination under Title VII).

169. Yuracko observes a spectrum of privacy from touching (labor room and other care givers) to seeing to embarrassment but not touching or seeing (restroom attendants). Yuracko, *supra* note 165, at 157; see also Michael J. Frank, *Justifiable Discrimination in the News and Entertainment Industries: Does Title VII Need a Race or Color BFOQ?*, 35 U.S.F. L. REV. 473, 491 (2001) (noting that "within the privacy cases, the courts deem the interests of ordinary customers in their privacy to be less than those of patients in nursing and health care facilities").

170. "The courts that have permitted the privacy-based sex BFOQ believe that the very sex of the excluded individuals prevents them from giving customers adequate privacy. Accordingly, the test for the privacy-based sex BFOQ is whether the excluded applicants can satisfactorily respect the privacy of customers in the performance of the job." Frank, *supra* note 169, at 490. While Yuracko notes the "symmetry" in privacy preferences, Frank notes that the privacy BFOQ defense is typically only applied to women's privacy preferences, not to men's. *Id.* at 489–91; Yuracko, *supra* note 165, at 181–83; see also Kapczynski, *supra* note 165.

171. See *supra* notes 56–57 and accompanying text. I thank Holning Lau for helping me with this language.

172. I take up gender segregation in Adrienne D. Davis, *The Potty Is the Hardest Part: Irregular Intimacy, Gender Segregation, and the Search for Equality* (unpublished manuscript) (on file with author).

173. Importantly, courts do not guarantee male patients male nurses. Kapczynski, *supra* note 165. Kim Shayo Buchanan finds that, contrary to popular wisdom, men in prison are at risk of sexual abuse by women corrections officers. Kim Shayo Buchanan, *Beyond Modesty: Privacy in Prison and the Risk of Sexual Abuse*, 88 MARQ. L. REV. 751 (2005).

174. Homosociality is a social, not sexual, preference for members of one's own sex. For instance, while many heterosexual men and women sexually desire members of the "opposite" sex, they prefer to socialize with members of the same sex. Queer theorist Eve Sedgwick elaborates

Yet decisional privacy is arguably operative in these cases as well. Kimberly Yuracko observes that courts have carved out a second exemption that affirms the right of employers to employ only women (or, presumably, only men) in workplaces that sell sex.¹⁷⁵ Myriad businesses use sex to market other goods or services, e.g., meals, clothes, transportation, gambling, etc., and to enhance revenues. But Yuracko distinguishes these from businesses that *actually charge for and derive receipts* from the sale of sexual services. Unlike stripping, prostitution, and phone sex, in Hooters and Abercrombie and Fitch, the cash register has no provision for ringing up erotic sales.¹⁷⁶ Yuracko shows that employer efforts to assert BFOQs in the latter instances rarely win, while courts have been more willing to permit employers to practice sex discrimination for businesses that ring up erotic receipts, in which selling sex is the “inherent business essence.”¹⁷⁷ Yuracko distinguishes these “sex business” cases from the privacy ones.¹⁷⁸ Yet, one might understand the sex business

manifestations of homosociality among men and women of different sexual orientations. EVE KOSOFKY SEDGWICK, *BETWEEN MEN: ENGLISH LITERATURE AND MALE HOMOSOCIAL DESIRE* (1985).

175. See, e.g., *Wilson v. Sw. Airlines Co.*, 517 F. Supp. 292, 301 (N.D. Tex. 1981) (“Generally, a male could not supply the authenticity required to perform a female role. Similarly, in jobs where sex or vicarious sexual recreation is the primary service provided, e.g. a social escort or topless dancer, the job automatically calls for one sex exclusively; the employee’s sex and the service provided are inseparable. Thus, being female has been deemed a BFOQ for the position of a Playboy Bunny, female sexuality being reasonably necessary to perform the dominant purpose of the job which is forthrightly to titillate and entice male customers.”).

176. By the same token, these sexual services could be provided even when they are not erotic (such as a phone sex or prostitution interaction in which the parties talk non-sexually). In addition, even outside of erotic receipt businesses, workers often receive an erotic premium in wages or tips. See Dianne Avery, *The Female Breast as Brand*, in *INVISIBLE LABOR* (Marion Crain et al. eds.) (forthcoming 2015). By comparison, Ohio’s General Assembly defined a “sexual encounter establishment” in a 2001–2002 bill as “a business or commercial establishment that, as one of its principal business purposes, offers for any form of consideration a place where two or more persons may congregate, associate, or consort for the purpose of engaging in specified sexual activities or when one or more of the persons is nude or seminude.” S.B. 251, 124 Gen. Assemb., Reg. Sess. (Ohio 2002), http://naturistaction.org/Legislative_Bill_Texts/2002/OH_2002_SB_251/oh_2002_sb_251.htm 1.

177. Yuracko, *supra* note 165, at 157–58 n.27. “Attempts to discriminate on the basis of sex in hiring for plus-sex businesses are virtually always unsuccessful.” *Id.* at 158. She claims that airlines and related cases demonstrate that “courts simply do not permit employers to explicitly sell sexual titillation along with other goods and services.” *Id.* at 159. Yuracko also believes that most employers would not risk association as an erotic receipt business. “Businesses explicitly selling sexual titillation may do so only by positioning themselves within the traditionally marginalized and stigmatized sex industry. Businesses that seek to bring sexual titillation into the mainstream by combining sexual titillation (and sex-based hiring) with the sale of other goods and services are not permitted to exist.” *Id.* at 196. Ann McGinley, on the other hand, is not as sanguine about the plus-sex/sexual gratification dichotomy. McGinley finds that “[t]he lines between sex work, work in a highly sexualized environment, and other work requiring employees to ‘sell’ their sex or gender to give up control over their intimate emotions are hazy.” McGinley, *supra* note 145, at 95 (footnote omitted). Instead, “[o]ften, a woman’s job prospects and ability to advance within an enterprise are linked to her setting the proper gender tone on the scale of commodification.” *Id.* at 94 (footnote omitted).

178. Yuracko, *supra* note 165, at 167–95.

exemption as extending the logic of decisional privacy to the commercial sphere: that decisions about sex lie in a zone of protected intimacy liberty.

Hence, spatial privacy and decisional privacy for sex work businesses are noteworthy as the only forms of sex discrimination in which customer “tastes for discrimination” trump workers’ rights to equal treatment.¹⁷⁹ There is overlap since both embed a sexual logic.¹⁸⁰ Yet they are conceptually distinct. Yuracko contends that courts “are far more permissive” of sex discrimination on behalf of spatial privacy concerns than they are of discrimination on behalf of what I have characterized as decisional privacy in sex businesses.¹⁸¹ Part III returns to this distinction to elaborate how the different logics of spatial and decisional privacy would play out in a discrimination regime that could govern sex workplaces. Thus, service remains a deeply complicated and contested terrain for sex discrimination claims.

In an important contrast, when it comes to race, employers cannot defer to their own or their customers’ preferences or biases. Unlike sex, race and disability have no explicit bona fide occupational qualification. The standard for disability is that employers must make “reasonable accommodations” and not deny an opportunity to an otherwise qualified individual.¹⁸² And race is straightforward¹⁸³: the only explicit exception is a narrow one recognized by the Seventh Circuit for correctional officers.¹⁸⁴ But there appear to be other exemptions operative in race jurisprudence. For instance, one judge speculated

179. See generally Avery & Crain, *supra* note 166 (showing that employers are successfully recasting appearance discrimination in the language of “branding”).

180. While sexual gratification rests on an explicitly sexual logic, privacy, too, can be implicitly sexual. Its assumption that people are comfortable with care attendants of the same sex is heteronormative—lesbian, gay, and bisexual people may experience varied degrees of (dis)comfort with same-sex care providers. For example, some lesbians may feel more uncomfortable with female caregivers, but others may object to male invasions of their privacy, rooted in perceptions of male supremacy and objectification, rather than in assumptions of heterosexual desire.

181. Yuracko, *supra* note 165, at 152.

182. Americans with Disabilities Act, 42 U.S.C. § 12112(b) (2012) (“As used in subsection (a) of this section, the term ‘discriminate against a qualified individual on the basis of disability’ includes . . . (5)(A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity . . .”).

183. “The bona fide occupational qualification (“BFOQ”) defense is an extremely narrow exception, . . . and is *not* available for racial discrimination.” Ferrill v. Parker Grp., Inc. 168 F.3d 468, 473 (11th Cir. 1999); Swint v. Pullman-Standard, 624 F.2d 525, 535 (5th Cir. 1980), *rev’d on other grounds*, 456 U.S. 273 (1982) (finding that omission of race as BFOQ was intentional on part of Congress and that the defense is not available in race discrimination cases); Knight v. Nassau Cnty. Civil Serv. Comm’n, 649 F.2d 157, 162 (2d Cir. 1981) (same); Burwell v. E. Air Lines, Inc., 633 F.2d 361, 370 n.13 (4th Cir. 1980) (same); EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.2 (2014) (describing BFOQ for gender but not race).

184. Wittmer v. Peters, 87 F.3d 916 (7th Cir. 1996) (adopting narrow, judicially crafted racial BFOQ for correctional officers); see also Robinson, *supra* note 162, at 40–41 (“A few courts have suggested without holding that Title VII could permit a BFOQ for race in certain contexts, like police forces and prison security.”).

that law enforcement could assign undercover agents by race, e.g., limit Ku Klux Klan infiltration to white officers and agents.¹⁸⁵ In a radically different context, Michael Frank and Russell Robinson have both observed that race has been effectively exempted from race discrimination law in the highly influential and profitable filmmaking industry.¹⁸⁶ Writing in 2001 and 2007, neither author found any published adjudication of the highly prevalent racial preferences in casting decisions.¹⁸⁷ Robinson observed, “[T]he EEOC carves out casting as an arbitrary exception to the normal requirement that an applicant be considered as an individual and not saddled with group-based stereotypes and the ban on catering to customer preferences.”¹⁸⁸ These racial breakdowns are defended as protecting authenticity, but, unlike cuisine, religion, and undercover agents, in film casting, authenticity is linked to First Amendment protection for artistic expression, including character and plot creation. Robinson rejects the authenticity exemption, contending, “Indeed, when it comes to casting, an entire industry effectively disregards Title VII.”¹⁸⁹

Judicial dicta similarly suggest protection for another market sector that regularly employs racial preferences: advertising. A district court noted that advertisers might select actors based on race in order to “solicit products to a certain group.”¹⁹⁰ An appellate court further clarified and refined the

185. Some have also suggested that newspapers might send white reporters to interview Klan members. *See, e.g.*, Frank, *supra* note 169, at 506 (“Discriminatory practices may also exist in the television news industry, where it sometimes may be necessary to use reporters of a particular race to do undercover work, such as an exposé on the Ku Klux Klan, or where an Asian-American reporter might have better success getting other Asians to volunteer information during an interview.”).

186. *See id.*; Robinson, *supra* note 162.

187. Frank, *supra* note 169, at 512 (“There is not a single reported case in which an actor has sued a director for race-based casting decisions, even though it is common.”); Robinson, *supra* note 162, at 2 (noting his research “did not turn up a single published decision in which a court adjudicated an actor’s Title VII claim of race or sex discrimination”). Robinson contrasts race and sex specifications in casting breakdowns, finding that 45.2 percent had racial codes, compared with 94 percent for gender and “women over 40 [who] are as much a minority as any ethnic group.” Robinson, *supra* note 162, at 19 (quoting interview with casting director). “This common sequencing suggests that sex forms the foundation of a character more than the traits that follow, such as race and age.” *Id.* at 10.

188. Robinson, *supra* note 162, at 34. *Compare id.* at 40 (“advocat[ing] a different approach that acknowledges First Amendment concerns and focuses not on whether a female can ‘authentically’ play a male, but on whether the sex of the character could be changed without doing substantial harm to the narrative”), with Frank, *supra* note 169, at 498 (“Despite Congress’ omission of race from the BFOQ provision, people accept the reasonableness and morality of recognizing a BFOQ for race, at least in some instances involving the entertainment industry. Indeed, to demonstrate the necessity of a race BFOQ, some scholars use as their prime example the need to employ black actors to portray black characters.” (footnotes omitted)).

189. Robinson, *supra* note 162, at 5.

190. *See Ferrill v. Parker Grp., Inc.*, 967 F. Supp. 472, 475 (N.D. Ala. 1997), *aff’d*, 168 F.3d 468 (11th Cir. 1999). As the appellate court elaborated:

The District Court expressed some concern that its decision “might well prevent advertisers from employing, based on race, actors to solicit products to a certain group.” This conclusion, however, does not necessarily follow. A film director casting a movie about African-

hypothetical test as employers' ability to take racial *appearance* into account.¹⁹¹

A final looks-based profession that appears to inhabit at least a litigation-free zone with regard to antidiscrimination law is modeling. Fashion designers and editorial directors routinely use race as an organizing principle, either excluding non-white models from highly lucrative runway shows and editorial campaigns, or, alternatively, use race to organize how they showcase clothes and trends. Thus, while nominally there are no BFOQs for race discrimination (§ 1981 follows Title VII in denying one), the reality is that some appearance industries—film, advertising, and modeling—routinely make hiring and other employment decisions based on race.¹⁹² Despite the absence of any significant ideological justifications, it is these looks-based, or “appearance,” markets that enjoy expressive protection to discriminate.

In sum, erotic assimilationists seek access to antidiscrimination law in order to ameliorate the significant bias customers and employers exert against sex workers. Yet, Title VII is a doctrine riddled with exclusions, tiers, and inconsistencies. These include BFOQ's rooted in authenticity as well as both decisional and spatial privacy, First Amendment exclusions, and tiered standards in sexual harassment. Given this doctrinal complexity and unpredictability, sex workers may not enjoy the full protections from discrimination that assimilationists anticipate and hope for. An additional question, taken up in Part III, is whether Title VII should be applied to sex markets.

D. Summary

In the end, the erotic assimilationist claim that professional sex is just work and could be easily assimilated into extant regulatory structures is a miscue from the diversity of workplaces and their regulation. Regulations for health and safety, violence prevention, and antidiscrimination law apply in varying ways to different market sectors and types of work. To gain maximum protections in a world of decreasing regulation, workers must define

American slaves *may not exclude Caucasians from the auditions*, but the director may limit certain roles to persons having the physical characteristics of African-Americans.

Ferrill, 168 F.3d at 474 n.10 (emphasis added); *see also* *Miller v. Tex. State Bd. of Barber Exam'rs*, 615 F.2d 650, 654 (5th Cir. 1980) (suggesting that a director wishing to cast the role of Henry VIII may announce that only applicants of sufficient physical likeness to Henry VIII will be considered). As applied here, the Parker Group could have legally assigned jobs based on accent, speech pattern or dialect, but not expressly on race. The statutory language allows gender to be a valid BFOQ for hiring an actor or actress where it is necessary for the “purpose of authenticity or genuineness.” 29 C.F.R. § 1604.2(a)(2). Congress specifically rejected race as a BFOQ. *See generally* 110 Cong. Rec. 2550-63 (1964) (House discussion on inclusion of race and color in the BFOQ exception).

191. *Ferrill*, 168 F.3d at 474 n.10.

192. Siobhan Brooks recasts these as “desire industries.” “Desire industries can include various forms of media and industries, which operate on ideas of desire and attractiveness such as fashion modeling, acting, and selling retail.” BROOKS, *supra* note 149, at 6.

themselves as certain kinds of workers doing certain kinds of work. Workers successfully gained regulatory interventions in the factories, mines, slaughterhouses, and other worksites that labor reformers targeted after the industrial revolution. These regulatory interventions aligned particularly well with Fordist factories in which employers' efforts to standardize production also showcased their control, responsibility, and liability. Applying antidiscrimination law to these same workplaces was similarly straightforward: neither employers nor consumers have any legitimate interest in the race or gender of the worker who produces their coal, car, or widget.¹⁹³ But as many commentators have noted, labor's golden age ended with the manufacturing economy. Workers in the service economy struggle to make their needs legible to regulatory agencies and to access protections. Even the OSH Act, despite strong calls and efforts to expand it, continues to envision a historical, increasingly non-relevant workplace.

Despite more than a century of effort by labor activists and reformers, workplace law remains unpredictable, and many workers find that its protections are inadequate for their needs. Beyond that, the regulation of work is deeply instrumentalist: it is neither natural nor inexorable. As such, erotic assimilationists should be thoughtful about *which* type of labor sex work would be most likely to be assimilated into. While assimilationists might be envisioning those laborers *and labor* with the most conventional set of protections, e.g., manufacturing, which features relatively strong protections from single-incident injuries, as well as racial and other forms of discrimination, it is just as likely that sex work would be assimilated into labor in which workplace hazards are un- or under-regulated. Regulators might find sex work akin to in-home health care providers, late-night retail, or other relatively invisible, powerless service work. Or modeling.¹⁹⁴

In addition, as the next Part shows, the erotic assimilationist claim is a miscue not only from the diversity of *workplaces*, but also from the diversity of *sex workplaces*. Sex workplaces differ not only from many other workplaces, but also from each other. The next Part explores both the diversity of sex markets and the distinctive challenges of regulating them in order to contemplate whether and how sex workplaces could be more effectively regulated to ameliorate both danger and discrimination.

193. *But see* DAVID R. ROEDIGER, *THE WAGES OF WHITENESS: RACE AND THE MAKING OF THE AMERICAN WORKING CLASS* (1991) (describing economically irrational behavior in which White workers accept lower wages for a racial premium of not working with Blacks).

194. As explored in Part III, modeling and sex work have much in common. *See infra* notes 294–98 and accompanying text. According to Ashley Mears, modeling is emblematic of disempowered and precarious labor. ASHLEY MEARS, *PRICING BEAUTY: THE MAKING OF A FASHION MODEL* (2011).

III

PROFESSIONAL SEX: A NEW MODE OF WORK

A. *Peculiarities of Markets for Sex*

Part II argued that erotic assimilationists' insistence that sex work be regulated like "any other labor" ignores the diversity of workplaces and their regulation. This Section shows additional flaws in assimilationist logic that may have contributed to regulatory stall. In the strong form version, the homogeneity of labor claim insists—and in the weak form version it assumes—that sexual labor is no different from other, non-sexual work. Recall Sylvia Law's point from Part I: "It seems . . . likely that [sex workers'] problems would be addressed through measures applicable to all workers, and extended to commercial sex workers if commercial sex were legal, rather than through special programs for commercial sex workers."¹⁹⁵

This Part shows that, contrary to the assimilationist claim, sex workplaces are not like most workplaces. Rather, they are distinct in ways that have regulatory significance.

Sex workers are disproportionately cisgender or transgender women but cater to a customer base that is overwhelmingly male.¹⁹⁶ Sex work is not alone in these ratios; historically secretarial work also manifested these dynamics. (In contrast, other female dominated professions, like nursing, waitressing, and teaching, serve gender-mixed populations.) However in sex markets, these ratios can engender distinct dynamics that pose real risk to the workers. For instance, exotic dancers typically cater to a male customer base and work for multiple customers simultaneously, either in clubs or for parties—bachelor, fraternity, work, etc.—held in private or rented places, i.e., at outcall locations. While dance clubs often have regular customers who may come alone, many men patronize dancers together, seeking homosocial bonding through group

195. Law, *supra* note 11, at 599.

196. Kathleen D. Vohs & Jannine Lasaleta, *Heterosexual Sexual Behavior Is Governed by Social Exchange and Basic Economic Principles: Sexual Economics Theory*, 9 MINN. J.L. SCI. & TECH. 785, 792 (2008) ("There exists a great gender asymmetry in prostitution: it is almost always the man that is paying for sex. Even male prostitutes have mainly male clients. Research by Atchison, Fraser, & Lowman provide evidence for the idea that women do not pay for sex: in a study using several multi-method searches for clients of prostitution they only found two women. Of interest is that both women did not purchase sex on their own, but rather were engaging in group sexual activity with a male partner."); see also Lynn Sharon Chancer, *Prostitution, Feminist Theory, and Ambivalence: Notes from the Sociological Underground*, 37 SOC. TEXT 143, 151 (1993) (describing sex work as "an overwhelmingly female work force that services an overwhelmingly male clientele"); RICHARD A. POSNER, *SEX AND REASON* 91–92 (1994) ("Even in societies in which women are prosperous and independent (modern Scandinavia, for example), and therefore could easily afford to patronize prostitutes, there is no demand for prostitutes of either sex to service women."). *But see, e.g.*, Klaus de Albuquerque, *Sex, Beach Boys and Female Tourists in the Caribbean*, 2 SEXUALITY & CULTURE 87 (Barry M. Dank ed., 1998) (observing women do not seek out sex in brothels or on the street but increasing numbers partake of sex tourism).

interaction with the worker.¹⁹⁷ Several sociological studies have found that in these spaces patrons may experiment with and negotiate social norms and expectations of masculinity that differ from—and would be condemned as unacceptable in—other social contexts.¹⁹⁸ For example, sex workers who are cisgender and transgender women face heightened risks of violence, particularly sexual violence, which are described in more detail below.¹⁹⁹ Transgender women are especially vulnerable due to their marginalized social position²⁰⁰ and also customers who react violently when learning a prostitute is biologically male.²⁰¹

These same homosocial masculinities can trigger violence against men sex workers. Violence against men in the sex trade is well documented.²⁰² Overwhelmingly, this violence is perpetuated against them by men customers, not women and is often triggered by perceived threats to the same masculinity that degrades women sex workers.²⁰³

197. According to one of Siobhan Brooks's informants, men "show off in front of their friends and may refer to you as a bitch or a ho, you just never know what can happen, especially at a bachelor party where you don't even know if security will be there." BROOKS, *supra* note 149, at 67. Some clubs reinforce this homosociality by denying access to women unaccompanied by a man. Sociologist Bernadette Barton found that, as a lesbian "with no readily available male partner to accompany me, even getting into the clubs" to conduct field research presented hurdles because "the vast majority of strip bars do not allow women to enter unaccompanied by a man." Barton, *Dancing on the Möbius Strip*, *supra* note 50, at 587.

198. Lisa Pasko, *Naked Power: The Practice of Stripping as a Confidence Game*, 5 SEXUALITIES 49, 64 (2002) ("For the male customers, the stripping experience initially seems to provide opportunities to enact masculinity by using economic power to achieve emotional and sexual intimacy. The setting of the club reinforces the general social construction of women as ubiquitously available sex objects, despite the fact that dancers actually maintain a certain form of power in their particularized interaction. It is power, though, that does not really challenge male authority, and ultimately embeds even the con woman in stigmatizing, exhausting and dangerous work. The money may be good, but the social consequences for the women are profound."). Bernadette Barton's field research in strip clubs found the same dynamics at work. "[B]ecause strip clubs exist on the borders of 'morally correct' society, in the mind of the average customer, normal rules of etiquette do not apply. He may feel entitled to make the dancer the receptacle of all of his most abusive, perverse, and obnoxious behaviors and ideas." Barton, *Dancing on the Möbius Strip*, *supra* note 50, at 592; *see also* VIVA LAS VEGAS, MAGIC GARDENS: THE MEMOIRS OF VIVA LAS VEGAS 39 (2009) ("Lawyers were always the worst. They seemed to feel they could get away with murder. Probably could. At the Magic they were constantly getting tossed for taking out their erect cocks.").

199. *See infra* Part III.B.

200. "Transgender sex workers are among the most vulnerable populations in the United States, partly due to their limited access to health care, job discrimination, high HIV prevalence, violence, and social marginalization." Elizabeth Schepel, A Comparative Study of Adult Transgender and Female Prostitution (May 2011) (unpublished M.S.W. thesis, Arizona State University), http://repository.asu.edu/attachments/56451/content/Schepel_asu_0010N_10422.pdf.

201. *See, e.g.*, Kirk W. Elifson et al., *Male Transvestite Prostitutes and HIV Risk*, 83 AM. J. PUB. HEALTH 260 (1993); L.A. Sausa et al., *Perceived Risks and Benefits of Sex Work Among Transgender Women of Color in San Francisco*, 36 ARCHIVES SEXUAL BEHAV. 768 (2007).

202. MICHEL DORAIS, RENT BOYS: THE WORLD OF MALE SEX WORKERS 67–68 (Peter Feldstein trans., 2005) (2003); DONALD J. WEST, MALE PROSTITUTION 103–14, 290 (1993).

203. WEST, MALE PROSTITUTION, *supra* note 202. West notes that men prostitutes who consider themselves heterosexual also exert violence against clients who are gay men. *Id.* at 100–01.

Customers' significant alcohol consumption can further loosen social inhibitions and lubricate behavior that puts workers at risk of both verbal abuse and violence.²⁰⁴ Moreover, sex workplaces are some of the only ones in which the *workers* are not only permitted but actually expected to consume alcohol. In dance clubs in particular, operators may require dancers to "hustle" drinks from customers, which the dancers are then expected to drink.²⁰⁵ Hence, not only are the customers often intoxicated, but also the workers are required to work in a state in which their own judgment is definitionally impaired.²⁰⁶ Compared to other workers, then, sex professionals endure a combination of gender ratios, masculinity threats, and alcohol consumption that heightens workplace risk.

A second distinctive characteristic of the work is the dangerous blurring of when sex professionals are "on" versus "off" duty. In sex work, part of what is being "sold" is a fantasy of interpersonal connection.²⁰⁷ Customers purchase

In both cases, men aligning themselves with conventional masculinity use violence to police other men deemed non-normative and threatening.

204. See, e.g., Barton, *Dancing on the Möbius Strip*, *supra* note 50, at 592 (dancer describes drunken, threatening behavior).

205. BERNADETTE BARTON, STRIPPED: INSIDE THE LIVES OF EXOTIC DANCERS 55–56 (2006) ("In the clubs that serve alcohol, management expects the dancers to accept drinks from the customers because most club owners make the bulk of their profit from alcohol purchases. . . . Customers invariably want dancers to drink alcohol and are savvy to the tricks dancers use to stay sober. A client reasons that if he can get a woman sufficiently intoxicated, it might loosen her inhibitions enough that she'll have sex with him later."); see also Panagos v. Indus. Comm'n, 524 N.E.2d 1018, 1021 (Ill. App. Ct. 1988) (holding that dancer injured in an alcohol-related automobile accident after her shift at a club could receive workers' compensation because her drinking on the job arose out of and occurred in course of employment), discussed in Margaret A. Baldwin, "A Million Dollars and an Apology": Prostitution and Public Benefits Claims, 10 HASTINGS WOMEN'S L.J. 189, 202 (1999) ("The common-sense acknowledgment by these courts that drinking is a job requirement for women in strip clubs—affecting women's lives inside and outside the club—has potentially radical ramifications for women's benefit eligibility."). In contrast, Elizabeth Bernstein's study of prostitutes in Stockholm, Amsterdam, and San Francisco found that many "career" prostitutes were "vigilant" about working "straight," that is, not drunk or high, carefully distinguishing themselves from "survival" prostitutes who bartered their bodies for drugs. BERNSTEIN, TEMPORARILY YOURS, *supra* note 23, at 49.

206. In one case, the court upheld a worker's claim to compensation when she accepted a ride after work from an intoxicated driver who then had an accident. The court concluded:

We find the commissioner's conclusion that claimant's intoxication was caused by her drinking while at work is supported by substantial evidence. *The employer required its dancers to socialize with customers and to hustle the purchase of drinks for the dancers. It should expect this requirement to result in intoxication of the dancers.* This practice also benefited the employer in two ways. First, it profited from the sale of the drinks, which customers paid for. Second, the dancers' socializing contributed to the lounge's goodwill by creating an atmosphere appealing to its customers.

2800 Corp. v. Fernandez, 528 N.W.2d 124, 128 (Iowa 1995) (emphasis added).

207. "What a john wants is for the woman to *act* like the woman he wants, and for the woman to maintain a credible performance as part of the bargain. She is to act as if she *is* the role he wants her to play." Margaret A. Baldwin, *Split at the Root: Prostitution and Feminist Discourses of Law Reform*, 5 YALE J.L. & FEMINISM 47, 118 (1992). Discussing dancers, Brooks says that dancers circulating with patrons "allows for increased individual attention to the male guests and the formation of relationships between 'regulars' and the dancers. Gentlemen's clubs rely on fantasy to run their businesses. The fantasy is that the dancer is sexually and personally interested in the customer." BROOKS, *supra* note 149, at 78 (footnote omitted).

vastly differing fantasies, but, with the exception of domination fantasies, the scenario typically entails a performance of erotic attraction from and personal interest in them by the worker. Hence, the popularity of The Girlfriend Experience, in which sex workers “advertise themselves as ‘girlfriends for hire’ and describe the ways in which they offer not merely eroticism but authentic intimate connection for sale in the marketplace.”²⁰⁸ Good sex workers deliver the fantasies their customers want.²⁰⁹ It should not be surprising that some customers confuse the fantasy with reality and attempt to pursue the relationship beyond the transactional contract.²¹⁰ One regular customer at a dance club in New York, who often volunteers to escort dancers to the subway or help them hail a cab after their shifts, observed, “It’s leaving the club that’s dangerous.”²¹¹ This danger arises for other service workers, as well, who may be stalked or harassed by clients or customers, but the risk is higher in sex work, given that the customer’s fantasy is embedded in an actual sexual relationship and interest, feigned or not.

Heightening the risk is the fact that some sex market employers appear to purposely blur lines between on-work/off-work. They may demand sexual services—or “entertainment” as they put it—for themselves or for friends, as a condition of employment or favorable treatment, such as good shifts or referrals to clients.²¹² In contrast, factory workers *typically* are not asked to make widgets for free or for the boss’s personal use after hours. Both of these

208. BERNSTEIN, TEMPORARILY YOURS, *supra* note 23, at 7. Indeed, sociologist Bernstein’s ethnographies found that “[o]ne of the most sought after features in the prostitution encounter has . . . become the ‘girlfriend experience,’ or GFE. Ads for escorts in print media and online now routinely feature this in their advertisements, and there are entire Web pages where people who specialize in this service can advertise.” *Id.* at 126. Bernstein dubs this “bounded authenticity.” Although the emotional and erotic authenticity these sex workers offer is sincere, the interactions remain bounded by the market-mediated nature of the transactions. Bernstein finds that neither the clients nor the workers want unbounded eroticism, as demonstrated by the fact that many sex workers report that when they offer favored clients “freebies” or discounts the men often do not return. *Id.* at 102. Rather, “[f]or many clients, one of the chief virtues of commercial sexual exchange is the clear and bounded nature of the encounter” and the “clarifying effect of payment.” *Id.* at 120, 121. Importantly, The Girlfriend Experience is not a substitute or second best to conventional, amative relationships; it, or bounded authenticity, is itself the desired experience. *Cf.* ZELIZER, *supra* note 24, at 17 (complicating idea of authenticity in intimate relationships).

209. “This emotional labor, which she describes as more tiresome than the work of exotic dance, is crucial to the financial success of the dancer.” BERNSTEIN, TEMPORARILY YOURS, *supra* note 23, at 80 (footnotes omitted). One sociologist observed “the interactions between dancer and customer become complicated because the dancer not only displays her body, but also sells versions of her ‘self’—including her personality, attention, and conversation—in order to sustain the relationship with the customer.” McGinley, *supra* note 145, at 79 (footnote omitted).

210. “The dancer uses emotional labor to develop clients into ‘regulars’ who spend hundreds of dollars at each visit to the club. The emotional labor, which is invisible to the regular clients, results in clients’ belief that they are ‘boyfriends’ rather than customers.” BROOKS, *supra* note 149, at 80–81 (footnotes omitted).

211. BROOKS, *supra* note 149, at 96.

212. Lisa E. Sanchez, *Boundaries of Legitimacy: Sex, Violence, Citizenship, and Community in a Local Sexual Economy*, 22 LAW & SOC. INQUIRY 543, 567 (1997) (reporting that men who serve as agents for exotic dancers frequently insist upon sex as a condition for a referral).

dynamics are exacerbated by the attribution to sex professionals of an identity as always sexually available and willing or, alternatively, as a lesser human being deserving of exploitation, because s/he has explicitly commodified he/r sexuality. Both beliefs can lead to threatening behavior toward workers, including stalking, harassment, and even assault and murder. While many customers do get and respect the boundaries between “on” and “off” duty, the nature of the work lends itself to confusion, thereby heightening risk.

Similarly, the line between re-negotiating terms and harassment or assault also can be blurry. A dancer who is asked to perform a sexual act on a client may prefer not to do so, be offended, or even feel threatened or coerced. Another dancer, or the same dancer in different circumstances, might be open to the request, depending on the price point, client, or context. The same is true for a prostitute who has agreed in advance to a negotiated set of transactions but who may or may not be open to expanding the sexual menu during the encounter.²¹³ While workers in non-sexual contexts might characterize the request for *additional* work or *more* work or *different* work as unpleasant, exploitative, and/or coercive, law and society typically do not perceive such requests as criminal behavior the way that violations of sexual contracts can easily cross into sexual assault.

A third meaningful distinction stems from the fact that sexual labor entails a social stigma that is almost unique. The stigma results in significant social isolation, as it interferes in the worker’s relationships with friends, family, and, importantly, with other workers. For instance, dancers trying to unionize have found their organizing efforts rejected by several unions.²¹⁴ In addition, while other workers who labor in stressful, high-risk, or low-prestige jobs can find solace from family, friends, and community, many sex professionals hide their work from those closest to them, resulting in profound social isolation.²¹⁵ Some commentators also attribute the isolation to the extreme control that employers exert over sex workers that “leads to the erosion of other relationships and

213. Kathy Abrams’s theory of partial agency highlights the pluralism of women’s responses to sexualized conduct. Abrams, *supra* note 30, at 366 (“Acknowledging partial agency means looking for responses outside the range of the autonomous liberal subject or the wholly dominated victim, responses consistent with the broad notion that women strive to affect their environments and direct their lives, even when their chances of doing so are limited by structures or relationships of oppression.”).

214. Margot Rutman notes that the Screen Actors Guild excludes such performers from membership and their independent-contractor status precludes their protection under the National Labor Relations Act. Rutman, *supra* note 102, at 519.

215. “[B]ecause of the stigmatized nature of their work, many dancers cannot tell their families or friends about what they do for a living.” Chun, *supra* note 103, at 233. The main dancer featured in the documentary *Live Nude Girls UNITE!* had more difficulty coming out to her mother as a sex worker than as a lesbian, even though her mother was a doctor who worked with prostitutes. LIVE NUDE GIRLS UNITE!, *supra* note 154; see also Barton, *Dancing on the Möbius Strip*, *supra* note 50, at 596–98 (describing the toll over time of emotional labor, constant rejection, and intermittent but regular cruelty and humiliation).

thwarts personal autonomy.”²¹⁶ Importantly, the stigma also afflicts customers, who are largely unwilling to admit they consume professional/commercial sexual services.²¹⁷ Unlike, say, those who consume, admit to, and even defend their consumption of fossil fuels produced by coal miners, “[m]any people watch pornography, but few are willing to write to their assemblypersons about it.”²¹⁸

Of course, some contend this stigma is a *product* of the criminalization of sexual labor. Stigma is associated with most illegal activities (and many legal ones associated with lower classes) and can be exacerbated by gender.²¹⁹ Yet other criminalized activities do not incur the *intensity* of the stigma associated with sex work. Some law breakers, including drug dealers and even, ironically, pimps, enjoy cultural valorization.²²⁰ In contrast, the stigma associated with commercial sex appears to stem from deep-seated biases, discomforts, and ambivalences about sex itself, which, while culturally specific, are almost universal in their attribution of differential meaning to men and women and particularly prostitutes.²²¹ It remains unclear how positive regulation and/or

216. Baldwin, *supra* note 205, at 197. Baldwin, who is an antiprostitution activist and scholar, further contends that the isolation of women who work in the sex industry is not unlike that of battered women. She also speculates that “[p]rostitution and stripping also require women to create an illusion of personal interest in the customer, a dynamic that in and of itself hedges the difference between work and personal life.” *Id.* at 198.

217. *But see* CHESTER BROWN, PAYING FOR IT: A COMIC-STRIP MEMOIR ABOUT BEING A JOHN (2011) (memoir in form of graphic novel recounting self-described “john’s” sexual encounters with prostitutes). *See also* Dwight Garner, *A Graphic Memoir that Earns the Designation*, N.Y. TIMES (May 24, 2011), <http://www.nytimes.com/2011/05/25/books/paying-for-it-is-chester-browns-memoir-of-prostitutes.html> (“It’s a factual and often graphic recounting of the author’s many erotic sessions with sex workers; it’s a bitter critique of the inanities of romantic love; and it’s a sustained argument in favor of decriminalizing prostitution.”); Annie Sprinkle, *A John’s Story*, N.Y. TIMES (July 3, 2011), <http://www.nytimes.com/2011/07/03/books/review/book-review-paying-for-it-by-chester-brown.html> (noting that in her forty years among sex workers she has only known one john, and arguably Charlie Sheen, “to come out voluntarily—with honesty, integrity and pride”).

218. Rutman, *supra* note 102, at 558 (footnote omitted).

219. Martha Nussbaum offers an interesting contrast with the stigma associated with domestic workers:

In domestic service as in prostitution, one is hired by a client and one must do what that client wants or fail at the job. In both, one has a limited degree of latitude to exercise skills as one sees fit, and both jobs require the exercise of some developed bodily skills. In both, one is at risk of enduring bad behavior from one’s client, although the prostitute is more likely to encounter physical violence. Certainly both are traditionally professions that enjoy low respect, both in society generally and from the client. Domestic service on the whole is likely to have worse hours and lower pay than (at least many types of) prostitution, but it probably contains fewer health risks. It also involves no invasion of intimate bodily space, as prostitution (consensually) does.

Nussbaum, *supra* note 34, at 702.

220. The most recent example is the movie *Hustle and Flow* about a pimp striving to become a musician. The theme song, *It’s Hard Out There for a Pimp*, won the 2006 Academy Award for Best Achievement in Music Written for Motion Pictures, Original Song.

221. Certainly prostitutes can be romantic figures in literature. For instance, prostitutes functioned as figures of moral transcendence in Victorian literature. Perhaps most famously several of Fyodor Dostoyevsky’s works feature prostitutes as catalysts for redemption. Sonia Marmeladov

decriminalization would affect stigma. While legalization might over time ameliorate some of the law-breaking stigma, it is less clear that it will overcome the second form of stigma, rooted in American prudishness and sexism. Insulting a woman by calling her a “whore” is not based on the illegality of the activity but rather on deep-seated biases against non-marital sex and also aggressive cultural hostility toward women who defy norms that they repress their sexuality.²²²

Finally, while autonomy is a concern for all workers, sex work heightens the stakes for both the workers and the customers. Feminists have fought long and hard for consent to be the determining principle in the legal governance of sex.²²³ These liberal iterations of sexual agency and autonomy that characterize our current legal and moral moment mandate that a person can change their mind and withdraw consent at anytime during a sexual encounter.²²⁴ In keeping with this autonomy premium, sex professionals insist they should be able to refuse their services to *any* customer for *any* reason and withdraw consent at *any* time while a sexual service is being provided. Importantly, sex workers include among these reasons racial and gender preferences and biases. Some sex workers restrict their clientele based not only on a potential customer’s gender (which few will find surprising), but also race as well. Thus, although

redeems both herself and the protagonist, Raskolnikov, in *Crime and Punishment* and Liza in the short story, *Notes from the Underground*. In contrast, one is hard-pressed to find actual prostitutes who enjoy status and influence in their communities due to their work.

222. For example, Duke freshman Belle Knox reported severe sexual harassment and threats after classmates learned she was financing her education by filming pornography. Knox observed the irony in social sexual norms: “I feel like girls at Duke have to hide their sexuality. We’re caught in this virgin-whore dichotomy,” she said. “Gender norms are very intense here and I feel like that’s particularly carried out by frats. I think that being a woman at Duke is extremely difficult. I think that being a sexual woman at Duke is extremely difficult.” Katie Fernelius, *Portrait of a Porn Star*, DUKE CHRON. (Feb. 14, 2014), <http://www.dukechronicle.com/articles/2014/02/14/portrait-porn-star>.

223. Consent governs not only rape law, but also sexual harassment. The main exception is statutory rape, which remains a strict liability regime in a majority of states. See generally Catherine L. Carpenter, *On Statutory Rape, Strict Liability, and the Public Welfare Offense Model*, 53 AM. U. L. REV. 313 (2003) (complicating common wisdom that statutory rape is universal strict liability regime).

224. See, e.g., *State v. Baby*, 946 A.2d 463, 493 (Md. 2008) (“We conclude that post-penetration withdrawal of consent negates initial consent for the purposes of sexual offense crimes and, when coupled with the other elements, may constitute the crime of rape.”); *In re John Z.*, 60 P.3d 183 (Cal. 2003) (becoming the first state supreme court to hold that post-penetration continuation of intercourse after consent is withdrawn constitutes rape); *State v. Robinson*, 496 A.2d 1067, 1069 (Me. 1985) (instructing jury that “if a couple consensually engages in sexual intercourse and one or the other changes his or her mind, and communicates the revocation or change of mind of the consent, and the other partner continues the sexual intercourse by compulsion of the party who changes his or her mind, then it would be rape. The critical element there is the *continuation under compulsion*”); *State v. Siering*, 644 A.2d 958, 961 n.4 (Conn. App. Ct. 1994) (instructing jury that “if there exists consensual intercourse and the alleged victim changes her mind and communicates the revocation or change of mind of consent and the other person continues the sexual intercourse by compelling the victim through the use of force then it would be sexual assault in the first degree”). A Kansas statute “proscribes *all* nonconsensual sexual intercourse that is accomplished by force or fear, not just the initial penetration.” *State v. Bunyard*, 133 P.3d 14, 28 (Kan. 2006) (but also requiring use of force or fear in addition to absence of consent).

this autonomy premium puts sex professionals in direct conflict with public accommodations and consumer protection law, many embrace and insist on the same norms of personal choice and preference that govern non-market intimacy.²²⁵

In sum, while it may be tempting to “view[] them through the same labor lens as other workers,” professional sex is not like “most” work.²²⁶ Contrary to assimilationists’ claim of homogeneity, *most* workplaces are not characterized by the particularities of sex work: the culture of alcohol, drinking, and drugs; the homosocial “mob” context; the blurred line between legitimate re-negotiations and criminal assaults; a similarly blurred line between on-site/off-site (that is, on-duty/off-duty) identities; and employer expectations of “free” services that all can combine to create distinct risks and hazards. Nor does *most* work entail the stigma and resulting isolation or threaten entrenched liberal norms of autonomy in the same way.

Hence, on the one hand, sex professionals share many basic concerns with non-sexual workers, e.g., exploitation by management, weak rights, dangerous and unsanitary working conditions, as well as distinctly gender-based harms (for instance, wearing stiletto heels and sexual harassment are both more likely to affect women than men). If social institutions, including law, recognized sex workers as employees, many existing workplace regulations would also apply to sex workplaces. For example, exit signs and fire extinguishers are mandatory in brothels and dance clubs as they are in factories and restaurants. Other requirements will be relatively straight forward to enforce, for instance that stages, poles, sex toys, beds, i.e., “equipment,” be safe and meet specified standards of hygiene. However some types of risks and hazards, such as the violence, sexual harassment, and discrimination described in Subparts II.A and III.B, tend to be specific to or intensified by sex work. Importantly, many of these risks are areas in which current workplace law is especially weak and constrained. OSHA and workers’ compensation are characterized by constrained enforcement powers and both categorical and gendered exclusions of much of the risk that characterizes sex workplaces. Many urge exclusions or limitations on the application of Title VII’s sexual harassment prohibitions to erotic receipt businesses. BFOQ defenses similarly complicate the application of discrimination law to race and gender. Finally, sex workers will battle with employers over their characterization as employees, which is necessary to access many protections that are already available.

225. In this sense, they embrace the exceptionalist stance that the sexual nature of their work trumps its role as labor. The 1964 Civil Rights Act prohibits discrimination against consumers in places of public accommodation. 42 U.S.C. § 2000a(a) (2012) (“All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.”).

226. Moukalif, *supra* note 85, at 254.

In the end, Part II showed how much of standard workplace law will almost certainly fail sex workers, and that the erotic assimilationist claim obscures both the distinctive characteristics of much sexual labor and the distinct regulatory challenges it poses. The remainder of this Part explores further the peculiarities of sex work and how these are relevant to any proposed regulatory structures, focusing on ameliorating danger through risk reduction, accessing employee status, and prohibiting potential racial and other forms of discrimination.

B. *Sexual Geography and Mitigating Risks*

As described in Part II.B, sex workplaces engender several health risks for workers, including occupational hazards and violence. Indeed, as Monica Moukalif observes, “Occupational health and safety is the major organizing point for prostitutes and other sex labor activists.”²²⁷ This Section considers how internal differentiation might provide a strategy for ameliorating these significant risks.

1. *Violence*

As described above, violence poses one of the biggest risks to sex professionals’ well being. However, because sex work is so highly internally differentiated, violence threatens some sex workers more than others. Face-to-face interactions that occur in isolation from others pose the biggest threat. Sociologist Elizabeth Bernstein found in her research on sex workers in San Francisco that while it was true that “streetwalkers were indeed at exceptionally high risk of physical violence, by their own accounts the chief danger existed when they were alone with a client—in a car or hotel room—not when they were standing on the street.”²²⁸ Audrey Macklin’s study of lap dancing in Canada observes the same dynamics at work: “It requires little imagination to recognize that the risk of harm to performers in the form of nonconsensual contact could only be exacerbated in circumstances where the patron and the performer are secluded from observation.”²²⁹ Hence, although some municipal codes target public sexual acts, criminalizing them as “indecent,” from the workers’ perspective, the more “private” the sexual activity, the greater the risk.²³⁰ In this view, the degree of risk correlates not with the *type* of activity but with the *proximity* and *isolation* of the interaction.

227. Moukalif, *supra* note 85, at 270.

228. She continues: “Pimps were of little or no use in this regard.” BERNSTEIN, *TEMPORARILY YOURS*, *supra* note 23, at 55.

229. Macklin continues, “The curtain shielding what happens on the other side of it from public and, therefore, judicial scrutiny is precisely what heightens the performer’s vulnerability. The parallels between the regulation of private and public space in these cases and historic patterns of judicial treatment of domestic violence seem striking and obvious.” Macklin, *supra* note 93, at 470.

230. See also Lauren Berlant & Michael Warner, *Sex in Public*, 24 *CRITICAL INQUIRY* 547 (1998).

We might map this sexual geography as follows. Organizational forms of sexual labor that do not require personal contact—that is, that entail no proximity—pose the least risk. This would include phone sex or other new media sexual services, as long as the workers remain “virtual” and unidentifiable.²³¹ Importantly, because employers, co-workers, and third-party intermediaries can pose as great a threat to workers as customers do, another crucial factor is the degree of contact between workers and these actors. The more limited these interactions, the lesser the risk. In sum, in sexual geographies with no proximity, i.e., no physical or face-to-face interactions, between the worker and customers and employers, the risk of violence is minimal. These “virtual” sexual geographies ought not require significant regulation to protect workers from violence, other than clear rules and protocols to prevent cyberstalking and to preserve the virtual nature of the interactions.²³²

In contrast to the anonymous, virtual institutional form, proximate—or face-to-face—sexual services that occur in commercial establishments can pose a greater risk for workers. Brothels typically have private rooms or spaces in which prostitutes provide services to clients; similarly, some dance clubs offer separate rooms or lounges for customers who want private lap dances or massages. It is during these proximate interactions, while isolated from others, that clients are most likely to assault or threaten workers. In addition, as described above, many assaults and threats against sex professionals occur when they are leaving the establishment and alone in parking lots, on the street, etc.

Although commercial establishments have a heightened risk of violence, these institutional geographies are arguably the most straightforward to regulate for worker safety. Mandatory protections for the commercial institutional form might include bodyguards, panic buttons, a security service, escorts out of the workplace, and/or surveillance if appropriate.²³³ I propose that regulation of this institutional form should rest on two principles. The first is to ameliorate the risk correlated with both proximate and isolated sexual transactions through surveillance, security, and/or empowering the worker to quickly call on other stakeholders. The second principle is to make the establishment operator, not the worker, responsible for the risk reduction. Many sex establishments try to shift this cost, often by construing workers as independent contractors, but the point is that in commercial establishments, the owner/operator is best situated to maximize economies of scale and manage the geographic infrastructure to reduce risk. As in other, non-sexual workplaces,

231. Otherwise, stalking, both physical and cyber, becomes a severe threat.

232. On the other hand, virtual workers might seek protections from privacy law to control their images and how they are used. I thank Emily Danker-Feldman for this insight.

233. Some brothels and clubs already include these safeguards. Workers recognize and discuss risk management as they differentiate among worksites. *See, e.g.*, BROOKS, *supra* note 149.

compliance with these requirements would be a condition of licensing. “Scores” akin to restaurant sanitation ratings could be publicly posted to alert workers and customers alike to the degree of risk and any conditions that might compromise their safety.²³⁴

The final institutional form generates the greatest risk of violence. In this sexual geography workers transact sex outside of dedicated commercial establishments; they are in proximity to their clients and are isolated from other potential stakeholders. Unlike those who work in brothels or clubs, these sex workers largely provide their sexual services in private homes, rented spaces such as hotel rooms, or on the street or other public places.²³⁵ Such workers might transact sex independently or for a third-party intermediary, such as an escort service or pimp. The defining characteristic of this sexual geography is its absence of an institutional infrastructure. Unlike brothel or club workers, outcall, street, and incall workers serve clients in unregulated private or informal (e.g., the street) contexts without any structural supports. Outcall dancers in particular may serve multiple clients simultaneously, but do so without co-workers, managers, or even other customers who have a stake in the on-going stability of the enterprise, including the safety of its workers. The presence of other stakeholders can provide formal or informal security for sex workers.

In addition, in outcall or street work, unlike brothels, clubs, and other commercial establishments, the law cannot mandate a thick security apparatus—panic buttons, security guards or bouncers, surveillance—because there is no stable worksite to regulate. Sex professionals who provide incall services out of their own homes have greater control over their circumstances, but even they may struggle to reduce risk.²³⁶ If the sex workers are independent contractors, working without managers or intermediaries, then they must absorb the costs of security completely on their own and cannot achieve the economies of scale that brothel and club operators can with security systems and guards. Independent sex professionals may also be reluctant to reveal their profession to others and resist the security apparatus that could compromise their privacy. Hence, because of its lack of institutional infrastructure and isolation, this sexual geography, in which I collapse outcall, incall, and informal into the label “outcall,” poses the greatest risk of violence and is the hardest to regulate.

234. Sex workplaces could be subject to the same random audits by regulators as restaurants, day care centers, and other regulated businesses.

235. Sexual services provided in the worker’s home are known as incall; services in other non-public venues are known as outcall.

236. Many high-end prostitutes would resist this regulation, contending that they rely on closely monitored referral networks to carefully screen their clients and protect themselves. My point is that if they miscalculate, there are no formal protections from client violence. In particular, those who work out of their homes are vulnerable to stalking and harassing behavior.

Of course, that does not mean that outcall work cannot or should not be regulated. Recognizing the particular risks posed by the outcall form, New Zealand has issued specific guidelines and protocols that include panic buttons and cell phones, as well as recommendations to carry flashlights in case of poor lighting.²³⁷ Another protocol could be check-in systems, in which sex workers could confidentially document their schedule, including the relevant customer information, location of the rendezvous, and anticipated time until the next check in. This could function akin to an answering service with the addition of a pre-directed alarm or alert if the check in (and follow ups) are missed. We could also anticipate software companies creating applications, or “apps,” that would manage such information.²³⁸ Regulations might also mandate bodyguards for incall and outcall work, or other isolated venues, although this might make costs unaffordable to most customers. Finally, hotels or landlords could market to sex professionals, offering rooms that provide security akin to some brothels.²³⁹ For both third-party intermediaries and sole proprietors performing incall or outcall work, adhering to regulations would be a condition of licensing.

In sum, when viewed on a continuum of sexual geographies, isolation and proximity are the biggest predictors of worker risk. The virtual form is the safest as long as workers preserve their anonymity and minimize or avoid physical interactions with third-party intermediaries. The commercial form (i.e., club dancing and brothel prostitution) can pose significant risks, but it is the most susceptible to regulatory interventions that can increase worker safety. Regulations can require operators to provide a thick security apparatus as a condition of licensing. Finally, unlike brothels and clubs, in informal sexual geographies without a stable infrastructure, workers are at the greatest risk. In what I have labeled the outcall form, there is no stable worksite to regulate, i.e., it would be difficult to enforce requirements for panic buttons, security, and

237. From the health axis of risk management, the New Zealand guidelines also encourage outcall workers to inspect the premises and take other precautions. For instance, the guidelines encourage workers to note whether the house is well lit and listen as she/he approaches the front door for voices that may indicate that more than one person is inside. If the client is not alone, then the sex worker may require the driver to accompany her/him inside. The sex worker should try to ascertain whether the client is too intoxicated. If the sex worker feels uncomfortable or endangered at any stage, she/he should leave immediately. HEALTH AND SAFETY IN THE NEW ZEALAND SEX INDUSTRY, *supra* note 20, at 82–84.

238. Apps are now widely used to track and call private taxi and ride share services, such as Uber and Lyft. See, e.g., Mark Gongloff, *Uber Worth \$18 Billion Because, Sure, Why Not?*, HUFFINGTON POST (June 6, 2014, 2:48 PM), http://www.huffingtonpost.com/2014/06/06/uber-18-billion_n_5460748.html. Uber has generated controversy for several reasons: complaints from cab companies about unlicensed competition, looser protocols for background checks, which has resulted in assaults against some customers, and an antisocial CEO. As sex work currently is not legal or licensed, one cannot argue that these apps will lower standards of safety as Uber and Lyft’s opponents argue.

239. KOTISWARAN, *supra* note 12 (describing complex relationships between lessors and sex workers in India).

surveillance, and the worker is isolated from other stakeholders who might provide formal or informal security. These workplaces will pose the greatest regulatory challenge, but New Zealand's protocols provide a starting point.²⁴⁰

As is the case with extant regulation of workplaces, for all of these forms we can imagine a range of regulatory approaches—mandatory requirements, guidelines, and aspirations supported by incentives. Regardless of the geographic structure and its regulatory regime, compliance would be a condition of licensing and legality. This would be as true for sole proprietors as for commercial establishments and third-party intermediaries. No regulation will eliminate the risk of violence, of course; that is as impossible as it is in non-sexual workplaces. However, by seriously considering the institutional forms violence takes in sexual workplaces, we can certainly align sex work with the harm reduction approach found in other workplace safety regulation.

My organization of forms of sex work according to sexual geography is certainly not the first attempt to formally distinguish between different kinds of sex work. The two most common categorizations focus on degrees of legality or bodily penetration, but neither of these systems is satisfying from a regulatory standpoint. The former approach distinguishes illegal prostitution from the legal forms of professional sex: dancing, phone sex, etc.²⁴¹ The latter approach classifies sex work along a continuum of its proximity to sexual penetration. Embraced by conservatives, liberals, and radicals alike, the spectrum ranges from phone sex to dancing without sexual contact to dancing with sexual contact to prostitution, which is assumed to entail penetration, vaginal, anal, or oral.²⁴² For all of their intuitive appeal, neither of these approaches provides the analytic power to tackle the specific risks currently inherent in sex work.

In contrast, this Article has reorganized sex work along the lines of sexual geography. The innovation of the sexual geography approach is that it rejects both the legalistic binary of criminal/legal and the bodily penetration

240. See *supra* note 20 and accompanying text.

241. Even absent criminal law complications, there are vast differences among trades within the sex work industry. Consider, for example, organized dancing in direct contrast to organized prostitution. Exotic dancing is generally legal and is performed at a specific worksite (club) for a set hourly duration. Exotic dancers who work at a club or specific worksite arguably have a single employer—the club/site owner. Prostitution, however, is generally illegal, performed on a per client basis, and not necessarily at a single location for a set duration. Prostitutes are arguably self-employed. Moukalif, *supra* note 85, at 255.

242. The continuum privileges touching over looking and contact over looking and penetration over contact. As described in Part I, liberals and conservatives can both condemn commodified sex, although for different reasons. Following conservative logic, the closer sexual acts come to penetration the closer they are to religious sin, or, in secular terms, the threat to the family. For liberals and some radicals, the closer to penetration a sexual act, the closer the act to the degradation of women, people who stand in for women, and dignity and rights. Hence, both political ideologies subscribe to the penetration continuum.

approaches, replacing them with one based on institutional form and risk.²⁴³ In this sense, it is highly attuned to the internal differentiation and structure of sex work.²⁴⁴ It is designed to address the distinct needs and vulnerabilities of the distinct institutional forms that dominate sex markets. In sum, the sexual geography approach blurs the moral and criminal lines between prostitution and other legal forms of sex work in favor of a risk-based approach to regulation.

2. *Other Health Risks*

To be clear, I propose the geography model specifically to regulate against violence, because, as is my contention, proximity and isolation are better predictors of harm than the nature of the activity. The sexual geography is potentially applicable to the health and safety risks that plague sex workers, as well. Notably, these health risks are predicted by both activity and geography.

For instance, risks from high heels and malfunctioning equipment, from potential for exchange of bodily fluids, or from genital contact with surfaces map onto the nature of the activity. Dancing engenders the first and is joined by prostitution and pornography in the second two sets of risks. Phone sex would not pose any of these risks, but could potentially entail ergonomic injuries from improperly held phones.²⁴⁵ Thus some risk does map onto the nature of the activity, which would affect regulatory strategy.

At the same time, geography is highly relevant to risk. Beyond determining which activities require the use of condoms or dental dams, institutional form will be key to successful regulatory design. In fact, from a risk management perspective, types of penetration and bodily fluid exchange may even be secondary to geographic indicators, especially the isolation of the activity and the fixity of the infrastructure in which it occurs. As described in the previous Section, commercial forms are the most straightforward to regulate. Like other fixed site workplaces, they can be monitored for compliance with health and safety regulations. Regulation of outcall work will be more difficult to administer. Akin to regulating violence in sex workplaces, monitoring and enforcing health and safety violations in streets, private homes,

243. Viviana Zelizer uses a site-based continuum in analyzing caring relations. ZELIZER, *supra* note 24, at 163–85.

244. As Prabha Kotiswaran notes, “Sex workers are highly internally differentiated according to their mode of organization of sex work and their relationship to the institution of the brothel.” Kotiswaran, *supra* note 63, at 581. She identifies several axes of differentiation, including wage and conditions of labor, such as bonded labor, sharing income with brothel keeper, or independent. She also incorporates scale of the institution as influencing the autonomy of worker. *Id.* at 585–88; *see also* SEX FOR SALE: PROSTITUTION, PORNOGRAPHY, AND THE SEX INDUSTRY 3 (Ronald Weitzer ed., 1st ed. 2000) (“Essentialist claims about the ‘intrinsic’ nature of sex work (whether oppressive or liberating) clash with the reality of *variation* in sex work.”).

245. Presumably there are some minimal sanitation standards for call centers.

hotels, and the like will be highly challenging. Without a formal, fixed worksite, monitoring costs are high and, when activities occur in private homes, the potential for abridging privacy is high. Hence administrability is a challenge in regulating health in outcall work as it is for violence. Finally, some virtual work will be as straightforwardly administrable. Call centers can be regulated akin to non-sexual call centers, although, as described in Part II.B, workers may struggle to get the appropriate ergonomic standards imposed and enforced.²⁴⁶ In contrast, virtual workers who function akin to incall and outcall workers, without a fixed and formal infrastructure, will yield greater administrability concerns, hence shaping regulation. Thus, from a regulatory perspective, other forms of risk also map onto sexual geography.

3. *Sexual Geography and The Threshold Employee Test*

Internal differentiation means that sex workplaces differ radically in the allocation of autonomy and control between sex professionals and those who operate their workplaces. Internal differentiation also recalls the question of when and whether sex workers are employees, the threshold test for access to many legal protections.²⁴⁷ Basic benefits, including unemployment and health insurance, retirement, social security benefits, and minimum wage and overtime, are only available to those legally classified as employees. In addition, access to much of discrimination law is only available to employees. Finally, as noted in Part II, employee status also determines the ability to unionize, which improves worker protections through collective bargaining, thereby offering an important alternative to state regulation or industry self-regulation.²⁴⁸

As described in Part II, the employee tests vary and are complex.²⁴⁹ A key recurring factor is the allocation of control over how sex workers execute their work.²⁵⁰ Those working in the commercial form, in dance clubs and brothels, are most susceptible to significant employer control and hence are most likely to cross the threshold test to claim employee status. Employers set dancers' appearance, costumes, routines, and highly restrict and regulate their hours. Employers likewise set many of the basic conditions in Nevada's legal brothels. Still, even within this form, the exact allocation of decision making between operators and workers can vary drastically, leaving the employee test to be decided on a case-by-case basis.

246. See *supra* note 20 and accompanying text.

247. See *supra* notes 100–04 and accompanying text.

248. Although unionization has thus far not been very helpful to sex workers, and indeed is becoming less effective generally, some assimilationists and activists view it as a potential path to sex worker empowerment. See *supra* notes 74–77 and accompanying text.

249. See *supra* notes 159–61 and accompanying text.

250. See *supra* note 102 (describing role of control in threshold employee test).

In contrast with the commercial form, outcall workers may be more likely to both seek and exercise autonomy in their daily conditions and decisions.²⁵¹ They are more likely to set their own hours and exercise more control over how they dress and interact with customers. (Pimps can complicate this control, however, for some outcall prostitutes.) Thus outcall workers may be more likely to be legally characterized as independent contractors than commercial form workers. Finally, the virtual form presents an intriguing case. For instance, phone sex can be done as easily from one's own home, as an entrepreneur or independent contractor, as it can from a highly standardized and monitored conventional call center.

Much will turn on the facts of individual sex work arrangements. Margot Rutman's analysis of several highly contested disputes between dance club and brothel owners and sex professionals suggests that this crucial threshold classification will remain uncertain and unpredictable.²⁵²

4. Summary

In sum, the erotic assimilationist claim obscures the diversity of sex work. It does not take account of how sex work is internally differentiated and how these very real differences translate into worker risk. By the same token, erotic exceptionalists ignore the very real hazards posed by sex work, insisting that the sexual nature of the labor should shield it from regulation. I have sympathy with both of these views. Yet, neither does very much to accomplish the goals of reducing the very real risks of sex work. To combat and manage this risk, this Subpart has proposed a sexual geography approach that parses sex work according to its institutional form and how that form affects worker risk. Mapping sex work in this way provides a pragmatic approach to violence reduction and potentially other risks as well. It should also appeal to feminists on both sides of the debate, in that it suspends the typical classifications of sex work grounded in binaries of criminality or moralizing continua of penetration and instead evaluates sex work according to risk assessment and reduction.²⁵³

251. Of course, under the current criminal regime, pimps exercise such extreme control that few would mistake that for an independent contractor arrangement. Yet, this Article is gambling on the possibility of reduced pimping as we know it under legalized regimes. If my optimistic bet is right, then outcall prostitution will become more autonomous than it currently is, and more akin to outcall dancing.

252. Rutman, *supra* note 102, at 537–49. There have been some recent successes. In a recent class action between dancers and club owners in seven states, the clubs settled for almost \$13 million and agreed to no longer treat dancers as contractors and instead to treat them as either employees or part owners. *Trauth v. Spearmint Rhino Cos. Worldwide*, No. EDCV 09–01316–VAP, 2012 WL 4755682, at *1 (C.D. Cal. 2012) (upholding attorneys' fees and incentive awards).

253. An episode of the popular *Tyra Banks Show* discussed how sex workers themselves perpetuate this hierarchy:

It's always seemed odd that women in such a controversial line of work would even bother to be judgmental of what the next person does, but there's a silent hierarchy that exists within the sex industry, e.g., topless models look down on girls who go bottomless, girls who go bottomless look down on girls who strip, strippers look down on porn stars, porn stars look

C. Discrimination

If violence and safety are relatively straightforward, albeit controversial, to regulate, how might sex work fare under one of the most debated areas of the law? A goal for many erotic assimilationists is accessing antidiscrimination laws. As described in Part II, they want sex professionals to have the same remedies against invidious bias that other workers do. Can harassment and discrimination be regulated and ameliorated in sexual labor? Yes—and maybe. But the potential consequences should give us pause. Allow me to elaborate.

1. Sexual Harassment

As discussed earlier, sexual harassment is prevalent in markets for sex, and sex workers are particularly vulnerable to it.²⁵⁴ As in other workplaces, *unwanted and unwelcome* sexual propositions and behavior should comprise impermissible harassment in sex markets. This is relatively straightforward to implement in cases of quid pro quo harassment, in which employers and intermediaries demand sex in exchange for employment or favorable terms. In fact, in sexual workplaces, quid pro quo rules should be rigorously enforced precisely because of the prevalence of the practice and the particular vulnerability of sex workers to it. This is a prime area in which law can play a crucial role in shifting cultural norms and combating employers' views of sex workers as their own personal sex slaves.²⁵⁵ In sum, there is nothing about the sexual nature of the labor that should subject workers to quid pro quo demands.

In contrast, hostile work environment doctrine is not such a neat fit with professional sex. For instance, some commentators contend that employers should be excused from hostile environment liability because exotic dancers, prostitutes, and other sex workers have “assumed the risk” of harassment. Kelly Cahill argues that “application of the assumption of risk defense to the allegations of hostile work environment sexual harassment in the Hooters lawsuits suggest that the plaintiffs may have knowingly and voluntarily

down on hookers, etc. During the episode, Tyra had the women rank one another in order from most respectable to least respectable.

Tracie Egan Morrissey, *Sex Workers Go at It on Tyra*, JEZEBEL (Nov. 17, 2008), <http://jezebel.com/5091460/sex-workers-go-at-it-on-tyra>.

254. See *supra* notes 84–85, 157–58, and accompanying text.

255. Quid pro quo liability raises a fundamental question regarding the potential implications of legalizing sex work: What was the legal logic behind making quid pro quo part of Title VII rather than bringing it under the rubric of tort or blackmail law, as some urged? On the one hand, if the quid pro quo norm was based on the inalienability of sex, grounded in the illegality of its explicit trade, then legalizing sex work would undermine the rationale for quid pro quo harassment. However, this was not the logic. Rather, the stated logic of quid pro quo liability was that demanding sex in exchange for work comprised sex discrimination and an abuse of power. At the time, it was largely men who used their power in the workplace, and in other institutional settings like schools, as a powerful mechanism to coerce sex.

assumed the risk of verbal harassment by customers.”²⁵⁶ She characterizes sex workers’ comparatively generous tips as a wage premium.²⁵⁷ Margot Rutman, who is largely sympathetic to the assimilationist cause, is even less optimistic about sexual harassment claims in such “sexy workplaces.”²⁵⁸ In the view of these commentators, sex work, by its nature, should be exempt from sexual harassment liability.

Others, though, disagree and argue that sex workers should be allowed access to legal recourse for hostile work environments. For instance, Ann McGinley charges that exempting these workplaces from liability for sexual harassment constitutes a windfall for employers.²⁵⁹ She argues that because sexual commercial establishments rely on the fantasy that “the dancer is sexually and personally interested in the customer” to maintain their profits, “[t]o maintain this fantasy, the club walks a fine line between permitting the customers to believe that the exotic dancers are completely available to the customers and protecting the dancers from sexual harassment and criminal assault.”²⁶⁰ McGinley rejects the assumption of risk and wage premium

256. Kelly Ann Cahill, Note, *Hooters: Should There Be an Assumption of Risk Defense to Some Hostile Work Environment Sexual Harassment Claims?*, 48 VAND. L. REV. 1107, 1133 (1995). She continues:

It can be argued that the [Hooters] plaintiffs’ conduct, in agreeing to work for a restaurant named after a slang-term for women’s breasts where waitresses must wear sexually provocative attire, evidenced their consent to relieve Hooters from liability for any sexual harassment which they reasonably expected at the time they took their jobs.

Id. at 1131; see also Robert J. Aalberts & Lorne H. Seidman, *Sexual Harassment of Employees by Non-Employees: When Does the Employer Become Liable?*, 21 PEPP. L. REV. 447 (1994) (arguing for a sliding scale of protection from sexual harassment based on classification of jobs as high, mid-level, or low risk); Jeannie Sclafani Rhee, *Redressing for Success: The Liability of Hooters Restaurant for Customer Harassment of Waitresses*, 20 HARV. WOMEN’S L.J. 163 (1997).

257. Cahill, *supra* note 256, at 1138 (“Some women, including at least some of those who work at Hooters, choose to work in environments that promote their sex appeal and provide a greater risk of sexual harassment, in order to receive a premium wage for their acceptance of that risk.”).

258. Rutman, *supra* note 102, at 532–33 (“Realistically, exotic dancers do tolerate much more than women in other professions. In fact, one might suggest that in actuality, exotic dancers harass customers by touching and cajoling the customers to purchase private dances. When true sexual harassment does occur, it may be difficult to distinguish from the ordinary conduct of the dancers and customers. Zoning laws provide some guidance to help determine when harassment has occurred because conduct that goes too far is considered lewd conduct or prostitution, but this is not harassment if this conduct is consensual. Applying the traditional notions of sexual harassment in an environment like a strip club becomes virtually impossible.” (citations omitted)); cf. Yuracko, *supra* note 165, at 199 (“It seems plausible to think that sexual comments that might otherwise be actionable might not be when aimed at employees who are explicitly selling sexual titillation—either alone or with other goods and services.”).

259. McGinley, *supra* note 145, at 78, 81.

260. *Id.* She elaborates: “[A]dvocacy of the assumption of risk defense fails to recognize that employers whose businesses rely on the display of masculine practices consciously create and benefit from an environment in which harassment is likely to occur.” *Id.* at 91; see also Joshua Burstein, *Testing the Strength of Title VII Sexual Harassment Protection: Can It Support a Hostile Environment Claim Brought by a Nude Dancer?*, 24 N.Y.U. REV. L. & SOC. CHANGE 271, 307 (1998) (“Even if strippers are treated as sexual objects as part of their jobs, they still can claim Title VII protection. It is

constructions as “plac[ing] on women the responsibility of regulating the sexualized aggression of heterosexual men without placing any responsibility on the individual men, on the employer, or on society in general.”²⁶¹ Finally, McGinley notes the class discrimination lurking in the assumption of risk defense. She contends that the best economic option for some working-class women may be to work in “sexy” work environments and argues that the assumption of risk doctrine imposes a penalty on them for trying to find economic security.²⁶²

Instead, McGinley and others contend that hostile work environment doctrine should apply to sex workplaces, although the “welcomeness” standard should be adjusted to take account of the sexual nature of the work.²⁶³ Thus, because the work is to transact sex, sexual conduct and advances in and of themselves cannot constitute a hostile environment. This is so because “[b]ehavior that creates a cause of action for sexual harassment in a non-sexualized workplace may actually constitute agreed-upon terms or conditions of the employment of workers in sexualized workplaces.”²⁶⁴ Sexual harassment liability should turn then on whether the complained of behavior is a term or condition of the job.²⁶⁵ Stares, comments on body parts, sexual propositions, and general lewd comments all could be terms and conditions of an erotic-receipts business.²⁶⁶ Still, “aggressive sexual behavior such as derogatory

the employers who profit from the fact that male customers may react in a certain way who must assume the risk of that misbehavior.”).

261. McGinley, *supra* note 145, at 91. Reinforcing this point, from a cost-of-accidents perspective, the operator who “creates the sexualized environment is on notice that customers will likely harass her employees and has the means to prevent and correct such harassment.” *Id.* at 67; *see also* Schultz, *Sex for Sale: Sex and Work*, 18 *YALE J.L. & FEMINISM* 223, 229 (2006) (“Even if the law allows businesses to create jobs that involve selling sex appeal, why is it that so often women alone are perceived to have that sex appeal?”).

262. McGinley, *supra* note 145, at 90. Bernadette Barton documents the significant wages some dancers can earn; while the average was \$200 to \$300, they could earn from \$500 to \$1,500 a day or night. Barton, *Dancing on the Möbius Strip*, *supra* note 50, at 589.

263. She contends that “[w]hile the context of sexualized work environments is significantly different from non-sexualized work environments, Title VII should account for this context in determining whether a hostile work environment exists, rather than rejecting a cause of action altogether.” McGinley, *supra* note 145, at 92; *see also* Burstein, *supra* note 260, at 307 (“Perhaps the problem lies within male biology and socialization, and not within the jobs that women take.”).

264. McGinley, *supra* note 145, at 68.

265. “Because the essence of the business and the prostitutes’ role in the business is selling sexual acts to customers, sexual harassment will depend in large part on the negotiations and behavior agreed upon by the prostitute and the john.” *Id.* at 86. Put differently, “[t]here can be no alteration of a term or condition of employment if acquiescing to certain behavior is a term or condition of the job.” *Id.* at 99.

266. Regarding comments that would be deemed harassing in other workplaces, “dirty” talk for many people is an inherent part of sex, for some verbal stimulation is the most exciting part, and for yet others it simply is sex. *See, e.g.*, McClintock, *supra* note 38, at 6 (discussing S/M practices that involve role playing in which there is often no intercourse or even touch, just “talk”). “For example, a term or condition of employment for exotic dancers in gentlemen’s clubs may require tolerating hooting and staring from the audience.” McGinley, *supra* note 145, at 102. She elaborates: “An exotic

name-calling, clearly unwanted touching, stalking, or physical assault may alter those terms or conditions of the dancer's employment and may create a legally cognizable hostile work environment."²⁶⁷ In these instances, employers should have an obligation under Title VII to implement policies and procedures to protect workers.²⁶⁸

This may seem overly complex. But I would answer that the law still has not figured out the nuances of sexual harassment in *non-sex-work* contexts. It is too early to decide that harassment issues in other contexts are too difficult to tackle. Others may take a more pragmatic approach, doubting that we could realistically apply sexual harassment law in these overtly sexual workplaces. To this second concern, I would respond that skeptics had exactly the same reservations about the very creation of sexual harassment law. Many doubted that it was possible to make the pinching of bottoms, for example, the outlier behavior that it has currently become in most workplaces. Sexual harassment law is not yet thirty years old; there is no reason to believe that it cannot evolve standards to define and manage outlier behavior even in sexual workplaces.²⁶⁹

2. *Disparate Treatment*

Disparate treatment discrimination claims will be even harder to apply to sex work. As described in Part II, sex work is highly racially stratified.²⁷⁰ Racial discrimination against sex workers occurs not only in hiring, but also in the terms and conditions of employment, which include lucrative shift and private lounge assignments and referrals to desirable customers. Discrimination can also take another form, that of expectations by employers and customers that racial and ethnic minorities will perform racial fantasies that many find degrading.

dancer who strips in a gentlemen's club should reasonably expect more customer sexual behavior than the blackjack dealer or the cocktail waitress." *Id.* at 104.

267. *Id.* I would change the sentence to "does alter" and "should create."

268. Similarly, punishing workers who do not accept the impermissible behavior or who complain about it would violate Title VII.

When confronting harassment by customers, the fact finder should therefore consider the three-way relationship between the supervisor, the customer, and the worker. If the supervisor *punishes or otherwise discriminates against women who refuse to accept harassing customer behavior or if there is an expectation that the employee not complain or respond negatively to the customer's harassment*, the jury should consider this fact as evidence that the woman did not welcome the behavior, even though she may have acquiesced to it.

Id. at 99 (emphasis added). Dianne Avery's recent work on "breastaurants" suggests that lines will continue to be blurry. For instance, although touching clearly is not a term and condition of employment at a breastaurant such as Hooters or other restaurants that Avery studies, is flirting? And, does drawing such a clear distinction then anger customers who feel "teased" and put workers at risk for stalking or retaliation by customers? *See generally* Avery, *supra* note 176.

269. *Meritor Sav. Bank, v. Vinson*, 477 U.S. 57 (1986).

270. In sex work as elsewhere, these consumer preferences mirror broader systems of oppression. And, of course, the same identity characteristics that put these workers at the bottom of the consumer preference ladder also make them the most economically vulnerable more generally, that is, more likely to experience adverse economic shocks and with less cushion to absorb them.

The erotic assimilationist claim that antidiscrimination norms should apply to sexual commerce as they do to other service work is persuasive at first glance. It resonates with the generations of scholarship criticizing Jim Crow doctrine and the particular role that employment segregation played in the U.S. system of racial caste. Assimilationists contend that sex work is no different from other service jobs in which Title VII bars discriminatory preferences, however strong, by both employers and customers.²⁷¹ In fact, one of the most significant interventions of employment discrimination law was in prohibiting employers from using customers' "taste for discrimination" as a rationale to discriminate against employees. As one prominent feminist theorist argued, lawyers are no different than prostitutes or club dancers:

Law firms aren't allowed to hire only white lawyers on the ground that most of their clients are white and would prefer to work with lawyers of the same race, and I doubt that courts would allow that excuse if any other racial or ethnic group were involved. So why not apply the same reasoning to sex and sexual services?²⁷²

Siobhan Brooks, one of the leaders of the first Title VII suit brought by dancers, strongly concurs.²⁷³ Hence, discrimination is a realm where assimilationists make a strong and persuasive case.

What should be made of the assimilationist claim regarding discrimination law? Can someone legitimately prefer one sex worker to another based on appearance? Is sex work just like "all other work" in this realm? And what is the role of race relative to other axes of discrimination, including gender, disability, and age? This Section attempts an answer to these vexed questions. It argues that, in contrast to regulating sexual commerce to reduce workers' risk and protect them from sexual harassment, efforts to apply standard discrimination law to sexual markets may not work exactly the way assimilationists anticipate.

First, assimilationism may rest on an indefensible disaggregation of racial preferences from other sorts of erotic discrimination. Imagine that a brothel's heterosexual male customer requests a woman sex worker. On its face, this should disturb assimilationists. Title VII issues a clear prohibition against discrimination based on sex. A customer cannot request a male librarian, flight attendant, or restaurant server.²⁷⁴ Yet, intuitively to many, a market for erotic services in which customers cannot request the gender of their worker does not seem like much of an erotic market at all.²⁷⁵

271. Presumably § 1981 would also apply to such cases. For the sake of simplicity, I confine my analysis to Title VII as the assimilationists do.

272. Schultz, *supra* note 261, at 229 (footnote omitted).

273. See *supra* note 149 and accompanying text.

274. 42 U.S.C. § 2000e (2012).

275. In fact, in discussions with many audiences, which included vociferous opponents of my claim, I have yet to encounter anyone who contended that customers should not be able to exercise discretion regarding the gender of their sex worker. Elizabeth Emens echoes this argument in the non-

Courts have translated this intuition into doctrinal terms. As described in Part II, law permits sex discrimination in two instances: to protect customers' spatial privacy, and to preserve what I have characterized as decisional privacy in sex work businesses.²⁷⁶ Explaining the second BFOQ exemption, Kimberly Yuracko observes:

Prostitution is, of course, broader than heterosexual intercourse, and sex work is broader than prostitution. Sex work also includes lap dancing, stripping, and acting as a sexualized gaze object. Unlike heterosexual intercourse, these activities can technically be performed by individuals of either sex. Yet, all these other forms of sex work might also be thought to have inherent essences that require customer sexual stimulation. Therefore, sex discrimination might be required by the inherent essences of these broader forms of sex work—not because individuals of the disfavored sex are unable to perform the acts desired, but because of the depth and relative stability of customers' sexual preferences. That is, the sex of the person trying to arouse them really does matter for people's sexual stimulation.²⁷⁷

Judicial recognition of a BFOQ for decisional privacy in this context puts pressure on the assimilationist claim that antidiscrimination law should apply to professional sex like any other job. Sex work, *doctrinally*, is *not* like other work in which sex discrimination is impermissible and illegitimate.

If customers have a doctrinally protected preference in the sex of their service provider, then what does that mean for the assimilationist claim that *racial* preferences are illegitimate and violate antidiscrimination mandates? Would decisional privacy extend beyond sex to race? Nor are race and sex the only suspect characteristics operative in sexual markets. Although

market context, observing that “[m]ost people believe the sex of another is the starting point for their desire. That is, most people understand themselves to be monosexual rather than bisexual, so another person’s maleness or femaleness is a prerequisite for desire, or at least for sexual intimacy.” Emens, *supra* note 28, at 1342 (footnote omitted). Hence, raising the legitimacy of sex in economies of desire serves a useful conversation-forcing function, because it tends to frustrate the generalized assertion that desire in its ideal form would operate independently of “superficial” identity traits and instead would track something “deeper” in the self. Most people would, of course, not make the same assertion about the role of sex in their desire. And so including sex forces the recognition that some of these traits make a difference for many or most of us, and not necessarily in ways that are readily described as morally problematic. Although Emens is writing about erotic preferences in the non-market context, her observations arguably support my argument that the gender BFOQ in sexual commerce should be extended to other suspect characteristics, including race. *Id.* at 1313–14.

276. See *supra* notes 56–57 and accompanying text; see also Crain, *Managing Identity*, *supra* note 166, at 1179 (observing an emerging third doctrine, employer “branding”).

277. Yuracko, *supra* note 165, at 172. She elaborates, “This view may justify courts’ allowance of sex discrimination in the hiring of sex workers. Consider prostitution aimed at heterosexual men. Arguably, the inherent essence of heterosexual prostitution is vaginal intercourse. If this is so, then the essence of heterosexual prostitution requires sex discrimination in the hiring of prostitutes.” *Id.* Vicki Schultz resists the sexual gratification BFOQ: “Even if the law allows businesses to create jobs that involve selling sex appeal, why is it that so often women alone are perceived to have that sex appeal?” Schultz, *supra* note 261, at 229.

assimilationists have limited their arguments to race, their concerns about discrimination clearly implicate the entire range of legally protected categories, including disability and age. Returning to our hypothetical brothel, imagine a customer declined a sex worker the age of his grandmother. Or, in the alternative, requested a “young” worker, under age thirty. Similarly, a customer might refuse a sex worker who was deaf, legally blind, or in a wheelchair. Or the customer might *request* a sex worker with a disability, for any number of reasons. These preferences might be conscious—stemming from active hostility to the elderly and the disabled, or from fantasies or endogamous preferences.²⁷⁸ But they also could be byproducts of unconscious biases and preferences rooted in an idealized erotic image that embodies age and disability as well as race and gender. Can racial, sexual, and other identity preferences be meaningfully disaggregated in sexual markets?

For the spatial privacy doctrine described in Part II, the answer is yes. In those classic, sex discrimination spatial cases, gender and race are doctrinally separable.²⁷⁹ A consumer can prefer a woman “attendant” in certain settings—e.g., locker rooms, restrooms, nursing homes, labor delivery rooms—but not a white one.²⁸⁰ In contrast, the only judicially recognized exemption for racial preferences has been in prison case dicta.²⁸¹ The doctrine is clear—in spatial privacy, courts disaggregate gender from race, finding a BFOQ defense for the former but not the latter. In this sense, courts defer to social conventions that gender has a defensible meaning—for example, separate bathrooms—that race does not.²⁸²

In contrast, I would contend that gender and race are not separable for erotic preferences based not on spatial privacy but on the sexual preferences and desire that underlie decisional privacy. To disaggregate them would be to believe either that Title VII’s bans on sex discrimination are less compelling than its racial ones, that there are not meaningful erotics of race, or, as I elaborate below, that commitments to ending racial discrimination outweigh commitments to legalizing sex markets.

278. See *supra* note 207 and accompanying text.

279. See *supra* notes 169–74, 183, 184, and accompanying text.

280. In labor and delivery rooms, patients can express gender preferences for their nurses, but not their doctors. See, e.g., Buchanan, *supra* note 173 (rejecting modesty or privacy framework in favor of an approach that protects the constitutional right to be free of fear of sexual abuse).

281. See *supra* notes 169–70 and accompanying text. And some contend that the gender privacy cases should be extended to guarantee same-sex prison guards. See, e.g., Brenda V. Smith, *Watching You, Watching Me*, 15 YALE J.L. & FEMINISM 225, 285 (2003) (articulating a human rights approach that balances prisoner privacy with guards’ employment rights); Jennifer R. Weiser, *The Fourth Amendment Right of Female Inmates to be Free from Cross-Gender Pat-Frisks*, 33 SETON HALL L. REV. 31, 65–66 (2002) (urging a general right to bodily integrity as a factor in assessing reasonableness of cross-gender body searches because “[a]lthough privacy is genderless, concern for symmetry in the treatment of searches must not mean that critical differences in the sexualization of power get overlooked”).

282. Of course, current controversies regarding transgender peoples’ access to bathrooms troubles this easy determination. See, e.g., Davis, *supra* note 172.

Racially discriminatory erotic preferences come in different forms. In the weak form, appearance can be a crucial part of erotic stimulation. It can be so integral, in fact, that Elizabeth Emens notes that “antidifferentiation”—or failing “to notice someone’s race or disability”—would be insulting.²⁸³ Yet, it can be difficult to disentangle racial preferences from other appearance-based erotic preferences, such as for large breasts, red hair and freckles, large rear ends, boyish figures, almond-shaped eyes, deeply defined muscles, hairy chests, plump lips, tall or short height, milky or bronze skin, each of which are associated with racial phenotypes, if imperfectly so.²⁸⁴ Many would argue that these characteristics function akin to gender, as intrinsic sexual preferences, necessary to their sexual arousal and stimulation.²⁸⁵

The strong-form argument in erotic markets is for explicit statements of racial preference. Many people limit their intimate relationships to those of the same racial or ethnic background. But the same social forces that underlie endogamy also produce fetish markets, as well as run-of-the-mill sexual fantasies about the taboo and the forbidden, the latter of which is often termed race play.²⁸⁶ Even as some look to sex markets to mirror the same preferences they pursue in their non-market lives, it should not surprise us that others turn to sex markets in order to explore preferences that are considered taboo in their

283. Emens, *supra* note 28, at 1354–55. For a discussion of how visually impaired people perceive and understand race, see generally OSAGIE K. OBASOGIE, *BLINDED BY SIGHT: SEEING RACE THROUGH THE EYES OF THE BLIND* (2014). Emens elaborates: “In the realm of sexual intimacy, [not noticing appearance] seems a particularly odd way to understand the ideal treatment of others.” Emens, *supra* note 28, at 1355 (footnote omitted). “Think how offended a lover can be if a partner fails to notice trivial aspects of appearance, such as new glasses or a haircut; imagine if it were the partner’s sex that went unnoticed.” *Id.*

284. Emens’s antidifferentiation critique runs counter to mainstream, colorblind approaches to race grounded in liberalism. If popular legal discourse calls for colorblindness as the solution to racism, then critical race theory has long launched a set of criticisms, urging color consciousness under some conditions. Compare Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959), with Neil Gotanda, *A Critique of “Our Constitution Is Color-Blind,”* 44 STAN. L. REV. 1 (1991); Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993); and Charles R. Lawrence III, *The Epidemiology of Color-Blindness: Learning to Think and Talk About Race, Again*, 15 B.C. THIRD WORLD L.J. 1 (1995).

285. This is *not* to say that sexual preferences are any less socially constructed than are privacy ones; only that they are distinct and almost certainly equally strong. These preferences might be the product of social norms and constructions, but scholars make the same case for sexual orientation and gender identity more broadly. My point is not that physical appearance has the same fixity as sexual orientation. Many will date people of varying physical types, but still limit themselves to one gender rather than another. But fixity is not required in order for the underlying case to be true: that physical attributes and appearance are part of the inherent essence of the business of sexual markets. They believe that gender has an essential quality and that race does not. *But see* DEVON W. CARBADO & MITU GULATI, *ACTING WHITE?: RETHINKING RACE IN “POST-RACIAL” AMERICA* (2013) (contending that appearance- and performance-based discrimination should be of social and legal concern). Carbado and Gulati raise an excellent point. Part III.D considers whether sex markets should be an exception.

286. See, e.g., AMBER JAMILLA MUSSER, *SENSATIONAL FLESH: RACE, POWER, AND MASOCHISM* 172–77 (2014).

amateur intimate lives.²⁸⁷ And while many find race play reprehensible, some find these racial fantasies therapeutic.²⁸⁸ It would be difficult to engage in race play or satisfy one's dream of sleeping with a woman who looks like Miley Cyrus or Beyonce if one cannot specify appearance, in either the weak or strong form.²⁸⁹ These fantasies may be as crucial to that customer's erotic stimulation as specifying "male" or "female."²⁹⁰ This is *not* to say that decisional sexual preferences are any less socially constructed than are spatial privacy ones; only that they are distinct and almost certainly equally strong.²⁹¹ If this is the case, it would appear that the decisional privacy logic could be extended from gender to racial preferences.

Of course, as this Article has shown, sex work is not monolithic, and not all of it warrants an exemption from disparate treatment law. The exemption should inure to sexual commerce, where there is a visual, or tactile, element to the business essence of sexual stimulation and customers exercise individual discretion in satisfying their preferences.²⁹² Where they do not, the inherent business essence presents a far weaker case and may be outweighed by Title VII's equality norms. In sum, discrimination doctrine is where I join with erotic exceptionalists.

Assimilationists urge that one cannot prefer the race, and by extension, the gender or age, of one's sex worker any more than of one's secretary or lawyer. But, when we filter personal preferences through the doctrinal lens of

287. For instance, some disabled people prefer to date other disabled individuals. At the same time, there is an active fetish market for disabled people as sexual partners, such as amputees. *See, e.g.*, Emens, *supra* note 28, at 1343–45 (describing acrotomophilia, or desire for amputees).

288. *See, e.g.*, MIREILLE MILLER-YOUNG, *A TASTE FOR BROWN SUGAR: BLACK WOMEN IN PORNOGRAPHY* (2014).

289. Indeed, one need only look at the dizzying array of ethnic pornography genres to comprehend how much the accentuation of social categories can yield sexual pleasure. *See, e.g.*, Xavier Livermon & Mireille Miller-Young, *Black Stud, White Desire: Black Masculinity in Cuckold Pornography and Sex Work* (unpublished manuscript) (on file with author) (exploring genre of white heterosexual couples having "cuckold" sex with black men).

290. One finds similar preferences at work in adoption "markets." *See, e.g.*, R. Richard Banks, *The Color of Desire: Fulfilling Adoptive Parents' Racial Preferences Through Discriminatory State Action*, 107 *YALE L.J.* 875, 899–900 (1998) ("Prospective adoptive parents are generally allowed to express preferences in a wide variety of areas. Health, age, sex, appearance, and prior experiences are all areas in which parents may say what type of children they want. Race is recognized as one of many reasonable preferences parents are likely to hold."); Andrew Morrison, *Transracial Adoption: The Pros and Cons and the Parents' Perspective*, 20 *HARV. BLACKLETTER L.J.* 167, 181 (2004) ("During the application process, parents often request particular characteristics of the child they would like to adopt. Most adoption agencies allow parents to specify the child's race, age, gender, level of disability, or any combination thereof." (citations omitted)).

291. The sexual gratification BFOQ differs with privacy in another way as well. Michael Frank notes that the privacy BFOQ defense typically is extended to "protect the sensibilities and preferences only of women." Frank, *supra* note 169, at 490. In contrast, in markets for sexual gratification, it would be the reverse: it is the overwhelmingly male base of customers for sexual services whom the exemption would protect.

292. *See, e.g.*, OBASOGIE, *supra* note 283 (exploring how unsighted people understand and make sense of race).

the essence of the business, clients do not have a legally defensible interest in whether a secretary or lawyer is in a wheelchair, African American, or male. Filtering sex work through the same lens, clients do have an interest in whether their sex worker is male, and, I would contend, whether s/he has other traits and characteristics that in almost all other instances would be protected categories. In sex markets, these characteristics are prerequisites to the essence of the business, the customer's sexual preferences for stimulation and gratification. The analogy between sexual orientation and racial preferences is, of course, a deeply contested one. Mainstream LGBT discourse has successfully lodged sexual orientation as immutable, akin to race, and hence deserving of legal protection. However, when it comes to eroticized racial preferences, many would argue these are not immutable, that they are socially constructed and can be reshaped in accord with social values. In contrast, many queer theorists resist the immutability argument regarding sexual preferences, instead contending that human sexuality is plastic and shaped by social context, exposure, and opportunity. Another counter-argument is that erotic racial preferences may reinforce structures of racial discrimination that gender preferences do not. That is, my erotic preference for men does not reinforce negative stereotypes of women as undesirable, etc. I do not disagree with this view. However when we explore the actual nature of the gender BFOQ's for Title VII spatial privacy cases they do reinforce powerful gender stereotypes—that women have deeper privacy interests than men and that law should honor and reinforce gender binaries more generally. Hence, contrary to the assimilationist claim, in sex work, body type and physical appearance, including race, gender, and other traits, are uniquely integral to the commodity and service.

It would be a bitter irony if sex markets became the ultimate policing mechanism for sexual desire, only enabling and authorizing normative, vanilla sexualities. Thus, I embrace erotic exceptionalism, but narrowly drawn, around the sex act itself. I endorse exemption from state regulation limited to the goal of enabling workers to refuse sex, for any reasons, and enabling customers to exercise their sexual preferences with consenting workers.²⁹³

My first point, then, was to argue that in sex industries discriminatory preferences, including for race, would receive a very limited exemption, or erotic exceptionalism. This would expand the existing doctrinal exemption for sex, based on the disaggregation principle. This leads to a second intervention.

293. Again, given the autonomy premium in sex work specifically, and the broader underlying proposition that market transactions should be sexual, consent remains a crucial precondition. Although the role of consent in labor markets enjoys a heavy and healthy body of criticism, abandoning it is not the solution. Hence there are non-normative sexualities that abridge consent, such as pedophilia and "rape play," that would continue to be not only impermissible but criminal and should be actively prosecuted, even more so if sex work were to become legal. We can think of this as a classic slippery slope argument, but, given the stakes for human autonomy and criminal behavior, one that should be taken seriously.

On the one hand, one would imagine that, following Yuracko's analysis, this exemption would be unique to sex-receipt industries. In fact, sex work is on a continuum with other market sectors in which appearance is an intrinsic part of demand and "production." As discussed in Part II, while facially there are no bona fide occupational qualification defenses for race in employment law, there appear to be various exemptions that are effectively operative. These include the First Amendment-based exemption for racial breakdowns in casting observed by Russell Robinson and Michael Frank, as well as judicial dicta suggesting similar exclusions for racial specification in advertising. Finally, modeling seems to operate in a litigation-free zone, as runway shows and magazine editorials routinely use gender, race, age, and ability to construct an aesthetics of fashion, as exclusionary and offensive as many find it.²⁹⁴

Hence, rather than being unique, sex work may exist on a continuum with other "appearance" industries. Conceived in this way, sex work and acting would be at opposing poles. This is partially because I find scholarly critiques of the film industry exemption persuasive. Mary Anne Case has declared that it is "bizarre that sex is considered a BFOQ, in the interests of 'authenticity or genuineness,' for the job of actor or actress. . . . After all, the very essence of this job is to pretend to be something one is not."²⁹⁵ Russell Robinson elaborates, "Actors generally do not face authenticity requirements regarding many character traits; for example, an actor need not be gay or have a disability or pregnant in order to play a character with that trait."²⁹⁶ Together, Case and Robinson make a persuasive case to eliminate the racial exclusion in Hollywood casting breakdowns.²⁹⁷ And their logic could be easily extended to advertising and modeling. Yet, sex work is meaningfully different, or at least proximate sex work that involves physical contact or face-to-face interactions, which I have argued implicates decisional privacy. "Acting" is much harder naked.²⁹⁸

294. See, e.g., Robin Givhan, *Confronting the Lack of Black Models on the Runway*, NYMAG.COM (Sept. 6, 2013, 8:45 AM), <http://nymag.com/the-cut/2013/09/givhan-confronting-the-lack-of-black-models.html> (criticizing absence of racial diversity in modeling). Of course, the distinction between litigation-free zones and formal BFOQs is a significant one. Unlike the sex-based BFOQ for sex gratification industries, these other appearance-based exemptions are not formal; they are recognized by courts only in dicta. Given the stakes in sex work, I am calling for the same clear-cut and certain doctrinal guidelines and mandates (that is, formally recognized BFOQs) as those that currently exist for sex in other forms of discrimination. See *supra* Part II.B.2.

295. Case, *supra* note 162, at 12 n.23.

296. Robinson, *supra* note 162, at 31–32.

297. According to Case, "All that a producer should be allowed to require is that the pretense be convincing." Case, *supra* note 162, at 12 n.23. Robinson reminds us, "Indeed, good acting is often defined as the ability to pull off a role quite different from the actor's own identity." Robinson, *supra* note 162, at 32.

298. Although I mean this as a tongue-in-cheek remark, it is also literally true. See, e.g., Adrienne D. Davis, *Erotic Entitlements Part I: A Reply to Sex Therapy in the Age of Viagra*: "Money Can't Buy Me Love," 35 WASH. U. J.L. & POL'Y 421, 436–38 (2011) (noting in gay pornography, straight-identified men can achieve and maintain the erections necessary for the job).

3. *Assimilationism Redux*

There is also the possibility that empowering preferences might bring unanticipated benefits. For instance, disabled sex workers could find themselves desired and desirable in ways they ordinarily do not. The same logic applies to racial minorities. And the corollary is also true: sex workers might not want to risk being randomly paired with racist or ableist clients who are disgusted by the prospect of having sex with them.

The point that appearance can matter in sex markets should be an obvious one. And yet, discrimination assimilationists resist this intuition. Contemplating whether people can pursue their various preferences for sexual gratification in sex markets raises the very real question whether assimilationists truly do endorse professional sex. Ironically, like abolitionists who adamantly oppose commercial sex, many who proclaim to be pro-sex work seem to display a suspicion of markets for sex. They purport to advocate sexual commerce, yet, the prerequisite for sexual markets, the *underlying commodification of erotic preferences*, seems to trouble them. Of course, feminist critiques of capitalism and its deleterious effects on women are tried and true. Yet, in the case of sex work assimilationism, I suspect something else is at work.

I believe the gap stems from assimilationists devoting their analytic and regulatory energy to the supply side of the market, workers and their employers, while giving little theoretical or empirical attention to the demand side, customer desire and preferences. Their emphasis is on safety, justice, and full citizenship for sex workers, and laudably so.²⁹⁹ Largely absent from their analysis is what demand looks like in markets for sex—erotic preferences and consumption of sexual stimulation and gratification.³⁰⁰ Assimilationists may proclaim it as “just work,” while at the same time doubting the legitimacy of customer tastes and preferences that we find in markets.

Ironically, abolitionists have developed thick accounts of demand in sex markets. Kathleen Barry, Sheila Jeffreys, Carol Pateman, and, of course legal scholar Catharine MacKinnon have offered rich accounts of demand as based in what Pateman calls the “male sex-right.”³⁰¹ Building on these sharp theoretical insights, abolitionists have achieved marked success in promulgating regulatory models now being adopted across Europe. Assimilationists stand in stark contrast. The fact that assimilationists have

299. See *supra* notes 55–66 and accompanying text.

300. But see Showden, *supra* note 45, at 18 (“The more interesting radical feminist question is why so many men use the services of prostitutes.” (footnote omitted)).

301. PATEMAN, *supra* note 40, at 208; see also *supra* notes 18–23 and accompanying text. Erotic exceptionalists, too, have a theory of the demand side—that sex markets facilitate sexual pleasure. They often cast this claim in therapeutic terms, that is, that sex workers are akin to counselors or others who enhance patients’ well being. See, e.g., BERNSTEIN, TEMPORARILY YOURS, *supra* note 23, at 96–97 (describing how many who urge what I call erotic exceptionalism embrace call for a therapeutic, affective embrace of their work).

largely declined to wrestle with the demand side, either conceptually or ideologically may be a large part of the reason the pro-sex work debate has stagnated and remained unevolved. As this Part has shown, the demand side is where many of the challenges and the problems reside. As a conceptual matter, the absence of a theory of demand prevents assimilationists from tackling complex regulatory problems of institutional design and reconciling sex markets' distinct characteristics with broader goals for just and fair workplaces. Most keenly, we have forbidden discriminatory demands, productions, and biases in other service sectors. Ideologically, neglecting the demand side leads assimilationists to an almost certainly unintentionally conservative view of sex markets.³⁰²

Indeed, there is a sense in which assimilationist arguments can begin to sound a bit Soviet: there is a strong rhetoric of worker solidarity and dignity from the supply side, and yet a rejection of market logic from the demand side. In fact, the model may be the Soviet car, that is, you can have any car you want as long as it is the state car. And you will like it (envisioning legalized sex for hire as perhaps a sort of moral education of customers). This is in stark contrast to visions of sex markets as liberating sexual desire, and enabling fantasies that allow customers to explore the taboo and the verboten. In sum, when confronted with a fully commodified market for sex, and all that it entails, erotic assimilationists may be more squeamish about sex work than they know.

Something has to give: either we use Title VII and other discrimination law to impose tight restrictions on demand and ban sexual preferences and fantasies for gender, race, ability, and age for inevitably more vanilla sex markets, or we carve a narrow exemption from Title VII and allow these preferences, but give up the basis of the assimilationist claim that sex work is no different from any other labor. I recognize that permitting an exemption for racial preferences, even a limited one, is a real cost of sex markets, and for many that cost may be too high. Indeed, the argument that the racial harms from permitting discrimination outweigh the benefits should be a compelling one as our society continues to struggle with ever more invidious and pernicious forms of racism. But we would need a set of principled criteria to distinguish these costs of sex work from the costs that flow from other appearance-industries, most notably the film industry, modeling, and advertising. Not to mention the constant and relentless shaping of the meaning of race, gender, ability, and age to our youngest citizens by toys, video games, books, and, my personal favorite, child beauty pageants.³⁰³ These billion-dollar

302. At bottom, many assimilationists are probably closer to the abolitionist Swedish model than they know: protect the seller and buyer be damned. *See supra* note 176 and accompanying text. Like feminist abolitionists, they genuinely care about the workers, but they do not theorize the market in which the workers labor.

303. In an intriguing parallel to sex work, several countries, including France, New Zealand, and Australia are considering criminalizing child beauty pageants. Alissa J. Rubin & Maïa de la Baume, *French Senate Approves Ban on Pageants for Young Girls*, N.Y. TIMES (Sept. 18, 2013)

industries, too, shape gender roles and their racial and other content. There may not be a way to disaggregate sex work that does not rest on and reiterate antisex moralism.

D. Summary

The assimilationist claim is a miscue not only from the diversity of work and its regulation, but also from the ways that sex workplaces differ from many other workplaces and, crucially, from each other. Taking account of when, how, and to an extent, why, various risks and problematic behavior occur is a prerequisite to fashioning an effective regulatory regime. In its recognition that commercial sex is labor deserving of recognition and regulation, assimilationism is an important first step. But its labor essentialism rapidly can become an active impediment to regulating sex markets.³⁰⁴ The question is not to enable markets in sex; rather, *which* market to enable? As this Part has shown, there are many regulatory switches that need to be thrown to begin to imagine effective regulation of sex markets.

This Part has suggested that some workplace risk can be ameliorated in a fairly straightforward fashion, once we embrace the right regulatory lens. The Section rejects the common approach of differentiating sex work according to a legalistic binary of criminal/non-criminal or a bodily integrity framework of proximity to heterosexual intercourse. Instead, it urges an approach that rests on how institutional form influences the risk to sex workers. This sexual geography approach has the benefit of actually addressing the causes of risk— isolation and proximity—distinguishing virtual, commercial, and outcall institutional forms, while also trying to preserve at least some of the tradeoffs between risk reduction and autonomy that seem to matter deeply to sex workers.

In contrast with health and safety, addressing discrimination is far more vexed. When it comes to markets for sexual gratification, protected categories of race, disability, and age may be built into erotic preferences and fantasies, as gender is. We may not be able to defensibly disaggregate racial and other preferences from the doctrinal exemptions for gender. In addition, sexual commerce appears to be on a heretofore unnoted continuum with other appearance markets that enjoy implied defenses and exemptions or at least litigation-free zones, for racial discrimination. This Part has argued that erotic preferences are at the stronger end of the pole than businesses for which there seem to already be exemptions in effect.

<http://www.nytimes.com/2013/09/19/world/europe/french-senate-passes-ban-on-beauty-pageants-for-girls.html>. I thank Carisa Showden for pointing this out to me.

304. Writing about the commodification of care work, Viviana Zelizer observes, “The way to make such levers effective is not to deny that households have special properties but to identify those special properties and investigate how they work.” ZELIZER, *supra* note 24, at 215. The same holds for sex work.

The discrimination analysis also sheds some light on one of the pro-sex-work camps. Their effort to eradicate customers' racial and other preferences from sex markets reveals an important analytic gap: assimilationists have theorized the supply side of sex markets but sorely neglected the demand side. They may be pro-sex work, but seem to be antisex market. In this sense, they share more with abolitionists than they assume.

CONCLUSION

Sex work advocates claim that it is "just work" to great rhetorical effect—to normalize sex for hire, decriminalize it, destigmatize it, de-exceptionalize it, and, in the case of legalization advocates, entitle its workers to basic labor protections. Much of this scholarship and activism is insightful and has moved the debate over markets for sex out of mere moralizing and into a substantial policy and legal debate. Yet, the rhetoric of sex as "just" work elides, obscures, and confuses issues raised by legal markets for sex.

This Article has made two arguments about the debate over explicitly commodified sex. The first argument is a conceptual one—that the emphasis on the sex work debate between abolitionists and sex work advocates has hindered serious grappling with the question of whether sex work could be governed and regulated consistent with liberal goals of protecting workers within well-functioning, minimally exploitative markets. This Article has teased out different strands within the pro-sex-work camp in order to showcase some latent contradictions and also test some regulatory hypotheses. Both erotic exceptionalists and erotic assimilationists want to legitimize professional sex and reduce workers' vulnerability. Yet, they could not be more opposed in the regulatory end-states they envision. Erotic exceptionalists call for a radically non-interventionist approach to sexual labor, stressing that it should not be treated any differently than non-market sex with the latter's attendant protections from state interference. In stark contrast, erotic assimilationists want to do just that, assimilate or integrate sex work into the existing regulatory employment regime. They envision a thick set of rules that will actively intervene in the worker/employer *and* worker/customer relationships.

The Article's second argument is a set of governance moves. By casting sex work as like any other labor, assimilationists anticipate an array of effects, including normalizing and legitimizing the work, changing endowments through enforceability, and accessing legal regulation to ameliorate some of the worst aspects of contemporary sex markets. From a harm reduction perspective, assimilationism is a persuasive and tempting rubric; sex workers truly are a vulnerable population. But is the sex worksite really like the factory floor? This Article has contended the answer is no. I have argued that, despite all of its good intentions, in essence, assimilationism misunderstands work, sex work, and the regulation of both. And yet, the assimilationist claim is revelatory—about both the discourse and the regulation of commercial sex.

Assimilationism is deeply essentialist. It invokes a monolithic workplace that is governed by a uniform and universal set of rules. At the same time, assimilationist discourse essentializes professional sex itself into a singular form of work. Assimilationists anticipate that once sex work is legitimated it will be integrated into the universal regulatory regime they imagine, without need for attention to the particularities of sexual labor. This Article has demonstrated how assimilationist claims are first, miscues from regulatory realities, and second, bound to be unhelpful if not actively harmful to the cause of legitimizing and protecting sex workers.

Contrary to the assimilationist discourse, workplaces and work are extraordinarily diverse and subject to varying and differential regulation. Some workers have decent protections from workplace hazards, while others, including those who labor in some of the riskiest workplaces, struggle for protection. Workplace violence remains almost universally under-regulated; yet even within that bleak regulatory landscape, some workers enjoy more protections than others. Finally, employment discrimination remains contested terrain. Employers continually recast verboten discriminatory forms in new ways, sometimes with success. Age, sex, disability, and race are treated differently, with BFOQ exemptions formally permitted for some but not others. And even in those areas that formally ban BFOQs, commentators have observed implied ones at work. The Article has demonstrated that the assimilationist claim misses the point. The question is not whether sex can be legitimate work, but, rather, what kind of work will it be?

Equally important, the assimilationist claim fails to grapple with the distinctive characteristics and challenges commercial sex poses for labor regulation. Sex workplaces differ not only from non-sexual ones, but also, crucially, from each other. Only by taking account of the internal differentiation of sex workplaces—both institutional form, or sexual geography, and the preferences that comprise the markets—can meaningful and effective regulation be crafted. Finally, regulation is neither natural nor inevitable, but deeply political and instrumentalist. Many factors will influence the political calculus that will determine whether and how sex work will be regulated.

Yet, this Article does not then fully concede the pro-sex work terrain to erotic exceptionalists. At bottom, erotic exceptionalists argue that commercial sex work should be viewed as legitimate labor, but that it should not be subject to any more restrictions or regulations than is non-market sex. Given the range of commodified activity currently regulated—florists, tattooists, astrologers, lawyers—there is no defensible way to exempt professional sex. The activity poses risks to both workers and consumers, and those risks—of disease, violence, and emotional trauma—warrant regulatory attention no less than providing massages or spa services. People are free to engage in non-commodified sexual activity free from state intervention, but sex, like many

other activities, becomes a different case when it is explicitly commodified. In the end, erotic exceptionalists undermine their own cause. To call sex work “work” and then insist on exempting it from the labor regulation that characterizes the modern democratic workplace is assuredly a strategy designed to fail. If its sexual nature exempts it from regulation, then people will certainly call it sex, and not work. And fairly so.

Many will believe that this Article is unrealistic, utopian even, in believing that sex work could ever be regulated effectively. They will make the persuasive case that changing such longstanding entrenched norms is impossible. Yet, other feminist regulatory efforts suggest some cause for optimism. Consider sexual harassment: thirty years ago, skeptics believed it would be impossible to get people to stop pinching their co-workers’ bottoms or linking sex to terms and conditions of employment. Skeptics similarly expressed doubt about law’s capacity to bring domestic violence or marital rape within the regulatory imagination. Yet in each of these instances, feminism aligned with law to effect massive cultural shifts, not ending any of this behavior, but reconstructing it as outlier behavior and the object of both legal and cultural reprobation.

This Article is a first step—an effort to jumpstart “second-generation” questions in sex work debates, by moving beyond the abolition/advocacy stand-off to consider whether and how sex work could be effectively regulated.³⁰⁵

305. Samuel Brunson characterizes his work and my own on polygamy as second-generation questions. Samuel D. Brunson, *Taxing Polygamy*, 91 WASH. U. L. REV. 113, 116 (2013); see also Davis, *Regulating Polygamy*, *supra* note 16 (discrediting dominant analogy between polygamy and same-sex marriage and using commercial partnership law to consider whether and how polygamy could be regulated on its own terms).

