

# Why Sex Work Isn't Work - Safety, Sexual harassment, Civil Rights

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Many in favor of the legalization of prostitution refer to it as “sex work” and employ concepts such as “consent,” “agency,” “sexual freedom,” “the right to work,” and even “human rights” in the course of making their defense. [1] Consider some of the common claims defenders of legalization advance: sex work is work just like any other form of work, only the social shame and stigma around sex prevent people from seeing it as such; [2] many (most) women [3] who sell sex chose to be there, so we should respect their choice and agency, after all they are in no different a position than someone who chooses a minimum wage job without better alternatives; [4] women choosing to sell sex is an example of sexual freedom and rejecting repressive norms that limit women’s sexuality, [5] so we should respect their sexually autonomous choices to sell sex for a living. Other defenders are more circumspect in their defense of legalization, arguing that prostitution is “the oldest profession,” isn’t going away, and so we are better off adopting a “harm reduction model.” That is, they argue that many of the harms associated with the buying and selling of sex are harms that are either a product of its illegality or can be reduced by a program of regulation that would be required if prostitution were legalized. [6] For example, they claim that legalization will reduce trafficking for purposes of sexual exploitation; they claim that legalization will increase the health and safety of women (the workers); they claim that legalization will reduce death, violence, and other abuses. [7]

There is an abundance of literature rebutting these claims. Study after study shows that the primary reason that women begin selling sex for money is out of economic desperation. [8] Moreover, many women in prostitution began before the age of 18; [9] many feel trapped and feel they have no other realistic opportunities for economic survival. [10] Legalization does not come with many of the benefits its proponents suggest: it does not reduce trafficking (assuming a distinction can be made) [11]; “indoor prostitution” is not necessarily safer than “outdoor” prostitution or streetwalking, as it is called; [12] it does not provide a solution to the most vulnerable women in prostitution—immigrants—who are often excluded from regulatory procedures and licensing; it does not necessarily increase the health and safety of women—buyer’s health and STD status is not tested under legalization; legalization does not remove social stigma for the women in prostitution. [13] However, legalization does likely remove some of the social stigma for the buyers in addition to making access to women easier and less dangerous (for the buyer). Moreover, despite the common refrain calling prostitution “sex work,” many of the women in prostitution, both actively and exited, refer to it as “the life” or “a lifestyle”—the emphasis on “the life” as describing a way of being in the world, a description of the whole of one’s existence, not as something one leaves at “the office.” [14] Finally, the violence—the potential for assault, rape, and even death—endemic to prostitution exceeds the level of danger accompanying even those most dangerous of other forms of work. [15]

Many of these arguments have been made and are gaining more and more traction against the legalization (regulatory) position. More and more nation-states and international bodies are recognizing that the options for addressing prostitution aren't simply legalization or criminalization [16]—neither of which does anything for the women in prostitution. [17] The Nordic model, in which the selling of sex is decriminalized and the buying of sex criminalized, along side social services for increasing the exit options of the women, is being increasingly adopted and considered as the best approach to combating the harms of prostitution, empowering persons in prostitution, all the while affirming a commitment to sex equality.

However, in this paper, rather than defend the Nordic Model further, as eloquent defenses are already made, [18] I wish to take seriously the claim that selling sex is “work like any other kind of work” and examine what taking this claim on its face as true would entail in the United States. In my view, there are serious problems with the regulatory approach that aims to treat women selling sex (“sex work” in their lingo) as simply a form of work like any other. To take the claim that “sex work” should be treated/regulated like any other form of work seriously, the following, at minimum, would have to be addressed:

### **Worker Safety, Sexual harassment, Civil rights**

In what follows, I draw on the laws of the United States regarding workers safety, sexual harassment, and civil rights to show that the claim that selling sex is work just like any other form of work is indefensible. It's indefensible because if we apply the regulations currently applied to other forms of work to the selling and buying of sex, the acts intrinsic to the “job” can't be permitted; they are simply inconsistent with regulations governing worker safety, sexual harassment laws, and civil rights.

OSHA (Occupational Safety and Health Administration) is responsible for overseeing worker safety and health in the U.S. They specify the standards for worker safety regarding in employment contexts that include exposure to blood borne pathogens and other potentially infectious materials (of which sperm counts) [19], as they are concerned with the potential transmission of HIV or Hepatitis, or other infectious diseases. The sexual acts that form the necessary working conditions for (persons) women selling sex means that routine “Occupational Exposure” is intrinsic to the “job”. Occupational exposure “means reasonably anticipated skin, eye, mucous membrane, or parenteral contact with blood or other potentially infectious materials that may result from the performance of an employee's duties.” [20] Employers must “list ... all tasks and procedures or groups of closely related task and procedures in which occupational exposure occurs...” and [t]his exposure determination shall be made without regard to the use of personal protective equipment.” [21] So, presumably, every potential sex act would need to be on the list, as “tasks”, in which occupational exposure occurs, and the list needs to be made without reference to condom use because the list is required list exposure threat without reference to personal protective equipment.

Condom use certainly would be a minimum requirement for compliance with OSHA standards. However, condom use will not be sufficient to meet OSHA regulations, for: “All procedures involving blood or other potentially infectious materials shall be performed in such a manner as to minimize splashing, spraying, spattering, and generation of droplets of these substances.” [22] Condoms break, they are not foolproof. Moreover, condoms break more frequently in anal sex. The CDC states that receptive anal sex with an HIV positive person, even with a condom, represents a 100X greater risk for contracting HIV than oral sex with a condom. [23] Anal sex, with an HIV positive partner, without a condom puts the “recipient” at a 2000X greater risk for contracting HIV than oral sex with a condom. [24] Condoms, while reducing risk, does not eliminate it, nor arguably does it “minimize

risk” per the OSHA standard; Condoms also don’t protect against all sexually transmitted infections (STIs). The CDC makes clear that, though condoms can reduce some STIs, they are not effective for all STIs, HPV and genital ulcers occur in places that condoms don’t cover, and hence condom use is not necessarily an effective prophylactic in all cases. [25] Moreover, we know that even where condoms are required by law, “clients” often prefer not to use them. [26] We also know that the most vulnerable among persons selling sex are the least likely to use condoms (to have the power to require purchasers of sex to use them), for example, transgendered persons and “migrant sex-workers.” [27]

Other relevant OSHA regulations that clearly would govern worker safety in a “sex work” environment:

1. “Mouth pipetting/suctioning of blood or other potentially infectious materials is prohibited.” Note this doesn’t say is permitted with protective gear. It says prohibited. So, oral sex seems to be inconsistent with OSHA worker safety standards as applied to every other form of work. [28] Will “sex work regulations” allow an exception? And if so, what could possibly be the rationale? Will we say that worker safety is less of a concern in this industry?
2. “Gloves. Gloves shall be worn when it can be reasonably anticipated that the employee may have hand contact with blood, other potentially infectious materials, mucous membranes, and non-intact skin...” This regulation seems to entail that “sex workers” must wear latex gloves while performing any “work task” in which their hands may come in contact with potentially infectious materials (i.e., sperm). Should this sound ridiculous to some readers, consider that the St. James Infirmary **Occupational Safety & Health Handbook** makes a very similar recommendation, but only for some activities. The *Handbook* suggests: “use latex gloves (ideally, elbow length) and lots of lube for fisting.” [29] But, this is not the only “task” in which exposure is possible or even likely. Moreover, in other fields in which exposure is possible or likely, notably medical fields, glove wearing is mandatory. Small cuts or abrasions to the skin are potential transmission sites and “minimizing risks” surely seems to demand gloves be worn at all times for all “tasks” in which exposure is possible. Hence, St. James’s Handbook goes further and states: “Because body fluids such as blood, vomit, urine, feces, saliva and semen many contain infectious organisms, protective gloves must always be worn when dealing with body fluids.” [30]
3. “Masks, Eye Protection, and Face Shields. Masks in combination with eye protection devices, such as goggles or glasses with solid side shields, or chin-length face shields, shall be worn whenever splashes, spray, spatter, or droplets of blood or other potentially infectious materials may be generated and eye, nose, or mouth contamination can be reasonably anticipated.” [31] Ejaculation on the face of women in pornography is routine. Data for how wide spread this practice is among men who buy sex is unknown. However, we can safely assume it’s not zero. However, this practice would either be prohibited (under the OSHA minimize risk standard) or if permitted worker protection demands masks, eye protection, and face shields. If this sounds absurd, consider that among porn performers gonorrhea and Chlamydia is frequent, including such infections in the eyes. [32]
4. “Gowns, Aprons, and Other Protective Body Clothing. Appropriate protective clothing such as, but not limited to, gowns, aprons, lab coats, clinic jackets, or similar outer garments shall be worn in occupational exposure situations. The type and characteristics will depend upon the task and degree of exposure anticipated.” While this may indeed sound absurd in the context of “sex work”, it goes to the point that the kinds of worker protections deemed necessary in every other work context, in which exposure to infection materials is possible or likely, cannot be maintained in the context in which the work is sex. One can argue that an exception can be carved out for this type of “work”, but then what does that say about the relative value of these “workers” as opposed to every other

worker who is entitled to such protection? Moreover, exceptions are permitted only in “rare and extraordinary circumstances” where it is judged that health and safety are put in jeopardy by the use of personal protective equipment. [33] Even further, as noted above not all STIs can be protected against by condom use, or even gloves. “Syphilis can be transmitted through skin-to-skin contact and does not require exposure to semen or vaginal fluids.” The same is true of herpes, molluscum contagiosum, and HPV, among other infectious diseases. [34] Direct skin on skin contact puts “workers” at risk. Hence, direct skin-to-skin contact is not compatible with OSHA regulations governing exposure to potentially infectious materials.

5. In the event of exposure OSHA requires: “The source individual’s blood shall be tested as soon as feasible and after consent is obtained in order to determine HBV and HIV infectivity. If consent is not obtained, the employer shall establish that legally required consent cannot be obtained. When the source individual’s consent is not required by law, the source individual’s blood, if available, shall be tested and the results documented.” [35] This means that if any employee is exposed to a potentially infectious material, despite using personal protective equipment, the source individual (the buyer in the case of “sex” work) needs to be tested for HIV and HBV. In all of the places in which prostitution is legal it is the sellers not the buyers that are mandated for testing, which of course protects the buyer to an extent, but does nothing to protect the seller/worker.

Obviously the OSHA standards were not created with sex work in mind, however that is irrelevant to the key point being made here—namely, if these are the regulations deemed necessary to protect worker safety in every other work environment in which exposure to potentially infectious material is a risk of the job, why should they not apply in the context of “sex work”? If selling sex is work like any other form of work, then the safety of these workers is just as important to protect as the safety of workers in other contexts. The retort that condom use will be required by law and that is sufficient to protect the health and safety of “sex workers” is simply not true. Condoms may reduce risk in some cases, as noted above, however they do not “minimize” risk nor do they protect against all potentially infections transmissions (STIs) as noted above. Moreover, where the selling and buying of sex is currently legal and condoms required by law—New Zealand, Australia, the Netherlands, parts of Nevada, e.g.—there is ample evidence of clients preferring sex without condoms, offering to pay more for sex without condoms, and a lack of enforcement among “management.” [36]

The attempt to draw attention to worker safety in the sex industry is not new. In 2012, voters in Los Angeles voted for “Measure B”—a law requiring condom use in the pornography industry as a means of protecting worker health and safety. The result of the law was not, in fact, increased worker safety. The result was that applications for permits to film in L.A. County dropped 90%; porn production companies either stopped filming in L.A. County or stopped filing for permits and continued to film illegally. [37]

The fact is the buyers drive the market, as is true generally in commercial exchanges. If the buyers don’t want to use condoms or follow other “worker safety protocols” as would be necessary to protect the safety and health of workers, then we have little reason to be confident that legalization and regulation will effectively protect those who sell sex.

## **Sexual Harassment**

Sexual harassment is defined as “unwelcome sexual conduct that is a term or condition of employment.” [38] Such harassment can take the form of a quid pro quo (when “submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting

such individual”) or in subjecting the employee to a hostile work environment. [39] The standard kinds of cases of sexual harassment involve a supervisor or co-worker harassing, in one form or another, a co-worker. Presumably, in the context of “sex work” a supervisor or co-worker demanding sex as a condition of employment or creating a hostile work environment could be adjudicated similarly to other work contexts. A more difficult kind of case to consider in the context of “sex work” is harassment by a client. Hence, it is important to note: “The harasser can be the victim’s supervisor, a supervisor in another area, a co-worker, or someone who is not an employee of the employer, such as a client or customer.” [40] So, “clients” or “customers”—purchasers of sex in this discussion—can also be found to have sexually harassed someone from whom they are purchasing sex, under the current legal standards.

It is a serious question as to how sexual harassment laws can possibly be enforced in a context in which sex is a commercial exchange. Where every “job task” potentially involves unwelcome sexual conduct as a condition of employment, because sex is the job, how can we possibly enforce sexual harassment law? Will we carve out an exception for commercial sex—sexual harassment laws don’t apply in this context? Or will we continue to stand by our judgments that sexual harassment is a form of sex inequality, from which employees deserve protection? In which case, legalization of prostitution is simply incompatible with sexual harassment legislation that protects “all workers.”

To see precisely how the legalization of the buying and selling of sex is inconsistent with the logic of sexual harassment law, consider the following. First, as noted above “unwelcomeness” is the legal standard for whether some act constitutes sexual harassment. Whether the victim of the harassment voluntarily complied is not a defense to sexual harassment. “[T]he fact that sex-related conduct was ‘voluntary,’ in the sense that the complainant was not forced to participate against her will, is not a defense to a sexual harassment suit brought under Title VII. . . . The correct inquiry is whether [the victim] by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary.” [41] “The Eleventh Circuit provided a general definition of “unwelcome conduct”: the challenged conduct must be unwelcome “in the sense that the employee did not solicit or incite it, and in the sense that the employee regarded the conduct as undesirable or offensive.” [42] Assume for the moment that in the context of “sex work” agreeing to accept money for specific sex acts constitutes welcomeness—insofar as doing so can be understood to “solicit” or “incite” the agreed to acts. Under this assumption, the employee has the burden of showing that any further—unwelcome acts—are, in fact, unwelcome. Moreover, the employee must clearly notify the harasser that the conduct is unwelcome, and notify management. If we adopt the language of some of those who defend legalization, and see sex workers as “consumer service agents” engaged in “customer relations,” how realistic is it to think that the sex worker is going to be in a position to make meaningful refusals?, to notify the customer that is conduct is unwelcome?, to report to management continued harassment? We know that economic survival is the reason that people do this “work.” We also know that in work environments that aren’t sexual, sexual harassment is underreported due to fear of sanction or loss of job. Moreover, what possible sense can it make to say that “refusal to submit to the sexual conduct cannot be a basis for denying her an employment benefit or opportunity” when sex is the condition of employment?

Consider further that Courts have found the presence of “pornographic magazines.” “vulgar sexual comments” “sexually oriented pictures in a company- sponsored movie and slide presentation,” “sexually oriented pictures and calendars in the workplace,” all relevant to hostile work environment claims. [43] In *Barbetta*, “the court held that the proliferation of pornography and demeaning comments, if sufficiently continuous and pervasive “may be found to create an atmosphere in which women are viewed as men’s sexual playthings rather than as their equal coworkers.” [44] How could such a ruling have effect in a brothel: where pornography is used as an accompaniment to sex? Where “vulgar sexual comments” are the eroticized language of clients? Where sex is the job?



Of course, these rulings and regulations are premised upon the fact that sex isn't the job itself. If the sex is the job, what sense can we make of the claim that treating (unwelcome) sex as a condition of employment is an instance of sexual harassment, and so sex inequality? Legalizing prostitution is not compatible with the legal recognition of sexual harassment as a form of sex inequality. And, supposing advocates argue for a carve out, an exception, for this form of "work," what message does that convey? Some women are deserving of protection from, or legal recourse in the event of, unwanted sexual harassment while some women are not? And those that aren't are the least advantaged of all "workers"? This reeks of the all too common view that women that prostitute themselves are whores by nature and deserve whatever they get.

## **Civil Rights**

Although those advocating for legalization (or decriminalization) often frame their arguments in terms of the civil or human rights of "sex workers," once sex is a regulated commercial activity the civil rights of the "clients" are legally enforceable. Businesses may not refuse service to a person on the basis of race, color, national origin/ancestry, sex/gender, religion/creed and disability (physical and mental), as a matter of Federal Law. Some U.S. states have further legislation prohibiting discrimination on the basis of sexual orientation, gender identity and expression. What this means is that businesses that provide "public accommodation" are not free to deny service to anyone who is a member of such a protected classes because they are member of the protected class. To do so is to infringe upon the civil rights of the relevant person. So far, so good. But, how are we to understand this in the context of providing sex, as a commercial service, and so "public accommodation"?

If sexual autonomy is to mean anything, it has to mean the right to refuse sex with anyone, at anytime, for any reason. We may think in one's personal life refusing to entertain the possibility of dating or becoming sexually involved with someone solely on the basis of their race, religion or disability is an undesirable preference, especially if such preferences are rooted in prejudice or animus more broadly speaking. Nonetheless, everyone has the right to choose their sexual partners on whatever grounds they subjectively judge to be relevant, including the sex and gender of any potential partner. If someone thinks they absolutely don't want to have sex with anyone over 65, it is absolutely their right to act (or refuse to act) on that preference. We are under no obligation to have sex with someone who might be interested in sex with us. The right to refusal for any reason, whether an "admirable" reason, or not is absolute.

However, where sex is a commercial activity, considered to be work just like any other form of work, its hard to see any rationale for defending the "rights of workers" to refuse service to someone based on their subjective preferences. Should "clients" have the right to sue brothels or particular women for "refusing service" based on their membership in a protected class? If this sounds absurd, consider the evidence New Zealand's Prostitution Reform Act (PRA) offers: In a report following up on the PRA, five years after its passage, the Review Committee queries, among other things, the ability of "sex workers" to refuse sexual services to a particular client. They found that 60% of "sex workers" felt more able to refuse sex with a particular client than prior to the passage of the PRA, which, of course, means 40% did not feel more able to refuse sex with a particular client. [45] In interviewing both brothel owners and "sex workers", the Committee reports that although "workers" have "right" to refuse a particular client both "workers" and owners held that refusal was acceptable "only with a good reason." One brothel owner is quoted as saying, "We won't allow nationality to be the reason—they [the women selling sex] don't have a right to discriminate." [46]

Hence, where sex is a "job like any other," a regulated commercial exchange, the "providers" are cannot be legally free to refuse clients in protected classes on grounds of their membership in the

protected class. Refusing to have sex with anyone over 65 is age discrimination, where sex is a job like any other. Similarly, refusing to have sex with someone because of their sex (or gender or transgender status, where protected) is also potentially a civil rights violation of the client. This argument, more than any other, I think exposes the fault lines of the “sex work is work like any other form of work” argument. Refusing sex is not like refusing to serve someone dinner, do their nails, cut their hair, or other forms of “personal service.” Refusing to give someone a manicure on grounds of their race, age, sex, etc. is a gross refusal to treat them as an equal person. It is, in fact, to treat them unequally and to deny their basic civil rights. Refusing to have sex with someone, on any grounds, is simply not parallel. Refusing to have sex with someone does not make them unequal, civilly or otherwise.

Beyond the arguments I have presented here there are further questions raised by a system of legalization. Where it is legal to include sex as a condition of employment (in sex work), other types of job descriptions may be redefined to include sex. How will we draw the line? Or is sex potentially legitimate part of any job description? Where welfare or unemployment benefits require recipients to accept available work, will sex work be required of people (women) in lieu of public assistance? Under current contract law, failure to perform agreed upon services is a violation of the terms of the contract and may demand compensation or penalties for the party refusing to fulfill the contract: will this extend to “sex work” contracts? [47] Simply extending the regulations that currently cover employment law, contracts, and other public benefits to “sex work” reveals the implausibility of the slogan “its work just like any other form of work.”

One of the primary motivations for the legalization argument is the desire to reduce harm among persons in prostitution, although as noted above many of the harms associated with the selling of sex will not be removed or reduced with legalization, and some, indeed may be exacerbated. However, the harms associated with the criminalization of the selling of sex—arrest, incarceration, inability to report the crimes of rape, assault, and other forms of violence—need to be addressed. Even worse, under systems of criminalization of the selling of sex, vulnerable persons (largely, women) are made more vulnerable to assault and coercion into sex by police officers, the very people charged with “protecting” them against such abuses. [48] The answer to these harms is not legalization. Rather, it is the full decriminalization of the selling of sex. However, a commitment to sex equality, to the full social, civil, and political equality of prostituted persons does not entail providing buyers full, unfettered legal access through a system of legalization. The buyers—the demand—fuel the system of inequality that keeps prostitution flourishing. Criminalization of the buying of sex is an essential element of addressing the harms of prostitution, and the harm that is prostitution. We need the kind of Copernican Revolution the Nordic Model embodies.

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## Footnotes

[1] For a history of the “Sex Worker” movement, see: Chateauvert, Melinda. *Sex Workers Unite: A History of the Movement from Stonewall to SlutWalk* (Boston, MA: Beacon Press, 2013). For an example of arguments in favor of legalization, see: Weitzer, Ronald. *Legalizing Prostitution: From Illicit Vice to Lawful Business* (New York: New York University Press, 2012).

[2] See, for example, Nussbaum, Martha. “‘Whether from Reason or Prejudice’: Taking Money for Bodily Services,” in *Prostitution and Pornography: Philosophical Debate about the Sex Industry* (Stanford, CA: Stanford University Press, 2006), edited by Jessica Spector, pp. 175-208.

[3] Men, boys, and transgendered persons also sell sex for money. However, I refer to women throughout the text when I refer to the sellers of sex. I do this because, overwhelmingly, the persons who sell sex are women or girls. The fact that women are the overwhelming sellers, and men are the vast majority of buyers is relevant to discussing prostitution its harms and who would benefit from legalization. Moreover, it makes clear that it is a socially gender institution, which is crucial to an accurate engagement with the issues at stake.

[4] Weitzer (2012).

[5] Various groups such as C.O.Y.O.T.E (Call Off Your Old Tired Ethics) make this claim, see Sex Workers Unite for discussion. Weitzer also makes this argument of some women in prostitution. For example in a table defining “Selected Types of Prostitution” he classifies “Independent Call Girl/Escort” as having “None” under the category of “Exploitation by Third Parties” (Table 1.1, p. 17). And, later in discussing the benefits of prostitution, he cites job satisfaction higher among indoor workers including the benefits of “feeling ‘sexy,’ “beautiful,” and “powerful” (*Legalizing Prostitution*, p. 29).

[6] The best examples of these claims can be found in the Occupational Health and Safety Handbook published by St. James Infirmary (edited by Naomi Akers and Cathryn Evans, 2013, 3<sup>rd</sup> edition). St. James Infirmary “is an Occupational Safety & Health Clinic for Sex Workers founded by activists from COYOTE (Call Off Your Old Tired Ethics) and the Exotic Dancers Alliance in collaboration with the STD Prevention and Control Section of the San Francisco Department of Public Health.” They are a private, non-profit. The entire handbook has been archived at <http://perma.cc/02CetqGsJMU?type=live>.

[7] This was part of the argument relied on in *Bedford v. Canada* (2013), the Canadian Supreme Court Case in which the Court struck down the avails and bawdy house provisions of the Canadian criminal code (provisions which made it illegal to live off the avails of prostitution of another person and to maintain a bawdy house or place of prostitution, respectively). For a thorough analysis of the Bedford case, see: Waltman, Max. “Assessing Evidence, Arguments, and Inequality in *Bedford v. Canada*,” *Harvard Journal of Law & Gender*, Summer 2014, Vol. 37, pp. 459-544, available online at <http://harvardjlg.com/wp-content/uploads/2014/07/Waltman.pdf>.

[8] A variety of sources confirm this, across a range of perspectives on whether prostitution should be legalized, decriminalized, or criminalized in some form. See for example: A study conducted by the Policy Department on Citizen’s Rights and Constitutional Affairs for the European Parliament titled, “Sexual Exploitation and Prostitution and its impact on gender equality,” completed in January 2014, available online at <http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/493040/IPOL->



[FEMM\\_ET\(2014\)493040\\_EN.pdf](#); see also, "Behind Closed Doors," a report by the Sex Workers Rights Project, available at <http://sexworkersproject.org/downloads/BehindClosedDoors.pdf>, citing "financial vulnerability" and "economic deprivation" as the overwhelming reason for entry into prostitution in a study of "indoor" sex work in New York City; see also, "Shifting the Burden: Inquiry to assess the operation of the current legal settlement on prostitution in England and Wales," a March 2014 report prepared by an All-Party Parliament Group on Prostitution and the Global Sex Trade, available at <http://appgprostitution.files.wordpress.com/2014/04/shifting-the-burden1.pdf>, citing "poverty" as the primary reason for entry into prostitution for 74% of indoor workers. Other routes into prostitution cited by the report include: experience of sexual abuse as a child, drugs and alcohol abuse, being in the foster care system as a female child; they conclude "More often than not, prostitution is entered out of desperation arising from a number of situation-specific factors."

[9] The FBI reports the average age of entry for girls into prostitution (in the U.S.) at between 13-14, see: [http://www.fbi.gov/stats-services/publications/law-enforcement-bulletin/march\\_2011/human\\_sex\\_trafficking](http://www.fbi.gov/stats-services/publications/law-enforcement-bulletin/march_2011/human_sex_trafficking); see also, "Myths and Facts about Trafficking for Legal and Illegal Prostitution" (March 2009) <http://www.prostitutionresearch.com/pdfs/Myths%20&%20Facts%20Legal%20&%20Illegal%20Prostitution%203-09.pdf>

[10] Melissa Farley's extensive study of prostitution across nine countries, reports that 89% of those women in prostitution interviewed for the study "wanted to escape prostitution but did not have other means for survival." See: Farley, et al. "Prostitution and Trafficking in Nine Countries: An Update on Violence and Posttraumatic Stress Disorder," available at <http://www.prostitutionresearch.com/pdf/Prostitutionin9Countries.pdf>

[11] See: MacKinnon, Catharine A. "Trafficking, Prostitution, and Inequality," Harvard Civil Rights-Civil Liberties Law Review, 2011, Vol. 46, No. 2, pp. 271-293, available at <http://harvardcrcl.org/wp-content/uploads/2011/08/MacKinnon.pdf>

[12] See, Waltman. See also, Behind Closed Doors: An Analysis of Indoor Sex Work in New York City, published by Sex Workers Project at the Urban Justice Center (2005), available at <http://sexworkersproject.org/downloads/BehindClosedDoors.pdf>

[13] See, Waltman and MacKinnon (2011). See also, Moran, Rachel. Paid For: My Journey Through Prostitution (Dublin: Gil & Macmillan, 2013).

[14] As one example, see Moran, Paid For (2013).

[15] According the National Bureau of Labor Statistics report on fatal job injuries in 2011, fishers and logging are the most dangerous jobs in the U.S. (as measured by fatalities). "In 2011, the fatal injury rates of fishers (127.3) and loggers (104.0) were approximately 25 times higher than the national fatal occupational injury rate of 3.5 per 100,000 full-time equivalent workers. Pilots, farmers, roofers, and drivers/sales workers and truck drivers also had fatal injury rates that exceeded the all-worker rate of 3.5 fatal occupational injuries per 100,000 full-time equivalent workers." See: <http://www.bls.gov/opub/btn/volume-2/death-on-the-job-fatal-work-injuries-in-2011.htm>. By contrast, the death rate of women in prostitution is 40 times higher than women not in prostitution. In a study of women in prostitution in Colorado, researchers calculated a crude morality rate of 391 per 100,000 and a homicide rate among active "prostitutes" as 229 per 100,000. See, "Morality in a Long-Term Open Cohort of Prostitute Women," American Journal of

Epidemiology (2004), Vol. 159, no. 8, pp. 778-785. Based on this study, the death rate of women in prostitution is just over 3 times higher than that of fishers, and nearly 4 times higher than loggers, the two most dangerous jobs in the U.S.

[16] Increasingly States and International Bodies are considering or advocating for the Nordic Model, which recognizes that the criminalization of the selling of sex harms women, and other prostituted persons, and so decriminalizes the selling of sex while continuing to criminalize the buying of sex. Norway, Sweden, Iceland all have adopted this model of legislation. France's parliament recently voted affirmatively in favor the Nordic Model, as did the European Parliament. It is currently being considered in the U.K. as well as Canada. In Germany, trauma experts are organizing against the current system of decriminalization and advocating for the Nordic model as well claiming: "Prostitution is in no way a job like any other. It is degrading, torturous, exploitive. On the side of the prostituted, there is a lot of horror and disgust at play, which they have to repress in order to get through it at all." So says Michaela Huber, psychologist and head of the German Society for Trauma and Dissociation. See: <http://www.emma.de/artikel/traumatherapeutinnen-gegen-prostitution-317787>, see the English translation here: <http://www.sabinabecker.com/2014/09/german-psychologists-and-the-scientific-case-against-prostitution.html>

[17] Persons, women, in prostitution are not a monolithic group. The more inequality persons, women, face generally with regard to race, national origin, age, ability, economic status the more unequal they are within systems of prostitution. To the extent that legalization would benefit anyone currently in prostitution, it would benefit the most well-off, the women with the most choice, the most safety, and the most freedom within. Just like any other industry regulated by a capitalist market, there will be (and are) tiers of employment-hierarchies within the industry. There is no reason to think that legalization will equalize the hierarchies within the sex industry anymore than in any other industry.

[18] See for example: MacKinnon (2011).

[19] "Other Potentially Infectious Materials means (1) The following human body fluids: semen, vaginal secretions, cerebrospinal fluid, synovial fluid, pleural fluid, pericardial fluid, peritoneal fluid, amniotic fluid, saliva in dental procedures, any body fluid that is visibly contaminated with blood, and all body fluids in situations where it is difficult or impossible to differentiate between body fluids; (2) Any unfixed tissue or organ (other than intact skin) from a human (living or dead); and (3) HIV-containing cell or tissue cultures, organ cultures, and HIV- or HBV-containing culture medium or other solutions; and blood, organs, or other tissues from experimental animals infected with HIV or HBV." See: Occupational Safety and Health Standards, Code of Federal Regulations, Standards, Part 1910, Toxic and Hazardous Substances, Blood Borne Pathogens, (hereinafter, OSHA regulations) available on line at, [https://www.osha.gov/pls/oshaweb/owadisp.show\\_document?p\\_table=STANDARDS&p\\_id=10051](https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=STANDARDS&p_id=10051)

[20] OSHA regulations, [https://www.osha.gov/pls/oshaweb/owadisp.show\\_document?p\\_table=STANDARDS&p\\_id=10051](https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=STANDARDS&p_id=10051)

[21] Ibid.

[22] Ibid.

[23] See, <http://www.cdc.gov/hiv/topics/treatment/PIC/pdf/chart.pdf>

[24] See, <http://www.cdc.gov/hiv/topics/treatment/PIC/pdf/chart.pdf>

[25] See, <http://www.cdc.gov/condomeffectiveness/brief.html>

[26] “Throughout the world, study after study documents that about half of all johns request or insist that condoms are not used when they buy sex. Many factors militate against condom use: the need of women to make money; older women’s decline in attractiveness to men; competition from places that do not require condoms; pimp pressure on women to have sex with no condom for more money; money needed for a drug habit or to pay off the pimp; and the general lack of control that prostituted women have over their bodies in prostitution venues. Even though sex businesses had rules that required men to wear condoms, men nonetheless attempted to have sex without condoms. According to an economic analysis of condom use in India, when extremely poor women used condoms, they were paid 66%-79% less by johns.” See: <http://www.prostitutionresearch.com/pdfs/Myths%20&%20Facts%20Legal%20&%20Illegal%20Prostitution%203-09.pdf>

[27] In a Special Report “Thematic Report: Sex Workers. Monitoring implementation of the Dublin Declaration on Partnership to Fight HIV/AIDS in Europe, Central Asia” prepared by ... reports, “Overall, condom use by female sex workers with clients is relatively high. Reported data suggest that condom use may be lower among male sex workers than among female sex workers but it is difficult to draw firm conclusions as relatively few countries reported data on condom use by male sex workers and sample sizes were generally not representative. Reported data do not provide any information about use of condoms by other sub-groups of sex workers, such as migrant sex workers.” <http://www.ecdc.europa.eu/en/publications/Publications/dublin-declaration-sex-workers.pdf>

[28] St. James Infirmary recommends the use of “dental dams or plastic wrap for both oral-vaginal and oral-anal activity.” Occupational Health and Safety Handbook, p. 18. However, this recommendation is insufficient to meet current OSHA regulations.

[29] St. James Infirmary, Occupational Health and Safety Handbook, p. 18.

[30] Ibid. p. 13.

[31] OSHA regulations, [https://www.osha.gov/pls/oshaweb/owadisp.show\\_document?p\\_table=STANDARDS&p\\_id=10051](https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=STANDARDS&p_id=10051)

[32] <http://www.dir.ca.gov/dosh/DoshReg/comments/STD%20and%20HIV%20Disease%20and%20Health%20Risks%20Los%20Angeles%20County%20DPH.pdf>

[33] OSHA Regulations: “Use. The employer shall ensure that the employee uses appropriate personal protective equipment unless the employer shows that the employee temporarily and briefly declined to use personal protective equipment when, under rare and extraordinary circumstances, it was the employee’s professional judgment that in the specific instance its use would have prevented the delivery of health care or public safety services or would have posed an increased hazard to the safety of the worker or co-worker. When the employee makes this judgment, the circumstances shall be investigated and documented in order to determine whether changes can be instituted to prevent such occurrences in the future. OSHA regulations, [https://www.osha.gov/pls/oshaweb/owadisp.show\\_document?p\\_table=STANDARDS&p\\_id=10051](https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=STANDARDS&p_id=10051)

[34] St. James Infirmary, Occupational Health and Safety Handbook, pp. 21-30.

[35] OSHA regulations,

[https://www.osha.gov/pls/oshaweb/owadisp.show\\_document?p\\_table=STANDARDS&p\\_id=10051](https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=STANDARDS&p_id=10051)

[36] See: Waltman (2013); Farley, Melissa. Prostitution and Trafficking in Nevada Making the Connections (San Francisco, CA: Prostitution Research & Education, 2007); Malarek, Victor. The Johns: Sex for Sale and The Men Who Buy It (New York: Arcade, 2009), esp. p. 232, where he writes: "The WHO failed to understand that the very request to wear a condom can get a woman beaten or even killed."

[37] <http://www.latimes.com/opinion/editorials/la-ed-condoms-porn-20140810-story.html>

[38] <http://www.eeoc.gov/policy/docs/currentissues.html>

[39] Ibid.

[40] Ibid.

[41] <http://www.eeoc.gov/policy/docs/currentissues.html>

[42] Henson v. City of Dundee, 682 F.2d at 903] In the context of commercial sex, what will count at "soliciting" or "inciting" sexual conduct? Will it be because she agreed to do acts x, y, and z, she will have been found to "inciting" the acts she finds objectionable, refuses, or declares unwelcome? In other words, suppose she does agree to oral sex, vaginal sex, but refuses anal sex. Suppose the client then demands anal sex and conditions payment upon agreement. Suppose she complies—she views the overture and the act as unwelcome, it was in fact a condition of employment (payment), whether it was voluntary is immaterial to whether she was sexually harassed. She was. But why should we exempt the first acts, the prior agreed upon acts, from sexual harassment? They were unwelcome in the sense that they were done for the money—and not for reciprocal sexual enjoyment—and they were a condition of getting the money (the employment). Submitting to unwelcome sexual acts as a condition of employment—getting paid for sex—is sexual harassment; submitting to sexual harassment is the job.

Moreover, there are legal grounds for thinking that the fact that she works in the sex industry and may have welcomed some acts but not others is irrelevant to whether some specific act was unwelcomed and so harassment. Legally, the fact that someone works in the sex industry is irrelevant as to whether any specific act of harassment was unwelcome. So, we can imagine an attempted defense along the lines that "well, she works as a prostitute. So, the behavior in question could not have been unwelcomed." However, "any past conduct of the charging party that is offered to show "welcomeness" must relate to the alleged harasser." In other words, the only past conduct of the charging party that is relevant is conduct related to the specific individual alleged to have harassed her.

The EEOC acknowledges "A more difficult situation occurs when an employee first willingly participates in conduct of a sexual nature but then ceases to participate and claims that any continued sexual conduct has created a hostile work environment. Here the employee has the burden of showing that any further sexual conduct is unwelcome, work-related harassment. The employee must clearly notify the alleged harasser that his conduct is no longer welcome. If the conduct still continues, her failure to bring the matter to the attention of higher management or the EEOC is evidence, though not dispositive, that any continued conduct is, in fact, welcome or unrelated to work... In any case, however, her refusal to submit to the sexual conduct cannot be

the basis for denying her an employment benefit or opportunity; that would constituted a “quid pro quo” violation.”[[<http://www.eeoc.gov/policy/docs/currentissues.html>

[43] Ibid.

[44] Ibid.

[45] <http://www.justice.govt.nz/policy/commercial-property-and-regulatory/prostitution/prostitution-law-review-committee/publications/plrc-report/documents/report.pdf>, p. 45.

[46] Ibid.

[47] For a thorough development and analysis of these questions, see: Anderson, Scott, Prostitution and Sexual Autonomy,” in Prostitution and Pornography, ed. Spector (cf. fn. 2).

[48] See, “Behind Closed Doors,” available at <http://sexworkersproject.org/downloads/BehindClosedDoors.pdf>