

## Male Prostitution & Equal Protection: An Enforcement Dilemma

THAYNE D. STODDARD\*

I was in my first weeks of law school, desperately outlining, briefing, and constantly studying, when I was first exposed to prostitution. I had just returned home from an afternoon studying and was changing into gym clothes when I heard a knock at my door. I opened the door to an attractive, young African-American woman who I had seen walking in my neighborhood. After exchanging greetings, she asked me if I wanted to “hang out.” I thought the question a benign one, and while we had talked once or twice, I was a little confused as to how she knew where I lived, and why she had singled me out. At my confused expression, she explained, “You know, make some heat.” Being rather slow, I still must have looked confused, as her tone became exasperated, and she blurted out, “I’m trickin’!” Embarrassed at my denseness, slightly offended, a little scared, and blushing furiously, I told her that I was sorry and I wasn’t really interested, but I’d be happy to grab a meal with her sometime. Yes, in my anxious state, I asked a prostitute to join me for dinner. As she walked out the door, she turned, and with a broken look, asked if there was no way that I could help her. I didn’t know what to say.

The experience brought into sharp reality the facts that I had heard about prostitution in America. Many have studied the problems surrounding female prostitution and have found just how troubling the conditions are for these women. While it is difficult to find reliable data regarding prostitution, some reports show that, of street prostitutes, 65 to 75% are victims of long-term incest.<sup>1</sup> Of all prostitutes, 75 to 90% were sexually abused during childhood,<sup>2</sup> and 85% of prostitutes working in the United States are addicted to crack, heroin, prescription drugs, or alcohol.<sup>3</sup> Working the street is a bleak prospect for women, according to Dr. Joyce I. Wallace, the founder of From Our Streets with Dignity

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\* J.D./M.A. in English, Duke University School of Law 2014. Special thanks to Professor Kevin Sobel-Read for his help and support in writing this note and to the Duke Journal of Gender Law & Policy for their hard work in editing this piece for publication.

1. Stephanie Salter, *Creating hope from lives of desperation*, S.F. CHRON., Nov. 16, 1997, available at <http://www.sfgate.com/news/article/Creating-hope-from-lives-of-desperation-3089534.php>.

2. Donna M. Hughes et al., *Factbook on Global Sexual Exploitation*, COALITION AGAINST TRAFFICKING IN WOMEN, [http://mediagovernance.univie.ac.at/fileadmin/user\\_upload/p\\_mediagovernance\\_industriesresearchgroup/Ressourcen/Factbook\\_on\\_Global\\_Sexual\\_Exploitation\\_United\\_States\\_of\\_America.pdf](http://mediagovernance.univie.ac.at/fileadmin/user_upload/p_mediagovernance_industriesresearchgroup/Ressourcen/Factbook_on_Global_Sexual_Exploitation_United_States_of_America.pdf) (citing Debra Boyer, *Danger for Prostitutes Increasing, Most Starting Younger*, BEACON J. (1997)).

3. Sarah McNaught, *Working for the Man*, BOS. PHOENIX, (Oct. 23-30, 1997), [http://www.bostonphoenix.com/archive/features/97/10/23/PROSTITUTION\\_5.html](http://www.bostonphoenix.com/archive/features/97/10/23/PROSTITUTION_5.html).

(an organization which offers free services to women who are often defined as prostitutes in New York City). "Half the time, they're on the street because they had a drug problem and got thrown out of whatever homes they came from, . . . [b]ut half are on the street because it's less violent than home. They turn to drugs to make life tolerable."<sup>4</sup> Academic work on the plight of female prostitutes has been extensive.<sup>5</sup>

But women are not the sole purveyors of sexual services in America or the world. Men throughout history have also offered up their bodies for money, with some academics positing that ever since women have solicited, so have men.<sup>6</sup> Ancient Greek acceptance of the practice is well documented, and it was even licensed and taxed in Augustinian Rome.<sup>7</sup> Despite this prevalence, even if male prostitution has occurred on a less grandiose scale to its female counterpart, "social inquiry has been largely limited to women servicing men."<sup>8</sup>

My purpose in this note is threefold: first, to examine the history and present-day social status of male sex workers and the academic understanding thereof; second, to analyze whether historical legislation targeting female prostitution would, in fact, have violated the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution as it stands today had the statutes remained in their gendered forms; and finally, to assess whether today's current prostitution law enforcement policies, though couched in generally gender neutral language, in fact violate the Equal Protection Clause because of law enforcement's insistence on almost the exclusive targeting of women for the crime of prostitution. While arguments can be made both for and against Equal Protection violation, the existence of the dispute itself brings to light a number of worthwhile questions about the nature of prostitution at large and the way we as a society choose to prosecute and deter individuals from engaging in it. At the same time, the nature of male prostitution as a near-exclusively same-sex exchange affects the comparison itself, as female-male encounters carry their own set of issues.<sup>9</sup>

Ultimately, I conclude that in order to best protect the interests of both men and women, these anti-prostitution statutes must be enforced against both sexes. By only prosecuting women, we are stating that differences exist where in fact they may not. Stating these differences harms women by forcing them to view themselves as weak and in need of protection, while simultaneously pushing male sex workers to believe they should be able to help themselves in a potentially dangerous situation. While selective enforcement of these laws might be constitutional, we would do well to reexamine the idea of "real" differences in the hopes of lessening discrimination, as well as gender stereotyping, against

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4. Christopher S. Wren, *Life Gets Harder on the Already Mean Streets*, N.Y. TIMES, Aug. 19, 1997, at B3 (quoting Dr. Joyce I. Wallace, founder of Frost'd a non-profit organization that helps prostitutes).

5. See, e.g., R. BARRI FLOWERS, *THE PROSTITUTION OF WOMEN AND GIRLS* (1998).

6. DONALD J. WEST, *MALE PROSTITUTION* ix (1993).

7. *Id.*

8. *Id.*

9. See J. Marlowe, *It's Different for Boys*, in *WHORES AND OTHER FEMINISTS* 141 (Jill Nagle ed., 1997) (considering the heteronormative boundaries confronted in female-male exchanges).

both men and women.

### I. A BRIEF HISTORY OF MALE PROSTITUTION<sup>10</sup>

The existence of male sex work dates back to antiquity. The relationship between the male sex worker and his society has varied across time and cultures. In Ancient Athens, an adult male prostitute was treated as a second class citizen and had no political rights, while his clients remained full fledged citizens.<sup>11</sup> Adult prostitution existed simultaneously with a more youthful counterpart, and Rome had many boys' brothels where men could seek sexual services from other men and boys.<sup>12</sup> The street-walking youth sex workers also had their place, "lifting their tunics to show off their genitals and entice potential clients."<sup>13</sup>

There was a similar delineation between prostitutes and their clients in the Arab world as well. The receiving (penetrated) sex worker was thought of as the disordered and dishonorable member of the pairing, while the active (penetrating) client was able to maintain his status as virile and masculine by avoiding playing the part of the penetrated, woman-like figure.<sup>14</sup>

This seemed to also be true in the European world prior to the arrival of Christianity. As Christianity established itself, along with its strict condemnation of homosexual acts, male prostitution continued to exist, although discretely, operating within the still functioning bathhouses of the Middle Ages.<sup>15</sup> Further, historian Vern L. Bullough has documented the existence of male prostitution in the Americas prior to the arrival of Western explorers.<sup>16</sup> Colonization did not stop this spread; as Western peoples and ideals moved across America, male brothels sprung up in metropolises all the way to the Pacific.<sup>17</sup>

10. For purposes of this note, I will be using the term "prostitution" as defined by The New Oxford American Dictionary as "The practice or occupation of engaging in sexual activity with someone for payment." THE NEW OXFORD AMERICAN DICTIONARY 1369 (ELIZABETH J. JEWELL & FRANK R. ABATE eds., 2001) (JW, Rule 15). This definition includes street solicitation for sexual acts, stripping, as well as escort services and erotic massage. *Id.* Though a prostitute (I will use the term sex worker going forward, as the term "prostitute" carries its own discursive burden) may participate in only some and not all activities, the full range of sexual services offered by sex workers which fall under the traditional legislative definition of prostitution requires a broad reading of the term.

Additionally, I have chosen to limit myself to male-male exchanges, rather than address female-female exchanges as well, due to the fact that the literature in same sex interactions is also segregated this way. The issues surrounding male-male interactions may indeed be similar to those of female-female interactions, but in order to focus the scope of my paper, I have chosen not to address the similarities and differences, instead limiting myself to male same sex exchanges.

11. MICHEL DORAIS, RENT BOYS: THE WORLD OF MALE SEX WORKERS 13 (Peter Feldstein trans., 2005).

12. *See id.* at 14 (discussing the existence of brothels in Rome where young men "offered their charms with a modicum of discretion.").

13. *Id.*

14. Jayesh Needham, *After the Arab Spring: A New Opportunity for LGBT Human Rights Advocacy?*, 20 DUKE J. GENDER L. & POL'Y 101, 110 (2013).

15. *See DORAIS, supra* note 11, at 14 (discussing the condemnation of homosexuals in the church).

16. *See VERN L. BULLOUGH, SEXUAL VARIANCE IN SOCIETY AND HISTORY* 45 (1976) (detailing the existence of prostitution in South and Central America prior to Westernization).

17. *See ROBIN LLOYD, FOR MONEY OR LOVE: BOY PROSTITUTION IN AMERICA* 74-75 (1976) ("San

Prior to the 20<sup>th</sup> century and the formulation of the modern heterosexual/homosexual dichotomy,<sup>18</sup> same-sex sexual encounters were largely considered acceptable for the penetrating or active partner (if not in society at large, then at least within the confines of the active partner's own self-perception). Conversely, the penetrated, receiving, or passive partner (and often sex worker) was frequently regarded as effeminate and distasteful.<sup>19</sup>

In fact, the discourse surrounding male prostitution itself was largely intertwined with discussions of homosexuality at large, in that it was not until discussions about homosexuality as an identity entered the discourse that male prostitution was considered equivalent to female prostitution. While evidence exists that male prostitution in London frequently occurred as early as the 18<sup>th</sup> century, "such behavior was often not recognised as prostitution. No distinction emerged during this period to distinguish same-sex desire from commercial sexual activity involving males, both being conflated and assumed to be indistinguishable."<sup>20</sup> In other words, male prostitution as an equivalent to female prostitution did not exist because gay desire did not exist in the public's mind. The situation, prior to this hetero/homosexual conceptual turn in the early 20<sup>th</sup> century, is described by LGBT historian George Chauncey as one wherein "the predominant form of male prostitution seems to have involved fairies selling sex to men who, despite the declaration of desire made by their willingness to pay for the encounters, identified themselves as normal."<sup>21</sup> These clients did not yet need to confront any questioning of their "sexuality" as such, because in maintaining their role as a penetrator, they were allowed to retain their masculinity, heterosexuality, and thus avoid the pitfalls created in occupying the passive role of the prostitute. The sex worker himself did not need to confront his own sexuality, as it was conceptually tied up in his profession; as the passive partner, he was defined simply as a male prostitute without the need for a further homosexual identity and the ensuing examination of real desire. These distinctions in how a society, and the individual participant himself, think about male prostitution are important for the later discussion of whether there exist real differences in male prostitution vis-à-vis female prostitution.<sup>22</sup>

Whether we frame male-male exchanges as homosexual activity or as simply the exploitation of impoverished, young, heterosexual men may help determine if a legitimate and avoidable social harm exists in male-male exchanges. It ultimately becomes a question of whether the presence of desire affects the way social harm is framed. If we deem these men homosexual, we then inevitably open the door to the sex worker actually enjoying the exchange. If so, does this enjoyment remove the risk of the social harms, including degradation, to a straight man engaging in male-male sexual conduct as a means of financial necessity? Ultimately, in asking if these harms are removed by the

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Francisco got off to an early start in the boy business, also in the late 1800's, during the Gold Rush.").

18. See DORAIS, *supra* note 11, at 15.

19. See *id.*

20. John Scott, *A Prostitute's Progress: Male Prostitution in Scientific Discourse*, 13 SOC. SEMIOTICS 179, 181 (2003).

21. DORAIS, *supra* note 11, at 15 (quoting GEORGE CHAUNCEY, *GAY NEW YORK* (1994)).

22. See discussion *infra* Part V.

presence of desire, we are confronting whether we can treat male-male sexual commodification differently from female-male exchanges, which we seem to believe has more obvious social harms. But, taking desire into account in this way exposes the inconsistency in how we weigh desire in a female-male exchange, where no one asks if the woman is enjoying herself as a means to either mitigate or heighten the level of harm to both the sex worker and society. It seems that desire should play no part in assessing these harms, and yet from a practical standpoint, society has largely tied up the question of the existence of homosexual desire with whether or not a harm exists in male-male sexual exchanges.

The image of the poor, often exploited, young male as the face of male prostitution came into prominence in the academic and popular mindset in the middle of the 20<sup>th</sup> century.<sup>23</sup> Scott describes the way in which male prostitutes were depicted:

Male prostitutes came to be depicted as young, innocent victims of older, predatory perverts:

During this period it was understood to be the duty of the law and agencies of enforcement to protect 'ignorant' young males from the 'unnatural lusts' of older men . . . Increasingly, young males involved in prostitution were portrayed as weak and lacking in judgment. . . they were not automatically classified as 'homosexuals.'<sup>24</sup>

Dorais identifies the destitute nature of young male runaways as the driving force for many young men engaging in same-sex prostitution in the Americas.<sup>25</sup> These young men may have viewed engaging in same-sex sexual acts as a last resort, or perhaps as simply a chance at relatively easy money.<sup>26</sup> Because the hetero/homosexual identity dichotomy had not yet emerged in public thought, this definition was the only way to explain the existence of male-male exchanges. The sex worker was simply destitute, and the older, wealthier pervert preyed upon that need. Whether this was in fact the case is unclear. A homosexual identity was still incredibly difficult to assert, and many of these young men could have simply been acting according to their desires, entirely contradicting then the popular depiction of coercion and extortion.

Nonetheless, this framing of the young, exploited male allowed young men to engage in homosexual conduct without taking on the condemning social label of "homosexual." This classification, in turn, presumably made public discourse about the subject of male prostitution less uncomfortable. Framing the issue as one in which laws were passed to prevent poor, straight men from being forced to engage in same-sex prostitution as a means to survive was much less taboo than discussing homosexuality and deviancy for their own sake.

But with the post-World War II shift in the "way in which sexual behaviour

23. Scott, *supra* note 20, at 183.

24. *Id.* (citing JEFFREY WEEKS, *AGAINST NATURE: ESSAYS ON HISTORY, SEXUALITY AND IDENTITY* (1991); GARRY WOTHERSPOON, *CITY OF THE PLAIN: HISTORY OF A GAY SUBCULTURE* (1991)).

25. See DORAIS, *supra* note 11, at 15.

26. *Id.* at 15-16.

was understood and governed"<sup>27</sup> came a change in the perception of male-male sexual contact, allowing for the start of a popular acceptance of homosexuality as an identity rather than a disorder. Kinsey's reports on human sexuality (1948, 1965) offered a "'liberal' re-interpretation of human sexual behaviour," and "dispensed with earlier static readings of sexual behaviour in favour of a more fluid reading."<sup>28</sup> Scott explains during this same time period:

[a] wide variety of social scientific texts of the period mark[ed] adolescence out as a phase of life imbued with great socio-sexual significance. . . Adolescence came to be viewed as a problem of governance, particularly in relation to 'normal' sexual development and functioning. Adolescence was identified as the site in which sexual identification and desire developed, where life-long sexual habits formed, and were [sic] the 'truth' of sexual orientation revealed itself.<sup>29</sup>

This new view of adolescent sexuality, which perhaps included a broader view of homosexuality itself, presented a new problem for the way that society viewed the issue of the young, male sex worker. While the view of the male sex worker as a young, heterosexual man was in force in the 1950s and 60s, "[w]hat rendered male prostitution a governmental problem was the idea that such men ['heterosexual' male prostitutes] could be 'treated' through practical welfare or medical interventions."<sup>30</sup> In this way, society was able to incorporate the emerging idea that homosexual acts equated to a homosexual desire into its depiction of the stereotypical male sex worker. But rather than label the male prostitute as a homosexual, the prostitute needed instead only to be "treated" so as to avoid falling into homosexuality.

By defining homosexual desire as a treatable disease, and by characterizing male sex workers as homosexuals motivated by poverty, (with the fear that repeating sexual acts would in itself lead to homosexual desire, or was symptomatic of a disordered desire<sup>31</sup>), the public discourse surrounding male prostitution was kept decidedly within the moorings of preventing public harms. Scott summarizes a startling depiction of a 19-year-old, white, male homosexual, written by Dr. Freyhan, a clinical psychologist, in the 1947 issue of *The Delaware State Medical Journal*:

The patient, identified by Freyhan as a male prostitute, was said to have adopted an 'aggressive' homosexuality; that is, he self-identified as homosexual. A teacher's report (included in the study uncritically as evidence) noted that the patient's homosexuality was not of the type normally found in pubescent boys and girls, the patient having pursued other males and 'persuaded' them to use him as a 'passive' partner in sexual relations. It was also noted that at one institution, in which the patient had previously spent time for committing a petty crime, he had corrupted other boys to the extent that he was placed in separate

27. Scott, *supra* note 20, at 183.

28. *Id.* (citing Alfred C. Kinsey et al., *Sexual Behaviour in the Human Male* (1948); Alfred C. Kinsey et al., *Sexual Behavior in the Human Female* (1953)).

29. Scott, *supra* note 20, at 184. (citing C.M. FLEMING, *ADOLESCENCE: ITS SOCIAL PSYCHOLOGY* (1948); ELIZABETH B. HURLOCK, *ADOLESCENT DEVELOPMENT* (1949); RUDOLPH M. WITTENBERG, *ADOLESCENCE AND DISCIPLINE: A MENTAL HYGIENE PRIMER* (1959)).

30. Scott, *supra* note 20, at 184.

31. *See id.*

sleeping quarters. Moreover, when he had been arrested by police (not initially for prostitution, but for wearing a naval uniform in an unauthorised manner) he confessed to police that he had been 'frilled' engaging in the pursuit of young soldiers and sailors, Freyhan conclude[ed] that he was 'proud' of his ability to attract other men. Freyhan . . . went on to point out that the absence of any kind of self-criticism and inner conflict in the patient 'proved to be a severe obstacle to psychotherapy', being symptomatic of a psychopathic personality make-up. "As such he concluded that lobotomy was the only option left open for 'treatment' that could curtail the patient's current behaviour."<sup>32</sup>

The young man's apparent homosexuality is framed in terms of disorder and perversity, describing him as deviant in spite of the fact that he was probably only pursuing the same kinds of sexual liaisons with men that a heterosexual male would seek from his female peers.

With subsequent progress in the gay rights movement and growing public acceptance of homosexuality, a slow but growing acceptance of the gay identity of male sex workers emerged in the academic literature of the 1980s and 90s.<sup>33</sup> Male sex workers were described "as individuals, varied in character but usually gay, as much in need of friendship and sexual love as other young people, but who happen to have chosen prostitution as a temporary method of surviving in impoverished social circumstances."<sup>34</sup> Donald West, who has studied and written extensively about male prostitution, imagined a potential counterpart to the young, poor, and now gay, male sex worker, describing a "young, promiscuously inclined homosexual who finds occasional prostitution a congenial and profitable activity, one that brings him into contact with interesting people . . . and an exciting lifestyle," but notes that at the time of his writing, "[o]nly exceptionally has published research ventured beyond the full-time street prostitute [and presumably the prostitute more aligned with the poor-heterosexual model]."<sup>35</sup>

Recent research by Michel Dorais, a professor at McGill University, has confirmed that there are indeed numerous backgrounds from which male sex workers hail. Through his analysis of forty accounts taken from interviews with current and recently retired male sex workers, he has outlined four "typical life patterns" within which his subjects could be classified.<sup>36</sup>

Dorais classified his first group, comprising twenty-two of his forty respondents, as "outcasts."<sup>37</sup> Their living situation was marked by "dire poverty," "substance abuse," "the group comprising all confirmed cases of HIV transmission," "the earliest entrants into the sex trade . . . half of them before the age of sixteen," and the group including the "largest number of sexual abuse victims."<sup>38</sup> This group most closely maps onto the now-traditional view of male

32. *Id.*

33. See WEST, *supra* note 6, at xi-xii (discussing recent literature as being markedly different from the image of male prostitution displayed in literature prior to gay liberation).

34. *Id.* at xii.

35. *Id.* at xiii.

36. DORAIS, *supra* note 11, at 36.

37. *Id.*

38. *Id.* at 36-38.

sex workers as predominately young, impoverished, abused, and suffering from addiction, and also happens to most closely mirror the stereotypical female, street-soliciting, sex worker. Additionally, twenty out of the twenty-two “outcasts” “were or had previously been street hustling on a regular (in most cases daily) basis; only a few had worked at any time in stripping or escorting.”<sup>39</sup> These “outcasts” report very low levels of self-esteem, viewing themselves as worthless due to their need to pursue sex work to meet their monetary needs.<sup>40</sup> In short, the majority of Dorais’ subjects do in fact map onto the image of male sex worker as driven to sex work because of poverty, addiction, and abuse, and thus seem to have the most to gain from laws outlawing male prostitution.<sup>41</sup>

Dorais divides the remaining half of the respondents into three other categories. While each category is not mutually exclusive of the others, as some respondents had experienced multiple categories throughout their time as sex workers, Dorais notes that usually respondents have a predominant pattern.<sup>42</sup>

The second group he deems “part-timers” who work as sex-workers to “make ends meet” while maintaining another job.<sup>43</sup> “Part-timers” entered sex work between the ages of twenty-two and forty, a later age than men in other categories, and worked primarily as strippers if heterosexual, or escorts if homosexual.<sup>44</sup> These men, due to the reputational costs of having a “real” job and due to some of them identifying as homosexual, tend to keep their work discreet; they often garner some degree of self-affirmation from their work, and an overall level of self-esteem, in contrast with the “outcasts”.<sup>45</sup>

The third group is made up of “insiders,” or “young men who have grown up in or around the sex trade to the point that they come to view it as their primary social circle.”<sup>46</sup> These men do not view sex work as a last resort, but as “something natural, an honourable living.”<sup>47</sup> These men also entered the sex trade at an early age, between fifteen and twenty-one, but unlike the “outcasts” they maintain a positive self-image and have relatively stable friendships and relationships.<sup>48</sup>

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39. *Id.* at 38.

40. *Id.* at 37-38.

41. If we accept the view that laws banning prostitution benefit those who stand to gain most monetarily, the very poor. Removing prostitution as a possible avenue of employment benefits them, as in so banning, we affirm the social value of sex as something that is de-valued through the commodification thereof, and refuse to allow their commoditized sex to dehumanize them. This argument has of course been questioned by many academics, but I will refrain from critiquing it, if only because for purposes of constitutional analysis, the proposed governmental interest in promoting sex between consenting adults free from the possibly coercive effects of poverty that lead to selling sexual services would clearly withstand even the lowest level of scrutiny, rational basis review.

42. DORAIS, *supra* note 11, at 38-39.

43. *Id.* at 39.

44. *Id.*

45. *Id.* at 39-40.

46. *Id.* at 40.

47. *Id.*

48. *See id.* at 40-41. (4.1)



The final group Dorais terms “liberationists,” “for whom prostitution is a way of living out fantasies, exploring new experiences and partners, and profiting from these discoveries.”<sup>49</sup> This group maps most closely to West’s vision of the “young, promiscuously inclined, homosexual.”<sup>50</sup> Dorais argues that this group most challenges preconceived notions of male prostitution, since for these men, the work “has the potential to be gratifying and affirming under the right circumstances and with the right clients.”<sup>51</sup> These men had, on average, higher levels of education than men from other groups, and viewed sex work as an “opportunity to affirm their sexual orientation or preference and to grow as an individual.”<sup>52</sup> Men from this group also seem to present the most cogent argument for differing treatment of male and female sex workers, as they do not seem in need of any of the social protections that banning prostitution promises. Instead, this group could be seen as providing a social good of sorts, a sexual service to those men incapable of finding a consenting partner, while simultaneously reaping a monetary reward without the costs to self that are associated with the “outcast” class.

In summary, the history of male prostitution is one in which Western society has done its best to ingrain heteronormative ideas of dominant-masculine and submissive-feminine identities onto the client and sex worker respectively. With this mapping came the assumption that the male sex worker, as a genetic male and naturally dominant being, is forced into sex work due to poverty, abuse, addiction, and other circumstances, all falling within the “outcast” category, and will subsequently experience depression and low self-esteem. The existence of the “part-timer,” the “insider,” and the “liberationist,” each in his own way freed from the traditional concerns of drug abuse and poverty that plague the “outcast,” challenges the strict mapping of the equivalence of female-male and male-male sex work, which I will further explore through the analysis of the laws and enforcement policies of the government vis-à-vis the Equal Protection Clause of the 14<sup>th</sup> Amendment.

## II. A BRIEF HISTORY OF EQUAL PROTECTION AND GENDER CLASSIFICATIONS

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.<sup>53</sup>

The Fourteenth Amendment was introduced by the Reconstruction Congress in the wake of the Civil War to protect the newly granted citizenship rights of freed black slaves from explicitly discriminatory legislation in

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49. *Id.* at 41.

50. See WEST, *supra* note 6, at xiii.

51. DORAIS, *supra* note 11, at 43.

52. *Id.* at 41-42.

53. U.S. CONST. amend. XIV, § 1.

previously Confederate states.<sup>54</sup> This new amendment was quickly tested in the *Slaughter-House Cases*, in which the Supreme Court drastically limited the scope of the amendment's privileges and immunities clause, essentially stating that it "did not provide general federal protection for citizens against state regulation. Rather, it protected only a few rights, 'which ow[e] their existence to the Federal government, its National character, its Constitution, or its laws.'"<sup>55</sup>

The day after deciding the *Slaughter-House Cases*, the Supreme Court used its newly minted rule of protecting only those rights owing their existence to the Federal government in *Bradwell v. Illinois*, and in so doing, began to outline the Court's eventual approach to "real" differences between the sexes.<sup>56</sup> In *Bradwell*, the Court upheld an Illinois statute that refused to license a woman as a lawyer, holding "that the right to practice law was not a privilege or immunity of national citizenship and therefore was not protected by the fourteenth amendment."<sup>57</sup> While Justice Bradley dissented in the *Slaughter-House Cases*, arguing that "a law which prohibits a large class of citizens from adopting a lawful [employment deprives] them of liberty as well as property, without due process of law,"<sup>58</sup> he articulated what would later become the "real difference" doctrine when he wrote in *Bradwell*:

[the] natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood.<sup>59</sup>

Justice Bradley's words, though now 140 years out of date, shows the troubling beginnings of the Supreme Court's thinking in regards to gender distinctions. By creating differing spheres for men and women, the Court began to blaze a dangerous path that would allow some discrimination on the basis of gender, if not through application of antiquated norms of motherhood and family due to the application of patriarchal and heteronormative thinking channeled through language of biological "real" differences.

The Court finally changed its stance on gender discrimination in the 1970s, first with *Reed v. Reed*.<sup>60</sup> The case involved an Idaho statute governing the estates of persons who died intestate, granting a preference to men over women as administrators by, specifically stating that "of several persons claiming and equally entitled to administer, males must be preferred to females."<sup>61</sup> The Court issued a unanimous opinion that the statute in question violated the Equal

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54. See GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 452 (6th ed. 2009) (ratified on July 28, 1868).

55. *Id.* at 453 (quoting *The Slaughter-House Cases*, 83 U.S. 36, 79 (1873)).

56. See generally *Bradwell v. Illinois*, 83 U.S. 130 (1873).

57. STONE ET AL., *supra* note 54, at 619.

58. *Id.* at 619-20 (quoting *The Slaughter-House Cases*, 83 U.S. at 122).

59. *Id.* at 620 (quoting *Bradwell*, 83 U.S. at 141).

60. See 404 U.S. 71, 76 (1977).

61. *Id.* at 72 (quoting IDAHO CODE § 15-314 (repealed 1972)).

Protection Clause of the Fourteenth Amendment.<sup>62</sup> Chief Justice Berger, writing for the majority, wrote that the relevant standard to be applied to gender classifications was “whether a difference in the sex of competing applicants [bears] a rational relationship to a state objective that is sought to be advanced by the operation of [the statute].”<sup>63</sup> The State argued that the classification provided for the distinction and appointment of an administrator when presented with two equal candidates only differing in gender. The Court rejected this as “the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause.”<sup>64</sup>

The *Reed* Court asserted that it was applying a rational basis test to gender.<sup>65</sup> As such, the decision, while indeed a move to protect women, is somewhat troubling from a doctrinal sense. Under normal rational basis review, with its high level of deference, a statutory provision must be “rationally related” to a “legitimate” government interest,<sup>66</sup> and a “legitimate interest” need only be a hypothetical one, not one actually articulated by the government at the time of passing the suspect law.<sup>67</sup> Using regular rational basis, it would seem that Idaho’s need to distinguish between persons, and the use of this gendered methodology, would probably be allowed.

The Court began to move away from the application of rational basis review in *Frontiero v. Richardson*.<sup>68</sup> The challenged statute was a federal law under which “a male member of the uniformed armed services could automatically claim his spouse as a dependent . . . [whereas] a female service member could claim comparable benefits only if she demonstrated that her spouse was in fact dependent on her for over half his support.”<sup>69</sup> Though the Court was unable to author a majority opinion, eight of the justices agreed that the law violated the Equal Protection Clause.<sup>70</sup> Writing for four of the justices, Justice Brennan argued that like racial classifications, gender distinctions should similarly receive heightened scrutiny.<sup>71</sup> Brennan noted that many “stereotyped distinctions” are present in many statutes, and justified heightened scrutiny by acknowledging that “the sex characteristic frequently bears no relation to ability to perform or contribute to society.”<sup>72</sup> Justice Powell wrote a concurrence, joined by Chief Justice Burger and Justice Blackmun, wherein he expressly rejected the need to apply a heightened classification to gender, arguing that it was not necessary to

62. *Reed*, 404 U.S. at 74.

63. STONE ET AL., *supra* note 54, at 621 (quoting *Reed*, 404 U.S. at 76).

64. *Reed*, 404 U.S. at 76.

65. *See id.*

66. *See United States v. Carolene Products, Co.*, 304 U.S. 144, 152-53 (1938) (defining and applying the standard for normal rational basis review).

67. *See* KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 641 (17th ed. 2010) (“Such [rationality] review does not demand anything approaching a perfect fit to an actual purpose; any conceivably rational basis is enough.”).

68. *See generally* 411 U.S. 677, 682 (1973) (plurality opinion).

69. STONE ET AL., *supra* note 54, at 622.

70. *See Frontiero*, 411 U.S. at 690-91 (plurality opinion).

71. *See id.* at 688.

72. *Id.* at 686.

decide what level of scrutiny gender classifications warranted in light of *Reed*'s use of rational basis and the similarly groundless discrimination in *Frontiero*.<sup>73</sup> While Justice Brennan's opinion did make progress, acknowledging the long-suffered discrimination against women that existed in statutes, his caveat that such distinctions "frequently" do not bear any relation to ability is still troubling, because it allowed for the later doctrine of "real differences" to develop around what many would argue are differences, based only in slightly less offensive traditions of the female as a disadvantaged gender.

In *Craig v. Boren*, the Court finally adopted intermediate scrutiny as we know it today.<sup>74</sup> An Oklahoma statute prohibited the sale of 3.2% alcohol beer to men under the age of 21, but to women under the age of 18.<sup>75</sup> The question was "whether such a gender-based differential constitute[d] a denial to males 18-20 years of age of the equal protection of the laws in violation of the Fourteenth Amendment."<sup>76</sup> Justice Brennan articulated the new test, intermediate scrutiny, as one where "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives," clarifying that the statute must be "substantially related to achievement of the statutory objective."<sup>77</sup> Oklahoma argued that the statute enhanced traffic safety, showing statistical evidence that more men aged 18-20 were arrested for drunk driving than women of the same age.<sup>78</sup> But the Court found that the statute's use of gender to prevent a marginal difference in drunk driving incidents was "an unduly tenuous 'fit,'" and that "the showing offered by the appellees [the legislature] does not satisfy us that sex represents a legitimate, accurate proxy for the regulation of drinking and driving."<sup>79</sup> It is somewhat ironic, through perhaps not surprising, that the intermediate scrutiny test emerged out of a law that discriminated against men; nevertheless, this test has become the Court's approach to gender distinctions in law.

But intermediate scrutiny, with its test of "substantially related" to "important objectives," is not the same as strict scrutiny's test that there must be a "compelling governmental interest" to which purpose the statute is "narrowly tailored", and also constitutes the "least restrictive means" for achieving that purpose.<sup>80</sup> "Important objectives" are doubtless different from "compelling interests," as is "substantially related" different from "narrowly tailored" and "least restrictive." In practice, this has led the Court to allow some separate but equal treatment of men and women, as well as acknowledge real and inherent differences between the two.

In *United States v. Virginia* (the Virginia Military Institute case), the Court

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73. See *id.* at 691-92.

74. See 429 U.S. 190, 204 (1976).

75. *Id.* at 197.

76. *Id.* at 192.

77. *Id.* at 197, 204.

78. See *id.* at 225 (showing that 2% of men, compared to only .18% of women, aged 18-20 are arrested for drunk driving).

79. *Id.* at 202, 204.

80. See *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 702 (2007) (describing the strict scrutiny test applied to matters concerning race).

struck down the Virginia Military Institute's (VMI) policy of only admitting men.<sup>81</sup> The case is particularly instructive in the way it outlines acceptable governmental purposes for treating men and women differently, as well as the burden of the state in defending these distinctions. Justice Ginsberg, writing for the majority, arguably strengthens the intermediate scrutiny test, explaining that the government must have an "exceedingly persuasive justification" for its action and that the "burden of justification is demanding" and "rests entirely on the State."<sup>82</sup> The Court clarifies that it believes there are differences at play between men and women:

Supposed "inherent differences" are no longer accepted as a ground for race or national origin classifications. . . Physical differences between men and women, however, are enduring. . . "Inherent differences" between men and women, we have come to appreciate, remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual's opportunity. Sex classifications may be used to compensate women "for particular economic disabilities [they have] suffered," to "promote equal employment opportunity," to advance full development of the talent and capacities of our Nation's people. "But such classifications may not be used, as they once were, to create or perpetuate the legal, social, and economic inferiority of women."<sup>83</sup>

The Court first found that the all female program of VMI's sister school the Virginia Women's Institute for Leadership did not offer an equivalent education to that of VMI (which would presumably have provided an acceptable reason for either school to deny admittance on the basis of gender).<sup>84</sup> Next, the Court found that the differences of sex, which would require alterations necessary to ensure privacy, did not justify excluding women from admission (i.e. that the physical requirements imposed by VMI's style of education were not too much for a woman to bear).<sup>85</sup>

The Court has, however, upheld a few gender-based classifications, even under the intermediate scrutiny test. In *Michael M. v. Sonoma County Superior Court*, "the Court upheld a statute defining statutory rape as 'an act of sexual intercourse accomplished with a female not the wife of the perpetrator, where the female is under the age of 18 years.'"<sup>86</sup> The Court reasoned that the State's interest in preventing illegitimate pregnancies was a strong one, and that "punish[ing] only the participant who, by nature, suffers few of the consequences of his conduct," was well within the legislature's purview, especially when "the risk of pregnancy itself constitutes a substantial deterrence to young females."<sup>87</sup>

81. 518 U.S. 515, 519, 558 (1996).

82. *Id.* at 524, 533 (citing *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724).

83. *Virginia Military Institute Case*, 518 U.S. at 534 (citing *Goesaert v. Cleary*, 335 U.S. 464, 467 (1948)).

84. *See Virginia Military Institute Case*, 518 U.S. at 534.

85. *See id.* at 534, 551, 558.

86. STONE ET AL., *supra* note 54, at 647 (quoting *Michael M. v. Superior Court of Sonoma Cnty.*, 450 U.S. 464, 466 (1981)).

87. *Michael M.*, 450 U.S. at 464-65, 473.

Similarly, in *Nguyen v. Immigration and Naturalization Services*, the Court upheld a federal law requiring that the child of a male U.S. citizen born abroad must file more documentation of parentage to gain citizenship than if the mother of the child were a U.S. citizen.<sup>88</sup> The governmental interest at issue was “the importance of assuring that a biological parent-child relationship exists.”<sup>89</sup> In the case of the mother, the relation “is verifiable from the birth itself.”<sup>90</sup> *Nguyen* seems less offensive as an example of “real differences” as it is indeed much easier to establish maternity than paternity given the fact that the woman must give birth. But *Michael M.*’s reasoning is a bit more troubling. While the state may indeed have an interest in deterring illegitimate pregnancies, is it enough of a real difference to justify criminalizing the male behavior? Yes, a child is a significant burden, but to equate the burden of a child to the burden of carrying a criminal rape conviction seems disproportionate. Again, the Court seems to feel the need to protect stereotypically weak women from the lusts of young men, and does so by over-punishing the male partner who may have been equally, or even less, responsible for the sexual episode.

Regardless, this line of thinking about “real differences” in Equal Protection cases dealing with gender is a difficult subject. Returning to the power of societal discourse itself, Catherine MacKinnon has written that accepting these “real differences” may in fact support male domination of society: The idea of gender difference helps keep the reality of male dominance in place. . . . Difference is the velvet glove on the iron fist of domination. This is as true when differences are affirmed as when they are denied, when their substance is applauded or when it is disparaged, when women are punished or [when] they are protected in their name. A sex inequality is not a difference gone wrong, a lesson the law of sex discrimination has yet to learn. One of the most deceptive anti-feminisms in society, scholarship, politics, and law is the persistent treatment of gender as if it truly is a question of difference, rather than treating the gender difference as a construct of the difference gender makes.<sup>91</sup>

In short, by making distinctions of any sort, women are inherently kept separate, and are thus subjugated, to male dominance. Even measures which would seek to protect women inherently associate femininity with weakness. Acknowledging differences of any sort opens the door for comparison, and in that comparison, women usually lose.

There are several cases in which the acknowledgement of “differences” is clearly suspect. In *Kahn v. Shevin*, the Court upheld a property tax exemption for widows but not for widowers on the grounds that there are greater financial difficulties confronting a lone woman than there are a lone man.<sup>92</sup> Similarly, in *Schlesinger v. Ballard*, the Court upheld a Naval policy giving women more time to achieve a mandatory promotion before being discharged, arguing that remedial measures that advantage women who have been historically

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88. See 533 U.S. 53, 73 (2001).

89. *Id.*

90. *Id.* at 54.

91. STONE ET AL., *supra* note 54, at 652 (quoting CATHARINE MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 3, 8-9 (1987)).

92. 416 U.S. 351, 352 (1974).

disadvantaged are permissible.<sup>93</sup> In both of these cases the Court implied, if it did not directly state, that women in society confront more problems in the workforce, struggling to make money and to be successful in a male dominated world. But rather than insist on the equality of the sexes and rule these two laws unconstitutional, the Court instead believed itself to be helping women to catch up. What they were perhaps failing to consider is MacKinnon's argument that by acknowledging some differences, we are simply reinforcing and retrenching the inequality that we seek to stamp out, and perhaps even seeing difference through the lens of male dominance and patriarchy where none exists.

By legally allowing for some "real" differences, we as a society may in fact be reinforcing older, discriminatory stereotypes both about the nature of heterosexual sex and about homosexual interactions as well. MacKinnon's argument can easily extend into the problems that we might see when comparing past legislation, which often directly targeted only male-female sex work by only criminalizing opposite-sex interactions rather than same-sex interaction. In addition, many more resources of today's police departments are used to stop opposite-sex rather than same-sex sex work. By calling the two types of interactions "different" on the basis of gender, we inherently read in weakness to the woman in the female-male interaction, and a strength and lack of public protection for the male sex worker engaged in same sex exchanges.

### III. LEGISLATIVE DISCRIMINATION IN THE PAST

It is clear that some states conceived of homosexual interactions as occurring completely outside the context of traditional sex work and prostitution, instead using the discourse of non-naturality to stigmatize homosexual conduct as disordered and criminal behavior. Historically, anti-prostitution laws were frequently written so as only to target opposite-sex interactions, leaving same-sex interaction to anti-sodomy statutes, but without the stigma of the "prostitution" label. These laws sought only to target the traditional opposite-sex interactions that comfortably fit within a heteronormative model of sexual behavior, leaving the possibility of homosexual sex for pay completely outside the criminal label of "prostitution." While this perhaps gave male prostitutes an advantage by removing them from the criminal penalties associated with prostitution, it doubtless left them subject to the harsher penalties of these "unnatural acts" statutes, which were much harsher.

Many of these statutes were on the books until relatively recently. For example, in Mississippi, only procuring female prostitutes was covered, with a recommended penalty of six-months in prison for the crime (by either a party looking to sell or buy).<sup>94</sup> By contrast, homosexual interactions, whether for pay or merely consensual, are covered under Mississippi's "unnatural intercourse" statute, which carries a hefty ten-year penalty for both parties.<sup>95</sup> While *Lawrence v. Texas*<sup>96</sup> doubtless made the latter "unnatural intercourse" statute

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93. See 419 U.S. 498, 508 (1975).

94. MISS. CODE ANN. § 97-29-51, 53 (1972).

95. MISS. CODE ANN. § 97-29-59 (West 2013).

96. 539 U.S. 558 (2003).

unconstitutional, the offending statute is still present in the Mississippi code. Louisiana similarly worded their prostitution statute, writing:

Prostitution is the practice by a female of indiscriminate sexual intercourse with males for compensation.

Whoever commits the crime of prostitution shall be fined not more than one hundred dollars, or imprisoned for not more than six months, or both.<sup>97</sup>

This statute, as later construed by law enforcement and the court system of Louisiana, explicitly excludes men from the profession, and the relatively lax punishment, leaving them subject to other statutes with much harsher sentences.<sup>98</sup>

These laws criminalizing only opposite-sex sex work were also upheld as constitutional despite cries that they violated the Equal Protection Clause. In *State v. Devall*, the Louisiana Supreme Court addressed the federal constitutionality of the above-referenced statute.<sup>99</sup> The court itself acknowledged that the challenged statute only criminalized the selling of sex by women (to either female or male clients).<sup>100</sup> While this court was operating without the intermediate scrutiny standard laid out in *Craig v. Boren*, *Frontiero v. Richardson* had already been decided, and with it the move towards including gender as a protected class. But because no majority had emerged in *Frontiero*, the Louisiana Supreme Court used a rational basis analysis in examining the constitutionality of the law.<sup>101</sup> The court acknowledged *Reed*, but limited its impact to only disallowing the use of gender to eliminate a class from consideration for a benefit.<sup>102</sup> They instead cited to *Goesaert v. Cleary*, a case decided by the U.S. Supreme Court in 1948.<sup>103</sup> In *Goesaert*, the Court upheld a Michigan statute which denied women bartending licenses unless they were the wife or daughter of the male owner of a tavern.<sup>104</sup> The Louisiana court summarized the import of the case by writing that “a statute may make a distinction without violating the constitutional guarantee, if the classification is a natural and reasonable one.”<sup>105</sup> The court found that the defendant had not presented any evidence to show that “male prostitution is a social problem of any importance” and “[t]he Constitution does not and should not require the legislature, before attempting to regulate an existing practice which is detrimental to the public welfare, to regulate a practice which is not.”<sup>106</sup>

The court reveals a distinct bias in these statements. First, the court assumes that it is “natural and reasonable” to classify women as the class more likely to

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97. *State v. Devall*, 302 So. 2d 909, 910 (La. 1974) (quoting LA. REV. STAT. ANN. § 14:82, as it appeared in 1974).

98. See LA. REV. STAT. ANN. § 14:89 (1974) (amended 2013).

99. See *Devall*, 302 So. 2d at 910.

100. See *id.*

101. *Id.* at 912-13.

102. *Id.* at 912.

103. 335 U.S. 464 (1948).

104. See *id.* at 467.

105. *Devall*, 302 So. 2d at 911. (citing *Goesaert*, 335 U.S. at 468).

106. *Id.* at 912.



engage in prostitution, without offering any reasons for that assumption other than perhaps some commonly held, but mistaken, social knowledge. But the second statement reveals that this assumption runs even deeper to the point that the court cannot imagine that male sex work occurs absent a concrete showing by the defendant of its existence. While the burden to overcome rational basis review doubtlessly rested on the defendant to demonstrate that male prostitution was not merely a theoretical matter, the language of the court begs the question: how much data would be enough to lift the issue of male sex work to a “social problem of any importance” such that the court would feel it had to intervene? The court concludes with this statement:

[A]bsent a showing that distinctions involving prostitution are merely pretexts designed to effect an invidious discrimination against the members of one sex or the other [and thus trigger the sort of Equal Protection offered post-Reed], lawmakers are constitutionally free to exclude male prostitution from the coverage of legislation on the reasonable basis that it does not constitute a social problem. Differences between the sexes does bear a rational relationship to the prohibition of prostitution by females.<sup>107</sup>

In this decision, the Louisiana Supreme Court not only upheld a gendered version of the state anti-prostitution statute against equal protection violation, it also confirmed the contemporary societal view of male, and most often male-male sex work as something completely outside the heteronormative model of the traditional heterosexual prostitution exchange. To recognize that same-sex interactions occur frequently would place the court in the uncomfortable position of admitting homosexual sex workers into the definitional ranks of prostitutes at large.

In much the same way that some conservatives fear that allowing gay marriage will mar the term “marriage” for opposite-sex couples, admitting homosexual men into the category “prostitute” could be seen as equally altering the definition of prostitution itself. Admittedly, “marriage” has usually been a positive term in society, whereas “prostitute” has carried a negative burden, but one which homosexuals were denied to carry even if they wanted it. To acknowledge male sex workers would be to acknowledge, and legitimate through discourse, the existence of homosexuality, or taken to a lesser extreme, the existence of men forced into selling sex in order to survive. To admit the former into the term “prostitute” could remove the disordered connotation, because while some female sex workers are doubtless seen as in need of mental help, the profession also includes semi-respectable call women trying to earn a living. To admit the poor heterosexual male forced into same-sex exchanges into the category could be seen as removing the stigma from gay-for-pay interactions by giving it the valid, though admittedly still stigmatized, label of prostitution rather than that of “unnatural act.”

While the Louisiana Supreme Court probably did not consciously acknowledge the meaning of its assumptions, analyzing them reveals that, at least in Louisiana in the 1970s, little progress was being made both in terms of acknowledging the existence of male sex workers, nor in granting homosexuality

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107. *Id.* at 912-13.

any sort of label which would grant it an equivalent social status even to "prostitution." And while the justice system might like to believe itself an objective voice relatively removed from societal influence, the very terms in which it speaks are evident that it is doubtless influenced by the public consciousness. Louisiana was not alone in its thinking either, with supreme courts of both Indiana<sup>108</sup> and Wisconsin<sup>109</sup> making similar decisions on similar grounds.

It seems that in the years following these decisions, with the *Craig v. Boren* intermediate scrutiny in place in 1976, gendered prostitution statutes would have been quickly deemed unconstitutional due to the lack of a substantial relationship to the important government interest of preventing prostitution. Had the issue ever reached the Supreme Court, it would presumably have ruled that these laws impermissibly targeted women and not men. But the case history did not need to move in this direction. It seems that many states in fact had gender-neutral prostitution statutes on their books, and so the case history post-*Craig v. Boren* is one in which the courts examine whether enforcement in a gender-biased manner is in fact a violation of Equal Protection. Importantly, the discussion of these cases still hinges on whether, and to what degree, we accept the existence of male-male sex exchanges and homosexuality at large.

#### IV. SELECTIVE ENFORCEMENT AS A VIOLATION OF EQUAL PROTECTION

Before discussing enforcement of anti-sex work statutes, one would naturally ask, how much of the total sex-work pie is actually composed of male sex workers? We know that although "the ratio of female to male prostitutes is unclear,"<sup>110</sup> women account for some ninety percent of the total arrests made under prostitution statutes.<sup>111</sup> Law enforcement officials sometimes point to common policies of using male officers to target female prostitutes as a reason for these numbers.<sup>112</sup> While these numbers do not answer the important question as to what percentage of all sex work is actually engaged in by men selling services, the admission of law enforcement officials that they do in fact more often target women serves to demonstrate that female sex work is more sought out by law enforcement than its male counterpart. This sort of selective enforcement is covered by constitutional law through a chain of Supreme Court decisions.

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108. See *Wilson v. State*, 278 N.E.2d 569, 571 (Ind. 1972).

109. See *State v. Mertes*, 210 N.W.2d 741, 744 (Wis. 1973).

110. Alysa Castro, Note, *Student Note: Better in Theory: The Road to Prostitution Reform in Pennsylvania*, 9 RUTGERS J.L. & PUB. POL'Y 37, 48-49 (2012) (citing Jacqueline Cooke & Melissa L. Sontag, *Sixth Annual Review Of Gender and Sexuality Law: II. Criminal Law Chapter: Prostitution*, 6 GEO. J. GENDER & L. 459, 470 (2005); Gregg Aronson, *Seeking a Consolidated Feminist Voice for Prostitution in the US*, 3 RUTGERS J.L. & URB. POL'Y 357, 378 (2006)).

111. Castro, *supra* note 110, at 49 (citing Jessica N. Drexler, Comment, *Governments' Role in Turning Tricks: The World's Oldest Profession in the Netherlands and the United States*, 15 DICK. J. INT'L L. 201, 214 (1996)); Aronson, *supra* note 109, at 378.

112. Castro, *supra* note 110, at 49 (citing Coty R. Miller & Nuria Haltiwanger, *Prostitution and the Legalization/Decriminalization Debate*, 5 GEO. J. GENDER & L. 207, 228 (2004); Cooke & Sontag, *supra* note 109, at 477).

The Supreme Court famously ruled in *Yick Wo v. Hopkins* that the discriminatory administration of a facially neutral statute violated the Equal Protection Clause of the Fourteenth Amendment.<sup>113</sup> While the case dealt with the granting of laundry licenses in a manner that effectively discriminated against Chinese Americans, the Court's language in no way limits the doctrine of discriminatory administration only to victims of racial discrimination:

[T]he facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion, that, whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration, and thus representing the State itself, with a mind so unequal and oppressive as to amount to a practical denial by the State of [equal] protection of the laws.<sup>114</sup>

While *Yick Wo* has not been cited by the Court in relation to any case dealing with gender discrimination, it is reasonable to assume that were the Court to employ it for that purpose, the discriminatory, or selective, enforcement would need to withstand intermediate scrutiny itself, namely through substantial relation to an important governmental interest.<sup>115</sup> *Yick Wo's* holding was extended to discriminatory enforcement of criminal laws through *Oyler v. Boles*, though it did allow the "'conscious exercise of some selectivity' in criminal law enforcement as long as the selectivity is not based on 'an unjustifiable standard such as race, religion, or other arbitrary classification.'"<sup>116</sup> Presumably, those unjustifiable standards would include gender today.

The Minnesota Supreme Court defended the decision of selective enforcement of its prostitution law against an Equal Protection attack in 1976 in *City of Minneapolis v. Buschette*.<sup>117</sup> Buschette complained that the City of Minneapolis had violated her Equal Protection rights by conducting police stings against sex workers when they had put forth no similar efforts against their predominantly male customers.<sup>118</sup> The statute under which Buschette was charged is gender neutral, and read as follows: "No person, in any public or private place, shall offer or submit his or her body indiscriminately for sexual intercourse, whether or not for a consideration."<sup>119</sup> The court made note of a series of important facts:

113. See 118 U.S. 356, 374 (1886) ("Though the law itself be fair on its face, and impartial in appearance, yet, if it is applied and administered . . . so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution.").

114. STONE ET AL., *supra* note 54, at 537 (quoting *Yick Wo*, 118 U.S. at 373).

115. See *Craig v. Boren*, 429 U.S. 190, 197 (1976) ("To withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.").

116. *Commonwealth v. King*, 372 N.E.2d 196, 205-06 (Mass. 1977) (quoting *Oyler v. Boles*, 368 U.S. 448, 456 (1962)).

117. See 240 N.W.2d 500, 504-05 (Minn. 1976) (notably the same year of the *Craig* decision, but the court here is using the rational basis scrutiny of *Reed*).

118. *Id.* at 501.

119. *Id.* (citing MINNEAPOLIS, MINN., CODE OF ORDINANCES § 870.110).

- A. Minneapolis Code of Ordinances, s 870.110, under which defendant is charged, applies equally to men and to women;
- B. All nine permanent members of the Minneapolis morals squad are men;
- C. An important function of the morals squad, as articulated by its then chief officer, Sergeant Jon Prentice, is to eliminate or control prostitution on the streets of the city;
- D. In the performance of this important duty, the morals squad officer makes himself available for propositions by suspicious women by acting in the role of decoy or, in the argot of the profession as the 'trick';
- E. One hundred ninety adults were charged with prostitution between March 31, 1972, and August 28, 1973, of whom 172 were women and 18, men;
- F. On only one occasion, in March 1972, a policewoman was used by the morals squad as a decoy, and she effected the arrest of 7 of the above 18 men for the offense of prostitution;
- G. Of the remaining 11 men, most, if not all, were female impersonators;
- H. Since August 28, 1973, and until October 26, 1973, 29 persons were arrested by the morals squad and charged with prostitution, 17 of them being female and 12 of them being male;
- I. Of the 12 males arrested by morals squad officers, none of them was arrested for offering to take money from a female to perform an act of sexual intercourse with her, but all were arrested after they attempted to solicit a female police officer by offering her money to do so with them; . . . .
- . . . .
- L. It is the current intention of the morals squad to continue apprehension of males as well as females who are engaged in prostitution.<sup>120</sup>

It is important to note that the large majority of those people arrested between March 31, 1972 and October 26, 1973 were female and not male. Those men who were arrested were either trying to solicit a female officer for sex or were themselves impersonating women (and perhaps would have identified as women or transgender today). Notably, the facts do not make a single mention of any sort of same-sex interactions in the city's anti-sex work efforts.

The court allowed the statute to be subject to a claim of selective enforcement of the sort described in *Yick Wo*, and went so far as to list a number of cases that expanded that doctrine to other types of laws.<sup>121</sup> The court described the claim as one in which the "defense has the burden of producing evidence of discrimination by a clear preponderance of the evidence. If such intentional and purposeful discriminatory enforcement is shown, the court has the remedy of dismissing the charge against the defendant."<sup>122</sup> In *Buschette's* case, the court found that she not only failed to produce evidence of only female arrests, but

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120. *Buschette*, 240 N.W.2d at 501-02.

121. *See id.* at 502-03.

122. *Id.* at 503-04.

that it was the stated intent of the police chief to arrest men and women sex workers.<sup>123</sup>

The defendant made the argument that the statistical disparity between female sex worker arrests to male sex-seeker arrests was enough to show discriminatory enforcement.<sup>124</sup> In response, the court employed a rational basis review of the decision, and trusted Minneapolis' assertion that it was more efficient to concentrate on the assumedly female "sellers of sexual services, rather than on the buyers."<sup>125</sup> The court concluded that there was indeed, "a rational relationship between that selectivity and the governmental objective of controlling prostitution."<sup>126</sup>

It is worth noting that in its determination about whether the statute violates *Reed's* rational basis review of an Equal Protection claim, the court assumes that the sellers of sex are predominately female and the buyers predominately male'. The defendant herself did not express that the violation might not lay in targeting female sex workers more than male solicitors of females, but in the statistical selective enforcement against women. If she had brought this argument, the court would have needed to engage in a *Yick Wo* analysis similar to that used in her first claim of selective enforcement against female sex workers and not males. But the court already ruled that the enforcement schema could not be shown to be discriminatory against women as the defendant had not presented evidence of discrimination. The evidence of that discrimination would presumably be the statistics of arrests of women for prostitution as opposed to those of men who were similarly selling sexual services (even if they were doing so in drag). While the court respected those statistics enough to engage in rational basis review in regards to the disparity in arrests of women for selling services to arrests of men seeking them, it somehow discredited that same data set for purposes of demonstrating discriminatory enforcement between genders of sex workers, instead trusting implicitly the police chief's clearly contradicted assertion that he intends to arrest both men and women.

Buschette would probably have had to provide evidence that same-sex interactions were in fact occurring (outside the transgendered ones documented) before she could assert that the selective enforcement was indeed discriminatory. The enforcement policy of the city, which provided no documentation that same-sex interactions were occurring (again, outside of those transgendered ones that the court and city seem to map onto a more societally palatable, heteronormative exchange), meant that the burden on Buschette would have been heavy indeed. She would have had to produce some evidence of those interactions. The court's assumptions, and the enforcement policy itself, are another demonstration of the way in which the law, and its enforcement mechanism, turned a blind eye to same-sex exchanges, both in mapping those same-sex exchanges that were recorded in a heteronormative manner, and by failing to target any openly same-sex exchanges.

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123. *Id.* at 504.

124. *Id.*

125. *Id.* at 505.

126. *Id.* at 506.

Massachusetts came to a similar ruling in *Commonwealth v. King* in 1977, but with an important distinction.<sup>127</sup> Here, the defendant was charged with prostitution, and as part of her claim that discriminatory enforcement violated her Equal Protection rights, presented evidence, through the arresting officer's testimony, that it was "the practice of the vice squad division of the Boston police department to file such complaints against only females."<sup>128</sup> The Supreme Judicial Court disregarded this evidence, instead conjecturing that the officer's testimony was not necessarily the official position of the department at large, and that male sex workers were perhaps being prosecuted under other laws covering similar conduct instead of the anti-prostitution statute.<sup>129</sup> Again, the burden would be on the defendant to seek out data about the prevalence of same-sex exchanges and the failure of the police department to enforce against them before her claim of discriminatory enforcement could stand. Absent concrete evidence of both, her claim could not proceed. The court here did seem to allow the assumption that same-sex exchanges were taking place,<sup>130</sup> but in a similar fashion to the *Buschette* case, demanded a high level of proof of selective enforcement before it would even hear the claim.

The court surprisingly did not end the case there, and instead continued to outline what such a claim of discriminatory enforcement would look like, though it must have known that discussion would in fact be considered dicta. The court recognized the Massachusetts Equal Rights Amendment as granting strict scrutiny to distinctions made on the basis of gender, and also cited to *Yick Wo* and *Oyler* in extending that review to cases of discriminatory enforcement in criminal proceedings.<sup>131</sup> The court concluded that given Massachusetts' prohibition of sex discrimination and the constitutional framework against discriminatory enforcement:

[T]he Commonwealth cannot enforce [the anti-prostitution statute] against female prostitutes but not against male prostitutes unless it can demonstrate a compelling interest which requires such a policy.

The defendant bears the initial burden of alleging and showing, prima facie, selective enforcement of the law on the basis of sex, because we presume that criminal arrests and prosecutions are undertaken in good faith, without intent to discriminate.<sup>132</sup>

The case represents progress. The Court openly assumes that same-sex exchanges do indeed take place and that selective enforcement against female sex

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127. See *Commonwealth v. King*, 372 N.E.2d 196, 199 (Mass. 1977).

128. *Id.*; See also *id.* at 204-05 (the defendants also attempted to present statistical evidence at the appellate level that showed that the police failed to prosecute male prostitutes which they had not presented at trial; the court ignored that evidence in its determinations).

129. *Id.* at 205.

130. See *id.* ("It is left entirely conjectural in the record before us whether males who solicited for or engages in sexual relations for hire, but were not arrested for prostitution, were charged instead with any number of other applicable criminal offenses including: . . . the common law crime of soliciting for an unnatural act . . .").

131. See *id.* at 205-06.

132. *Id.* at 207.

workers would indeed be a violation of the Massachusetts Constitution given its Equal Rights Amendment, but still leaves the burden of proving that discrimination squarely in the defendant's lap, and with a rather high standard of proof that seems difficult to meet.<sup>133</sup>

Not surprisingly, there are few cases addressing this issue. The cases above give us two options to approach Equal Protection claims arising from gender neutral anti-prostitution laws that seem to be enforced only or predominately against female-male exchanges; either the defendant must demonstrate only that enforcement is biased (the liberal approach taken by a state like Massachusetts), or carry the burden both that enforcement is biased, and that the bias does not meet intermediate scrutiny's necessity of bearing a substantial relationship to an important governmental interest.<sup>134</sup> In my final section, I will address the potential arguments that might be employed to justify selective enforcement against only female-male exchanges, and analyze the discursive problems that underlie these arguments.

#### V. SELECTIVE ENFORCEMENT AND "REAL" DIFFERENCES FOR PURPOSES OF INTERMEDIATE SCRUTINY

The case law discussed has demonstrated that under federal law a statute is subject to intermediate scrutiny when it distinguishes between classes of people on the basis of gender,<sup>135</sup> or heightened scrutiny in states with an Equal Rights Amendment,<sup>136</sup> and that those statutes which are selectively enforced in a discriminatory manner may also violate the Equal Protection Clause of the Fourteenth Amendment if they do not survive the appropriate level of

133. The Supreme Judicial Court later revisited the issue of selective enforcement in *Commonwealth v. Franklin*, 385 N.E.2d 227, 233-34 (Mass. 1978). The court clarified the burden of the defendant:

In order to meet the initial burden in raising a reasonable inference of impermissible discrimination, defendants must demonstrate (1) 'that a broader class of persons than those prosecuted has violated the law,' (2) 'that failure to prosecute was either consistent or deliberate,' and (3) 'that the decision not to prosecute was based on an impermissible classification such as race, religion, or sex.' Once a defendant has satisfied this tripartite burden, the prosecution must rebut the inference or suffer a dismissal of the underlying claim.

Mara Shulman Ryan, Note, *Criminal Law—Invisible in the Courtroom Too: Modifying the Law of Selective Enforcement to Account for White Privilege*, 34 W. NEW ENG. L. REV. 301, 312 (2012) (citing *Franklin*, 385 N.E.2d at 233-34).

While this standard is somewhat clearer, it still places a heavy burden on a presumably female defendant sex worker to produce evidence that same-sex exchanges are in fact occurring and that the police department consistently fails to enforce the same anti-prostitution law against those same-sex interactions.

134. I arrive at this second approach by first acknowledging a dearth of jurisprudence in the federal courts. Following the lines of both constitutional case law relating to discriminatory enforcement and Equal Protection, as well as gender distinctions and Equal Protection, I believe a defendant would need to demonstrate violations on both levels in order to establish any sort of case of precedential value.

135. See discussion *supra* Part III.

136. See *King*, 372 N.E.2d at 206.

scrutiny.<sup>137</sup> “Real differences” have included the ability to get pregnant,<sup>138</sup> a history of difficulties in the workplace,<sup>139</sup> and a history of financial difficulty generally,<sup>140</sup> but as the Court said in *VMI*, “such classifications may not be used, as they once were, to create or perpetuate the legal, social, and economic inferiority of women.”<sup>141</sup> If the statute is facially neutral, but in its enforcement there is an element of selectivity on the part of the executive, we must then ask if such selective enforcement is in fact discriminatory to the level of a violation of equal protection.<sup>142</sup> Some selectivity is allowed in criminal prosecutions, but that selectivity cannot be based on impermissible categorizing along lines of race, religion, or presumably gender.<sup>143</sup>

In order to best protect both male and female sex workers, these anti-prostitution statutes must be enforced equally against both sexes. By only serving to prosecute women, men and women both suffer in terms of the imposed social discourse, and in the day-to-day violence that affects both parties. While the current constitutional schema may indeed protect people from discrimination today, the Court, and the other 30 states without ERAs, would do well to close the gap of “real” difference and ensure that heteronormative and patriarchal ideas of gender difference stop placing men and women into roles within which they may not fit. If not, we risk the propagation of further discrimination against women and against those men who may find themselves in need of the protections offered by banning sex work as a feasible career option. A close look at the reasoning behind the arguments for difference reveals that little, if any, difference exists at all.

When analyzing male-male to female-male sex exchanges, the obvious question becomes, whether there is enough of a real difference between the harms sought to be avoided in each arrangement such that selectively enforcing anti-prostitution laws against women and not men is constitutionally permissible. The answer to this question of course hinges on if real differences exist, because if they do, then selective enforcement would presumably be constitutional. If there are no real differences, the purpose of selective enforcement is not substantially related to an important governmental interest, the selectivity would not be allowed.

Presumably, it is the larger social harm of the woman engaging in

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137. See discussion *supra* Part IV.

138. See *Michael M. v. Super. Ct. of Sonoma Cnty.*, 450 U.S. 464, 471 (1981) (stating that one does not need to be a doctor to realize that men and women are different because women can get pregnant).

139. See *Schlesinger v. Ballard*, 419 U.S. 498, 508 (1975) (discussing the different treatment of men and women serving as naval officers).

140. See *Kahn v. Shevin*, 416 U.S. 351, 353 (1974) (“There can be no dispute that the financial difficulties confronting the lone woman in Florida or in any other State exceed those facing the man.”).

141. *United States v. Virginia*, 518 U.S. 515, 534 (1996) (citing *Goesaert v. Cleary*, 335 U.S. 464, 467 (1948)).

142. See *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886).

143. See *Oyler v. Boles*, 368 U.S. 448, 456 (1962) (“Moreover, the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation.”).



prostitution as her only viable means of financial support which somewhat justifies the total banning of female prostitution in most states. Instead of, for example, allowing high-end escort services to operate, we maintain the assumption that we are avoiding the potential harms to women that come with lower level, less lucrative, and more dangerous, street prostitution. If female prostitution at that low, street level causes social harms, then we can presumably justify that we as a society value a total ban on female prostitution in order to avoid line drawing problems (i.e. how high-end is high-end enough?), and to assert that there may be some harm that comes to society as a whole with the availability of any female prostitution (an argument put forward by many on moral and religious grounds). The same argument becomes harder to make when it is more difficult to identify equivalent and equal social harms in a same-sex interaction. For example, where presumably one or both parties identify as homosexual, (particularly where the prostitute identifies as homosexual), the threat of heteronormative coercion and power differentials is absent. Admittedly, the moral and religious argument that any male prostitution is a harm still exists, but as the Court has said, moral disapproval is not enough to justify a statute.<sup>144</sup>

But to admit such a difference is to in and of itself implicate a series of heteronormative structures, wherein we assume that female to male sex is inherently different from same-sex sexual conduct, and that the male figure is in a position of power over the woman that he somehow does not occupy vis-à-vis a male sex worker. This assumption helps to explain the Arab world's treatment of homosexuality and homosexual prostitution as existing outside the definitions of the Western homo/hetero binary, as the active client/participant is able to maintain his masculinity and heteronormative dominance over a socially-perceived feminine and submissive passive partner.<sup>145</sup> If such traditionalist views of gender roles and power structures are taken into play, we must ask from the constitutional perspective whether these traditions are truths, or whether there is no real difference in the social harms that we seek to subvert. If there is no difference, we either must admit that we think it wrong for anyone, of any gender in any sort of male-male, female-male, or female-female pairing, to engage in sexual activity with the promise of remuneration, or we must identify a real biological difference that somehow makes same-sex (in the context of this note, male-male sex) appreciably different from female-male prostitution scenarios to justify the differing treatment both from a historical legislative view, and from the current female-male biased enforcement and prosecution route.

There are a number of potential differences, outside the traditional heteronormative and patriarchal framework, that might be put forward as for why male-male exchanges represent different problems from female-male interactions. The most obvious concern is the transmission of HIV. According to the Center for Disease Control, "in 2010 MSM [men who have sex with men] accounted for 78% of the new HIV infections among males," and "the rate of new

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144. See *Romer v. Evans*, 517 U.S. 620, 635 (1996) (rejecting the state's argument that the law at hand protects the freedom of association for the people who object to homosexuality, implying that those objections do not serve a legitimate government interest).

145. See Needham, *supra* note 14, at 292 (discussing the power dynamics in Arabic homosexual relations).

HIV infections among males . . . was 4.2 times that of females.”<sup>146</sup> Some past research described male sex workers as “vectors of disease transmission into the heterosexual world.”<sup>147</sup> This fear stemmed from the idea that many men taking part in sex work self-identify as heterosexual and thus would bring home their work to female partners. But this fear of “infecting” the heterosexual world ignores the fact that most sex workers identify as gay or bisexual,<sup>148</sup> as well as other studies which have shown that sex workers more often use condoms with clients than with non-clients.<sup>149</sup> Additional research has suggested that “HIV rates in samples of male sex workers do not differ significantly from rates of HIV among samples of men who have sex with men in general.”<sup>150</sup> Law enforcement might use the relative safety, then, of male-male sex work to justify that there is no need to protect public health by targeting these men. This assumes that HIV transmission is the only appreciable difference between male-male and female-male exchanges, but this is not the only difference that would likely be put forward by law enforcement.

A more legally viable difference may be the relative differences in strength between men and women and the way such differences play out violently in sex work. The Court suggested in *VMI* that if women were really physically unable to participate in the same training as their male counterparts, that physical strength differences could be considered.<sup>151</sup> This line of thinking would allow that men are stronger than women on average, and so we need to ensure that women are not physically abused by their clients. As such, we can selectively enforce against female-male interactions. Similarly, as women are able to get pregnant and bear children, another difference acknowledged by the Court,<sup>152</sup> the government could have an interest in ensuring that children are not born out of wedlock, or even that pregnancies occur outside of the marriage union.<sup>153</sup>

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146. Ctrs. for Disease Control & Prevention, *HIV Incidence*, CENTERS FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/hiv/statistics/surveillance/incidence/index.html> (last updated May 22, 2013).

147. MICHAEL D. SMITH & CHRISTIAN GROV, *IN THE COMPANY OF MEN* 26 (2011) (quoting Edward V. Morse et al., *The Male Street Prostitute: A Vector for Transmission of HIV Infection into the Heterosexual World*, 32 SOC. SCI. MED. 535, 535 (1991)).

148. See DORAIS, *supra* note 11, at 10.

149. See SMITH & GROV, *supra* note 146, at 26 (citing David S. Bimbi, *Male Prostitution: Pathology, Paradigms, and Progress in Research*, 53 J. HOMOSEXUALITY 7, 7-35 (2007); David S. Bimbi & Jeffrey T. Parsons, *Barebacking Among Internet Based Male Sex Workers*, 9 J. GAY & LESBIAN PSYCHOTHERAPY 85, 85-105 (2005); Matthew J. Mimiaga et al., *Street Workers and Internet Escorts*, 86 J. URB. HEALTH 54, 54-66 (2009); M. Parker, *Core Groups and the Transmission of HIV: Learning from Male Sex Workers*, 00 J. BIOSOCIAL SCI. 1, 1-15 (2005); M.D. Smith & D.W. Seal, *Sexual Behavior, Mental Health, Substance Use, and HIV Risk Among Agency-Based Male Escorts in a Small U.S. City*, 19 INT'L J. SEXUAL HEALTH 27, 27-39 (2007)).

150. SMITH & GROV, *supra* note 147, at 26 (citing I. Vanwesenbeeck, *Another Decade of Social Scientific Work on Sex Work: A Review of the Research 1990-2000*, 12 ANN. REV. SEX RES. 242, 242-300 (2001)).

151. See *United States v. Virginia*, 518 U.S. 515, 550 (1996) (explaining that the program was not found to be so strenuous that a woman could not complete it).

152. *Michael M. v. Super. Ct. of Sonoma Cnty.*, 450 U.S. 464, 471 (1981).

153. An argument itself advanced by proponents of Proposition 8 in California, where it was

Numerous studies have shown that male sex workers do themselves experience violence,<sup>154</sup> although one might ask whether the violence is of the same level or concern as that found in female-male interactions. Men certainly cannot get pregnant, so that concern has no equivalent in the male-male situation. These concerns, then, might both be considered valid from a constitutional, legal perspective, and could perhaps withstand intermediate scrutiny if a defendant could first demonstrate that selective enforcement itself exists. The fact that this discriminatory enforcement might be found constitutional highlights some major problems with the ways in which we consider gender differences themselves as a matter of constitutional law. Both of these examples implicate the concern, discussed above, that in treating male-male sex as something inherently different from female-male sex, devoid of the elements of coercion and force that are read into heterosexual exchanges, both men and women suffer. Men, because they are denied the protection, admittedly of a patriarchal state, that comes with admitting the same dangers inherent to all prostitution, and women in that we frame the prostitution discourse as one of a female victim and male abuser, denying women the sexual freedom to pursue prostitution with dignity and respect.

Massachusetts, as highlighted above, is one of twenty states which have decided for themselves that intermediate scrutiny will not suffice when facing statutes which discriminate, either facially or through selective enforcement, on the basis of sex, through enactment of Equal Rights Amendments that cover sex in their state constitutions.<sup>155</sup> These states have decided that the differences accepted by the Supreme Court are not valid reasons for discriminatory treatment under the law. In this way they may be seen as echoing the reasoning of MacKinnon,<sup>156</sup> that in acknowledging these sorts of differences we are in effect continuing to accept discrimination, perhaps creating more of a difference than actually exists.

The discourse of difference itself can be used to rob women of the equality they deserve, and conversely, place male sex workers in a disadvantaged position. In the context of sex work, if we accept the proposition that women are more at risk of violence in female-male exchanges than men in male-male exchanges,<sup>157</sup> we as a society are robbing women of their own strength to resist violence or to assert themselves by stating that they are in fact less capable of protecting themselves. Through this sort of discourse we weaken what strength

argued that expanding the definition of marriage would affect heterosexual couples' incentives to marry and have children within the married relationship. See *Petition for a Writ of Certiorari at 26-34, Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (No. 12-144).

154. See generally DORIAS, *supra* note 11; SMITH & GROV, *supra* note 147; WEST, *supra* note 6.

155. See LESLIE W. GLADSTONE, CONG. RESEARCH SERV., RS20217, EQUAL RIGHTS AMENDMENTS: STATE PROVISIONS 1 (1999), available at <http://maloney.house.gov/sites/maloney.house.gov/files/documents/olddocs/era/CRS.pdf>.

156. See STONE ET AL., *supra* note 54, at 652 (quoting CATHERINE MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 3, 8-9 (1987)). (JW, Rule 1, 4.2, 15).

157. While studies have shown that male sex workers experience violence, it is unclear whether they experience it at the same level as female sex workers. See WEST, *supra* note 6, at 99 (describing the risk of violence that goes along with male prostitution); See also DORAIS, *supra* note 11, at 67 (describing male sex workers' violent incidents).

they may indeed have and send a signal to men and women alike that women are vulnerable to attacks. A similar set of reasoning follows from the pregnancy argument: by stating that the government has an interest in ensuring that pregnancies occur within wedlock, we deny women the power to be self-selected single parents, and somewhat rob them of autonomy over their own procreative choices, insinuating that while women can end a pregnancy in marriage,<sup>158</sup> they must be married to a man in order to exercise the choice of actually having a baby.

Men, too, suffer when we accept these differences. As discussed above, men too experience violence at the hands of their clients, and in failing to enforce anti-prostitution laws against men, those male sex workers are less likely to be protected from abusive clients. By essentially stating that these men should be able to protect themselves, we shame male sex workers into not reporting the crimes committed against them, for to do so would be to admit emasculation at the hands of another man. In short, by acknowledging “real” differences, all we do is reinforce heteronormative stereotypes about the roles that men and women should play in society, both on the streets and in the bedroom, and in the process, we hurt everyone.

## VI. CONCLUSION

In conclusion, while the Supreme Court could ultimately find that the differences between men and women are such that selective enforcement of anti-prostitution laws against women and not men is constitutional, such a decision would bring to light a number of issues regarding the way that the Court, and we as a society, have framed the difference between men and women. While there are indeed physical differences between the sexes, sweeping generalizations about these differences, from deeming women physically weaker, to calling men more aggressive, only serves to further entrench gender stereotypes that many may find an ill fit. As far as prostitution goes, selective enforcement against women sends a message to women that they are in need of more help, that they are weaker than their male counterparts. The same selective enforcement simultaneously infers that male-male exchanges are not a social problem, that men can take care of themselves, and that we as a society would rather turn a blind eye than ensure that these men are given the same protections, via enforcement, that women have. Law enforcement agencies would do well to alter their enforcement policies so as to end this mixed message of discrimination and gender stereotyping. At the same time, the courts should reexamine the way in which “real” difference has been framed, closing any gaps that may allow for discrimination on the simple basis of traditional gender, and heteronormative, stereotyping.

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158. See *Roe v. Wade*, 410 U.S. 113, 153 (1973) (explaining how a woman’s autonomy to decide whether or not to terminate her pregnancy is encompassed in a general right of privacy).