



# BETTER IN THEORY: THE ROAD TO PROSTITUTION REFORM IN PENNSYLVANIA

Student Note

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## I. INTRODUCTION

In many ways, Mark A. Sargent was a textbook example of an upstanding citizen. He was educated at Wesleyan University, where he graduated magna cum laude and Phi Beta Kappa and went on to complete a Master of Arts in Medieval Studies at Cornell University.<sup>1</sup> After completing a law degree (also from Cornell), Sargent practiced securities and corporate law for a few years in Boston before beginning his teaching career in 1980.<sup>2</sup> He was eventually appointed Dean and Professor of Law at Villanova University School of Law.<sup>3</sup> He was successful in this position, publishing numerous articles, including, “Lawyers in the Moral Maze,” which describes the

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<sup>1</sup> *Selected Works of Mark A. Sargent*, THE BERKELEY ELECTRONIC PRESS, [http://works.bepress.com/mark\\_sargent/](http://works.bepress.com/mark_sargent/) (last visited Oct. 21, 2011).

<sup>2</sup> *Selected Works of Mark A. Sargent*, *supra* note 1.

<sup>3</sup> *Selected Works of Mark A. Sargent*, *supra* note 1.

process of “ethical numbing” that many corporate lawyers experience, a process that results in corporate lawyers engaging in conduct that is diametrically opposed to their moral convictions.<sup>4</sup> His research and teaching interests involve the intersection between Catholic social thought and the law.<sup>5</sup> He has a wife, also a successful lawyer, one son, and is an active member of his community.<sup>6</sup>

On November 25, 2008, police raided a Kennett Township house suspected as a site for prostitution after a six-week surveillance.<sup>7</sup> They arrested the owner of the house and two women suspected of engaging in prostitution.<sup>8</sup> In investigating this prostitution ring, the police relied on the testimony of two known customers to sustain the convictions.<sup>9</sup> One of the customers was upstanding citizen Mark A. Sargent.<sup>10</sup>

Stephen A. Clark, the owner of the house, was arrested and charged with promoting prostitution and conspiracy, and after pleading no contest, he was sentenced to five to twenty-three months in jail.<sup>11</sup> Lacy Welsh, 20, was arrested and pleaded guilty to conspiracy and promoting prostitution.<sup>12</sup> Cara Martin,

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<sup>4</sup> Mark. A. Sargent, *Lawyers in the Moral Maze*, 49 VILL. L. REV. 867, 880 (2004). Sargent argues that ethical obligations, state law and self-interest apparently do not give lawyers “sufficient incentives to report law violations by corporate managers ‘up the ladder’ to appropriate decisionmakers within the corporate client, or to disclose illegality to regulators.” *Id.* at 867.

<sup>5</sup> *Selected Works of Mark A. Sargent, supra* note 1.

<sup>6</sup> *Selected Works of Mark A. Sargent, supra* note 1.

<sup>7</sup> Kathleen Brady Shea, *Ex-Dean Helped Police, Report Said*, THE INQUIRER, July 3, 2009, [http://articles.philly.com/2009-07-03/news/25288787\\_1\\_sargent-prostitution-ring-customer](http://articles.philly.com/2009-07-03/news/25288787_1_sargent-prostitution-ring-customer).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> Tamara Vostok, *Police: Ex-Nova Dean Customer of Prostitution Ring*, NBC PHILADELPHIA, July 3, 2009, <http://www.nbcphiladelphia.com/news/local-beat/Nova-Law-School-Dean-Prostitute-Customer.html>.

<sup>11</sup> Shea, *supra* note 7.

<sup>12</sup> *Id.*

32, the woman to whom Sargent paid \$170 dollars for thirty-five minutes of sexual contact, has a history of arrests for prostitution and other charges in Pennsylvania, New Jersey, and Delaware.<sup>13</sup> She also pleaded guilty to promoting prostitution and was sentenced to eight to twenty-three months in jail.<sup>14</sup> Sargent claimed to have seen an ad on Craigslist, “got curious,” and responded to it.<sup>15</sup> He was charged with absolutely nothing.<sup>16</sup>

Clark, the “brothel operator,” claimed that Sargent was not charged and was given special treatment because he was a “celebrity perp.”<sup>17</sup> According to Clark, “[i]f you watch the taped interview, the police are almost apologetic with this guy . . . . They told him, ‘You just happened to be in the wrong place at the wrong time.’”<sup>18</sup> The Chester County District Attorney claimed that this was simply not true, but admitted that getting convictions in prostitution cases is “always a challenge.”<sup>19</sup> Customers are not always charged or identified in prostitution investigations because law enforcement officials use them to build their cases.<sup>20</sup> “Unless we have someone on the inside, there's no way to prove that sex was exchanged for money,” said the District Attorney, and, in defense to Clark’s accusations, he claimed to have treated both customers exactly the same way.<sup>21</sup>

This story illustrates several issues arising from both the drafting of the Pennsylvania statute prohibiting prostitution and related offenses, and its past and present application by law enforcement officials. This note will first discuss the history of

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<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> Vostok, *supra* note 10.

<sup>16</sup> *Id.*

<sup>17</sup> Shea, *supra* note 7.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

the criminalization of prostitution in Pennsylvania. It will then go on to analyze the relevant statute and the current trends in its application by law enforcement officials. This discussion will highlight the inequities in application along both race and gender lines. It will then explore the current and historical spatial distribution of prostitution in Philadelphia to suggest that the current police tactics are ineffective in eradicating or even curbing the industry. Philadelphia serves as an excellent case study and a remarkable example of how the sex trade has changed in recent years by adapting to and thriving in ever-changing conditions. The geography of prostitution in this city in particular suggests that prostitutes themselves have “remained undeterred despite the extensive efforts of municipal officials.”<sup>22</sup>

This paper goes on to argue the need for reform in this area of law. It will discuss three distinct methods of reform arising from three predominant feminist doctrines on the issue of prostitution: liberal, social and radical feminist theories. These doctrines are vastly different and each seeks to improve this area of law in distinct ways.<sup>23</sup> This note will conclude by advocating for a middle ground. The initial push in prostitution reform should be geared toward a more equitable application of the law and the development of resources for women who either want to get out of the field or remain in a way that is safe and self-determined.

## II. THE HISTORY OF PROSTITUTION AND ITS REGULATION

Colloquially known as the “world’s oldest profession,” sex work has a long and tumultuous history in this country.<sup>24</sup>

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<sup>22</sup> Sarah S. Bertozzi, *Vicious Geography: The Spatial Organization of Prostitution in Twentieth Century Philadelphia*, COLLEGE UNDERGRADUATE RESEARCH ELECTRONIC JOURNAL, Dec. 2005, at 4, available at <http://repository.upenn.edu/curej/15>.

<sup>23</sup> Gregg Aronson, *Seeking a Consolidated Feminist Voice for Prostitution in the United States*, 3 RUTGERS J.L. & URB. POL’Y 357, 357 (2006).

<sup>24</sup> RUTH ROSEN, THE LOST SISTERHOOD 72-75 (1982); Drake Hagner, *Tenth Annual Review of Gender and Sexuality Law: Criminal Law Chapter: Prostitution and Sex Work*, 10 GEO J. GENDER & L. 433, 433 (2009).

Though prostitution was once a perfectly legal profession in the United States, the exchange of sexual acts for money has since been outlawed in nearly every state in the union, including Pennsylvania.<sup>25</sup>

Some of the first laws prohibiting prostitution in Colonial America were enacted in the late seventeenth century and were designed to punish single women as sexual deviants for street or “nightwalking.”<sup>26</sup> The overarching concern behind these laws, however, was directed at fornication in general.<sup>27</sup> In spite of this legal framework, prostitution was a pervasive and lucrative profession in Colonial America because of the disproportionately large number of men as compared to women.<sup>28</sup> This resulted in “a seller’s market of men seeking the companionship of the available women.”<sup>29</sup>

In the late eighteenth century, the industrialization of many American urban centers created numerous factory jobs, which often served as a newly available means of employment for working class women.<sup>30</sup> Philadelphia was no exception.<sup>31</sup> Factory work, however, was extremely difficult, with low pay and long hours.<sup>32</sup> When the income received from factory work was insufficient to provide them with basic necessities, “many women turned to prostitution as a way to survive.”<sup>33</sup>

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<sup>25</sup> Hagner, *supra* note 24, at 434-36.

<sup>26</sup> ELEANOR M. MILLER ET AL., *The United States, in* PROSTITUTION: AN INTERNATIONAL HANDBOOK ON TRENDS, PROBLEMS, AND POLICIES, 300, 301 (Nanette J. Davis ed., 1993). For example, in Massachusetts, “nightwalking” was an offense first established in 1699. *Id.*

<sup>27</sup> *Id.* at 302.

<sup>28</sup> VERN BULLOUGH & BONNIE BULLOUGH, *WOMEN AND PROSTITUTION* 211 (1987).

<sup>29</sup> Aronson, *supra* note 23, at 360.

<sup>30</sup> BULLOUGH, *supra* note 28, at 216.

<sup>31</sup> MELISSA HOPE DITMORE, *PROSTITUTION AND SEX WORK* 42 (2011).

<sup>32</sup> BULLOUGH, *supra* note 28, at 216.

<sup>33</sup> Susan E. Thompson, *Prostitution-A Choice Ignored*, 21 *WOMEN’S RIGHTS L. REP.* 217, 222 (2000).

Throughout the eighteenth and nineteenth centuries, prostitution was “not illegal” and flourished.<sup>34</sup> Prostitutes and local brothel owners were prosecuted under vagrancy or other misdemeanor charges, but there was no statutory definition of prostitution in most American jurisdictions during this era.<sup>35</sup> At the turn of the nineteenth century, prostitution continued to be tolerated in the United States as a necessary evil.<sup>36</sup> People were outraged by this policy of unspoken tolerance by law enforcement officials and began to form organizations and societies concerned with the eradication of such “moral disorders.”<sup>37</sup> Although laws concerning fornication and adultery were slowly being passed in some states, prostitution was still legally tolerated in spite of public outcry throughout most of the nineteenth century.<sup>38</sup>

Both industrialization and the Gold Rush created such a high demand for prostitutes that bordellos and brothels started popping up in abundance in cities in both the eastern and western parts of the country.<sup>39</sup> Although these establishments began to thrive in increasingly rural areas during this time as well,<sup>40</sup> they remained primarily concentrated in urban centers.<sup>41</sup> In 1856, Philadelphia had 130 brothels, which was far more than most eastern urban centers had at the time.<sup>42</sup>

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<sup>34</sup> TIMOTHY J. GILFOYLE, *Prostitution, in THE READER’S COMPANION TO AMERICAN HISTORY* 875, 875 (Eric Foner & John A. Garraty eds., 1991). It is more accurate to say that prostitution was not illegal rather than legal. *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> BULLOUGH, *supra* note 28, at 217.

<sup>37</sup> *Id.* For example, the Society for the Suppression of Disorders was formed by Cotton Mather in the early eighteenth century to curb “swearing, blaspheming and patronage of bawdy houses.” *Id.* Involvement in such organizations resurged during this time period in response to police inaction. *Id.*

<sup>38</sup> *Id.* See also ROBERT T. FRANCOEUR, *TAKING SIDES: CLASHING VIEWS ON CONTROVERSIAL ISSUES OF HUMAN SEXUALITY* 264 (1987).

<sup>39</sup> Thompson, *supra* note 33, at 223.

<sup>40</sup> *Id.* at 222.

<sup>41</sup> Bertozzi, *supra* note 22, at 6.

<sup>42</sup> Thompson, *supra* note 33, at 223.

After the Civil War, several major cities attempted to regulate prostitution by confining its activities to certain areas, wherein prostitutes would have to register and receive compulsory physical examinations.<sup>43</sup> This method of regulation was unsuccessful in most cities.<sup>44</sup> As further attempts at regulation of the sex trade failed and total repression proved to be impossible, the United States turned to a method of segregation, which confined prostitutes to specific areas known as “red-light districts.”<sup>45</sup> These districts were technically against the law in many states, but officials often tolerated this practice in hopes of maintaining some semblance of control over the prostitutes in their communities.<sup>46</sup> In Philadelphia, in fact, many of these districts were located in Center City, right in plain view of the public.<sup>47</sup> These districts became hotbeds of police corruption,<sup>48</sup> especially in Philadelphia.<sup>49</sup> Sarah Bertozzi provides the following succinct explanation of how this worked:

Threatening to penalize brothels for their infractions, law enforcement and municipal officials set up an unofficial protection network, whereby brothel owners could buy police neglect. By paying off the police and ward politicians, all parties benefited – brothels could continue to reap large profits from the selling of sex, politicians gained a regular tribute system and could be assured that their own infidelities would be kept silent, and police officers could safely earn a

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<sup>43</sup> BULLOUGH, *supra* note 28, at 222.

<sup>44</sup> *Id.* at 224.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> Bertozzi, *supra* note 22, at 34-37

<sup>48</sup> BULLOUGH, *supra* note 28, at 224.

<sup>49</sup> See Bertozzi, *supra* note 22, at 55.

second income without fear of political consequence.<sup>50</sup>

In part as a response to this police corruption, new “red-light abatement” laws were passed in all but three states by 1920.<sup>51</sup> These laws authorized individuals to take legal action against brothels without police or district attorney involvement.<sup>52</sup> The driving force behind this legislative intervention was the public outcry against prostitution and police corruption at the turn of the century.<sup>53</sup> In response to this public outcry and the newly formed legal outlet to enforce this societal disapproval, the sex industry was forced to adapt.<sup>54</sup> As a practical result, “[s]treetwalking . . . has become the predominate means of solicitation.”<sup>55</sup>

Between 1900 and 1920, criminal sanctions prohibiting prostitution were enacted at the state level all over the country.<sup>56</sup> In fourteen states, prostitution was a statutory offense in and of itself, and in twenty-eight states, prostitution was considered a form of vagrancy.<sup>57</sup> This trend was

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<sup>50</sup> *Id.* at 9.

<sup>51</sup> *Id.* at 12. Pennsylvania was not one of these three states. *Id.*

<sup>52</sup> *Id.* The municipality could even fine the property owner upon violation of an injunction and abatement order. See, e.g., Peter C. Hennigan, *Property War: Prostitution, Red-Light Districts, and the Transformation of Public Nuisance Law in the Progressive Era*, 16 YALE J.L. & HUMAN. 123, 152 (2004).

<sup>53</sup> See Hennigan, *supra* note 52, at 153-64.

<sup>54</sup> Bertozzi, *supra* note 22, at 12. Workers in the sex industry had to either embrace streetwalking or continue underground brothels under the guise of legitimate business establishments. *Id.*

<sup>55</sup> ROSEN, *supra* note 24, at 172. Rosen explains that, once the protective red-light districts had disappeared, so went the flourishing centralized subculture that supported the physical establishment of prostitution. *Id.* This led to an increase in the practice of streetwalking. *Id.*

<sup>56</sup> MILLER, *supra* note 26, at 303.

<sup>57</sup> *Id.* at 301.



exemplified at the federal level as well.<sup>58</sup> Throughout the 1960s and 1970s, courts struck down all kinds of laws concerning sexuality, but laws prohibiting acts of prostitution remained in effect.<sup>59</sup> By 1971, prostitution was illegal in every state in the United States except for Nevada.<sup>60</sup>

### III. CURRENT ENFORCEMENT IN PENNSYLVANIA

Today, the legal status of prostitution is a matter of state police power.<sup>61</sup> There are traditionally three ways of dealing with prostitution: criminalization, decriminalization and legalization.<sup>62</sup> In most states in the United States, including Pennsylvania, a system of criminalization is employed by the legislature and law enforcement.<sup>63</sup> The criminalization of prostitution “makes the act itself as well as all activities associated with prostitution illegal.”<sup>64</sup>

The crime of prostitution itself usually involves three basic elements: 1) some degree of sexual activity or conduct; 2) compensation; and 3) intent to commit prostitution (otherwise

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<sup>58</sup> Francoeur, *supra* note 38, at 265. In 1910, for example, Congress passed the Mann Act, which prohibited any man from taking a woman across state lines for the purpose of prostitution or debauchery of some sort. *Id.*

<sup>59</sup> Jessica N. Drexler, Comment, *Government's Role In Turning Tricks: The World's Oldest Profession in the Netherlands and the United States*, 15 DICK. J. INT'L L. 201, 205 (1996).

<sup>60</sup> Aronson, *supra* note 23, at 364. Thirteen counties in Nevada employ a legalized system of prostitution, in which the state government maintains significant control over the industry. *Id.*

<sup>61</sup> See 63C AM. JUR. 2D *Prostitution* § 4 (2011); see also *United States v. Wolf*, 787 F.2d 1094, 1097 (7th Cir. 1986) (“The primary responsibility for policing sexual misconduct lies with the states rather than the federal government.”); *People ex rel. Thrasher v. Smith*, 114 N.E. 31, 32 (Ill. 1916) (holding that the state’s regulation of prostitution “was an exercise of the police power of the State, passed in the interest of the public welfare, for the preservation of good order and public morals”).

<sup>62</sup> Thompson, *supra* note 33, at 239.

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

<sup>64</sup> *Id.*

known as an agreement).<sup>65</sup> In more general terms, the Pennsylvania Supreme Court has defined prostitution simply as “sexual relations for hire.”<sup>66</sup>

#### A. 18 PA. CONS. STAT. § 5902: PROHIBITION OF PROSTITUTION AND RELATED OFFENSES IN PENNSYLVANIA

Statutes regulating and punishing prostitution and related offenses fall within the police power of the state and are valid because they bear a rational relationship to valid state interests, including the control of venereal disease.<sup>67</sup> The Pennsylvania Crimes Code provisions concerning prostitution and other related offenses are derived from the Model Penal Code<sup>68</sup> and “represent the basic policy shared by American jurisdictions of repressing commercialized sexual activity.”<sup>69</sup> The Pennsylvania statutory scheme arranges these offenses within four classes: prostitution,<sup>70</sup> promoting prostitution,<sup>71</sup> living off prostitutes,<sup>72</sup> and patronizing prostitutes.<sup>73</sup>

A person is guilty of prostitution if he or she: “(1) is an inmate of a house of prostitution or otherwise engages in sexual activity as a business; or (2) loiters in or within view of any public place for the purpose of being hired to engage in sexual activity.”<sup>74</sup> This statute has been held to provide an

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<sup>65</sup> 63C AM. JUR. 2D *Prostitution* §§ 1-3 (2011).

<sup>66</sup> See *Commonwealth v. Blankenbiller*, 524 A.2d 976, 978 (Pa. Super. Ct. 1987); *Commonwealth v. Dobrinoff*, 784 A.2d 145, 148 (Pa. Super. Ct. 2001).

<sup>67</sup> 4 SUMM. PA. JUR. 2D *Criminal Law* § 14:2 (2011).

<sup>68</sup> MODEL PENAL CODE § 251.2 (West, Westlaw through 2010 Annual Meeting of American Law Institute).

<sup>69</sup> 4 SUMM. PA. JUR. 2D *Criminal Law* § 14:2 (2011).

<sup>70</sup> 18 PA. CONS. STAT. ANN. § 5902(a) (West, Westlaw through 2011 Acts 1 to 52, 63 and 67).

<sup>71</sup> *Id.* at § 5902(b).

<sup>72</sup> *Id.* at § 5902(d).

<sup>73</sup> *Id.* at § 5902(e).

<sup>74</sup> *Id.* at § 5902(a).

ascertainable standard of conduct directed at the commercial exploitation of sexual gratification, and is neither unconstitutionally vague nor overbroad.<sup>75</sup> The purpose of the statute is to curb the commercial exploitation of sexual gratification.<sup>76</sup>

The statute itself does not define “sexual activity,” except to clarify that it includes homosexual and “other deviate [sic] sexual relations.”<sup>77</sup> In determining what constitutes “sexual activity” for the purpose of the statute, the particular activity under scrutiny in any case must be examined in light of the statute’s underlying purpose of prohibiting commercial exploitation of sexual gratification, and also in light of the common and approved usage of the term “sexual activity.”<sup>78</sup> It is also important to note that the actual occurrence of sexual activity need not be proven or to have taken place at all; it is the mere offer of sexual gratification for compensation that constitutes the crime of prostitution.<sup>79</sup>

Pennsylvania law also sanctions other offenses related to prostitution, such as promoting prostitution, living off of prostitution, and patronizing prostitutes. It does so in a way that appears to be gender-neutral on its face and applicable to prostitutes and customers of prostitutes alike.

## B. DISCREPANCIES IN ENFORCEMENT

The Pennsylvania statute proscribing prostitution proclaims to be gender-neutral; “the roles of prostitute, client, and promoter may be played by either females or males.”<sup>80</sup> It is, however, disproportionately enforced against women, especially

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<sup>75</sup> Commonwealth v. Potts, 460 A.2d 1127, 1136 (Pa. Super. Ct. 1983).

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

<sup>77</sup> 18 PA. CONS. STAT. § 5902(f).

<sup>78</sup> Commonwealth v. Cohen, 538 A.2d 582, 584 (Pa. Super. Ct. 1988).

<sup>79</sup> Commonwealth v. DeStefanis, 658 A.2d 416, 420 n.4 (Pa. Super. Ct. 1995).

<sup>80</sup> 4 SUMM. PA. JUR. 2D *Criminal Law* § 14:3. “It is the conduct of the offender rather than his or her gender which provides the basis for the variance in the offense charged and penalty imposed.” *Id.*

streetwalkers, who are often low-income minorities and immigrants. Even though the Pennsylvania statute has been amended to punish all parties equally, the enforcement of the laws against prostitutes as opposed to customers remains discriminatory. Part of the reason for this arises from the need for the testimony of the customers to convict those actually selling sex for money.

**1. Although the Pennsylvania Provision Defining Prostitution Is Gender-Neutral,<sup>81</sup> It Is Disproportionately Enforced Against Women, Especially Poor Minorities and Immigrants.**

Interestingly enough, prostitution continues to be one of the only unskilled jobs where women on average can earn more than men.<sup>82</sup> Perhaps this explains why the scope of prostitution was initially limited to women at common law.<sup>83</sup> Many states now have gender-neutral statutes prohibiting prostitution and related offenses, and yet the manner in which they are enforced continues to raise equal protection concerns.<sup>84</sup> Prostitute advocacy groups have consistently argued that police discretion and vice enforcement tactics often lead to such gender discrimination, causing more women to be arrested and convicted.<sup>85</sup>

Statistical evidence suggests that gender discrimination at the law enforcement level does occur. While the ratio of female

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<sup>81</sup> 18 PA. CONS. STAT. § 5902(a). The statute explicitly says, “he or she.” *Id.*

<sup>82</sup> See Alexandra Bongard Stremler, *Sex for Money and the Morning After: Listening to Women and the Feminist Voice in Prostitution Discourse*, 7 U. FLA. J.L. & PUB. POL’Y 189, 197 (1995).

<sup>83</sup> See, e.g., *State v. Clark*, 43 N.W. 273, 273 (Iowa 1889).

<sup>84</sup> See, e.g., JUHU THUKRAL & MELISSA DITMORE, *REVOLVING DOOR: AN ANALYSIS OF STREET-BASED PROSTITUTION IN NEW YORK CITY* 38-40 (2003), available at <http://www.sexworkersproject.org/downloads/RevolvingDoor.pdf>.

<sup>85</sup> Priscilla Alexander, *Prostitution: Still a Difficult Issue for Feminists*, in *SEX WORK: WRITINGS BY WOMEN IN THE SEX INDUSTRY* 184, 205-11 (Frederique Delacoste & Priscilla Alexander eds., 1987).

to male prostitutes is unclear,<sup>86</sup> women account for nearly ninety percent of prostitution arrests.<sup>87</sup> Many within the law enforcement community attribute this discrepancy to the fact that police generally use male decoys posing as potential customers, rather than female decoys posing as prostitutes.<sup>88</sup>

The broad discretion given to law enforcement officials has also led to discrepancies in enforcement along racial and socio-economic lines. These discriminatory patterns are evident in arrest statistics, which suggest that law enforcement officers more aggressively target poor women of color who work on the street rather than higher-class escorts and call girls.<sup>89</sup> The most penalized demographic of prostitutes are poor, black women.<sup>90</sup> Black women are in fact seven times more likely to be arrested for prostitution than non-black prostitutes.<sup>91</sup> There is an undeniable hierarchy within the sex work industry. At the lowest end of the totem pole, street workers comprise a minority of those engaged in sex work, but account for an overwhelming majority of arrests.<sup>92</sup> Not only are these sex workers more vulnerable to arrest, but they are also more likely to experience

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<sup>86</sup> See, e.g., 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); Aronson, *supra* note 23, at 378.

<sup>87</sup> See Drexler, *supra* note 59, at 214; Aronson, *supra* note 23, at 378.

<sup>88</sup> Coty R. Miller & Nuria Haltiwanger, *Prostitution and The Legalization/Decriminalization Debate*, 5 GEO. J. GENDER & L. 207, 228 (2004). See also Cooke, *supra* note 86, at 477.

<sup>89</sup> See Sylvia A. Law, *Commercial Sex: Beyond Decriminalization*, 73 S. CAL. L. REV. 523, 529 (2000); Aronson, *supra* note 23, at 377.

<sup>90</sup> See Drexler, *supra* note 59, at 215.

<sup>91</sup> *Id.* Drexler attributes this to police prejudice as well as low living standards and resulting desperation experienced by women living in the inner city. *Id.* See also Elizabeth Bernstein, *What's Wrong with Prostitution? What's Right With Sex Work? Comparing Markets in Female Sexual Labor*, 10 HASTINGS WOMEN'S L.J. 91, 91-94 (1999) (describing this phenomenon in the Theater District and the adjacent Tenderloin in San Francisco).

<sup>92</sup> While street-based workers comprise less than twenty percent of all prostitutes, they account for between eighty-five and ninety percent of prostitution arrests. Cooke, *supra* note 86, at 473; Aronson, *supra* note 23, at 378.

violence or sexual assault.<sup>93</sup> Prostitution law, as it is, thus disproportionately affects only the most helpless minority of those engaged in the industry, such that the need for reform is self-evident. The amount of discretion currently given to law enforcement officials has proven to be not only ineffectively applied, but harmfully so, adversely affecting those who are most vulnerable without making any tangible efforts to protect them.

## **2. Although the Statute Applies to Customers As Well As Prostitutes, Customers Are Rarely Prosecuted.**

Generally, throughout the United States, prostitution statutes have only recently been applied to individuals who patronize prostitutes.<sup>94</sup> Even where the statutes have been amended to punish all parties, the enforcement of the laws remains discriminatory, and the penalties typically imposed on prostitutes are often far more severe than those imposed on either customers or parties who otherwise profit from the act.<sup>95</sup>

The story of Mark Sargent all too clearly illustrates this phenomenon. While those on the supply side of prostitution were all charged and convicted, the customers were not. The existence of this phenomenon is not only recognized, but has been explicitly justified by the Pennsylvania courts. Punishing the prostitute and the promoter as the providers of sexual services to a greater extent than the client who purchases such

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<sup>93</sup> See Drexler, *supra* note 59, at 229-30.

<sup>94</sup> *Id.* at 214-15. Some states still do not prosecute patrons of prostitutes at all. See, e.g., *State v. Chandonnet*, 474 A.2d 578, 579 (N.H. 1984) (statute proscribing prostitution and related conduct does not proscribe patronizing a prostitute or solicitation by a would-be patron). One possible explanation for this inequitable treatment of female prostitutes and male customers stems from the Victorian myth that men could not control their sexual desires, while women's sexuality was nonexistent. Julie Lefler, *Shining the Spotlight on Johns: Moving Toward Equal Treatment of Male Customers and Female Prostitutes*, 10 HASTINGS WOMEN'S L.J. 11, 14-15 (1999).

<sup>95</sup> Drexler, *supra* note 59, at 215. "Even when the wording of prostitution laws was changed, the enforcement remained unchanged; women were the ones arrested." *Id.*

services has been said to be “rationally related to the legitimate purpose of eliminating prostitution.”<sup>96</sup>

Pennsylvania’s criminal code follows the Model Penal Code, which codifies prostitution as a misdemeanor.<sup>97</sup> Unlike many states that apply the Model Penal Code, which codifies patronizing prostitutes as a mere infraction, Pennsylvania’s criminal code deems the purchase of sex for money to be a misdemeanor as well.<sup>98</sup> However, even in more equitable states like Pennsylvania where the laws have been amended to punish all parties equally, the enforcement of the laws against prostitutes as compared to “johns” remains discriminatory.<sup>99</sup>

Massachusetts serves as a rather extreme example of this. In 1983, the prostitution statute was amended to include patronizing prostitutes as an offense.<sup>100</sup> Like the Pennsylvania statute, the amended Massachusetts statute appeared on its face to be equally applicable to the activities of prostitutes and clients alike.<sup>101</sup> However, when a study was undertaken seven years later in Boston, the results indicated otherwise. Two hundred sixty-three women were arrested on charges of prostitution, while not one client was arraigned in court that year.<sup>102</sup> Additionally, while twenty-seven women were sentenced to jail time, not one male customer suffered such punishment.<sup>103</sup> This demonstrates how the amount of discretion extended to law enforcement can result in extremely discriminatory practice,

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<sup>96</sup> Commonwealth v. Finnegan, 421 A.2d 1086, 1090 (Pa. Super. Ct. 1980).

<sup>97</sup> 18 PA. CONS. STAT. § 5902(a.1). Prostitution is a misdemeanor of the third degree when the offense is a first or second offense. *Id.*

<sup>98</sup> *Id.* at § 5902(e.1). The offense of patronizing prostitutes constitutes a misdemeanor of the third degree when it is a first or second offense. *Id.*

<sup>99</sup> Drexler, *supra* note 59, at 215. “Even when the wording of prostitution laws was changed, the enforcement remained unchanged; women were the ones arrested.” *Id.* Evidence suggests that, even when customers are arrested, they are rarely convicted. Aronson, *supra* note 23, at 379-80.

<sup>100</sup> Lefler, *supra* note 94, at 20.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

even if the statute is equitable in theory. Moreover, even if law enforcement does charge a client with patronizing a prostitute, male clients are often asked to testify against the prostitute in exchange for their own charges being dropped.<sup>104</sup>

### **3. The Evidentiary Need for and Use of Customers to Convict Prostitutes Results in Further Discrimination.**

Part of the reason prostitutes are arrested and convicted more frequently for prostitution offenses than their customers arises from the need for the testimony of customers, or those posing as customers, in order to meet the evidentiary burden to support a conviction of the crime of prostitution itself. This illustrates and further reinforces the aforementioned gender bias resulting from broad police discretion, since law enforcement uses male decoys who pose as potential customers far more frequently than female officers posing as sex workers. Even when female decoys are employed, it is often in an effort to investigate a business proprietor or to infiltrate a prostitution ring, rather than to convict and punish customers.<sup>105</sup> Even if aimed at a male business owner, such tactics often still result in the arrests of the female sex workers involved.<sup>106</sup> It is also important to note that it is not only police officers that are being used as decoys, but citizen customers as well. The Sargent case is a notable example of this. Such police tactics result in outrageous government conduct.

For example, in *Commonwealth v. Sun Cha Chon*, the police commenced a prostitution investigation on a health spa upon the complaint of a citizen.<sup>107</sup> Apparently, the citizen was offered manual sexual stimulation by one of the masseuses but

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<sup>104</sup> Drexler, *supra* note 59, at 214.

<sup>105</sup> See, e.g., *DeStefanis*, 658 A.2d at 417 (A female officer went undercover, interviewing for a position as a masseuse at a fitness center that was suspected of being a prostitution ring).

<sup>106</sup> See, e.g., *id.* at 418. In *DeStefanis*, the male business owner's conviction was reversed on appeal, but the court noted that the female masseuses were indeed guilty of prostitution. *Id.* at 420.

<sup>107</sup> 983 A.2d 784, 785 (Pa. Super. Ct. 2009).



was not able to afford the additional fee.<sup>108</sup> Instead, he reported the conversation to the state police, who concluded that he was an “acceptable informant.”<sup>109</sup> The state police then provided this citizen with “fees for sexual contact.”<sup>110</sup> On multiple occasions, this citizen was given money not only to pay for the sexual acts of which he was the recipient, but also “to compensate [him] for his time.”<sup>111</sup> In other words, this random citizen was paid handsomely by the police department to receive oral sex and have intercourse in a variety of positions, after which he laughed and joked with officers during his debriefing.<sup>112</sup>

Chon filed a “Motion to Dismiss Due To Outrageous Government Conduct,” which the district court granted.<sup>113</sup> The commonwealth appealed, claiming that the trial court erred in dismissing their cases due to outrageous government conduct when an informant engaged in sexual acts four times with two prostitutes.<sup>114</sup> In order for a finding of outrageous government conduct to be sustained, it must be shown that the conduct of law enforcement officials was “so grossly shocking and so outrageous as to violate the universal sense of justice.”<sup>115</sup>

The court found that Chon had met this rigorous burden and that “the decision to send the citizen into Shiatsu Spa on

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<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 785-86.

<sup>111</sup> *Id.* The informant was given an increasing amount of money each time and the level of the sexual conduct escalated accordingly. *Id.* On the final occasion, the citizen was paid 100 dollars for sex and 60 dollars for his time. *Sun Cha Chon*, 983 A.2d at 786.

<sup>112</sup> *See id.*

<sup>113</sup> *Id.* Pennsylvania does recognize the defense of outrageous government conduct, which is “based on the theory that police involvement in criminal activity may be so outrageous that a prosecution will be barred on due process grounds.” *Commonwealth v. Mance*, 652 A.2d 299, 303 (Pa. 1995) (*quoting Commonwealth v. Mathews*, 500 A.2d 853, 854 (Pa. Super. Ct. 1985)).

<sup>114</sup> *Sun Cha Chon*, 983 A.2d at 786.

<sup>115</sup> *Id.* at 787 (*quoting Commonwealth v. Benchino*, 582 A.2d 1067, 1069 (Pa. Super. Ct. 1990)).

four occasions for a smorgasbord of sexual activity violates principles of fundamental fairness.”<sup>116</sup> In coming to this conclusion, the judge relied on the fact that the informant and the officers behaved in a manner that was extremely unprofessional, laughing about the sexual escapades of the informant with the spa employees on law enforcement’s dollar.<sup>117</sup> Additionally, the judge recognized the questionable motives of the “acceptable informant” in this case.<sup>118</sup> The lead investigator claimed the citizen had initially come to the police because he was offended by the activities at the spa, but it was difficult to imagine “how this informant could have been so offended, and yet proceed to engage in oral and sexual intercourse . . . and laugh . . . after each occasion.”<sup>119</sup>

*Sun Cha Chon* illustrates how wildly out of hand these investigations can get as a result of the amount of discretion given to law enforcement officers in efforts to combat prostitution. Although the charges against the spa were dropped in this case, this does not eradicate the trauma likely experienced by the female spa workers,<sup>120</sup> nor does it negate the permanent blemish on the investigating police department for their conduct. It is also important to note that in other jurisdictions, courts have not come out this way since outrageous government conduct is a fact-sensitive determination.<sup>121</sup>

Even though sex workers have challenged the discriminatory patterns resulting from the use of police decoys on equal protection grounds, courts have refused to find a

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<sup>116</sup> *Id.* at 789.

<sup>117</sup> *Id.* at 790.

<sup>118</sup> *Id.* at 790-91.

<sup>119</sup> *Id.* at 791.

<sup>120</sup> *Id.* The court also noted the expert testimony of Maryann Layden, Ph.D, who testified that “when police officers act as johns, and they traumatize an individual unnecessarily, it’s outrageous.” *Id.*

<sup>121</sup> See, e.g., *State v. Tookes*, 699 P.2d 983 (Haw. 1985); *Municipality of Anchorage v. Flanagan*, 649 P.2d 957 (Alaska Ct. App. 1982).

constitutional violation.<sup>122</sup> Courts are often able to find numerous arguments for rationalizing these police tactics. For example, in *People v. Superior Court of Alameda County*, the court argued that the vice squad was simply attempting to most effectively utilize its resources by concentrating on the “profiteers” of sex work.<sup>123</sup>

The socio-economic status of the respective parties is also likely to influence law enforcement’s decision as to whom to prosecute and on whose testimony to rely. Police agencies are often reluctant to expose customers to embarrassment because they are “mostly white, married men with at least a little disposable income.”<sup>124</sup> Another important consideration is that women who work in commercial sex generally oppose punishment of their clients.<sup>125</sup> Whatever the reason, the resulting discriminatory patterns of enforcement, along with the prevalent use of male customers to prosecute female prostitutes, results in an unacceptably inequitable application of the law. The only way to remedy such disparate treatment is to reform the prostitution laws in Pennsylvania.

### C. THE SPATIAL GEOGRAPHY OF PROSTITUTION IN PHILADELPHIA SUGGESTS THAT THE CURRENT STATUTORY SCHEME IS INEFFECTIVE IN ERADICATING OR EVEN EFFECTIVELY CURBING PROSTITUTION.

“Philadelphia’s sex trade has fluctuated between concentration in the central city and concentration at the peripheries over the course of the twentieth century . . . .”<sup>126</sup>

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<sup>122</sup> Law, *supra* note 89, at 566-67. The author attributed this phenomenon largely to the fact that disparate impact cases are so hard to prove. *Id.*

<sup>123</sup> *People v. Superior Court of Alameda County*, 562 P.2d 1315, 1321 (Cal. 1977). The court analogized prostitution to the sale of narcotics, arguing that the police may choose to focus resources on targeting those selling the illicit service. *Id.*

<sup>124</sup> Margaret A. Baldwin, *Strategies of Connection: Prostitution and Feminist Politics*, 1 MICH. J. GENDER & L. 65, 74 (1993).

<sup>125</sup> Law, *supra* note 89, at 568.

<sup>126</sup> Bertozzi, *supra* note 22, at 4.

While prostitution has been consistently organized in intense clusters, “the location of these hubs has oscillated between the City’s downtown core and its peripheries.”<sup>127</sup> In other words, the geography of prostitution in Philadelphia has been erratic but “tension between central city intensification and peripheral intensification” has been constant.<sup>128</sup> As Pennsylvania’s largest city, Philadelphia serves as an excellent case study because prostitution has been a constant and prevalent issue, and the geography of its sex trade has been adapting and changing since the beginning of the twentieth century.<sup>129</sup> This demonstrates that “prostitutes themselves have remained undeterred despite the extensive efforts of municipal [and law enforcement] officials.”<sup>130</sup>

The data suggest that the development of the transportation infrastructure and police repression have most contributed to the “re-spatialization” of prostitution.<sup>131</sup> In 1913, the Vice Commission located prostitution almost exclusively in Center City, specifically in an area known as the “Tenderloin.”<sup>132</sup> This was due in part to the explicit policy of Rudolf Blankenburg, the mayor at the time (1911-1916), to keep vice quarantined to this area.<sup>133</sup> Blankenburg’s suppression technique did not, however,

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<sup>127</sup> *Id.* at 28.

<sup>128</sup> *Id.* One possible reason police enforcement of prostitution is so erratic is that it depends “completely on how much the public complains and on pressure from politicians.” Drexler, *supra* note 59, at 213.

<sup>129</sup> Bertozzi, *supra* note 22, at 4.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 5. The data Bertozzi refers to are derived from Philadelphia Crimebase statistics. *Id.* at 23. Although these statistics have been criticized as under inclusive and generally inaccurate due to the discretion and possible corruption of law enforcement in dealing with prostitutes, the data were used mostly to reflect larger trends in the geography of the profession. *Id.* She also used reports and recommendations from the Vice Commission of Philadelphia, newspapers and other periodicals, as well as other studies. *Id.* at 21-25.

<sup>132</sup> Bertozzi, *supra* note 22, at 28. The “Tenderloin” stretches from Sixth Street to Broad Street, and from Chestnut Street to Poplar Street. *Id.*

<sup>133</sup> *Id.* at 29.

survive the change in administration, and prostitution proliferated in the city freely, especially after he left office.<sup>134</sup>

Vice raids were then undertaken by the Philadelphia Police Department to combat this expansion of the sex trade.<sup>135</sup> Still, the drift of clusters towards the fringes of the downtown that began in 1916 continued.<sup>136</sup> This is illustrated by increasing prostitution complaints west of the Schuylkill River and further into North and South Philadelphia.<sup>137</sup>

Arrest records during the 1930s point to a recentralization of prostitution that resulted in schematics similar to those found in 1913.<sup>138</sup> The following three decades then suggest an overall trend toward decentralization, but that transition was erratic and broken.<sup>139</sup> In the 1960s, the sex trade was dispersed widely throughout the city with clusters increasingly creeping into the southern and western neighborhoods.<sup>140</sup>

During the 1970s and 1980s, “[e]fforts to revitalize the downtown undertaken in previous decades had failed, resulting in considerable disinvestment in the downtown.”<sup>141</sup> This in turn resulted in re-centralization of the sex trade.<sup>142</sup> In 1970, the American Social Health Association (ASHA) initiated a study of prostitution in Philadelphia, which identified three primary vice

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<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at 31.

<sup>137</sup> Bertozzi, *supra* note 22, at 31. Bertozzi notes, however, that commercial sex establishments (brothels and the like) remained tightly clustered in Center City. *Id.*

<sup>138</sup> *Id.* at 32. One noticeable difference was that the so-called “vice clusters” were moving increasingly north within the Tenderloin. *Id.* at 33.

<sup>139</sup> *Id.* at 33-36. After the 1930s, prostitution clusters expanded to the fringes of the city. This was followed by an intense centralization in the 1950s and an even more intense expansion in the 1960s. *Id.* at 33. This “clearly illustrates the tension between core and peripheral concentration that has characterized Philadelphia’s sex trade.” Bertozzi, *supra* note 22, at 33.

<sup>140</sup> *Id.* at 33.

<sup>141</sup> *Id.* at 36.

<sup>142</sup> *Id.*

corridors all within the Center City area.<sup>143</sup> The resulting intensity of streetwalkers in Center City escalated, causing public panic.<sup>144</sup> The public outcry from downtown residents spurred drastic police crackdown.<sup>145</sup> This police crackdown has resulted in a present day trend toward decentralization.<sup>146</sup> This tension between intense clustering and decentralization continues and is not likely to abate.<sup>147</sup>

Bertozzi notes that a number of factors contribute to these trends, including economics and the development of the transportation infrastructure within Philadelphia.<sup>148</sup> Of the primary causes of the constant relocation of the prostitution industry throughout the city are the law enforcement practices employed by the Philadelphia Police Department.<sup>149</sup> Police

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<sup>143</sup> *Id.* Bertozzi refers to this as a “revival of the downtown sex trade,” during which the “crowd of streetwalkers along Locust and South Streets marked a return to Tenderloin-era centralization.” *Id.* at 37. She relies on prostitution arrests to come to these conclusions, noting that they are an imperfect measure of prostitution density. However, these figures serve to reveal that a disproportionate amount of soliciting occurred within the Center City area. Bertozzi, *supra* note 22, at 37.

<sup>144</sup> *Id.* at 37.

<sup>145</sup> *Id.* Prostitution was especially dense around Philadelphia’s public parks. Washington Square West, known as the “Merry-go-round,” was especially popular among streetwalkers, as was Rittenhouse Square. *Id.* at 37-38.

<sup>146</sup> *Id.* at 39.

<sup>147</sup> *Id.* at 41. Bertozzi also notes, “[d]espite the unprecedented decentralization of prostitution today and the considerable re-investment in the downtown, however, massage parlors and gay male prostitution have remained in Center City, around Chinatown and Thirteenth and Locust Streets respectively.” Bertozzi, *supra* note 22, at 40.

<sup>148</sup> *Id.* at 41-42. She discusses the movement of the hospitality and entertainment districts and how this affected the sex trade, noting that streetwalkers especially follow these markets because that is where the greatest demand for their services is located. *Id.* at 42-47. She also notes that streetwalkers tend to go where there is a lot of pedestrian and slow-moving vehicular traffic. They are similarly drawn to transportation hubs because of the market they provide. *Id.* at 51-53.

<sup>149</sup> *Id.* at 54. “Changes to the Philadelphia Police Department’s internal structure and shifts in enforcement tactics have significantly altered the geography of the city’s sex trade.” *Id.*

corruption is not so much a cause of the relocation of prostitution clusters, because it has been so constant in Philadelphia throughout the twentieth century.<sup>150</sup> While corruption has been constant, police tactics have varied greatly, indicating that they are more influential as to the geography of prostitution.<sup>151</sup>

The main reason changes in vice policing tactics have had an impact on the geography of prostitution is prostitutes' strategic reaction to law enforcement's efforts to suppress their trade.<sup>152</sup> The next logical inference is that law enforcement practices historically and currently are not likely to be effective. Rather, they will arguably result in a continuous relocation of those engaged in prostitution in efforts to evade arrest. As is illustrated above, during periods of elevated police enforcement, mobility becomes the principal strategy for prostitutes. Instead of continuing to engage in this cat and mouse chase, Pennsylvania should reform its current prostitution statute to reflect this modern understanding of the spatial distribution of prostitution in its urban centers.

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<sup>150</sup> THE PENNSYLVANIA CRIME COMMISSION, REPORT ON POLICE CORRUPTION AND THE QUALITY OF LAW ENFORCEMENT IN PHILADELPHIA 91 (Mar. 1974). "Widespread corruption has been a constant problem which has plagued the Department *since its inception*." *Id.* (emphasis added).

<sup>151</sup> Bertozzi, *supra* note 22, at 55. "The total number of prostitution arrests by year best illustrates the erratic nature of vice policing practices over the twentieth century," indicating fluctuations in police activity. *Id.* at 56. Bertozzi points to "great inconsistency in the methodology of anti-vice enforcement, especially in the second half of the twentieth century." *Id.*

<sup>152</sup> *Id.* at 59. "[P]rostitutes in twentieth century Philadelphia have utilized a variety of coping strategies to evade arrest, and these strategies have been spatial in nature – prostitutes locate themselves to minimize the risk of police interference." *Id.* See also, RICHARD SYMANSKI, THE IMMORAL LANDSCAPE: FEMALE PROSTITUTION IN WESTERN SOCIETIES (1981). Symanski describes police repression as a "principal causative agent" of vice re-location, citing examples in New York City and New Orleans. *Id.* at 187.

## IV. A THEORETICAL GUIDE FOR INITIAL REFORM IN PENNSYLVANIA

### A. THREE FEMINIST DOCTRINES OF PROSTITUTION REFORM

Among the most predominant feminist doctrines addressing the issue of prostitution are liberal, social, and radical feminism. The core tenets of these doctrines differ greatly, as each focuses on what it purports to be the root of prostitution, and each seeks to improve the quality of life for individuals involved in this profession in vastly different ways.<sup>153</sup> These doctrinal frameworks have individual strengths and weaknesses that can and should be considered in an effort to reform the way the commonwealth of Pennsylvania deals with prostitution.

#### 1. Liberal Feminist Theory

Liberal feminism takes a “prostitution as work” or a contractarian perspective. Basically, prostitution is thought of as legitimate work, and liberal feminists generally reject the argument that it is merely “a degrading sale of one’s body.”<sup>154</sup> Rather, they regard prostitution as “a contract between consenting adults” that should be respected by the law just like any other legitimate contract.<sup>155</sup> Liberal feminists believe that personal rights should outweigh social concerns for morality. This view goes back to the early writings of John Stuart Mill, who believed that the government should stay out of the private affairs of its citizens.<sup>156</sup>

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<sup>153</sup> Aronson, *supra* note 23, at 357.

<sup>154</sup> Aronson, *supra* note 23, at 365. “For the liberal feminist, prostitution does not symbolize the degradation of women, or male dominance over women, but rather represents a positive step towards empowering women personally and nurturing their path to economic independence.” Thompson, *supra* note 33, at 236-37. *See also*, Aronson, *supra* note 23, at 365.

<sup>155</sup> Aronson, *supra* note 23, at 365.

<sup>156</sup> Carlos A. Ball, *This is Not Your Father's Autonomy: Lesbian and Gay Rights from a Feminist and Relational Perspective*, 28 HARV. J.L. & GENDER 345, 361-63 (2005).



Call Off Your Old Tired Ethics, or COYOTE, is a self-proclaimed prostitutes' rights organization, perhaps the most well-known in the United States,<sup>157</sup> and has become a leading voice in the liberal feminist theory of prostitution.<sup>158</sup> COYOTE was founded in 1973 "to work for the repeal of the prostitution laws and an end to the stigma associated with sex work."<sup>159</sup> In addition to engaging in public education regarding a wide range of issues related to prostitution, COYOTE provides crisis counseling, support groups, and referrals to legal and other service-providers to people working as prostitutes (mostly women and mostly only in major urban centers).<sup>160</sup>

In the opinion of COYOTE co-founder, Priscilla Alexander, decriminalization of prostitution is the best way to solve the problems associated with the profession socially and the discrepancies in legal application.<sup>161</sup> Decriminalization would not require the passage of any new laws, but the repeal of all existing laws punishing voluntary prostitution and the relationships surrounding it.<sup>162</sup> According to Micloe Bingham, decriminalization "offers the best chance for women who are involved in prostitution to gain some measure of control over their work."<sup>163</sup> Further, "[i]nstead of punishing women for performing a legitimate service," the law should increase punishment for violence committed against prostitutes and/or involuntary prostitution.<sup>164</sup> Because it sees prostitution as a

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<sup>157</sup> Margo St. James & Priscilla Alexander, *What is COYOTE?*, COYOTE LA, [http://www.coyotela.org/what\\_is.html](http://www.coyotela.org/what_is.html) (last modified 2004). See also, Aronson, *supra* note 23, at 364.

<sup>158</sup> Aronson, *supra* note 23, at 365.

<sup>159</sup> St. James & Alexander, *supra* note 157.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*; Aronson, *supra* note 23, at 366. "The laws prohibiting the soliciting or engaging in a consenting adult act of prostitution, or patronizing a prostitute, should be repealed (decriminalized as opposed to legalized)." St. James & Alexander, *supra* note 157.

<sup>162</sup> Micloe Bingham, *Nevada Sex Trade: A Gamble for the Workers*, 10 YALE J.L. & FEMINISM 69, 80 (1998).

<sup>163</sup> *Id.*

<sup>164</sup> Aronson, *supra* note 23, at 366.

legitimate profession, COYOTE seeks the unionization of prostitution as a means to improve working conditions by guaranteeing various health and safety protections.<sup>165</sup> In addition to decriminalizing prostitution itself, COYOTE proposes that the laws regarding pimping and pandering be replaced with laws that deal only with fraud, deceit, force, or the threat of force used to coerce someone into working as a prostitute or pornography performer, and such abuse should be considered to be a form of sexual assault.<sup>166</sup>

## 2. Socialist Feminist Theory

Socialist feminists generally advance a Marxist theory of materialism, which argues that the institution of “capitalism exploits the labor of [prostitutes] for the benefit of those who control the means of production,” namely pimps and the government.<sup>167</sup> The socialist feminist framework maintains that people enter into prostitution for the sole reason of economic gain.<sup>168</sup> Many socialist feminists argue that, “if there were no poor women, there would be no prostitutes.”<sup>169</sup> Under this view, it is the poverty of women caused by patriarchy that is immoral and criminal, not prostitution itself. Unlike liberal feminists, socialist feminists believe that women are not free to choose prostitution; their need for money often leaves them with no alternative.<sup>170</sup>

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<sup>165</sup> *Id.* at 367.

<sup>166</sup> St. James & Alexander, *supra* note 157.

<sup>167</sup> Thompson, *supra* note 33, at 234. “The very structure of capitalism places women at an economic disadvantage to men. The structure of patriarchy ensures that work designated as women’s work, remains underpaid and unrecognized.” *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> Aronson, *supra* note 23, at 368. Prostitutes are simply women who refuse to be poor by “making money from what most women give to men for free.” Thompson, *supra* note 33, at 235.

<sup>170</sup> Thompson, *supra* note 33, at 235. Unemployment, discrimination and low-paying jobs force women to turn to prostitution to avoid poverty and can never be a deliberate choice when the threat of such poverty leaves women with no alternatives. *Id.*

One of the original socialist feminist organizations is the English Collective of Prostitutes (ECP), which is now part of a larger network known as the International Prostitutes Collective (IPC).<sup>171</sup> Founded in 1975, this collective is dedicated to “campaigning for the abolition of the prostitution laws which criminalize sex workers and our families, and for economic alternatives and higher benefits and wages.”<sup>172</sup>

Socialist feminists like those involved in ECP and IPC point to three problematic themes in prostitution: “1) Poverty causes prostitution; 2) Women are often poor; and 3) The government supports these conditions by its inaction.”<sup>173</sup> In an attempt to combat this chain of causation, socialist feminist organizations disperse information designed to protect prostitutes from the injustices of government criminalization by educating them about the legal side of prostitution.<sup>174</sup> In other words, they attempt to even out the playing field by disseminating information. In addition to stressing the value of public education about prostitution, such organizations advocate for improved social conditions and legal services for sex workers as well.<sup>175</sup> Also, like COYOTE, they too recommend that prostitution be decriminalized.<sup>176</sup> However, unlike liberal feminists, they feel that laws prohibiting pimping and other activities that profit from prostitution should indeed continue to be criminalized.<sup>177</sup>

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<sup>171</sup> THE INTERNATIONAL PROSTITUTES COLLECTIVE, <http://www.prostitutescollective.net> (last visited Jan. 4, 2012).

<sup>172</sup> *Id.* One of their main slogans is, “[n]o bad women, just bad laws,” and their mission statement emphasizes “help and support to individual prostitute women and others who are concerned with sex workers’ human, civil, legal and economic rights.” *Id.*

<sup>173</sup> Aronson, *supra* note 23, at 368.

<sup>174</sup> *Id.* at 369.

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

### 3. Radical Feminist Theory

Radical feminists typically view prostitution as nothing more than pure gender-based exploitation.<sup>178</sup> Radical feminist theory frequently criticizes the liberal feminist view that prostitution is a choice exercised by women who want to have sex for money.<sup>179</sup> Also unlike liberal feminists, who focus on the individual rights of women, radical feminists emphasize the rights of women as a whole because prostitution is, in their view, the result of the subordination of the entire female gender.<sup>180</sup>

One of the most prominent radical feminist groups is Women Hurt In Systems of Prostitution Engaged in Revolt (WHISPER), which was founded in 1985 by survivors of prostitution and advocates.<sup>181</sup> WHISPER argues that prostitution is not work; it is instead a type of sexual oppression of women by men.<sup>182</sup>

Because of the harms women as a whole suffer as a result of prostitution, WHISPER advocates for social and legal reform that would shift the bulk of the legal burden to those that benefit from prostitution.<sup>183</sup> In other words, they would decriminalize prostitution itself, while supporting strict legal penalties against all parties playing any other role in the industry, such as pimps, customers and owners of houses of prostitution.<sup>184</sup>

Radical feminist theorists also emphasizes the importance of public education about prostitution, and often

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<sup>178</sup> Bingham, *supra* note 162, at 81-82.

<sup>179</sup> Aronson, *supra* note 23, at 370. “The idea that prostitution is a choice is a ‘mistake[n] illusion of power.’” *Id.*

<sup>180</sup> Bingham, *supra* note 162, at 83.

<sup>181</sup> Thompson, *supra* note 33, at 232. Spokesperson for WHISPER Sarah Wynter asserts that the acronym was chosen quite purposefully. According to her, “women in systems of prostitution do whisper among [themselves] about the coercion, degradation, sexual abuse and battery in [their] lives . . .” *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> Aronson, *supra* note 23, at 371.

<sup>184</sup> *Id.* at 372. “WHISPER argues that a criminalized system of ‘prostitution leaves women doubly victimized; first by the abuses of both pimps and customers, and second, by a criminal system that blames and punishes them for their victimization.’” *Id.* at 372 n.87.

work with rape crisis centers and battered women's shelters in efforts to sensitize such institutions to the issues specific to sex work.<sup>185</sup> They call for more systematic reform than the other two feminist doctrines, addressing the gender inequality inherent in all other aspects of society, taking a much more protective and defensive attitude toward prostitutes than liberal or social feminists.

## B. A HYBRID APPROACH: FEMINIST THEORY AS A GUIDE FOR INITIAL REFORM MEASURES IN PENNSYLVANIA

As previously mentioned, these feminist doctrines of prostitution reform point to different problems with prostitution and seek to remedy those problems in particular and distinctive ways. Each has its pros and cons, and while each poses logical arguments for why prostitution should be handled in a certain way, "no one set of beliefs can accomplish a cure-all solution."<sup>186</sup> I would suggest that the best approach is to be flexible and cooperative, recognizing that the ultimate goal of these vastly different feminist doctrines is the same—to improve the lives of women engaged in prostitution. In spite of their differing approaches, these vastly different theories of prostitution reform share certain themes and strategies. These shared characteristics serve as the most logical starting point for prostitution reform.<sup>187</sup>

### 1. Statutory Reform

All three feminist doctrines are critical of the United States' current legal policy of enforcing criminal sanctions primarily against women who offer sex for money.<sup>188</sup> In other words, decriminalization of prostitution itself is a common theme in all three of these theories of reform. Statutory reform of the current framework existing in Pennsylvania, which criminalizes the act of prostitution first and foremost, would

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<sup>185</sup> *Id.* at 372.

<sup>186</sup> Aronson, *supra* note 23, at 388.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.* at 384.

almost certainly save numerous resources,<sup>189</sup> thereby allowing the state to put more money into enacting, and, more importantly, enforcing statutes designed to protect prostitutes against violence and sexual assault. Protection against violence is another theme common to all three of these feminist doctrines.<sup>190</sup>

Therefore, as all three feminist doctrines suggest, decriminalization is a good starting point for initial reform measures in Pennsylvania.<sup>191</sup> This would involve repealing 18 PA. CONS. STAT. § 5902(a) and (a.1), the provisions prohibiting prostitution itself. Other related crimes, such as pimping, running a house of prostitution, and everything else about the statute, could remain essentially the same, at least initially until other, more protective measures were enacted. This would allow those engaged in prostitution to be more autonomous (which would make liberal feminists happy), while protecting them from coercion and exploitation (which would make socialist feminists happy).

Another less extreme alternative would be to rewrite these provisions<sup>192</sup> in such a way that would narrow their scope. Streetwalking and outdoor solicitation have been shown to be dangerous. Therefore, the provisions of the statute relating to prostitution could continue to prohibit such public conduct. However, it could exclude consensual indoor prostitution between consenting adults. This would serve the state's interest in protecting the health and safety of its citizens, without intruding as much into their privacy rights or ability to contract. Although constitutional challenges to prostitution statutes on

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<sup>189</sup> *Id.* at 377; James R. Stout & Thomas S. Tanana, *Could California Reduce AIDS by Modeling Nevada Prostitution Law?*, 2 SAN DIEGO JUST. J. 491, 497-98 (1994). Many cities spend more money on criminal enforcement of prostitution than on education, public welfare and health services combined. Aronson, *supra* note 23, at 377.

<sup>190</sup> *Id.* at 385-86. "The groups believe that the prosecutions of abusers must be more tenacious and penalties more stern." *Id.* at 386.

<sup>191</sup> In the present context, total decriminalization "refers to the elimination of all laws against prostitution, including laws against those who associate with whores: i.e. madams, pimps, and johns." Law, *supra* note 89, at 553.

<sup>192</sup> 18 PA. CONS. STAT. § 5902(a)-(a.1).

these grounds have been consistently unsuccessful,<sup>193</sup> such a statutory scheme would implicate these constitutional rights less.

This would be very similar to how Rhode Island treated prostitution between 1980 and 2009.<sup>194</sup> In 1980, the Rhode Island General Assembly amended the law on prostitution, reducing solicitation from a felony to a misdemeanor and deleting a reference to prostitution as a crime.<sup>195</sup> Many have claimed that this was merely the result of a legislative mistake and the members of the generally assembly unknowingly created a loophole in the system.<sup>196</sup> However, given the length of time this “loophole” lasted and the historical context of the statute’s enactment, this claim has little merit.<sup>197</sup> For twenty-nine years in Rhode Island, the anti-prostitution statute applied

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<sup>193</sup> See *Commonwealth v. Dodge*, 429 A.2d 1143, 1146 (Pa. Super. Ct. 1981); see also *State v. Allen*, 424 A.2d 651, 655 (Conn. Super. Ct. 1980) (finding that “the constitutional right to privacy under the federal and state constitutions has never been extended to encompass prostitutes plying their trade on the street. . .”); *State v. Mueller*, 671 P.2d 1351, 1353-54 (Haw. 1983); *State v. Eighth Jud. Dist. Ct. of Nev.*, 668 P.2d 282, 283 (Nev. 1983).

<sup>194</sup> R.I. GEN. LAWS § 11-34-1 to 8 (repealed 2009).

<sup>195</sup> Lynn Arditi, *Behind Closed Doors: How R.I. Decriminalized Prostitution*, THE PROVIDENCE JOURNAL (May 31, 2009, 1:00 AM), [http://www.projo.com/news/content/PROSTITUTION\\_LAW31\\_05-31-09\\_NVEHGBH\\_v161.3e90048.html](http://www.projo.com/news/content/PROSTITUTION_LAW31_05-31-09_NVEHGBH_v161.3e90048.html). Prior to the enactment of the 1980 statute, prostitution was a felony punishable by up to five years in prison. *Id.*

<sup>196</sup> *Id.* Sen. John F. McBurney III, the only member of the General Assembly who served in 1980 said, “[t]hey didn’t know what they were voting for.” *Id.* Similarly, John C. Revens Jr., a former Senate Majority leader and a lawyer who served in the General Assembly for nearly four decades said of the 1980 General Assembly, “[t]hey would never sponsor a bill decriminalizing prostitution if they knew what it was . . . . No way. Not in a million years.” *Id.*

<sup>197</sup> *Id.* “To understand how Rhode Island became the only state in America to decriminalize prostitution, you have to go back to the mid-1970s, when a powerful politician and devout Roman Catholic named Matty Smith helped advance the cause of a former prostitute named Margo St. James.” Arditi, *supra* note 195. St. James founded Call Off Your Old Tired Ethics (“COYOTE”). *Id.* In 1976, COYOTE, a national sex-workers’ rights group, sued Rhode Island in federal court. *Id.* The redrafting of the prostitution statute was largely a response to this controversy, with supporters advocating that prostitution be made a misdemeanor rather than a felony to allow prostitution cases to move through the courts more quickly. *Id.*

to “pandering, loitering for the purposes of prostitution, and soliciting from motor vehicles for ‘indecent purposes.’”<sup>198</sup> There was, however, no statutory provision that defined the act of prostitution or outlawed indoor prostitution.<sup>199</sup>

While limiting the scope of the statutory provisions that relate to prostitution itself would be preferable to the current statutory scheme, it is important to note the shortcomings of such reform. It is clear that the most disadvantaged sex workers would continue to be adversely affected, because it is currently the most marginalized and powerless sex workers that are the most aggressively targeted.<sup>200</sup> To repeal the part of the statute that prohibits consensual, indoor exchanges of sex for money would serve to protect call girls and escorts, the middle to upper class minority of those doing sex work. Advocates of both social and radical feminist reform would thus be opposed to merely limiting the scope of the prostitution statute. Total decriminalization would therefore best achieve the desired results of all three feminist frameworks. Another initial reform measure could be improving and/or enacting stronger laws designed to protect prostitutes in the state of Pennsylvania. This would further increase legal protection against abuse and violence, which all three feminist doctrines advocate. Decriminalizing prostitution would save law enforcement a significant amount of time and money, especially in urban centers like Philadelphia and Pittsburgh. At the same time, stronger legal protections for those who choose to do sex work would allow people who choose such a profession to work in an environment that is more safe and self-determined.

## 2. Social Reform

In addition to advocating for legal protection for prostitutes against violence and abuse, all three groups also suggest social reform in this area. All three major representative groups discussed herein (COYOTE, IPC and WHISPER) have emphasized this issue, arguing that abused prostitutes need

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<sup>198</sup> Hagner, *supra* note 24, at 436.

<sup>199</sup> *Id.*

<sup>200</sup> Cooke, *supra* note 86, at 473.



more shelters for refuge.<sup>201</sup> Further, existing shelters must become more sensitized to the unique circumstances faced by prostitutes and open their doors to them.<sup>202</sup> In Pennsylvania, the decriminalization of prostitution argued for above would open up a significant amount of funding that could be put towards opening new shelters and educating current shelters as to the particular issues faced by prostitutes.

The money that is no longer being funneled into a futile attempt to regulate this ever-pervasive profession could also be flagged for other social programs, such as social welfare benefits, which might improve the conditions for prostitutes in this state. Each of the three feminist theories concerning prostitution reform points to the need for some sort of social welfare benefits. The liberal feminist argues that prostitutes deserve these benefits, just like any other legitimate worker.<sup>203</sup> The socialist feminist argues that such benefits would funnel money back into the hands of prostitutes as the workers, as opposed to those who are involved in production (pimps, panderers, etc.).<sup>204</sup> The radical feminist advocates for such benefits because they would provide women with the opportunity to take more legal and financial control over their lives, helping to even the playing field and decrease the subordination of women by men.<sup>205</sup> Each group puts forth differing reasons for social benefit reform, but such reform is common to all three nonetheless. If money were not being spent on prosecuting prostitutes, Pennsylvania might well have funding available for such programs. If prostitutes were treated like any other worker in this respect, the state could potentially provide money for such programs by taxing the income of prostitutes.

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<sup>201</sup> Law, *supra* note 89, at 582. Many shelters exclude women because space is limited, and those who provide funding often impose restrictions on whom the shelter can and cannot help, sometimes explicitly excluding sex workers. *Id.*

<sup>202</sup> See *id.* at 583.

<sup>203</sup> Aronson, *supra* note 23, at 386.

<sup>204</sup> *Id.*

<sup>205</sup> *Id.* at 386-87.

Another social reform measure advocated for by all three feminist doctrines is an increase in public education on the subject of prostitution. For all three groups, “public education would serve the common goal of eradicating the social stigma attached to these women.”<sup>206</sup> It might also serve the purpose of relieving prostitution of some of the blame for various other social problems in the United States generally, and in Pennsylvania specifically.<sup>207</sup> This is especially something to consider in urban centers such as Philadelphia and Pittsburgh, where prostitution is most concentrated, and the social backlash in opposition to it is the strongest.

## V. CONCLUSION

When one looks at the case of Mark. A. Sargeant, the fact that he and the other individuals involved were treated very differently is inescapable. While three individuals on the supply side of prostitution went to jail, two *known* customers were never even charged. Could this have something to do with the fact that Sargeant was such an upstanding citizen? The dean of a prestigious law school? A family man and a notable public figure? The answer to these questions is unclear. What is abundantly clear, however, is the need for reform in this area of law.

Although the Pennsylvania prostitution statute is drafted more equitably than many jurisdictions' prostitution statutes, statistics and specific case law suggest that the amount of discretion given to law enforcement officials results in discriminatory practices. Ideally, one would look to the societal roots of these practices to remedy their effect, but, absent a radical and total social revolution, we are left with only the tools with which our current mode of government provides us. Therefore, the most realistic approach to prostitution reform is to take small steps in the right direction, while keeping these feminist ideals and ultimate goals in mind.

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<sup>206</sup> *Id.* at 387.

<sup>207</sup> *Id.* “[Prostitutes] are people who have long been forced into the role of the scapegoat. Not only are they victims of the worst crimes society has to offer, but they are blamed for many of the same crimes that leave them victimized.” *Id.* at 388.

It is clear that the existing dominant feminist frameworks all have various strengths and weaknesses and that no one framework is likely to please everyone. Taken together, however, these doctrines can serve to point us in the right direction. By taking a hybrid approach, we can perhaps distill from these broad reform measures a few small steps we can take that will improve conditions and resolve some of the issues that are specific to Pennsylvania. Efforts to fully eradicate prostitution have been unsuccessful; it is a persistent field that has truly stood the test of time. Therefore, the best approach is to make prostitution safer and more self-determined for those involved through statutory and social reform.