

2013

Curbing Prostitution by Arresting Streetwalkers: The Unequal Treatment of Sex Workers in Crime Enforcement

Cara Parmigiani

Follow this and additional works at: https://scholarship.shu.edu/student_scholarship

Recommended Citation

Parmigiani, Cara, "Curbing Prostitution by Arresting Streetwalkers: The Unequal Treatment of Sex Workers in Crime Enforcement" (2013). *Law School Student Scholarship*. 384.
https://scholarship.shu.edu/student_scholarship/384

CURBING PROSTITUTION BY ARRESTING STREETWALKERS: THE UNEQUAL TREATMENT OF SEX
WORKERS IN CRIME ENFORCEMENT
BY: CARA PARMIGIANI

I. INTRODUCTION

Prostitution is a significant problem in the United States.¹ There are an estimated 100,000 to 300,000 child sex workers in the United States² and the prevalence of adult sex workers is 22.1 per 100,000.³ To reduce prostitution, lawmakers have criminalized the activity in all but one of the fifty states of the United States.⁴ Even when, in most jurisdictions, the statutes prohibiting prostitution prescribe similar punishments for customers and sex workers,⁵ in practice, the laws are frequently unequally applied.⁶ Sex Workers are often punished much more harshly and are prosecuted more frequently than customers.⁷ Their behavior is criminalized, and they are socially stigmatized, which often prevents them from obtaining other work and therefore perpetuates prostitution.⁸ This paper argues that because prostitution laws are unequally enforced

¹ "The act or practice of engaging in sexual activity for money or its equivalent; commercialized sex." BLACK'S LAW DICTIONARY 1342 (9th ed. 2009).

² RONALD B. FLOWERS, THE PROSTITUTION OF WOMEN AND GIRLS, 80 (1998).

³ DEVON D. BREWER ET. AL., PROSTITUTION AND THE SEX DISCREPANCY IN THE NUMBER OF SEXUAL PARTNERS, 12386 (2000).

⁴ LANDER COUNTY NV § 5.16.010, PROCON.ORG, <http://prostitution.procon.org/sourcefiles/LanderCountyChap516.pdf>. (last visited Mar. 22, 2011). See also US FEDERAL AND STATE PROSTITUTION LAWS AND RELATED PUNISHMENTS, PROCON.ORG, <http://prostitution.procon.org/view.resource.php?resourceID=000119> (last visited Mar. 22, 2011).

⁵ See US FEDERAL AND STATE PROSTITUTION LAWS AND RELATED PUNISHMENTS, *supra* 29.

⁶ CARYN E. NEUMANN, SEXUAL CRIME: A REFERENCE HANDBOOK, 54 (2010). See also FLOWERS, SEX CRIMES, 158, 181 (2006).

⁷ MARISSA H.I LUNING, PROSTITUTION PROTECTED IN PARADISE, 203 (2008).

⁸ ART HANGER & CUSTOMER MALONEY, THE CHALLENGE OF CHANGE: A STUDY OF CANADA'S CRIMINAL PROSTITUTION LAWS: REPORT OF THE STANDING COMMITTEE ON JUSTICE AND HUMAN RIGHTS: REPORT OF THE SUBCOMMITTEE ON SOLICITATION LAWS, 73 (2006).

against sex workers, prostitution statutes should provide more harsh punishments for customers to deter them from engaging in this crime.⁹

The problem of how to reduce prostitution is not confined to the United States. Other countries have also grappled with how to best further the legislative intention of reducing prostitution. In Canada, prostitution is legal, but it is highly regulated.¹⁰ The Canadian Criminal Code prohibits all forms of public communication for the purpose of prostitution, and most forms of indoor prostitution.¹¹ These regulations have not been demonstrated to be effective or safe, and are currently under litigation from sex workers.¹² In contrast, Swedish laws legalize the acts of sex workers while subjecting customers and pimps to criminal prosecution.¹³ These regulations appear to be a success because they deter customers and provide services for sex workers to leave the trade.¹⁴

The Swedish approach reduces prostitution and related crimes such as sex trafficking, violence, and rape, without necessarily criminalizing the sex worker's actions. The laws of Sweden make sex work legal, but the purchase of illegal.¹⁵ Further, those laws provide sex

⁹ MICHAEL SHIVELY, ET AL., FINAL REPORT ON THE EVALUATION OF THE FIRST OFFENDER PROSTITUTION PROGRAM, 5 (2008), *available at* http://www.iiv.nl/epublications/2008/Final_Report_on_the_Evaluation_of_the_First_Offender_Prostitution_Program.pdf (last visited Mar. 22, 2011). *See also*, AGAINST PROSTITUTION AND HUMAN TRAFFICKING FOR SEXUAL PURPOSES, REGERINGSKANLIET: GOVERNMENT OFFICES OF SWEDEN, 4 (2009). *See also* Hanger, *supra* 8, at 62.

¹⁰ OFFENCE IN RELATION TO PROSTITUTION R.S.C., 1985, c. C-46 (Section 213) (Can.), *available at* <http://laws-lois.justice.gc.ca/eng/acts/C-46/page-148.html#h-72> (last visited Mar. 22, 2011).

¹¹ *Id.*

¹² Tracey Tyler, *Prostitution laws struck down*, Toronto Star, Sept. 28, 2010, *available at* <http://www.thestar.com/news/canada/article/867332--prostitution-laws-struck-down> (last visited Mar. 22, 2011).

¹³ SWEDISH PENAL CODE, *available at* <http://www.sweden.gov.se/content/1/c6/02/77/77/cb79a8a3.pdf>.

¹⁴ *Inquiry on the evaluation of the prohibition of the purchase of sexual services*, Regeringskansliet: Government offices of Sweden, July. 2, 2010, *available at* <http://www.sweden.gov.se/sb/d/13420/a/151488>.

¹⁵ *See* SWEDISH PENAL CODE, *supra* note 13.

workers with access to assistance programs to provide them with skills, education, therapy, and medical care, as well as a forum to bring charges against rape and violence.¹⁶

In analyzing data collected from other countries, the individual states of the United States can gain insight into how best to draft their own statutes to make them more effective in diminishing prostitution. Currently the United States has fifty-two criminal penal codes¹⁷ that struggle to address the problem of prostitution. The Model Penal Code suggests states address prostitution by recognizing that at some point most males in the United States will be a customer, and therefore they should be punished less harshly.¹⁸ Some states explicitly link this issue to morality, like Wisconsin,¹⁹ while other states, like New York,²⁰ focus statutes on the best interest of the sex worker and children who are involved. New York's approach being more focused on protecting sex workers, recognizes the need to protect women and children from being the victims of prostitution in ways that morality based legislation does not. Statutes like that of New York and Sweden may effectively reduce prostitution by deterring customers through enhanced punishment.

This paper will argue that because prostitution statutes are unequally enforced, statutes need to enhance sentencing for customers to be greater deterrent to the few customers who are arrested and prosecuted to reduce prostitution. The structure of this paper will proceed as follows: Part II provides an overview of prostitution in the United States and the laws prohibiting it. Beginning with a definition of prostitution, and analysis of three different types of prostitution

¹⁶ *Id.*

¹⁷ ERIK LUNA, PRINCIPLED ENFORCEMENT OF PENAL CODES, 553 (2001).

¹⁸ *Id.* (quoting Model Penal Code § 207.12 cmt. at 169-70 (Tent. Draft No. 9, 1959)).

¹⁹ Wis. Stat. Ann. § 944 (2011).

²⁰ N.Y. Penal Law §§ 944.30-944.31, 230.4-6 (2008).

statutes, this paper shows that although most prostitution statutes in the United States are unequally enforced. Although law enforcement officials may arrest either sex workers or customers, the vast majority of arrests made are of sex workers.²¹ Comparing the Model Penal Code, Wisconsin, and New York's prostitution legislation, it seems as though the legislation of New York, which favors sex workers may be an effective means of reducing prostitution. Although it is unlikely that the United States would ever completely legalize sex as Sweden has done, New York's approach, being more sex worker friendly, may be a compromise other jurisdictions may accept to reduce prostitution.²²

Part III argues that unequal enforcement of prostitution laws frustrates efforts to reduce prostitution for three reasons. First, focusing on sex workers does not provide a substantial deterrent effect on customers. Second, arresting and prosecuting sex workers makes it more difficult for them to seek other employment. Third, arresting and prosecuting sex workers stigmatizes them and subjects them to social contempt exemplified by unequal enforcement.²³

Part IV will provide an alternative to the United State's approach to prostitution by examining other countries' laws and enforcement. Focusing on the approaches of Canada and Sweden, this paper examines whether these strategies are an effective means of reducing prostitution. Although Canada may not be effectively reducing prostitution through statutes regulating legalized prostitution, Sweden seems to be effectively reducing prostitution by statutes aimed at deterring customers.

²¹ See SHIVELY, *supra* 9, at 8.

²² See *Inquiry on the evaluation of the prohibition of the purchase of sexual services*, *supra* 14.

²³ See also Hanger, *supra* 8, at 34.

Part VI concludes that the United States would more effectively reduce prostitution by applying prostitution statutes similar to that of New York or Sweden because those laws deter customers without punishing sex workers in a way that would prevent them from seeking other employment and thereby reducing prostitution. More harsh punishments for customers to deter them from engaging in this crime may balance the unequal enforcement against sex workers and therefore reduce prostitution.

II. PROSTITUTION IN THE UNITED STATES

"It takes a village to create a prostitute."²⁴

The definition of prostitution may be simple, but to construct laws that actually serve to reduce the crime is far more complex. Prostitution has been defined as "[t]he act or practice of engaging in sexual activity for money or its equivalent,"²⁵ but it is more than the sale of sex, it is also the act of criminalizing behavior often based on moral condemnation. Statutes deterring customers from purchasing sex and sexual favors through harsher punishments may be more effective than statutes that treat sex workers and customers equally.

A. PROSTITUTION STATUTES IN THE UNITED STATES

²⁴ Melissa Farley, *Services for women and children escaping prostitution*, Prostitution Research & Education, <http://www.prostitutionresearch.com/services.html> (last visited Mar. 22, 2011).

²⁵ BLACK'S LAW DICTIONARY, 1342 (9th ed. 2009).

“The oft-repeated statement that morality cannot be legislated is fallacious; other than traffic regulations virtually all penal law is legislation of morality. Society may not be able to enforce morality, but it clearly can legislate it.”²⁶

Legislating morality has been the driving force behind many prostitution statutes in the United States. This legislation disadvantages of sex workers when enforced and at the same time does not successfully deter their customers from seeking sex elsewhere when sex workers are arrested.²⁷ Sex and sexual favors in exchange for money, is prostitution,²⁸ and in the United States today the practice is illegal in all states ²⁹ except Nevada,³⁰ where it is highly regulated. More often than not these statutes more often than not carry with them the identical punishments for sex workers and customers engaged in the acts.³¹ Some examples of diverse approaches to criminalizing prostitution within the United States include the Model Penal Code, Wisconsin, and New York.

1. PROSTITUTION UNDER THE MODEL PENAL CODE

Basing prostitution laws on morality as opposed to protecting sex workers from harms related to prostitution causes enforcement bias against sex workers. Several states like Nevada³²

²⁶ *People v. Costello*, 90 Misc. 2d 431, 434 (N.Y. Sup. Ct. 1977).

²⁷ See SHIVELY, *supra* 21, at 1.

²⁸ BLACK'S LAW DICTIONARY 1342 (9th ed. 2009).

²⁹ See US FEDERAL AND STATE PROSTITUTION LAWS AND RELATED PUNISHMENTS, *supra* 5.

³⁰ Nev. Rev. Stat. Ann. §§ 201, 244.345 (2009).

³¹ See US FEDERAL AND STATE PROSTITUTION LAWS AND RELATED PUNISHMENTS, *supra* 29.

³² Nev. Rev. Stat. Ann. §§ 201, 244.345 (2009).

and Wisconsin,³³ as well as the Model Penal Code,³⁴ use prostitution laws to regulate morality. These statutes do not deal with the larger issue of deterring customers which is the source of prostitution. New York prostitution statutes, however, focus on deterring customers and may be a more effective means of reducing prostitution.

The Model Penal Code (MPC) are model statutes drafted by the American Law Institute to provide states with suggestions as to how to draft their own statutes to standardize penal codes across the United States.³⁵ Prostitution under the MPC is found within the section defining “offenses against public order and decency.”³⁶ The MPC is very concise, simply outlining the offense of prostitution as a monetary transaction between a buyer and seller of sexual services.³⁷ It states that the, “[p]urpose of enactment was to provide ascertainable standard of conduct directed at defined evil, that being commercial exploitation of sexual gratification”³⁸ and recommends that sex workers found guilty should receive a petty misdemeanor and a customer would only be guilty of a violation.³⁹

The MPC commentary traces the evolution of the code through its British Common Law ancestry which recognized, “...that without demand for her services the prostitute could not exist, and that there are enough men who avail themselves of prostitutes who keep the trade alive.”⁴⁰

³³ Wis. Stat. Ann. §§ 944 (2011).

³⁴ MODEL PENAL CODE § 251.2 (Proposed Official Draft 1962).

³⁵ *ALI Overview*, American Law Institute, <http://www.ali.org/index.cfm?fuseaction=about.overview> (last visited Mar. 22, 2011).

³⁶ MODEL PENAL CODE § 251.2 (Proposed Official Draft 1962).

³⁷ MODEL PENAL CODE § 251.2 (Proposed Official Draft 1962).

³⁸ *Id.* note 4.

³⁹ MODEL PENAL CODE AND COMMENTARIES: PART II §§ 240.0 TO 251.5, AMERICAN LAW INSTITUTE, 459 (1980).

⁴⁰ *Id.* (citing COMMITTEE ON HOMOSEXUAL OFFENCES AND PROSTITUTION, REPORT, CMD. No. 247 (1957)).

Further the commentary admits that “[r]eligious and moral ideas undoubtedly are the main force behind the demand for repression,”⁴¹ of prostitution and that there should be more leniency toward customers because “males in this country will have had experience with prostitutes at some point during their lives,”⁴² which would justify treating them better than prostitutes because they are, “...victims of social and psychic conditions beyond their control.”⁴³

Despite knowing that the key to managing prostitution is deterring customers, the MPC victimizes customers rather than deter them from seeking sexual services by granting them a reduced sentence of a fine.⁴⁴ This approach recognizes but does not address the issue of demand for prostitution as the driving factor. Similarly, Wisconsin’s statutes which are gender neutral, do not recognize that the sex workers need more statutory protection to avoid unequal enforcement and deter customers.

2. PROSTITUTION LEGISLATION AND LEGISLATIVE INTENT OF WISCONSIN’S PROSTITUTION STATUTES.

Prostitution statutes in Wisconsin, although gender neutral on their face, are discriminatory against sex workers in application. Where statutes are gender neutral, and enforcement is gender-biased against the sex worker, customers are not adequately being deterred from purchasing services and prostitution is not reduced.

⁴¹ *Id.* at 456.

⁴² See ERIK LUNA, *supra* 17, at 553 (quoting Model Penal Code § 207.12 cmt. at 169-70 (Tent. Draft No. 9, 1959)).

⁴³ *Id.*

⁴⁴ See MODEL PENAL CODE AND COMMENTARIES, *supra* 39, at 459.

In 1913,⁴⁵ Wisconsin's legislature laid some of the foundation for prostitution laws in that state based on a survey conducted by the Committee to Investigate the White Slave Traffic and Kindred Subjects.⁴⁶ Essentially the legislature decided that sex workers, "...should be looked upon as persons who have contracted a moral disease, and should be treated accordingly."⁴⁷ Similarly the Committee concluded that, "[t]he sex worker, with character greatly soiled and reputation damaged seemingly beyond repair, should be sent to an institution where her physical and mental diseases can be adequately treated."⁴⁸ Although laws based on these recommendations may have seemed like benevolence,⁴⁹ they were difficult to properly enforce because benevolence without deterrence does not reduce prostitution.

Today, prostitution is still defined in Wisconsin as "a crime of sexual morality."⁵⁰ Present statutes make prostitution a class A Misdemeanor for both sex workers and customers but they are not actually equal.⁵¹ When sex workers are arrested and prosecuted more frequently than customers the statutes are not adequately providing a means of directing law enforcement. This

⁴⁵ WISCONSIN LEGISLATIVE COMMITTEE, REPORT AND RECOMMENDATIONS OF THE WISCONSIN LEGISLATIVE COMMITTEE TO INVESTIGATE THE WHITE SLAVE TRAFFIC AND KINDRED SUBJECTS, 5 (1914), *available at* <http://content.wisconsinhistory.org/u?tp,26679>

⁴⁶ *Id.* at 5.

⁴⁷ *Id.* at 163.

⁴⁸ *Id.*

⁴⁹ *Id.* at 84-89. *Id.*

⁵⁰ Wis. Stat. Ann. §944 (2011). *See also* In 1976 the state repealed statute § 944.02 defining the intent of "Crimes against Sexual Morality," which had previously read: "[t]he state recognizes that it has a duty to encourage high moral standards. Although the state does not regulate the private sexual activity of consenting adults, the state does not condone or encourage any form of sexual conduct outside the institution of marriage. Marriage is the foundation of family and society. Its stability is basic to morality and civilization, and of vital interest to society and this state." Wis. Stat. Ann. § 944.02 (repealed 1976).

⁵¹ Wis. Stat. Ann. §§ 944.30, 944.31 (2011).

in turn hinders the deterrence of customers who are the driving force behind prostitution.⁵² To curb prostitution, Wisconsin's statutes should be more comprehensive like the sex worker centered statutes of New York, which deter customers through enhanced punishment.

3. PROSTITUTION LEGISLATION AND LEGISLATIVE INTENT OF NEW YORK'S PROSTITUTION STATUTES.

By adopting laws that punish customers more severely than sex workers while not decriminalizing prostitution, the laws of New York are more similar to Sweden, which will be discussed later in this paper, and may work to reduce prostitution in ways that morality based legislation like that of Wisconsin may not. Where other approaches to prostitution in the United States are from a position of regulating immoral acts, New York takes a more comprehensive approach which incorporates concern for women and children as victims.⁵³

New York's prostitution laws are comprehensive and are geared at protecting women and children. To that end, it has as proposed that as of November 2011 the penal code will enhance the severity of punishment against customers.⁵⁴ These laws recognize the need to protect sex workers by creating degrees of patronizing a sex worker based on her age.⁵⁵ The younger the sex worker, the more severe the punishment to customers; turning moving felonies and

⁵² MODEL PENAL CODE AND COMMENTARIES: PART II §§ 240.0 TO 251.5, AMERICAN LAW INSTITUTE, 457 (1980) (citing COMMITTEE ON HOMOSEXUAL OFFENCES AND PROSTITUTION, REPORT, CMD. No. 247 (1957)).

⁵³ N.Y. Penal Law § 230.00 (2008).

⁵⁴ MEMORANDUM S644-2011: ELEVATES SEVERITY OF PATRONIZING A SEX WORKER AND PERMITTING PROSTITUTION, AND MAKES CERTAIN PROVISIONS OF PROMOTING PROSTITUTION VIOLENT FELONIES, (Jan. 5, 2011), <http://open.nysenate.gov/legislation/bill/S644-2011>. See also MEMORANDUM S1415-2011: RELATES TO PROSTITUTION OFFENSES; REPEALER (Mar. 10, 2011) <http://open.nysenate.gov/legislation/bill/S1415-2011>.

⁵⁵ See MEMORANDUM S644-2011, *supra* 54.

misdemeanors up one class per offense.⁵⁶ The penal code also punishes non-minor sex workers less harshly than customers by making the offense a class B Misdemeanor for sex workers and a class A Misdemeanor for customers.⁵⁷ Although the statute in New York is more extensive than Wisconsin, and punishes sex workers less harshly, it too is unevenly applied. The irony is that these statutes were recently revamped in 2007 by Eliot Spitzer, former Governor of New York turned customer.⁵⁸ Prostitution laws in New York are more favorable to sex workers and address more concerns than simply regulating immoral behavior. New York's prostitution statutes are not without their flaws. It seems possible, however, that the New York statutes providing enhanced sentencing for customers generally, and specifically depending on the age of the sex worker victim, may be more effective than simply legislating morality as is done in Wisconsin and other states.⁵⁹

Prostitution statutes may be gender neutral on their face, but because they punish buyers and sellers of sex equally they often lead to more arrests of sex workers than customers. To counterbalance that effect, it may be more effective to punish customers more harshly. The next part of this paper discusses the impact of these gender neutral laws that lead to unequal enforcement by law agencies and courts.

B. PROSTITUTION STATUTES ARE ENFORCED UNEQUALLY AGAINST SEX WORKERS

⁵⁶ N.Y. Penal Law §§ 230.4-6 (2008).

⁵⁷ N.Y. Penal Law §§ 230.00, 230.02 (2008).

⁵⁸ Joseph Berger, *Despite Law, Few Trafficking Arrests*, N.Y. Times, Dec. 3, 2009, <http://www.nytimes.com/2009/12/04/nyregion/04trafficking.html> (last visited Mar. 22, 2011).

⁵⁹ N.Y. Penal Law § 230.00 (2008). *See also* Wis. Stat. Ann. § 944.30, 944.31 (2011).

Unequal enforcement of prostitution is a reality in the United States today that hinders the goal of reducing prostitution by not addressing the issue of demand. Part II.A of this paper demonstrated that prostitution statutes are typically apply to both customers and sex workers equally although there are some noteworthy exceptions, Part II.B. will discuss how those statutes when applied by police, and courts, give rise to and permit enforcement that is biased against sex workers and perpetuates prostitution. The unequal enforcement of prostitution statutes against prostitutes may be improved by statutes that focus on deterring customers through enhanced sentencing.

1. UNEQUAL ENFORCEMENT OF PROSTITUTION STATUTES BY POLICE

Deterring customers is not a priority in most municipalities but to reduce prostitution it should be. Police prolifically employ sting operations designed to catch sex workers and not customers, and frequently release customers.⁶⁰ The law also fails sex workers because it allows police to use the same “immoral” behavior as customers to entrap criminals involved in other crimes through the use of sex workers’ services.⁶¹ By not enforcing the law equally against sex workers and customers, and not providing sex workers with means of challenging this enforcement, the law fails to reduce prostitution.

Prostitution arrest statistics are evidence of unequal enforcement of prostitution statutes against sex workers. The number of arrests for prostitution vary across the country ranging from

⁶⁰ See SHIVELY, *supra* 21, at 44.
See also *People v. Superior Court (Hartway)*, 19 Cal. 3d 338, 353 (1977).

⁶¹ *United States v. Simpson*, 813 F.2d 1462, 1468 (9th Cir. 1987).

14,506 arrests in 2004 in California to 3 in Vermont in the same year.⁶² The vast majority of those arrests are of female sex workers. “Over the past five years, there has been a national average of roughly 80,000 prostitution arrests per year reported in the Uniform Crime Report, (e.g., Federal Bureau of Investigation, 2007), two-thirds were arrests of women sex workers.”⁶³ The drastically unequal enforcement of prostitution laws makes the purchase of sex de facto legal. Arresting sex workers and not customers, may not provide a lasting reduction in prostitution because sex workers can return to the streets quickly after an arrest and are rarely provided with services that would allow her to break out of this cycle.⁶⁴

Sex workers are more frequently arrested than customers engaged in the same activity at the digression of law enforcement agents.⁶⁵ By failing to punish customers, the customer is not deterred and he can continue the cycle. Often, when caught in flagrante delicto with a customer, the customer is permitted to walk away from the “scene of the crime” and the sex worker is toted into the station.⁶⁶ Where the customer and the sex worker are both taken into the station, often the customer is released without fine or imprisonment because in some cases he is able to show valid identification and home address.⁶⁷ Sex Workers, on the other hand, are often arrested at the station because they do not have any identification on them, nor will they frequently give a

⁶² PROSTITUTION RELATED ARRESTS, ProCon.org, <http://prostitution.procon.org/view.resource.php?resourceID=120> (last visited May 22, 2011)

⁶³ See SHIVELY, *supra* 60, at 8.

⁶⁴ *Id.* at 1.

⁶⁵ William K. Rashbaum et. al., *Cops In Sex Scandal Iab: Hookers Paid In Trade To Avoid Arrest*, Daily News, July 17, 1998, http://articles.nydailynews.com/1998-07-17/news/18086758_1_cops-brothels-midtown-south-precinct. (last visited Mar. 22, 2011).

⁶⁶ Mark Benjamin, *In D.C. Prostitution Bust, ‘Customers’ Went Unpunished*, Ms. Magazine, Sep. 30, 2008.

⁶⁷ *People v. Superior Court of Alameda County*, 19 Cal. 3d 338 (Cal. 1977). See also SHIVELY, *supra* 64, at 5.

current address.⁶⁸ The production of identification as necessary to prevent arrest is clear bias against sex workers who would have no reason to carry any. They are not the ones driving a car; there would be no need for them to even poses a driver's license let a lone be penalized for not having one.⁶⁹ Further, many sex workers are victims of sexual and physical abuse from their pimps, if she were to give her address, she may subject herself or other women to the wrath of an angry and controlling pimp.⁷⁰ Punishing sex workers who are often the victims of poverty and violence while allowing customers to walk away unpunished does not deter prostitution.

Several police departments have managed to successfully explain away discriminatory enforcement of prostitution. Often departments accomplish this by claiming: that they did not have enough female officers available to play sex workers in sting operations, that even if they did have enough female officers that a male officer would have to accompany her for her

⁶⁸ The Minnesota Attorney General's Office in 1999 found that, "many youths are approached for sex within 48 hours of becoming homeless. Many runaway and homeless youth are too inexperienced, unskilled, drug addicted, traumatized, and/or young to maintain legitimate employment, and turn to prostitution to survive." See SHIVELY, *supra* 64, at 27.

⁶⁹ "Also, when arrested, many juvenile sex workers have fraudulent identification and social security cards and are reluctant to help authorities determine their true age and identity." CRIMINAL INVESTIGATIVE DIVISION FEDERAL BUREAU OF INVESTIGATION COMMISSION ON SECURITY AND COOPERATION IN EUROPE UNITED STATES HELSINKI COMMISSION WASHINGTON, DC (2005) (quoting Chris Swecker).

⁷⁰ STEVEN BITTLE, YOUTH INVOLVEMENT IN PROSTITUTION: A LITERATURE REVIEW AND ANNOTATED BIBLIOGRAPHY, 10 (2002). See also Hanger, *supra* 23, at 54.

protection against violent customers⁷¹ which would further tax the manpower of the squad,⁷² that arresting sex workers was the least intrusive means available for combatting prostitution...and the list goes on. These reasons fail to justify unequal application of the law because its uneven application does not address the reality that prostitution is demand driven.⁷³ The cycle of arresting and releasing sex workers slows the system down but does not deter it.⁷⁴

Customers are not deterred from when they know they are unlikely to be arrested.⁷⁵ Highly publicized prostitution arrests highlight unequal enforcement by demonstrating that even when customers are known to the public, arrest does not seem to follow, despite their female counterparts, madams and sex workers, being arrested. Heidi Fleiss known as the “Hollywood Madam,” was arrested in 1993 and convicted in 1997 for crimes in connection with prostitution and tax evasion. Her list of clients included “some of Hollywoods top producers, directors and movie stars, such as Charlie Sheen. Other clients represented the worlds wealthiest and most famous men, including royal figures, heads of state, sheiks and business tycoons.”⁷⁶ Although

⁷¹ “On the basis of homicide statistics published by the Canadian Centre for Justice Statistics (CCJS), prostitution is a very dangerous activity in Canada. Between 1994 and 2003, at least 79 sex workers were murdered while engaging in prostitution activities. It should be noted that this is almost certainly lower than the real figures, since it includes only those cases in which the police were able to determine that the death occurred during prostitution-related activities. Nearly all of these victims were women (95% women, 5% men). A study conducted by Statistics Canada in the 1990s suggests that in more than 85% of the cases, the people who committed the homicides were clients.” See also Hanger, *supra* 70, at 54.

⁷² “Cost of SFPD ‘Reverse Sting’ Operations: The median labor cost of reverse sting operations (usually involving three to five officers during the street operation, and spanning four or five hours including setup and report writing) was \$2,142. The mean cost per customer arrest was \$356, and per FOPP participant was \$896. When offset by the fee revenue received by SFPD, the average net cost for police operations that place offenders into the FOPP was \$418 per participant. Over the life of the FOPP, it has cost an estimated \$3,516,479 for SFPD reverse stings. Close to one third of those costs were recovered through the SFPD’s share of fee revenue (\$1,047, 706). See SHIVELY, *supra* 68, at 91.

⁷³ *Id.*

⁷⁴ See *Inquiry on the evaluation of the prohibition of the purchase of sexual services*, *supra* 59.

⁷⁵ See AGAINST PROSTITUTION AND HUMAN TRAFFICKING, *supra* 9.

⁷⁶ Rachael Bell, *Heidi Fleiss-- The Million Dollar Madam*, Tru Tv, http://www.trutv.com/library/crime/notorious_murders/celebrity/heidi_fleiss/index.html (last visited May 22, 2011).

Heidi did not publicly reveal the names of her customers, Charlie Sheen and Robert T. Crow, a Texas billionaire, both admitted to using her services at Heidi's court hearings.⁷⁷ Neither had charges pressed against them for engaging in prostitution. Her sentence to three years of imprisonment while her customers went free prompted widespread public outrage.⁷⁸ In an interview Heidi Fleiss condemned the criminalization of prostitution because, "[t]he laws are currently written by and for men. I've been out of the business for 10 years, but I still hear stories of men who hit women, walk out without paying, or write checks to hookers and then stop payment. It's outrageous. Here's a woman who has performed a service to the best of her abilities and to her client's satisfaction. But nothing will happen to that client because he knows he won't be prosecuted for refusing to pay for sex. They go after the women in those cases, not the men."⁷⁹

More recently, in March 2008, Eliot Spitzer, governor of New York, the same governor who ironically signed a bill in 2007 to prevent human trafficking and to suppress the demand for prostitution,⁸⁰ was identified as a client of "Manhattan Madam," Kristin Davis by the New York Times.⁸¹ In November 2008 the prosecutors in charge of the case decided not to press charges

⁷⁷ *Id.*

⁷⁸ GARTH MUNDINGER-KLOW, *PAYING FOR IT: MEN AND THE OLDEST PROFESSION*, 96 (2009).

⁷⁹ See Rachael Bell *supra* 76.

⁸⁰ Joseph Berger, *Despite Law, Few Trafficking Arrests*, N.Y. Times, Dec. 3, 2009, <http://www.nytimes.com/2009/12/04/nyregion/04trafficking.html> (last visited Mar. 22, 2011).

⁸¹ Alan Feuer, *Four Charged With Running Online Prostitution Ring*, N.Y. Times, Mar. 7, 2008, <http://www.nytimes.com/2008/03/07/nyregion/07prostitution.html> (last visited Mar. 22, 2011).

against the now resigned official.⁸² This is yet another case of “all’s well that ends well”⁸³ for customers who include vice presidents, CEOs, investment bankers, and other high powered executives⁸⁴ as Kristin Davis plead guilty to promoting prostitution and was sentenced to three months of time served and \$500,000 in fines.⁸⁵ Arresting sex workers and madams leaves these sex workers with criminal records, while many of “high profile” customers go without so much as a fine.⁸⁶ Not only are customers not often arrested, but sometimes, when a customer is an police officer, he may not be arrested or prosecuted either.

Police not only arrest customers less frequently than sex workers, but sometimes police also are customers. Where those enforcing criminal statutes are engaged in the same criminal behavior as customers, it makes equity in enforcement less likely and the demand for statutes punishing customers more harshly more critical. Police are supposed to enforce the “moral

⁸² Danny Hkim & William K. Rashbaum, *No Federal Prostitution Charges for Spitzer*, NY Times, Nov. 6, 2008, http://www.nytimes.com/2008/11/07/nyregion/07spitzer.html?_r=1&hp (last visited Mar. 22, 2011).

⁸³ Maggie Haberman, *You Can’t Keep A Bad Man Down: Spitzer is Eyeing A Comeback*, N.Y. Post, Sept. 2, 2009, http://www.nypost.com/p/news/regional/item_5rlvMcvGn81zUPHnHNstN;jsessionid=536F85E4A6E60E3061D3BD4F7F10074D (last visited Mar. 22, 2011).

⁸⁴ “[A] vice president of NBC Universal (owned by General Electric), the part owner of a Major League Baseball team who ‘loves Kelsey’, the CEO of one of the country’s largest private equity firms who met ‘Cameron’ at the Peninsula Hotel, a major New York real estate developer who, according to the list, ‘will come to the door wearing women’s panties’, a partner at the Wall Street law firm Cravath Swaine Moore “looking for a party girl to come fully equipped” and spent a total of \$20,000, an investment banker from Lehman Brothers who saw ‘Kelsey and Keely together’ and later saw ‘Aria and Skyler at the same time’, an investment banker at JP Morgan Securities who ‘loves Brooke’ and spent \$41,600, an investment banker at Goldman Sachs who ‘only wanted all-American girls’ and spent \$27,000, a managing director from Merrill Lynch who saw “Lana” using the name ‘Nataly’, a managing director from Deutsche Bank ‘who called about seeing Nataly again.’ Lisa Derrick, *Stimulus Package? Manhattan Madam Claims Wall Street Fat Cats Charged Girls on Corp Credit Cards*, La Figa, Feb. 6, 2009, <http://lafiga.firedoglake.com/2009/02/06/stimulus-package-madam-claims-wall-street-fat-cats-charged-girls-on-corp-credit-cards/> (last visited Mar. 22, 2011). See also, Anna Schechter et. al., *CEOs, Bankers Used Corporate Credit Cards for Sex*, Says New York Madam, ABC: 20/20, Feb. 6, 2009, <http://abcnews.go.com/Blotter/WallStreet/story?id=6813806&page=1> (last visited Mar. 22, 2011).

⁸⁵ *Ex-Madam Says Some Wall St. Clients Billed Their Firms*, N.Y. Times, Feb. 6, 2009, <http://dealbook.nytimes.com/2009/02/06/ex-madam-says-some-wall-st-clients-billed-their-firms/> (last visited Mar. 22, 2011).

⁸⁶ Mark Benjamin, *In D.C. Prostitution Bust, ‘Customers’ Went Unpunished*, Ms. Magazine, Sep. 30, 2008.

virtues” of society and yet they not only exchange sex workers’ services in exchange for escape from arrested,⁸⁷ and have sex with them in “sting operations,” but they also hire them or worse, induce other “informants,” to use sex to arrest other criminals, for crimes other than prostitution.

There are more than a few cases where officers posing as customers, have sex with a sex worker at least once and sometimes as multiple times prior to arresting her or being caught himself.⁸⁸ Also, it is not unusual for officers to offer to release sex workers if they have sex with them.⁸⁹ Similarly, unequal enforcement of prostitution laws against sex workers takes on new dimension when law enforcement agents hire sex workers.

The use of sex workers or “informants” as sex workers by the government has been criticized as being “... the moral equivalent of rape because they both deny the dignity and freedom of the individual.”⁹⁰ This tactic is not isolated event. In *State v. Banks*,⁹¹ police actually recommended that the female informant, “...push it [because] they were sure I could take him into it [illegally obtaining drugs];” by using sex. The Court recognized that the police were using this informant to have sex with the client to induce him to commit a crime. Similarly in *United*

⁸⁷ William K. Rashbaum et. al., *Cops In Sex Scandal Iab: Hookers Paid In Trade To Avoid Arrest*, Daily News, July 17, 1998, http://articles.nydailynews.com/1998-07-17/news/18086758_1_cops-brothels-midtown-south-precinct (last visited Mar. 22, 2011). See also *Former Milwaukee Officer Sentenced For Sexual Assault: Steven Lelinski Removed From Payroll*, The Milwaukee Channel, Mar. 29, 2007, <http://www.wisn.com/news/11442725/detail.html#ixzz1LFBjAd7o> (last visited Mar. 22, 2011).

⁸⁸ Stewart Bishop, *Ex-sex worker awarded \$200,000 in damages Filed suit against Hub police officer*, Boston Globe, Mar. 16, 2011, http://articles.boston.com/2011-03-16/news/29350054_1_prostitute-boston-police-police-officer (last visited Mar. 22, 2011).

⁸⁹ William K. Rashbaum et. al., *Cops In Sex Scandal Iab: Hookers Paid In Trade To Avoid Arrest*, Daily News, July 17, 1998, http://articles.nydailynews.com/1998-07-17/news/18086758_1_cops-brothels-midtown-south-precinct (last visited Mar. 22, 2011).

⁹⁰ Gary T. Marx, *Who Really Gets Stung? Some Issues Raised By The New Police Undercover Work*, MORAL ISSUES AND DECEPTION IN LAW ENFORCEMENT: ABSCAM ETHICS 65, 74 (1982).

⁹¹ Fla. App. LEXIS 11526, at *2 (Fla. Ct. App. Aug. 28, 1986).

States v. Simpson,⁹² the police employed a sex worker, “informant,” to have sexual relations with a man under investigation in order to induce him to buy heroin. Police as purchasers of sex services from sex workers is not different than the purchase by other customers.

Law enforcement agents soliciting sexual favors from sex workers and hiring sex workers to aid in other criminal stings sends a mixed message that a governmental body using a sex worker’s body somehow acceptable. Sex Workers challenging this enforcement through the court system have made little progress.⁹³

2. COURTS APPLYING EQUAL PROTECTION AGAINST UNEQUAL ENFORCEMENT

As stated above, statistics, news reports, and actual police testimony incontrovertibly demonstrates that sex workers are being discriminated against through unequal enforcement of prostitution statutes. Combined with their inability to successfully seek equal enforcement of prostitution statutes, it becomes necessary to enhance punishment of customers to balance this inequity. Sex Workers seeking to challenge unequal enforcement are left with high legal hurdles and few remedies.

Even though the majority of prostitution statutes in the United States are gender neutral they have discriminatory impact as demonstrated by the fact that sex workers are arrested disproportionately.⁹⁴ The U.S Supreme Court outlined the requirements necessary to bring a gender based claim in *Craig v. Boren*⁹⁵ where the state of Oklahoma had sought to enforce laws

⁹² 813 F.2d 1462, 1468 (9th Cir. 1987).

⁹³ ANDREA B. DALOIA, SEXUAL MISCONDUCT AND THE GOVERNMENT: TIME TO TAKE A STAND, 48 Clev. St. L. Rev. 793, 801 (2000).

⁹⁴ See SHIVELY, *supra* 72, at 8.

⁹⁵ 429 U.S. 190, 221 (1976).

that would make the ability to purchase of alcohol based on gender and age. According to the U.S Supreme Court's interpretation of the Constitution in that landmark decision, laws that facially do not discriminate according to gender but are unequally enforced are weighed against whether the enforcement was based on a "substantially related" government interest.⁹⁶ Many courts, like in *Simpson*, have justified law enforcement agencies that use sex workers to arrest other criminals by portraying sex as an act absent from emotional closeness and therefore have circumvented the "morality" of the moral bases crime.⁹⁷ Therefore a party bringing an equal protection claim regarding gender must prove not only that there was a disparate outcome in the application of the law, but also that there was a discriminatory intent in creating that outcome.⁹⁸ These hurdles prevent sex workers from successfully challenging the discriminatory impact of the law and therefore law enforcement agencies are also not deterred from pursuing sex workers disproportionately.⁹⁹

Sex Workers who challenge tactics that further the unequal enforcement of prostitution statutes are stonewalled by their inability to prove discriminatory intent when bringing their gender-based claims to trial. Because sex workers are arrested more frequently, prosecuted more harshly, and cannot successfully seek equal enforcement of prostitution statutes, it becomes necessary to enhance punishment of customers to balance this inequity and to deter customers.

⁹⁶Craig v. Boren, 429 U.S. 190, 221 (1976).

⁹⁷ See *Simpson*, *supra* 92, at 1468.

⁹⁸ *Id.*

⁹⁹ See *Daloia*, *supra* 93, at 814.

The effect of unequal enforcement and lack of available redress has caused sex workers to not only be criminalized, but also stigmatized. Criminalizing sex workers and stigmatizing them does not reduce the occurrence of prostitution.

III. LAW ENFORCEMENT OF GENDER NEUTRAL STATUTES

The unequal enforcement of prostitution causes sex workers to be arrested and prosecuted more often than customers.¹⁰⁰ This cycle does not allow sex workers to move toward other careers and similarly it does not punish customers adequately enough to deter them. Criminalizing and socially stigmatizing sex workers leaves them with few other alternatives but prostitution.¹⁰¹ Rising prostitution arrests, where most offenders are sex workers indicates that current unequal prostitution enforcement is failing. Criminalizing the activities of minors and women who are likely the victims of circumstance,¹⁰² leaves these women and girls with few alternatives to prostitution and therefore does not reduce prostitution.

Although statistics on prostitution is difficult to obtain, the data indicates not only that sex workers are being arrested more often than customers, but that incidence of prostitution arrests of minor girls are on the rise.¹⁰³ According to FBI in 2009 the increase in prostitution arrests of women under 18 between 2000 and 2009 was 57.2. No other type of crime analyzed by the FBI study comes close to this kind of expansion of crime.¹⁰⁴ Prostitution of adult women has

¹⁰⁰ See SHIVELY, *supra* 94, at 8.

¹⁰¹ CATHARINE A. MACKINNON, *PROSTITUTION AND CIVIL RIGHTS*, 1 Mich. J. Gender & L. 13, 24 (1993).

¹⁰² *Id.*

¹⁰³ TEN-YEAR ARREST TRENDS BY SEX, 2000-2009, F.B.I., http://www2.fbi.gov/ucr/cius2009/data/table_33.html

¹⁰⁴ In females under 18, robbery was the second closet percent change at 30.2. *Id.*

declined only .1%, and constituted 25,757 FBI arrests in 2009. Only 11,639 arrests were made of men over 18 a negative percent change of 38.4, and only 167 under 18 showing a percent change of negative 49.7.¹⁰⁵ Prostitution is not going away, it is just changing demographics, and arresting underage sex workers is not a deterrent because it keeps them locked into the business of sex.

The unequal enforcement of prostitution laws turns its victims into criminals; punishing them and preventing them from re-assimilating into society. A criminal record from a prostitution arrest not only impacts her ability to seek employment outside of prostitution, but also impacts her ability to maintain custody of her children and even to travel.¹⁰⁶ Criminalization continues a sex workers' dependance on prostitution for income, while a male customer is often free to entertain himself at her expense.¹⁰⁷ Despite the fact that customers are equally involved in perpetrating the crime of prostitution, society does not generally view them as the bad actors. Instead, society often choses to further stigmatize the sex worker which leads to more prostitution.

2. SOCIAL STIGMA IS REFLECTED IN THE UNEQUAL ENFORCEMENT OF PROSTITUTION STATUTES

The social stigmatization of sex workers is reflected in the unequal enforcement of prostitution statutes and criminalization of the female sex worker. Society, although evolving,

¹⁰⁵ *Id.*

¹⁰⁶ See MACKINNON, *supra* 101, at 24. See also Hanger, *supra* 71, at 67, 68, available at <http://www2.parl.gc.ca/content/hoc/Committee/391/JUST/Reports/RP2599932/justrp06/sslrp06-e.pdf>

¹⁰⁷ *NY law nixes crime record for coerced prostitution*, N.Y. Post, Aug. 16, 2010, http://www.nypost.com/p/news/local/ny_law_nixes_crime_record_for_coerced_U20hXIGqIAhnuAsJclVijN (last visited Mar. 22, 2011). See also SHIVELY, *supra* 100, at 8.

still expects women to be the more sexually pure of the sexes; the one who must “protect her chastity” against male desire for which she is blamed.¹⁰⁸ These outdated expectations are incongruent with the actual female sex worker who is being discriminated by unequal enforcement. Therefore, to reduce prostitution, it is necessary to enforce the law against customers.

The reality is that sex workers more often than not have been sexually and or physically abused during their childhoods or through the practice of prostitution.¹⁰⁹ Typically these women are under-educated, and reliant on this form of employment as their primary source of income.¹¹⁰ These outdated moral gender-based expectations hinder equal enforcement of prostitution statutes because they do not recognize that the sex worker is frequently the victim of prostitution.¹¹¹ The sex worker’s status as victim is further undermined by stigmatizing her. “The stigma associated with prostitution activity is a powerful social label that discredits and taints anyone to whom it is attached. It radically changes the way that person perceives himself/herself and is perceived as a person. Stigmatization exposes such people to various forms of violence, abuse and contempt. The stigma that sex workers feel or the fear of discrimination has a huge effect on their lives. As a result, they seldom trust government-run systems because they feel judged and categorized by those systems.”¹¹²

¹⁰⁸ STEVEN D. LEVITT, ET AL, *SUPER FREEKONOMICS*, 43 (2009).

¹⁰⁹ “57% of the U.S. respondents also reported childhood physical abuse. Similarly, McIntyre (1999) found the majority of sex workers have a history of sexual and physical abuse (82% and 75%, respectively).” See SHIVELY, *supra* 107, at 5.

¹¹⁰ See CATHARINE A. MACKINNON, *supra* 106, at 24.

¹¹¹ See ERIK LUNA, *supra* 43, at 553.

¹¹² MARIA NENGEH MENSAH, *RÉPONSE AU RAPPORT DU COMITÉ DU BLOC QUÉBÉCOIS SUR LA PROSTITUTION DE RUE* [TRANSLATION], 5 (2002).

These social labels punish sex workers to a greater extent than their customers who are objectively no less morally blameworthy under current legislation. Customers know what they are doing is socially reprehensible and therefore, like sex workers, customers operate in secrecy and anonymity. The term “john” for a male purchasing sex from a sex worker likely was a name given by early “customers” to keep their identities a secret.¹¹³ However, unlike sex workers, about 50-70% of customers are married,¹¹⁴ which means that they are more often than not committing adultery, another immoral act, and customers are not engaged in prostitution as a means of survival. Despite being involved in identical behavior as sex workers, and being adulterers, the social stigma on customers is not as harsh as that of sex workers and may explain why they compose only about 10% of prostitution arrests.¹¹⁵ This social judgement influences the unequal enforcement of gender-neutral prostitution statutes in a way that favors customers, hurts sex workers, and does not diminish prostitution.

Arresting and prosecuting sex workers more often than customers requires that the sentence for customers engaged in prostitution should be higher to serve as a deterrent and balance this inequity. The next section will examine Canada and Sweden’s efforts to reduce prostitution and whether those approaches could be beneficial in reducing prostitution in United States.

IV. PROSTITUTION REGULATION AND ENFORCEMENT IN CANADA & SWEDEN

¹¹³ Prostitution Definition, WEBSTER’S ONLINE DICTIONARY, <http://www.websters-online-dictionary.org/definitions/Prostitution?cx=partner-pub-0939450753529744%3Av0qd01-tdlq&cof=FORID%3A9&ie=UTF-8&q=Prostitution&sa=Search#922> (last visited Mar. 22, 2011).

¹¹⁴ SANA LOUE & MARTHA SJATOVIC, *ENCYCLOPEDIA OF WOMEN'S HEALTH*, 538 (2004).

¹¹⁵ See FLOWERS, *supra* 2, at 80.

Although no country has been able to suppress the “world’s oldest profession” completely, there have been many attempts. In particular Canada and Sweden provide alternative solutions. For example, in attempting to legalize prostitution, Canada’s prostitution legislation has struggled to find a balance between allowing prostitution to continue, and prohibiting some of the associated vices.¹¹⁶ These tactics appear to be failing as prostitution, violence towards sex workers, and unequal enforcement against sex workers has become common.¹¹⁷ Sweden, on the other hand has legalized sex work and criminalized being a customer or a pimp.¹¹⁸ Here, it appears as though prostitution is declining and so too is sex trafficking of women and girls because enforcement successfully deters customers.¹¹⁹ These two strategies are discussed in the following two parts.

A. PROSTITUTION REGULATION AND ENFORCEMENT IN CANADA

Canada is not immune from gender-based discriminatory implementation of prostitution laws. Prostitution in Canada is legal, but very highly regulated. Canadian regulations, like those in United States are not free from bias in enforcement. Canada’s gender-neutral laws do not focus on the peripheral issues that are frequently caused by unequal enforcement that hinder reduction in prostitution that could be addressed by deterring customers. Police violence, lopsided sting investigations, higher arrests statistics for sex workers, and an increase in sex worker

¹¹⁶ See also OFFENCE IN RELATION TO PROSTITUTION, *supra* 10.

¹¹⁷ See Hanger, *supra* 106, at 21, available at <http://www.pivotlegal.org>.

¹¹⁸ *Legislation on the purchase of sexual services*, Regeringkansliet: Government offices of Sweden, Feb. 4, 2009, <http://www.sweden.gov.se/sb/d/4096/a/119861> (last visited Mar. 22, 2011).

¹¹⁹ See *Inquiry on the evaluation of the prohibition of the purchase of sexual services*, *supra* 74.

homicides, have fueled litigation from sex workers challenging the statutes legality. Unlike in the United States, in Canada it seems as though the sex workers and madams are able to obtain legal redress for this discrimination which makes the practice of prostitution more unsafe and impractical. In June 2011, they will have their day in court to defend an appeal from lower court which decided that some of current statutes are unconstitutional because they violated the sex worker's rights to freedom of expression and security of the person.¹²⁰

Recently, sex workers challenged these statutes in a court of law. In a final judgment from the Supreme Court of Ontario set for appeal mid-June 2011 in Ontario, the Court held for the plaintiff sex workers that these components among others are in violation of Canada's Charter rights to freedom of expression and security of the person.¹²¹ This decision, however, may not be enough to turn around legislation that by enforcement seems to be a failure.

Canadian laws, like those in the United States may be gender neutral on their face, but also have a discriminatory impact when applied. The law as it currently stands makes the idea of prostitution legal, but the activities surrounding the business of prostitution is illegal in the same way for both sex workers and customers.¹²² The Canadian Criminal Code makes public communication for the purposes of prostitution and bawdy houses illegal.¹²³ Sex Workers still

¹²⁰ Ian Austen, *Canada: 'Bondage Bungalow' Madam Wins Prostitution Law Challenge*, N.Y. Times, Sept. 28, 2010, available at <http://www.nytimes.com/2010/09/29/world/americas/29briefs-PROSTITUTION.html> (last visited Mar. 22, 2011).

¹²¹ *Id.* See also Tracey Tyler, *Prostitution laws struck down*, Toronto Star, Sept. 28, 2010, <http://www.thestar.com/news/canada/article/867332--prostitution-laws-struck-down> (last visited Mar. 22, 2011). See also, *Ottawa to appeal prostitution ruling*, CBC News, Sept. 29, 2010, available at <http://www.cbc.ca/news/canada/story/2010/09/29/mcguinty-prostitution.html> (last visited Mar. 22, 2011). See also OFFENCE IN RELATION TO PROSTITUTION, *supra* 116. See also, *T.O. sex-workers group denied status in bawdy law appeal*, The Canadian Press, Mar. 17, 2011, available at <http://www.ctv.ca/CTVNews/Canada/20110317/group-denied-status-in-bawdy-law-appeal-110317/> (last visited Mar. 22, 2011).

¹²² See Hanger, *supra* 117, at 1.

¹²³ See also OFFENCE IN RELATION TO PROSTITUTION, *supra* 121.

manage to conduct business, but these laws force sex workers to conduct business in a more dangerous manner by forcing them to meet customers not in the security of a bawdy house, but in locations the customer provides.¹²⁴ The law is so awkward that former chief justice Brian Dickson stated that:

“We find ourselves in an anomalous, some would say bizarre, situation where almost everything related to prostitution has been regulated by the criminal law except the transaction itself. The appellants’ argument then, more precisely stated, is that in criminalizing so many activities surrounding the act itself, Parliament has made prostitution *de facto* illegal if not *de jure* illegal.”¹²⁵

The Canadian sex worker should not be the victim of gender-based unequal enforcement because she is already often left with few alternatives to lead a socially more acceptable lifestyle. In Canada, the typical adult sex worker, like her United States counterpart, has experienced physical and sexual abuse, and a family history of drug and alcohol abuse. Many sex workers are otherwise homeless and young sex workers are in demand.¹²⁶ Canada has drawn a distinction between “survival sex” and “sexual slavery.”¹²⁷ The former is where a woman is “choosing” prostitution because her life situation seemingly affords her few other alternatives to provide herself with basic necessities without income from prostitution.¹²⁸ Accepting this as true, a

¹²⁴ BITTLE, *supra* 70, at 10.

¹²⁵ 10 Reference re ss. 193 and 195.1(1)(c) of the criminal code (Man.), [1990] 1 S.C.R. 1123, per Dickson CJ at page 44.

¹²⁶ DOREEN DUCHESNE, STREET PROSTITUTION IN CANADA, JURISTAT: CANADIAN CENTRE FOR JUSTICE STATISTICS, 3 (Catalogue no. 85-002-XPE vol. 17. 2002).

¹²⁷ See Hanger, *supra* 122, at 7.

¹²⁸ *Id.*

“survival” sex worker does not need to be rescued from amoral behavior, instead she needs to be given more alternatives via education and social programs to reduce prostitution.¹²⁹

The Canadian female sex worker, a victim of circumstance, is also the victim of gender discrimination demonstrated by arrest and conviction statistics. The street sex worker is more conspicuous than other sex workers involved in “escort services” or “massage parlors,” and therefore often becomes the center of most research attention.¹³⁰ Like most nations, Canada has struggled to develop hard statistics and research regarding prostitution because it is covert by its nature.¹³¹

Statistics regarding the incidence of prostitution can hide gender discrimination in enforcement by taking into account prostitution arrests generally. The number of individuals charged with breaking the few but pivotal laws regulating prostitution has declined 27.6 percent between 1998 and 2007 for adults,¹³² and has declined by 29.2% between 2006-2007 for individuals between the ages of 12-17 years old.¹³³ Although this decline may indicate that Canada is effectively combating prostitution offenses, a closer examination of those statistics mirrors the United States gender bias.

Unlike female sex workers, customers have “enjoyed relative immunity from the law.”¹³⁴ Broken down by offense, “communication for the purpose of prostitution” constitutes about 90%

¹²⁹ *Id.*

¹³⁰ *Id.* at 23.

¹³¹ *Id.*

¹³² MIA DAUVERGNE, CRIME STATISTICS IN CANADA 2007, JURISTAT: CANADIAN CENTRE FOR JUSTICE STATISTICS, 15 (Catalogue no. 85-002-X, vol. 28, no. 7. 2002).

¹³³ *Id.*

¹³⁴ BITTLE, *supra* 124, at 10.

of charges since its inception in 1985.¹³⁵ The charges broken down by gender indicate that for the years 2003-2004,¹³⁶ 68% of women charged were found guilty.¹³⁷ Upon conviction, 40% of women received prison sentences making up 92% of those sentenced to prison for this offense¹³⁸. Conversely for the same time span, 70% of charges¹³⁹ were stayed or withdrawn for men and slightly under 40% of men convicted were fined.¹⁴⁰ Astonishingly customers can escape also escape criminal charges entirely by attending Canadian “customer schools” where they may receive a stay of charge or a withdrawal of the charge.¹⁴¹ The prison sentence rate for men was just over 5%.¹⁴² These statistics from the Centre for Justice Statistics, Prostitution in Canada indicate that gender inequality is rampant in Canada as well. Like the United States, justification for harsher sentences for sex workers is derived from the fact that sex workers, unlike customers, are “repeat offenders.”¹⁴³ Based on the statistical fact that customers are far less likely to be

¹³⁵ See Hanger, *supra* 131, 52.

¹³⁶ In 1993-1994 39% of women convicted were imprisoned, compared with only 3% of men. For men the most severe penalty was typically a fine in 56% of cases, where only 32% of women received fines. “When prison sentences were imposed in adult courts for communicating, the median duration was the same for both sexes (30 days). However, when probation was the most severe penalty incurred, the median length of time was twice as long for women as for men (one year versus six months). In cases where a fine was administered, the median amount was \$200 for both sexes.” See DOREEN DUCHESNE, *supra* 126, at 1.

¹³⁷ See Hanger, *supra* 135, 53.

¹³⁸ *Id.* at 52-53.

¹³⁹ See DOREEN DUCHESNE, *supra* 136, at 1.

¹⁴⁰ See Hanger, *supra* 138 at 52-53. See also “...women convicted of this offense in the 1993-1994 period were generally dealt with more severely than men, perhaps because they were more likely to have had previous convictions, or cases involving multiple charges. The data show that 39% of women were imprisoned and 22% were put on probation (Chart E). In contrast, the majority (56%) of men were fined; only 3% were jailed and 13% were given probation” *Id.* at 10.

¹⁴¹ *Id.* at 53.

¹⁴² *Id.* at 52-53.

¹⁴³ See DOREEN DUCHESNE, *supra* 140, at 10.

arrested at all and if arrested released, harsher sentences for sex workers are symptomatic of ongoing discrimination.¹⁴⁴

Female sex workers being arrested more frequently than customers is not coincidental; Canada, like the United States, uses sting initiatives predominantly aimed at catching sex workers and not customers.¹⁴⁵ The report of the Federal- Provincial-Territorial Working Group on Prostitution stated, “as was confirmed by police testimony before us, that police find it easier to conduct stings against those who sell sex rather than those who buy it, particularly because of the potential danger for an officer posing as a sex worker.”¹⁴⁶

By punishing sex workers disproportionately than customers and often the victims of police brutality, sex workers are incentivized to distrust police which provides them with little protection from abuse. Untrusting of police probably arising from police brutality, sex workers typically when arrested are often charged additionally with, obstructing, attempting to obstruct justice, and failure to appear in court, an offense which may also lead to a warrant being issued against her.¹⁴⁷

¹⁴⁴ See CATHARINE A. MACKINNON, *supra* 111 at 18.

¹⁴⁵ See Hanger, *supra* 142, 54.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 53.

Several studies have indicated that the communication statute is has not reduced the incidence of street prostitution or the “social nuisance associated with its practice”¹⁴⁸ and has instead forced prostitution more underground and has therefore made it more dangerous.¹⁴⁹ How much more dangerous? Between 1875 and 1994, 80% of women murdered in the province of British Columbia were street sex workers.¹⁵⁰ Unequal enforcement of prostitution laws makes it difficult for sex workers to turn to police for help which does not discourage violence against sex workers.

Canada shares the United States problem of police violence against sex workers. According to a Pivot Legal Society in a report entitled *To Serve and Protect: A Report on Policing in Vancouver’s Downtown Eastside*, fifty people engaged in street prostitution in 2002 were the subject of violence at the hands of police.¹⁵¹ Even though prostitution is legal in Canada, police may also contribute to violence against sex workers by frequently failing to investigate or take seriously claims brought by sex workers believing that she brought the violence onto her by engaging in this line of work.¹⁵²

¹⁴⁸ “Section 213’s failure to combat street prostitution is well documented. As noted in the previous chapter, all the evaluation studies carried out by the Department of Justice in support of the Bill C-49 review process, as well as the study conducted in the mid-1990s by the Federal/Provincial/Territorial Working Group on Prostitution, found that section 213 had failed. Its enforcement has not reduced street prostitution activity or even the number of complaints by residents of Canada’s large cities.” *See Hanger, supra* 152, at 62. “The Hon. Customer C. Crosbie, then Minister of Justice and Attorney General of Canada, stated as much when he tabled Bill C-49 in committee: ‘The customer now negotiates and consummates the deal in most cases within the privacy and security of his car. Remove that opportunity and the demand for prostitution services will be substantially diminished. When the customer knows that there is a strong possibility that he may well be arrested and charged with an offense following the passage of this legislation if he attempts this kind of transaction, I can assure you that the demand is going to fall pretty rapidly.’” *Id.*

¹⁴⁹ *Id.* at 62.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 21, available at <http://www.pivotlegal.org>.

¹⁵² *Id.*

It appears as though by legalizing prostitution but severely limiting it, Canada has painted itself into a corner. Soon the either through the judiciary or the legislature, Canada may have to lift the restrictions that make prostitution impractical.¹⁵³ To modify their laws, Canada has considered other alternatives including the Swedish approach legalizing sex work while making the purchase of sex illegal.¹⁵⁴ The Swedish approach provides an example of what could happen if the United States were to reduce prostitution by deterring customers by and not punishing sex workers at all.

B. PROSTITUTION REGULATION AND ENFORCEMENT IN SWEDEN.

The problem of reducing prostitution through unequal enforcement of prostitution laws against sex workers could be remedied using the Swedish approach by only enforcing prostitution statutes against customers and pimps. In 1999, Sweden focused its criminalization initiatives on customers and not sex workers thus incentivizing sex workers to leave the profession through means other than criminalization.¹⁵⁵ The government of Sweden stated that its reasons for criminalizing customers and pimps and not sex workers was that, "...it is unreasonable to also criminalize the one who, at least in most cases, is the weaker party who is exploited by others who want to satisfy their own sexual desires."¹⁵⁶

¹⁵³ See Austen, *supra* 121.

¹⁵⁴ See *Legislation on the purchase of sexual services*, *supra* 119.

¹⁵⁵ *Id.*

¹⁵⁶ KVINNOFRID, REGERINGENS PROPOSITION 1997/98:55, (1997) available at <http://www.regeringen.se/content/1/c4/22/66/5406e038.pdf>.

Although the United States has often identified prostitution as an immoral act that should be criminalized, the Swedish government perceives the same activities as the victimization of women and children.¹⁵⁷ Basically trafficking¹⁵⁸ is a shift in perception away from the idea that sex workers are amoral actors, but as women and children who chose prostitution or are forced into prostitution as a means of survival.¹⁵⁹ It makes these so called “sex workers” victims of the crime rather than perpetrators by making prostitution an act that no woman could have consented to but for the lack of other choices.¹⁶⁰ The intent of trafficking laws is to reduce violence and other forms of harm against women and children while providing them with tools they need to begin new lives free from the stigma and shame of what would otherwise be a prostitution arrest. To accomplish this, the Swedish government only legalizes being a sex worker,¹⁶¹ and not being a customer or a pimp thereby creating legislated unequal enforcement against buyers of sexual services.

Enacted on January 1999 The Act Prohibiting the Purchase of Sexual Services (SFS 1998:408) is gender neutral legislation making the purchase and not the sale of sex illegal.¹⁶² This act was further modified and replaced with Chapter 6, Section 11 of the Penal Code which

¹⁵⁷ See AGAINST PROSTITUTION AND HUMAN TRAFFICKING, *supra* 75.

¹⁵⁸ COUNCIL OF EUROPE TREATY SERIES, COUNCIL OF EUROPE CONVENTION ON ACTION AGAINST TRAFFICKING IN HUMAN BEINGS AND ITS EXPLANATORY REPORT, 4, (2005) available at http://www.coe.int/t/dg2/trafficking/campaign/Source/PDF_Conv_197_Trafficking_E.pdf.

¹⁵⁹ “The idea behind the move was that prostitution should be regarded as an aspect of male violence against women and children and therefore tackled.” *How Sweden tackles prostitution*, BBC News, Feb. 8, 2007, http://news.bbc.co.uk/2/hi/uk_news/6343325.stm (last visited Mar. 22, 2011). See AGAINST PROSTITUTION AND HUMAN TRAFFICKING, *supra* 157.

¹⁶⁰ See AGAINST PROSTITUTION AND HUMAN TRAFFICKING, *supra* 158.

¹⁶¹ *Sex Workers are even fighting for the right to pay taxes on their legitimate income*, The Local: Sweden’s News in English, Sept. 8, 2008, <http://www.thelocal.se/14202/20080908/>. (last visited Mar. 22, 2011).

¹⁶² See *Legislation on the purchase of sexual services* *supra* 154.

additionally reformed the purchase of sexual services.¹⁶³ The government rational behind the shift (prostitution had previously been legal),¹⁶⁴ was to reduce the incidence of street prostitution and the harm caused by prostitution including but not limited to human trafficking for sexual purposes, assault, procuring and drug-dealing.¹⁶⁵ Sweden's geographical location to other countries that had also, until recently, legalized prostitution made it a through way for human trafficking, a harm Sweden was very incentivized to stop at its border.¹⁶⁶ Sweden recognizes that, "Demand is the key what primarily sustains trafficking and prostitution is demand. In other words, the fact that people – mostly men – buy sex"¹⁶⁷ and reducing this demand is critical to reducing prostitution and sex trafficking.

Swedish prostitution statistics regarding this shift in gender bias away from sex workers and toward customers has shown promise. Although it is difficult to obtain statistics on prostitution,¹⁶⁸ according to internal reports evaluating the effectiveness of the law, "the ban on the purchase of sexual services has had the intended effect and is an important instrument in preventing and combating prostitution and human trafficking for sexual purposes."¹⁶⁹ "Some statistics have indicated that there has been a 50% reduction in prostitution since the statute was enacted reducing the number of individuals selling sex services from about 2,500-3,000, with

¹⁶³ *Id.* See also Swedish Penal Code, available at <http://www.sweden.gov.se/content/1/c6/02/77/77/cb79a8a3.pdf>.

¹⁶⁴ See Hanger, *supra* 148, 73-74,

¹⁶⁵ See *Legislation on the purchase of sexual services*, *supra* 154.

¹⁶⁶ *Id.*

¹⁶⁷ See AGAINST PROSTITUTION AND HUMAN TRAFFICKING, *supra* 159.

¹⁶⁸ See Hanger, *supra* 152, 34.

¹⁶⁹ See *Legislation on the purchase of sexual services*, *supra* 165.

about 650 sex workers on the street, to 1,500 with no more than 350-400 street sex workers.¹⁷⁰ This effect has been most noticeable in major cities and experts suggest that prostitution has not been driven underground by the law¹⁷¹ although there are some skeptics who believe the government's evaluation may not be substantially based.¹⁷² Canada has also been concerned that the Swedish government has simply forced prostitution even further underground and into suburbia where it would be harder to manage and detect.¹⁷³

This reduction in prostitution, is reinforced by results of police stings aimed at customers.¹⁷⁴ Unlike Canada or the United States, police sting initiatives only targeting customers have been linked to statistics indicating that prostitution crime in Sweden is declining.¹⁷⁵ In 2009-2010 the government spent an additional about 6 million dollars to provide police with the tools and training to specifically combat sex trade.¹⁷⁶ The result was a substantial. The number of arrests of clients rose from 148 to 770 largely because of a country wide police initiative to crack down on prostitution including internet based prostitution,¹⁷⁷ not from an expansion of crime.¹⁷⁸

¹⁷⁰ See Hanger, *supra* 164, 73-74.

¹⁷¹ *Id.* at 73-74.

¹⁷² *Big claims, little evidence: Sweden's law against buying sex*, The Local: Sweden's News in English, July 23, 2010, <http://www.thelocal.se/27962/20100723/> (last visited Mar. 22, 2011).

¹⁷³ See Hanger, *supra* 170, at 73.

¹⁷⁴ *Evaluation of the ban on purchase of sexual services*, Regeringkansliet: Government offices of Sweden, July. 2, 2010, <http://www.sweden.gov.se/sb/d/13358/a/149231> (last visited Mar. 22, 2011).

¹⁷⁵ *Id.*

¹⁷⁶ *Big Increase in Prostitution Reports*, The Local: Sweden's News in English, July 27, 2010, <http://www.thelocal.se/28034/20100727/> (last visited Mar. 22, 2011).

¹⁷⁷ See *Inquiry on the evaluation of the prohibition of the purchase of sexual services*, *supra* 119.

¹⁷⁸ See *Big Increase in Prostitution Reports*, *supra* 172.

Prostitution laws punishing customers and not sex workers deters prostitution and disincentives human trafficking by using fines that judges frequently base on income. In 85 percent of customer arrests in Sweden, the customers were fined 50 days' pay,¹⁷⁹ which is a lower sentence than in Canada for communicating.¹⁸⁰ Swedish courts are considering enforcing the provision of the statute that includes prison time.¹⁸¹ Between January 1999 and March 2005, 914 customers were reported and 234 customers were convicted.¹⁸² The likelihood of a prosecution arrest has served as a deterrent causing 70-80% of customers to leave public places.¹⁸³ Trafficking in Sweden has now plateaued at about 400-600 cases compared to its neighboring countries who have thousands of cases annually.¹⁸⁴ Also, It appears that foreign women are no longer being trafficked into Sweden because traffickers no longer find the practice to be financially practical.¹⁸⁵ The Ministry of Justice in July 2010, confirms that Sweden has not experienced expansion of prostitution since the law has come into effect and has contracted the spread of organized crime as a result of the deterrent effect the law has had on customers and pimps.¹⁸⁶ These two advances further the Swedish government's intention of reducing

¹⁷⁹ *Sweden unveils tougher penalties for buying sex*, The Local: Sweden's News in English, Jan. 27, 2011, <http://www.thelocal.se/31680/20110127/> (last visited Mar. 22, 2011).

¹⁸⁰ See Hanger, *supra* 173, at 73.

¹⁸¹ See *Sweden unveils tougher penalties for buying sex*, *supra* 177.

¹⁸² See Hanger, *supra* 180, at 73-74.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ See *Evaluation of the ban on purchase of sexual services*, *supra* 174.

prostitution and human trafficking for sexual purposes simply by deterring customers from purchasing sex.¹⁸⁷

The Swedish government reports that punishing customers and not sex workers has served to diminish prostitution while positively affecting sex workers. The study has reported that there have been little if any negative effects on sex workers.¹⁸⁸ Sex Workers that would otherwise be arrested are now free to go and are directed to support agencies. Although the statutes were difficult to implement at first, police officers and prosecutors currently agree that the law is making a positive change, although it is very dependent on other social programs and judicial cooperation to provide additional support.¹⁸⁹

Unlike the United States, Sweden provides its citizens with extensive social programs which reduce prostitution by providing sex workers with alternatives to working on the streets. These programs work intensively with legislative initiatives such as support services, public awareness campaigns, reporting and reintegration, which help facilitate governmental goals.¹⁹⁰ To fund these programs, Sweden spends six times more money on social programming than for law enforcement.¹⁹¹ These programs have been associated with an increase in the number of individuals exiting prostitution, a reduction in the number of children in the trade, and an increase in the general comfort sex workers feel with contacting the police.¹⁹²

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ See Hanger, *supra* 185, at 73.

¹⁹¹ *Id.*

¹⁹² *Id.* at 73-74

Sweden's approach seems to be reducing prostitution and human trafficking for sexual purposes by enforcing prostitution laws against customers. Statutes in the United States that are also pro-sex worker, like that of Sweden, may be equally effective in reducing prostitution by deterring customers. The next section compares and contrasts the legislation and legislative intent of New York regulating prostitution.

VI. CONCLUSION

When customers are publicly released without any charges or fines, people are left believing that the law only applies to sex workers. This does not deter customers from participating in prostitution and therefore does not reduce prostitution. The United States has fifty states and fifty two criminal codes¹⁹³ to experiment with how to regulate prostitution in a way that successfully addresses the underlying issue of deterrence. Looking toward other approaches outside the United States, Canada is still modifying its floundering legislation,¹⁹⁴ while Sweden's gender biased enforcement against customers has been effective at reducing prostitution and trafficking while enabling sex workers to seek help and leave the profession.¹⁹⁵ The United States is very unlikely to adopt Sweden's solution entirely by not criminalizing the behavior of sex workers. However, the effectiveness of deterring customers through enhanced penalization has worked in Sweden and statutes that are similar, like those of New York, may be more effective and more likely to be adopted. In the United States, as long as sex workers are

¹⁹³ PAUL H. ROBINSON & MARKUS D. DUBBER, THE AMERICAN MODEL PENAL CODE: A BRIEF OVERVIEW, 10 New Crim. L. Rev. 319 (2007).

¹⁹⁴ See Austen, *supra* 153.

¹⁹⁵ See *Inquiry on the evaluation of the prohibition of the purchase of sexual services*, *supra* 193.

viewed as immoral actors, they will not receive the support they need to pursue alternative employment options. Deterring customers is critical to reducing prostitution, not necessarily arresting and prosecuting sex workers.

