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# Why Nevada's System Might Work

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Law & Sexuality

## Why Nevada's System Might Work

### I. Introduction

Today in the United States, prostitution is illegal in every state except Nevada. The Nevada government employs a legalized system of prostitution where the state government maintains significant control over the lives of prostitute women.<sup>1</sup> Counties with populations of less than 400,000 people have the option of allowing legalized bordellos or brothels to operate.<sup>2</sup> Currently, brothels are legal in eleven of Nevada's seventeen counties.<sup>3</sup>

Prostitution has been considered "profoundly immoral" by many societies.<sup>4</sup> Anti-prostitution groups in the United States have lobbied both federal and state legislatures to annihilate prostitution.<sup>5</sup> The first federal anti-prostitution legislation in the United States, the White Slave Traffic Act (or Mann Act), was passed in 1910. Following the Mann Act of 1910

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<sup>1</sup> Jessica Drexler, *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, 225 (1996).

<sup>2</sup> Nev. Rev. Stat. § 244.345 (2001).

<sup>3</sup> Daria Snadowsky, Note, *The Best Little Whorehouse is Not In Texas: How Nevada's Prostitution Laws Serve Public Policy, and How Those Laws May Be Improved*, 6 Nev. L.J. 217, 224-25 (2006).

<sup>4</sup> Kristen Walker, *Damned Whores and the Border Police: Sex Workers and Refugee Status in Australia*, 31 Melb. U. L. Rev. 938, 963 (2007).

<sup>5</sup> Michèle Alexandre, *Sex, Drugs, Rock & Roll and Moral Dirigisme: Toward A Reformation of Drug and Prostitution Regulations*, 78 UMKC L. Rev. 101, 124 (2009).

and the Standard Vice Repression Law of 1919, by 1925, every American state, except Nevada, had enacted some form of legislation outlawing prostitution.<sup>6</sup>

However, recent analyses and research by legal scholars have shown that criminalizing prostitution may not be the best solution to addressing the “problem.” Some have suggested that Nevada’s system of legalized prostitution may be a better method of addressing prostitution than criminalizing prostitution.

This paper examines Nevada’s legal framework in addressing prostitution and argues why other American states ought to consider a similar approach. Part I provides a general history and background of prostitution and examines the state of prostitution in the United States today. Part II examines Nevada’s current regulatory scheme over prostitution, specifically its regulation of brothels, and suggests it as a viable approach that ought to be considered by other states. Part III explores possible shortcomings with Nevada’s regulatory system, but concludes why it remains preferable to other methods that address prostitution. This paper focuses on female prostitutes with male customers.

## **II. History & Background**

Although at times deemed “society’s oldest profession,”<sup>7</sup> American lawmakers’ interest in the ramifications of prostitution in the United States, is a recent phenomenon.<sup>8</sup> During the early colonial period, most of America was considered rural, and the disproportionate number of

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<sup>6</sup> Charles H. Whitebread, *Freeing Ourselves from the Prohibition Idea in the Twenty-First Century*, 33 *Suffolk U. L. Rev.* 235, 242-43 (2000).

<sup>7</sup> Kate DeCou, *U.S. Social Policy on Prostitution: Whose Welfare Is Served?*, 24 *New Eng. J. on Crim. & Civ. Confinement* 427, 427-31 (1998).

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

males to females made prostitution virtually nonexistent.<sup>9</sup> Indian women, slaves, or female indentured servants were often used to satisfy the demands of early frontier men.<sup>10</sup> With the industrial revolution, the increasing urbanization of the American landscape, and the migration of women in search of work, prostitution blossomed.<sup>11</sup> The migration of a large number of women from rural, agricultural areas to the urban industrialized cities in search of work, especially, created a thriving environment for prostitution.<sup>12</sup>

Immigration also played an important role in the increase of prostitution in the urban areas of the United States.<sup>13</sup> The first women to immigrate from the old country to the United States were often prostitutes.<sup>14</sup> At one point, immigrant-born prostitutes outnumbered the American-born prostitutes in the cities of Boston, New York, and Philadelphia, even though immigrants only represented the minority of the total population.<sup>15</sup> In Boston, two-thirds of the foreign-born prostitutes were Irish who probably immigrated to the United States during the famine.<sup>16</sup> British and Canadian prostitutes accounted for the next largest group of foreign-born prostitutes, although their numbers did not compare to that of the Irish.<sup>17</sup>

The California Gold Rush of 1849 became a magnet for prostitution in the western part of the United States.<sup>18</sup> During the gold rush, such a great demand for prostitutes arose that

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<sup>9</sup> Decker, at 57.

<sup>10</sup> *Id.*

<sup>11</sup> Ann M. Lucas, *Race, Class, Gender, and Deviancy: The Criminalization of Prostitution*, 10 *Berkeley Women's L.J.* 47, 42 (1995).

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

<sup>13</sup> Bullough & Bullough, at 217.

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

<sup>15</sup> Barbara Meil Hobson, *Uneasy Virtue: The Politics of Prostitution and the American Reform Tradition* 88 (1987).

<sup>16</sup> *Id.* at 89.

<sup>17</sup> *Id.*

<sup>18</sup> Nickie Roberts, *Whores In History: Prostitution In Western Society* 215 (1992).

prostitution houses emerged in great numbers across the United States.<sup>19</sup> Some prostitutes made large profits from the services they provided.<sup>20</sup> Early documentation revealed that a certain French prostitute made \$50,000 in one year for the services she provided to the lonely men in the West.<sup>21</sup>

Both industrialization and the California Gold Rush created such a demand for prostitutes that bordellos or brothels popped up in abundance in the western and eastern parts of the United States.<sup>22</sup> These houses of prostitution ranged from the best, where well-educated women catered to the aristocrats of society, to the worst of its kind, where poorer, less educated women serviced the undesirable members of the lower-class population.<sup>23</sup> Buffalo had 87 brothels, Louisville had 79 brothels, New Haven had 10 brothels, Norfolk had 40 brothels, Philadelphia had 130 brothels, Pittsburgh had 19, and Savannah had 15 brothels.<sup>24</sup>

One of the most profitable and luxurious brothel houses in the United States was known as the Everleigh Club.<sup>25</sup> Run by two sisters, Ada and Minna Everleigh in Chicago, the house was a three-story mansion with a library, art gallery, fourteen parlors, thirty working girls, and a host of other employees ranging from barbers to masseurs to help clients relax during their visit.<sup>26</sup> Each room was lavishly decorated with marble-inlaid brass beds, expensive artwork, books, fresh flowers, and surrounded by glass ceilings and walls.<sup>27</sup> A mechanical perfume sprayer was

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<sup>19</sup> Susan E. Thompson, *Prostitution - A Choice Ignored*, 21 *Women's Rights*. L. Rep. 217, 223 (2000).

<sup>20</sup> Roberts, at 215.

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

<sup>22</sup> Decker, at 59-61.

<sup>23</sup> *Id.* at 59.

<sup>24</sup> Decker, at 183.

<sup>25</sup> Roberts, at 210.

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

<sup>27</sup> *Id.* at 210-11.

mounted above each bed and released an exotic scent selected by the client.<sup>28</sup> Admittance to the Everleigh Club required a formal letter of introduction and a basic entrance fee of \$50.00.<sup>29</sup> Clients were required to pay for their own food and drinks. One night's visit could total anywhere between \$500 and \$1,000.<sup>30</sup> The Everleigh Club operated for approximately twelve years.<sup>31</sup> By the time the sisters retired, they had become millionaires.<sup>32</sup>

Prostitution, although thriving and pervasive, was not immune to regulation and control. After the Civil War, numerous American cities attempted to regulate prostitution by confining its activities to certain areas where prostitutes would have to register and receive compulsory physical examinations.<sup>33</sup> However, despite the efforts of various advocates for the regulation of prostitution in different cities, Saint Louis was the only U.S. city to adopt a system of regulation into the City Charter.<sup>34</sup>

The social evil ordinance was adopted by St. Louis on July 5, 1870 and recognized a brothel as a legitimate enterprise that could be licensed by the city.<sup>35</sup> The ordinance patterned after well-established regulations of several European cities and required brothel keeps and prostitutes to register with the police and pay fees to the board of health.<sup>36</sup> The money was to be used to pay city physicians who examined prostitutes for venereal disease and to aid the hospital

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

<sup>29</sup> *Id.* at 211.

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

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

<sup>32</sup> *Id.*

<sup>33</sup> Bullough & Bullough, at 222.

<sup>34</sup> Bullough & Bullough, at 223.

<sup>35</sup> James Wunsch, *The Social Evil Ordinance*, American Heritage Magazine, [http://www.americanheritage.com/articles/magazine/ah/1982/2/1982\\_2\\_50.shtml](http://www.americanheritage.com/articles/magazine/ah/1982/2/1982_2_50.shtml). (last visited Mar. 22, 2010).

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

where infected women were confined.<sup>37</sup> The ordinance appointed six physicians to the board of health to provide health care to the women registered under the ordinance.<sup>38</sup>

The rationale the St. Louis city council gave as the basis for the ordinance was that prostitution was an “inevitable accompaniment of city life.”<sup>39</sup> So rather than ban prostitution outright, the ordinance was intended to reflect “respectable opinion; the toleration, public acceptance of prostitution as a necessary evil.”<sup>40</sup> City council officials argued that, without access to prostitutes, men would seduce or rape innocent women.<sup>41</sup> They also suggested that prolonged sexual abstinence for men might lead to physiological disorders and insanity.<sup>42</sup>

The social evil ordinance won broad support and was passed by the St. Louis city council by a vote of sixteen to five.<sup>43</sup> The ordinance stayed in effect until 1874, when 100,000 clergymen and middle-class women demanded the state uphold its obligation of morality and signed a petition against prostitution forcing the ordinance to be repealed.<sup>44</sup>

In 1908, the United States became party to the 1904 International Agreement for the Suppression of White Slave Traffic.<sup>45</sup> The decision came as a response to social pressures that viewed prostitution as a moral vice in society.<sup>46</sup> In a few years, the federal government passed the White Slave Traffic Act, also known as the Mann Act of 1910.<sup>47</sup> The White Slave Traffic Act came as a response to the rise in “opium dens” that were being used to entice young girls into

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

<sup>38</sup> Bullough & Bullough, at 223.

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

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

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

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

<sup>45</sup> Decker, at 71.

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

<sup>47</sup> 18 U.S.C. § 2421 et seq. (1910).

prostitution.<sup>48</sup> The Act prohibited the interstate transportation of prostitutes and required the deportation of prostitutes who were illegal immigrants.<sup>49</sup> The White Slave Traffic Act was the first federal anti-prostitution legislation in America.<sup>50</sup>

Growing social stigma against prostitution also prompted cities and municipalities through the country to employ police powers to criminalize prostitution.<sup>51</sup> Several municipalities attempted to institute various registration schemes, requiring prostitutes to identify themselves to the police.<sup>52</sup>

However, after numerous attempts on regulating prostitution failed and total repression proved to be ineffective, the United States government segregated prostitutes to specific areas referred to as “red-light” districts.<sup>53</sup> The term derived “from the practice of trainmen leaving their signal lanterns in front of a house or shack while making a visit there.”<sup>54</sup> A system of registration was imposed in order to maintain the operation of these red-light districts.<sup>55</sup> Prostitutes were required to give “[their] real name plus alias or aliases, age, birthplace, birth date, place of last residence, the number of years [the prostitutes] had been in the sporting life, the name of the house to which [they were] going and other physical data for personal identification.”<sup>56</sup>

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<sup>48</sup> *Id.*

<sup>49</sup> Whitebread, at 243.

<sup>50</sup> DeCou, at 431.

<sup>51</sup> *Id.*

<sup>52</sup> Thompson, at 225.

<sup>53</sup> Bullough & Bullough, at 224.

<sup>54</sup> *Id.* at 217.

<sup>55</sup> *Id.* at 225.

<sup>56</sup> *Id.*

In order to attack the legitimacy of prostitution, by the 1920s the majority of U.S. cities and states had officially rejected the concept of the red-light districts.<sup>57</sup> All but one city had folded to the political pressures of the time and officially closed areas with segregated prostitution.<sup>58</sup> Even though there was a great decrease in the number of brothels and parlors around the country, the existence of such dwellings still remained intact in some cities.<sup>59</sup> New York City alone in 1912 had 142 such houses [brothels], only three of which reportedly remained in 1917.<sup>60</sup>

As industrialization continued, America became increasingly concerned about the health and moral of society and took steps toward the passage of laws prohibiting commercial sex.<sup>61</sup> Society's interest in purifying the public morals took center stage and those whose goal was to achieve the prohibition of prostitution feared that society itself was degenerating.<sup>62</sup> Congress reacted to these social pressures, and in 1919 passed the Standard Vice Repression Law.<sup>63</sup>

Since the creation of the Standard Vice Repression Law, every state but one has passed a law criminalizing prostitution in some manner.<sup>64</sup> Each state has done this in one of three ways: by prohibiting the solicitation of sex act, by banning commercial sex itself, or by creating a criminal stigmatizing label, known as "common nightwalkers," for those who have been

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<sup>57</sup> *Id.* at 227.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 228.

<sup>60</sup> *Id.*

<sup>61</sup> Whitebread, at 235.

<sup>62</sup> *Id.* at 242.

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

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

convicted of prostitution.<sup>65</sup> Today, Nevada is the only state in America that allows legalized prostitution.<sup>66</sup>

The most modern federal statute addressing the subject is the Victims of Trafficking and Violence Protection Act (VTVPA).<sup>67</sup> The first section of the VTVPA, entitled the Trafficking Victims Protection Act of 2000, defines the purpose of this section as to “combat trafficking in persons, a contemporary manifestation of slavery, the victims of which are predominantly women and children,” and “to ensure just and effective punishment of traffickers, and [to] protect their victims.”<sup>68</sup> Although the first section is designed to deal with both sex trafficking and prostitution laws, the statute fails to distinguish sex trafficking from common prostitution.<sup>69</sup> The basic definition of sex trafficking requires only having sex in exchange for something else, regardless of whether the act is coerced.<sup>70</sup> It fails to include an element of coercion, which traditionally differentiates sex trafficking from prostitution.

Despite formal criminalization and persistent moral outcries that stigmatize prostitution as a social evil, prostitution remains easily accessible for many who desire its services.<sup>71</sup> Estimates of the number of women who work as prostitutes either full-time or part-time, range from 250,000 to 1,300,000 and these women reportedly have approximately 1.5 million customers per week.<sup>72</sup> Estimates of the gross annual revenue derived from such activities vary anywhere

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<sup>65</sup> DeCou, at 433..

<sup>66</sup> Priscilla Alexander, *Prostitution: A Difficult Issue For Feminists*, in *Sex Work: Writings By Women In The Sex Industry* 195 (1987).

<sup>67</sup> Pub. L. No 106-326, 114 Stat. 1464 (2000) (codified as amended in scattered titles of U.S.C.).

<sup>68</sup> 22 U.S.C. § 102(a).

<sup>69</sup> 22 U.S.C. § 103(9).

<sup>70</sup> *Id.*

<sup>71</sup> Deborah L. Rhode, *Justice And Gender: Sex Discrimination and the Law* 257 (1989).

<sup>72</sup> Lucas, at 48 (1995).

between seven billion dollars and nine billion dollars.<sup>73</sup> Many observers will note that no matter how repugnant or irrational society comes to view the exchange of money for sex, prostitution clearly stood, and continues to stand, the test of time.<sup>74</sup>

Nevada presently has a system of legalized prostitution in place in some of its counties.<sup>75</sup> Prostitution is not illegal per se in Nevada; rather, each county has the choice whether to “outlaw” the trade.<sup>76</sup> Counties have responded in three ways: three counties have completely prohibited prostitution; twelve counties have permitted prostitution conducted inside a brothel subject to state nuisance laws; and two counties have opted to license and legalize the practice all together.<sup>77</sup> Nevada’s statutory framework towards prostitution forces counties with populations exceeding 400,000 to outlaw prostitution.<sup>78</sup> The counties where prostitution is outlawed include: Carson City, Clark County, Douglas County, and Lincoln County.<sup>79</sup> Most sanctioned brothels are in the more rural counties.<sup>80</sup>

While each county with legalized prostitution has differing regulations regarding licensing requirements and governing rules, county ordinances generally require licensed brothels to subject its employees to weekly and monthly medical examinations, prohibit patronage of non-customers or persons under the age of eighteen, and refuse to employ any male except for purposes of maintenance and security.<sup>81</sup> Failure to comply with any of these

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<sup>73</sup> Rhode, at 257.

<sup>74</sup> *Id.*

<sup>75</sup> Alexander, at 195.

<sup>76</sup> Nev. Rev. Stat. Ann. §244.345 (1995).

<sup>77</sup> Richard Symanski, *Prostitution in Nevada*, in *Studies in Prostitution (East, West, and South Africa, Zaire and Nevada)* 246, 249 (Erasto Muga ed., 1980).

<sup>78</sup> Nev. Code. Ch. 9, § 9.08.010 (1991).

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> Symanski, at 39.

requirements may result in the revocation of the house's license, fines, and even imprisonment.<sup>82</sup> In the areas of Nevada where brothels are sanctioned, all prostitution related activity remains "in house."<sup>83</sup>

Nevada has enacted laws aimed at preventing others from taking advantage of and exploiting prostitutes.<sup>84</sup> It is illegal for anyone to live off the earnings of a prostitute or to procure a person for the purpose of prostitution.<sup>85</sup> Counties often require that owners and managers of a brothel be females, and that brothels ban male employees from the premises.<sup>86</sup> Women who do not work in brothels are often barred from the premises in order to prevent domestic disputes between wives or girlfriends who come to the brothels looking for their partners.<sup>87</sup> Men who are drunk, rowdy, or underage may be declined prostitution services.<sup>88</sup> These regulations are credited with keeping licensed prostitutes safe and, as a result, licensed prostitutes rarely suffer physical violence.<sup>89</sup>

Prostitution is defined as any consensual sexual activity among or between adults where money or any other material compensation is involved.<sup>90</sup> Nonconsensual sex acts, whether perpetrated by fraud, threat of force, or force, such as sex trafficking, as well as any sex acts perpetrated against minors are not prostitution; they are referred to instead as criminal sexual acts.

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<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> James R. Stout & Thomas S. Tanana, *Could California Reduce AIDS by Modeling Nevada Prostitution Law?*, 2 San Diego Just. J. 491, 494-98 (1994).

<sup>85</sup> *Id.* at 494.

<sup>86</sup> *Id.* at 498.

<sup>87</sup> Alexa Albert, *Brothel: Mustang Ranch and Its Women* 11 (2001).

<sup>88</sup> *Id.* at 17

<sup>89</sup> Stout, at 498.

<sup>90</sup> Karin S. Portlock, *Status on Trial: The Racial Ramifications of Admitting Prostitution Evidence Under State Rape Shield Legislation*, Colum. L. Rev. 1404, 1405 (2007).

In terms of prostitution, American states have addressed the phenomenon in one of two ways: criminalization and legalization.<sup>91</sup> Criminalization makes an activity itself illegal.<sup>92</sup> All American states, except for Nevada, criminalize prostitution.<sup>93</sup> Legalization allows the government to enact regulatory schemes to be put in place in order to permit certain forms of prostitution.<sup>94</sup> Nevada uses legalization.<sup>95</sup> Decriminalization, which would remove most governmental regulations and allows prostitutes to control their business free from government interference, is employed in some European countries, such as the Netherlands,<sup>96</sup> but is not discussed in this paper. This paper limits its focus to an examination of Nevada's legalized system towards prostitution and argues why other American states may want to adopt Nevada's system towards prostitution.

### **III. Benefits of the Nevada System**

#### **A. Health, Safety, and Welfare**

Nevada's regulatory scheme over prostitution, specifically its regulation of brothels, may serve to promote the health, safety, and welfare of society.<sup>97</sup> Statistics regarding the health and welfare of Nevada's prostitutes and their customers indicate that both parties benefit more under Nevada's current regulatory scheme than they would if there were no regulatory scheme.<sup>98</sup> An estimated 365,000 sex acts are performed annually in Nevada's brothels; that amounts to 1,000

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<sup>91</sup> Thompson, at 239-47.

<sup>92</sup> *Id.* at 239-41.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 241-42.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 244.

<sup>97</sup> *Kuban v. McGimsey*, 605 P.2d 623, 627 (1980).

<sup>98</sup> *Snadowsky*, at 225.

chances per day in which a sexually transmitted disease (STD) may be transmitted via a sexual transaction.<sup>99</sup> However, no brothel prostitute in Nevada has ever tested positive for HIV since 1986.<sup>100</sup>

The Nevada Administrative Code, recently amended in 1985, outlines stringent health codes for prostitutes and brothel owners.<sup>101</sup> In counties where prostitution is legal, all persons applying to become brothel prostitutes must submit to a HIV and syphilis blood test as well as provide a cervical specimen for gonorrhea and Chlamydia.<sup>102</sup> Before commencing work, prostitutes must secure a state health card ensuring that they have no STDs.<sup>103</sup> During the course of employment, brothel prostitutes undergo weekly pap smears to check for gonorrhea and Chlamydia as well as monthly blood tests to check for HIV and syphilis.<sup>104</sup> In 1988, the Health Department of the State of Nevada mandated condom use for all sex acts;<sup>105</sup> today, many brothels post signs that declare condom use mandatory.<sup>106</sup>

Prostitutes that test positive for any disease, except HIV, must discontinue working until they are cured and a physician reinstates their health card.<sup>107</sup> Prostitutes that test positive for HIV must be reported to the Health Board of the State of Nevada and are banned from working as prostitutes.<sup>108</sup> It is a felony for a prostitute who previously tested positive for HIV to work again as a prostitute; the crime carries a punishment of either two-to-ten years in jail or a \$10,000 fine,

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<sup>99</sup> *Towns Want Modest, Not Glitzy, Brothels; Nevada: Legalized Prostitution Is Embraced by Some Communities*, Telegraph Herald, July 15, 2001, at A6.

<sup>100</sup> Barbara Brents & Kathryn Hausbeck, *State-Sanctioned Sex: Negotiating Formal and Informal Regulatory Practices in Nevada Brothels*, 44 Soc. Persp. 307, 314 (2001).

<sup>101</sup> Nev. Admin. Code ch. 441A, §§ 010-325, 775-815 (2003).

<sup>102</sup> *Id.* at § 800(1).

<sup>103</sup> Brents, at 314.

<sup>104</sup> Nev. Admin. Code ch. 441A, § 800(3) (2003).

<sup>105</sup> Brents, at 314.

<sup>106</sup> *Id.*

<sup>107</sup> Nev. Admin. Code ch. 411A, § 800(4) (2003).

<sup>108</sup> Brents, at 320.

or both.<sup>109</sup> Brothel owners are held liable to customers that contract HIV from a brothel prostitute that previously tested positive.<sup>110</sup>

Mandatory testing of brothel prostitutes was first implemented in Nevada in 1985; since then, no brothel prostitute in Nevada has ever tested positive for HIV.<sup>111</sup> Statistics show not only that legal prostitutes contract fewer STDs than illegal prostitutes, but that they contract fewer STDs than the female population as a whole.<sup>112</sup>

Thus, when the Ely city council of Nevada voted in 1999 to prohibit prostitution and revoke the licenses of its three brothels after prostitution had been legal in the county for over 112 years,<sup>113</sup> Mayor Bob Miller vetoed the prohibition on the grounds that maintaining legalized brothel prostitution would help prevent the spread of HIV.<sup>114</sup> He advocated his position and said the following at a town meeting:

“[We have an] opportunity...to control this potential problem [the spread of HIV] through legal prostitution. It is our moral responsibility as elected and appointed officials, to limit to the best of our ability, the potential of this killer in our society. Our legal brothel ordinance is a reasonable effort toward the realization of this potential.”<sup>115</sup>

Similarly, Oscar Baylin Goodman, the current mayor of Las Vegas, once acknowledged at a weekly news conference that there are pragmatic reasons to back legalized prostitution.<sup>116</sup>

“Brothels could provide safer, regulated, and revenue-generating sex.”<sup>117</sup>

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<sup>109</sup> Nev. Rev. Stat. §201.358 (2003).

<sup>110</sup> *Id.* at §041.1397.

<sup>111</sup> Brents, at 314.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> Neff, at 1A.

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

Besides protecting prostitutes and customers from disease and health risks, Nevada's regulation of brothels also insulate brothel prostitutes from violence and offers more protection to the health and welfare of Nevada's licensed brothel workers and their customers than if they were to conduct their commerce outside the bounds of law.<sup>118</sup> Brothels themselves are often encircled by high chain link fences.<sup>119</sup> Security guards are usually present both day and night inside the brothels and outdoors on surrounding premises.<sup>120</sup> Inside the brothel, prostitutes have access to emergency buttons installed in their bedrooms; they can use these buttons if they require protection.<sup>121</sup> Overall, brothel prostitutes are protected from theft, fraud, and crime, and other horrors of the streets.<sup>122</sup>

In stark contrast are counties in Nevada in which prostitution is illegal and is punishable as a misdemeanor.<sup>123</sup> Here, prostitution is rife with high incidents of disease and battery that affects both prostitutes and customers.<sup>124</sup> Frequent incidents of sex trafficking and a greater number of underage prostitutes exist in these areas than in areas where prostitution is legal.<sup>125</sup> Additionally, county governments spend countless dollars on law enforcement, but often in futile attempts to prevent crime and punish offenders.<sup>126</sup>

An examination of Nevada's regulatory scheme in prostitution, specifically its regulation of brothels, shows that Nevada's system may not only promote the health, safety, and welfare of

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<sup>118</sup> *Id.*

<sup>119</sup> Rebecca Mead, *Letter from Nevada: How to Make an Honest Living from the Oldest Profession*, *New Yorker*, Apr. 23, 2001, at 76.

<sup>120</sup> Information--Health Benefits, [http:// www.nvbrothels.net/infoHealthBenefits.shtml](http://www.nvbrothels.net/infoHealthBenefits.shtml) (last visited Mar. 22, 2010).

<sup>121</sup> Condom Use High in Nevada Brothels, [http:// www.worldsexguide.org/nv\\_legal.txt.html](http://www.worldsexguide.org/nv_legal.txt.html) (last visited Mar. 23, 2010).

<sup>122</sup> Information--Legal, <http://www.nvbrothels.net/infoLegal.shtml> (last visited Mar. 23, 2005).

<sup>123</sup> Nev. Rev. Stat. §201.354 (2003).

<sup>124</sup> Neff, at 10A.

<sup>125</sup> *Id.*

<sup>126</sup> Brents, at 308.

prostitutes and their customers<sup>127</sup> but also insulate prostitutes and sex workers from violence more commonly associated with street and illegal prostitution.

## **B. Legitimacy and Professionalism**

Another argument in favor of Nevada's brothel system is that it gives prostitutes a feeling of legitimacy and professionalism. Studies and surveys in reference to prostitutes' stance on any perceived illegitimacy towards their profession are sparse. Therefore, this argument may seem somewhat less persuasive than the former argument regarding the health, safety, and welfare of society. However, in all likelihood it would seem that workers in the sex industry would prefer greater legitimacy than less in their profession. Thus, this argument is not to be discounted.

Government-sanctioned brothels in Nevada may provide a twofold benefit: on one hand, brothel prostitutes enjoy a certain degree of legitimacy and professionalism in their work; on the other hand, the state effectively confines prostitution to brothel premises.<sup>128</sup> By concentrating the majority of prostitutes to brothels only, states can wield a greater power in regulating and keeping prostitution under control.

As a government sanctioned enterprise, brothels provide a safe, regulated environment where prostitutes could conduct their business.<sup>129</sup> Along with the more professional atmosphere, prostitutes may gravitate towards working in brothels rather than hiding on the streets where they are more vulnerable to drug, gangs, and violence.<sup>130</sup> If prostitution were legalized in other states,

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<sup>127</sup> Kuban, at 627.

<sup>128</sup> Jessica Drexler, *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, 203 (1996).

<sup>129</sup> Information--Legal, <http://www.nvbrothels.net/infoLegal.shtml> (last visited Mar. 24, 2010).

<sup>130</sup> Neff, at 10A.

prostitutes would, similar to Nevada's brothel prostitutes, feel more as "independent contractors" who choose the way to earn their living rather than some form of sex slave.<sup>131</sup>

If prostitutes could become concentrated to a specific location, the brothel for example, government oversight may become easier. Rather than employ additional resources to locate prostitutes under the radar, the state can use existing resources to focus almost entirely on regulating conduct and behavior within brothels. In Nevada, prostitutes are typically required by brothels to remain on the premises during the term of their contracts.<sup>132</sup> This sort of physical limitation enables the state government to better control the industry.

### **C. Revenue**

A last argument in favor of Nevada's brothel system is that it generates tax revenue for the government. The source of this revenue may appear immoral to some individuals, so again this argument may seem somewhat less persuasive than the argument with regards to the health, safety, and welfare of society. However, it would be difficult to discredit this argument because Nevada derives a real monetary benefit from the sex industry and other states currently invest enormous capital to combat this industry.

The prostitution business in Nevada generates large revenue for the city via tax dollars.<sup>133</sup> In a typical year, legal brothels generate about \$50 million in total revenue and have an economic impact of about \$400 million on the state.<sup>134</sup> Recently, in response to the economic downturn, Senate Taxation Committee Chairman Bob Coffin, a Las Vegas Democrat, proposed a

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<sup>131</sup> Brents, at 311.

<sup>132</sup> Drexler, at 225.

<sup>133</sup> Jessica Ramirez, *Feeling the Pinch: Nevada's Brothels Hit Hard Times*, Newsweek, June 16, 2008, available at <http://www.newsweek.com/id/141848>.

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

\$5 tax on acts of prostitution in Nevada and a counseling agency for sex workers that would be funded by part of the tax revenue.<sup>135</sup> In discussing his plan, Coffin estimated that the tax would raise at least \$2 million a year from sex acts in legal bordellos or brothels.<sup>136</sup> The proposed plan awaits approval; however, it illuminates prostitution as a genuine possibility of profitable endeavor for any government.

State governments spend millions of dollars and thousands of hours attempting to enforce the prohibition of prostitution.<sup>137</sup> It is estimated that taxpayers spend approximately seven and a half million dollars on prostitution control policy per major city.<sup>138</sup> A plan to tax the sex industry rather than criminalize it can save the government both time and money and, in fact, may serve as an important source of government revenue.

Aside from the fact that the United States spends millions of dollars a year to enforce anti-prostitution laws with seemingly no effect on the number of active prostitutes in the nation, productive enforcement resources are diverted from other areas that also require governmental attention.<sup>139</sup> Thus, converting the sex industry into a government-sanctioned, taxed industry may stop the government from diverting valuable resources.

#### **D. Benefits of the Nevada System: Conclusion**

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<sup>135</sup> *Prostitution Tax Proposed in Nevada*, National Public Radio, March 24, 2009, available at <http://www.npr.org/templates/story/story.php?storyId=102314296>.

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

<sup>137</sup> Drexler, at 201.

<sup>138</sup> Brents, at 308.

<sup>139</sup> Katri K. Sieberg, *Criminal Dilemmas: Understanding and Preventing Crime* 69-70 (Charalambos D. Aliprantis & G. Nicholas C. Yannelis eds., 2005).

Nevada's regulatory scheme over prostitution may serve to promote the health, safety, and welfare of society.<sup>140</sup> The Nevada Administrative Code outlines stringent health codes for prostitutes and brothel owners and protects both sex workers and their customers.<sup>141</sup> Besides protecting prostitutes and customers from disease and health risks, Nevada's regulation of brothels also insulates brothel prostitutes from violence, drugs, and gangs on the streets. Nevada's system also allows prostitutes a certain degree of legitimacy and professionalism in the industry and encourages prostitutes to work in brothels rather than on the streets. This in turn facilitates governmental oversight over the industry. Finally, a regulated brothel system similar to Nevada could generate important tax revenue for the government as well as save resources that would otherwise be diverted from other areas that also require governmental attention.<sup>142</sup>

#### **IV. Problems with Nevada's System**

Two major criticisms of the Nevada system are: (1) it promotes prostitution, an activity considered immoral and undesirable by society and (2) its system of checking prostitutes may violate their privacy rights.

##### **A. Immoral Activity**

One argument against Nevada's system over the regulation of prostitution is that it promotes an activity considered immoral and undesirable by society. However, from an alternate angle, Nevada's regulatory scheme over prostitution, specifically its regulation of brothels, may

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<sup>140</sup> Kuban, at 627.

<sup>141</sup> Nev. Admin. Code ch. 441A, §§ 010-325, 775-815 (2003).

<sup>142</sup> Sieberg, at 69-70.

actually serve to uphold society's moral values because it essentially quarantines behavior unaccepted by society.

First, Nevada does not tout prostitution as moral. In fact, its prostitution statutes are listed under the chapter heading of "Crimes Against Public Decency and Good Morals." Recognizing the failure of laws that criminalize prostitution, Nevada regulates prostitution so that it has less opportunity to affect the morals of society at large. In Nevada, brothels are required to maintain a certain distance from schools, houses of worships, and main thoroughfares. Furthermore, every Nevada county that permits legalized prostitution sets limits on how it is advertised. Brothel advertising is illegal in counties where prostitution is illegal. Brothel advertising is prohibited in public theaters, and on streets and highways in counties where is legal.

In balancing "the historic tolerance for legal prostitution with more genteel public sensibilities,"<sup>143</sup> Nevada regulates prostitution so as to diminish its presence and influence within the public arena. A townsman at the 1999 Ely town meeting, organized to discuss the prohibition of prostitution in Ely, noted that brothels actually help keep prostitution invisible.<sup>144</sup> "These women [brothel prostitutes] do not come and known on your door and walk in your house to disrupt your family."<sup>145</sup> But, if you stop to think, the TV and your computer bring all the filth into your house that you could [possibly] want..." Dennis Hof, the owner of the Moonlite Bunny Ranch in Carson City, observed that brothels tend to cut down on street prostitutes in the

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<sup>143</sup> Daria Snadowsky, *The Best Little Whorehouse Is Not In Texas: How Nevada's Prostitution Laws Serve Public Policy, And How Those Laws May Be Improved*, 6 Nev. L.J. 217, 230 (2005).

<sup>144</sup> Barbara Brents & Kathryn M. Hausbeck, *Pro-Family, Pro-Prostitution: Discourses of Gender, Sexuality & Legalized Prostitution in a Nevada Town* (2000), <http://www.unlv.edu/faculty/brents/research/msspaper.ely.pdf>. (last visited March 25, 2010).

<sup>145</sup> *Id.*

surrounding areas whereas the absence of brothels increases them.<sup>146</sup> “With the closure of the Mustang Ranch...there has been a proliferation of illegal hooking in Reno.”<sup>147</sup>

In accordance with public sentiments that look unfavorably upon prostitution, Nevada utilizes physical separation and under-advertisement to reduce its impact. Nevada’s legislature is both acknowledges the fact that prostitution is not universally accepted practice but concedes that prostitution is an old profession that will not disappear, even in jurisdictions where it is illegal. Nevada’s regulatory scheme balances both concerns and thereby protects the state’s interest in promoting morality and family values.

## **B. Invasion of Privacy**

### **1. Frank v. Maryland and Progeny**

Another argument against Nevada’s system, mandating bi-weekly and monthly health checks on prostitutes, is that it may violate their right to privacy, a fundamental guarantee by the U.S. Constitution.<sup>148</sup> While this argument has failed to emerge in any significant case literature as prostitution is outlawed in forty-nine U.S. states, a comparable example, may be had with administrative searches in the interests of public health.

*Frank v. Maryland*,<sup>149</sup> a 1959 case, provides a guide to the traditional understanding of the administrative search authority of public health officials.<sup>150</sup> Administrative searches, which can cover rat infestations to life-safety code violations to cases of communicable diseases,<sup>151</sup>

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<sup>146</sup> Dennis Hof, *Get Girls into Legal Brothels*, Reno News & Rev., Jan. 10, 2002, at 7.

<sup>147</sup> *Id.*

<sup>148</sup> Snadowsky, at 235.

<sup>149</sup> 359 U.S. 360 (1959).

<sup>150</sup> *Id.*

<sup>151</sup> Edward P. Richards, *Dangerous People, Unsafe Conditions: The Constitutional Basis for Public Health Surveillance*, 30 J. Legal Med. 27, 34 (2009).

raise the most important due process issues in public health law.<sup>152</sup>

The key to understanding public health searches is that they are prospective; their objective is to prevent future harm, not to punish existing harm.<sup>153</sup> In *Frank*, the defendant was arrested for failing to allow entry of a public health inspector into his home to locate the source of a rat infestation that raised awareness with the Baltimore health department. The inspector had found a pile of “rodent feces mixed with straw and trash and debris to approximately half a ton” along the exterior of the defendant’s house.<sup>154</sup>

The defendant’s conviction was upheld by Maryland courts and he appealed to the United States Supreme Court; he argued that the inspector’s actions violated his right to privacy.<sup>155</sup> The United States Supreme Court ruled the case as a case of first impression<sup>156</sup> and came to its critical conclusion, which still governs public health searches today. The Court held that the protection of the Fourth Amendment could not be invoked in the defendant’s situation because, contrary to the Fourth Amendment’s guarantee to the right to be secure from searches for evidence to be used in criminal prosecutions, no evidence for criminal prosecution was sought in this case.<sup>157</sup>

Rather, the defendant was simply directed to do what he could have been ordered to do without any inspection, namely, act in a manner consistent with the maintenance of minimum community standards of health and well-being, including his own. The Court found the defendant’s assertion for an absolute right to refuse consent for an inspection designed and pursued solely for the protection of the community’s health, and conducted with due regard for

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<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Frank*, at 361.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

every convenience of time and place, impermissible.<sup>158</sup>

The holding of *Frank* has been little affected by more recent jurisprudence, namely the major due process reforms of the Warren Court.<sup>159</sup> Although several members of the court expressed their displeasure with *Frank* in the 1960 case of *Ohio v. Price*<sup>160</sup> (in which *Frank* was limited by *See v. Seattle*<sup>161</sup>) and *Camara v. Municipal Court of San Francisco*<sup>162</sup>, the ultimate change to public health law has been relatively small.

Both *See* and *Camara* involved fines for refusing to allow a warrantless inspection by a public health inspector; *See* dealt with a business and *Camera* dealt with a private residence.<sup>163</sup> The Court left the core of *Frank* intact and retained the rule that full Fourth Amendment warrant protections are not required for public health inspections.<sup>164</sup> While it voiced concern about the potential for public health warrantless searches being used for harassment or discrimination purposes,<sup>165</sup> the Court recognized that requiring Fourth Amendment warrant would make it difficult to carry out public health inspections.

The Court reiterated the position that the Fourth Amendment fails for preventive inspections, where the inspection is to discover public health threats rather than respond to complaints about known threats. It recognized that while the Fourth Amendment does not allow screening for crime, screening is key to public health.<sup>166</sup> Implementation of the Fourth

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<sup>158</sup> *Id.* at 365-66.

<sup>159</sup> Richards, at 38.

<sup>160</sup> 364 U.S. 263 (1960).

<sup>161</sup> 387 U.S. 541 (1967).

<sup>162</sup> 387 U.S. 537 (1967).

<sup>163</sup> Richards, at 34.

<sup>164</sup> *Id.*

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

<sup>166</sup> Richards, at 34.

Amendment is also resource intensive; it raises the cost of enforcement.<sup>167</sup> Thus, when a warrant is constitutionally required, cost is not an issue,<sup>168</sup> but when there is no constitutional requirement for full criminal law due process protections, costs are a valid consideration.<sup>169</sup>

The Court was unwilling to burden public health officials with costs and delays inherent in the Fourth Amendment warrant process and essentially made a compromise in the area warrant arena. In these cases, which involve building inspections, the Court has held that if the owner refused entry, the public health inspector would need to get a warrant from a judge. But rather than having to show the judge individualized probable cause for a specific building, the inspector would need to show only a reasonable rationale for the inspection, the legal basis for the inspection, and the area covered by the warrant.<sup>170</sup>

For example, a warrant for fire inspections could be based on time period, such as yearly inspections, the statute or rule allowing such inspections, and a geographical or other method of determining which buildings would be inspected.<sup>171</sup> This single warrant would be good for all of the buildings being inspected, obviating any specific knowledge of conditions or the identity of the owners of specific buildings.<sup>172</sup>

## **2. Frank v. Maryland: Comparison to Prostitutes**

Under the reasoning of *Frank*, the Court would likely uphold regular health checks on prostitutes in the interests of public health. Similar to administrative health searches, health tests

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<sup>167</sup> *Id.*

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

<sup>169</sup> For a discussion of the use of cost-benefit analysis in administrative due process, see *Mathews v. Eldridge*, 424 U.S. 319 (1976).

<sup>170</sup> *Camara*, at 538.

<sup>171</sup> *Richards*, at 34-36.

<sup>172</sup> *Id.*

on prostitutes are prospective; in other words, they seek to prevent future harm, not to punish existing harm. Thus, the protection of the Fourth Amendment would not be invoked because the health checks are not being employed in order to search for evidence to be used in criminal prosecutions.<sup>173</sup>

The purpose of health checks on prostitutes is to ensure that prostitutes maintain a certain standard of health and well-being, both for the benefit of the community as well as their own. Provided that the health checks are designed and pursued solely for the protection of the community's health and conducted with due regard for convenience of time and place, a claim for an absolute right to refuse consent for a health check, would most probably fail.<sup>174</sup>

## **V. Conclusion**

States in the United States continue to outlaw prostitution and are therefore unable to truly combat the problems associated with prostitution. The legalization and regulation of prostitution would bring about many benefits. Prostitution generates important revenue for the government. Government legalization also allows prostitutes to enjoy a degree of legitimacy in their profession. Most importantly, legalization and regulation of prostitution leads to transparency in the sex industry, allowing the government to protect sex workers from drugs, abuse, and violence, impose strict health guidelines on prostitutes and brothel owners, and ultimately serve and uphold the goals of health, safety, and morality in society.

The problems associated with criminalized prostitution are greater than those associated with legalized prostitution. Under a criminalized system, prostitutes are relegated to the streets

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<sup>173</sup> 359 U.S. 361 (1959)

<sup>174</sup> Frank, at 365-66.

and the underground, where they face abuses from clients, pimps, community vigilantes, and frequent police harassment.<sup>175</sup> Prostitutes outside the scope of government protection are more vulnerable to being forced into sex trafficking. They must often frequent dangerous places and interact with sexually aggressive males; they are highly vulnerable to rape.<sup>176</sup>

While the Nevada system is imperfect, it is arguably a better system than criminalization. Prostitution is a supply and demand industry, and is viewed by many as inevitable.<sup>177</sup> It is not an honorable profession, but it is a profession that has stood the test of time. Given this reality, it is far more practical for the government to deal with the prostitution by regulating it. Nevada presents a workable solution and offers a system that is worth consideration by other U.S. states.

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<sup>175</sup> Juhu Thukral, Melissa Ditmore, & Alexandra Murphy, *Behind Closed Doors: An Analysis of Indoor Sex Work in New York City*, <http://www.sexworkersprject.org/downloads/BehindClosedDoors.pdf> (last visited Mar. 27, 2010).

<sup>176</sup> Kurt Weiss & Sandra S. Borges, *Victimology and Rape: The Case of the Legitimate Victim*, 8 *Issues Criminology* 95 (1973).

<sup>177</sup> Jason Chan, *Decriminalization of Prostitution in China*, 13 *New Eng. J. Int'l & Comp. L.* 329, 363 (2007).