

Michigan Journal of Gender & Law

Volume 24 | Issue 2

2017

Working Sex Words

Anita Bernstein
Brooklyn Law School

Follow this and additional works at: <https://repository.law.umich.edu/mjgl>



Part of the [Law and Gender Commons](#), [Public Law and Legal Theory Commons](#), and the [Sexuality and the Law Commons](#)

Recommended Citation

Anita Bernstein, *Working Sex Words*, 24 MICH. J. GENDER & L. 221 (2017).
Available at: <https://repository.law.umich.edu/mjgl/vol24/iss2/2>

This Essay is brought to you for free and open access by the Journals at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Journal of Gender & Law by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

WORKING SEX WORDS

*Anita Bernstein**

INTRODUCTION

Imagine yourself tasked to speak for a few minutes about legal controls on sex-selling in the United States, or any other country you choose. You need not have thought about the particulars. As someone willing to read a law review article, you have enough to say because sex-selling overlaps with the subject knowledge you already have. Criminal law, contracts, employment law, immigration law, tort law, zoning, commercial law, and intellectual property, among other legal categories, all intersect with this topic.¹

In your brief remarks on how law attempts to mediate the sale and purchase of sex, you have only one modest constraint: Omit a short list of nouns. Describe paid-for sex as a regulated activity without using the words “prostitute” (including “prostitution”), “sex work” (or “sex worker”), “legalization,” “decriminalization,” “john,” “pimp,” “madam,” “trafficking,” and “Nordic model” or “Swedish model.”

The premise of the exercise may be familiar from a game marketed under two names, Taboo and Catchphrase. When competing, a member of a team is told a word or phrase and then has to convey its meaning to teammates from whom the word has been hidden. Rules constrain players:

The clue-giver is allowed to make any physical gesture and give almost any verbal clue to get his/her team to say the word. But you may NOT:

- Say a word that RHYMES with the word.
- Give the FIRST LETTER of the word.

* Anita and Stuart Subotnick Professor of Law, Brooklyn Law School. This Essay benefited from workshops at Brooklyn and Universidad Torcuato di Tella in Buenos Aires, and from the insights and suggestions of Heidi Brown, Jim Friedman, Katie Holmes, Claire Wasserman, and Brian Lee. I acknowledge with gratitude the research support I received from Brooklyn Law School. Extra thanks to Sarah Swan and Mae Kuykendall.

1. See generally Vanessa E. Munro & Marina Della Giusta, *The Regulation of Prostitution: Contemporary Contexts and Comparative Perspectives*, in DEMANDING SEX: CRITICAL REFLECTIONS ON THE REGULATION OF PROSTITUTION 1, 1–5 (Vanessa E. Munro & Marina Della Giusta eds., 2008) (adverting to breadth of legal approaches to address prostitution).

- Say A PART OF THE WORD in the clue (i.e., shoe for shoe horn).²

But why, you may reasonably wonder, would anyone discuss an issue in American legal regulation by copying a game that demands dodging? Evasion is anathema to regulation, an endeavor that references an activity and then tries to give intelligible guidance about what participants in the regulated sector must, must not, and may do. Playing Taboo/Catchphrase about the law of sex-selling and -buying seems unproductive, to say the least.

Bear with the game a little longer. In this Essay, evasion is the point. Evasion showcases the extraordinary futility of American English with respect to legal controls. Coming up with ideal language for constraining anything is famously difficult, as the enormous secondary literature about the dialogue between H.L.A. Hart and Lon Fuller over how to interpret a ban on “vehicles in the park” attests.³ Adjectives written into regulations—“substantial,” “material,” “reasonable”—are often indeterminate.⁴ Persons bound by rules might not comprehend them well enough to understand what the law forbids them from doing. Quirks and unreliable heuristics impede compliance. Law lives with these infirmities and others: it has no choice.

But the problem with controls of sex-selling is more foundational. None of the words needed to describe these controls can meet even minimal standards of regulatory clarity. My exercise bans them not as a board game stunt but to say they do not work. Every noun central to law and law reform with respect to the selling and buying of sex, no exceptions, is at least one of the following: ambiguous, misleading, too slangy to be serious, missing (in the sense of nonexistent), or bitterly contested in a partisan divide. Prostitution, also known as sex work, has no words that law and regulation can use.

Every society that uses money regulates the buying and selling of sex,⁵ and one finds in the United States a federal system, whose law will occupy

2. Catch Phrase Instructions, HASBRO (1995), <http://www.hasbro.com/common/instruct/CatchPhrase.PDF>.

3. See, e.g., Frederick Schauer, *A Critical Guide to Vehicles in the Park*, 83 N.Y.U. L. REV. 1109, 1110-12 (2008); Pierre Schlag, *No Vehicles in the Park*, 23 SEATTLE U. L. REV. 381, 382-83, 387-89 (1999). The original articles are H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958), and Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958).

4. See Ruth Vatvedt Fjeld, *The Lexical Semantics of Vague Adjectives in Normative Texts*, in VAGUENESS IN NORMATIVE TEXTS 157, 157 (Vijay K. Bhatia et al. eds., 2005).

5. See *Introduction* to ENCYCLOPEDIA OF PROSTITUTION AND SEX WORK, at xxv, xxv-xxvii (Melissa Hope Ditmore ed., 2006).

the observations of this Essay, multiple controls and prohibitions. Regulators promulgate and enforce an extensive network of controls. Town and county ordinances,⁶ state laws,⁷ federal statutory law,⁸ and international instruments (which American governmental actors will sometimes heed)⁹ address sex-selling and buying, all the while lacking language to regulate buying and selling sex coherently.

Governments have no choice but to regulate here, because abstaining from interference with this activity is not an option—too many externalities, or at least linked consequences. Child prostitution is the most fundamental of these ill effects. Any legal regime that might prefer to leave sex-for-money exchanges alone still has to take a position on what to do when a seller is underage. Numerous fields of law, as noted, intersect with criminalized prostitution. Evidence rules cannot wait: they must take a position now on whether a stash of condoms in a purse is or is not admissible to show that a person was working in the sexual marketplace when arrested.¹⁰ Third parties with no interest in paying for sex themselves or selling it need to know whether the law will enforce a contract to exchange sex for money.¹¹

-
6. See, e.g., STOREY COUNTY, NEV., CODE ch. 5.16 (2015), <http://www.codepublishing.com/NV/StoreyCounty/#!/storeycounty05/StoreyCounty0516.html%2393> (declaring that brothels are permitted in the county and outlining regulations for them); CODE OF TUSCALOOSA, ALA., § 17-36 (2017), https://library.municode.com/al/tuscaloosa/codes/code_of_ordinances?nodeId=CDCTITUAL (stating that “no person shall own, operate, manage or keep any house of prostitution”).
 7. See, e.g., NEV. REV. STAT. ANN. § 244.345(8) (Westlaw through 2017 Reg. Sess.) (stating that in counties with populations larger than 700,000 the license board cannot grant licenses to people seeking to operate “a house of ill fame or repute” or another type of business employing persons for the purpose of prostitution); WASH. REV. CODE § 13.40.213 (Westlaw through 2017 Third Spec. Sess.) (providing that juveniles alleged to have committed prostitution offenses who have previously committed offenses can have their alleged offenses diverted if the county has a comprehensive program that provides safe housing and other services).
 8. E.g., Mann Act, 18 U.S.C. § 1591 (Westlaw through P.L. 115-46); 18 U.S.C. § 2421 (Westlaw through P.L. 115-46). See also Combating Human Trafficking Act of 2015, S. 529, 114th Cong. (2015) (proposed legislation introduced in the Senate).
 9. E.g., G.A. Res. 48/104, Declaration on the Elimination of Violence Against Women (Dec. 20, 1993); G.A. Res. 55/225, United Nations Convention Against Transnational Organized Crime and the Protocols Thereto (Jan. 8, 2001); G.A. Res. 317 (IV), Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (Dec. 2, 1949).
 10. Wilson Dizard, *NYC to Stop Using Condoms as Evidence—in Some Cases*, AL JAZEERA AMERICA, May 12, 2014, <http://america.aljazeera.com/articles/2014/5/12/sex-condoms-nyc.html> (noting shifts in policy).
 11. See Mark Pettit, Jr., *Freedom, Freedom of Contract, and the “Rise and Fall”*, 79 B.U. L. REV. 263, 326 (1999) (giving illustrations of this need).

The problem of working sex words has multiple manifestations. Persons who are paid for sex get labeled, but participants in the regulation conversation cannot agree on what label to call them. A related difficulty is the absence of any formal word at all for a couple of necessary categories: buyer and fosterer-procurer. Confusion and disagreement obscure what key terms mean, while a false veneer of agreement about one proposition—that we’re all against “trafficking” (not so much, actually)—impedes regulatory progress while purporting to advance it.

“Prostitution,” a noun laden with controversy and considerable historical baggage, may be the least-worst working sex word, the best of a bad lot. Lay people understand what it means, and its usage typically does not offend the listener. Once we leave this term for the phenomenon behind, tougher trouble follows. Two leading candidates compete to mean sex-seller: “prostitute,” the older of the two labels, and “sex worker,” which first turned up in legal sources a couple of decades ago. It is hard to say which does more mischief to any cogent regulatory agenda. I conclude that on the whole “sex worker” is worse than “prostitute,” for reasons expounded in Part II, but the question is close.

Next comes the vocabulary that isn’t there. Although the folk-anthropology cliché “Eskimos have [some large number of] words for snow” is an oversimplification,¹² cultures do reveal their positions about conduct and status by having or lacking nouns to describe an individual. Family relations are prominent at this intersection of linguistics and anthropology. For example, the presence of the “brother-in-law” and “sister-in-law” in English shows that the connection between a person and the spouse of another person of the same generation is important enough to have earned nomenclature and also that the distinction between the sibling of a spouse and the spouse of a sibling does not matter as much. Brothers- and sisters-in-law sit at the periphery of a natal family that came first. About how they joined the natal family, English cares less. As for “sibling,” one hears this word less often than “sister” or “brother,” suggesting an interest in gender as central to a birth-family relationship.

Other languages show the possibility of different choices about words for individuals with respect to the roles they play in association with identified others. Roma and Yiddish, for example, have a word for what one an-

12. David Robson, *There Really Are 50 Eskimo Words for “Snow”*, WASH. POST, Jan. 14, 2013, https://www.washingtonpost.com/national/health-science/there-really-are-50-eskimo-words-for-snow/2013/01/14/e0e3f4e0-59a0-11e2-beee-6e38f5215402_story.html?utm_term=.C635d1c9e82a (reporting difficulties that impede attempts to count; also noting that the Sami people of northern Europe use 180 words related to snow or ice and have more than a thousand words to describe attributes of reindeer).

thropologist calls “a co-parent-in-law,” or a person whose child is married to the child of the other person in the relationship.¹³ While evincing more interest in this connection than does English, at the same time Roma adamantly does not care about the difference between a nephew and a grandson, using “nepoto,” a Latinate noun borrowed from Romanian, to signify both.¹⁴ The Native American language Upper Chehalis omits gender when referring to an elder sibling but notes the gender of younger siblings.¹⁵ Upper Chehalis also uses different nouns for these relatives depending on whether they stand in a first, second, or third person relation to a speaker: a listener can tell from the word whether these people are the brothers or sisters of the speaker, the person whom the speaker is addressing, or someone not party to the conversation.¹⁶ The Turkish *kocamin cocugu* means “husband’s child.”¹⁷ English speakers can say “stepson,” but stepson doesn’t mean quite the same thing as *kocamin cocugu*. Inclusions and omissions in a language, in turn, indicate what matters and what doesn’t among those who speak it.

For the law, as in life, these characteristics both teach and conceal. And so it’s striking that in this genteel setting of a law review, where it is customary for authors to speak politely, or at least formally, I write with almost no alternative to a pair of loose terms. In place of “john” a writer can say buyer or customer—I will take that path in this Essay when I can—but how odd to have to do so when the other party to a sex-for-money transaction gets labeled with a non-slang noun that, unlike “seller,” says what the exchange sells and buys.¹⁸ Say what we might about the trouble with “sex worker” or “prostitute” as a term for regulation and ordinary discourse—and I will fill an entire Part in this Essay with criticisms¹⁹—unlike “john,” it

13. Werner Cohn, *Some Comparisons Between Gypsy (North American rom) and American English Kinship Terms*, 71 AM. ANTHROPOLOGIST 476, 479 (1969).

14. *Id.* at 478.

15. M. Dale Kinkade, *Kinship Terminology in Upper Chehalis in a Historical Framework*, 34 ANTHROPOLOGICAL LINGUISTICS 84, 84 (1992).

16. *Id.*

17. Ruth C. Busch, *In-Laws and Out Laws: A Discussion of Affinal Components of Kinship*, 11 ETHNOLOGY 127, 129 (1972).

18. [Sex customers] are invisible in the sense that they can go anywhere and not stand out as buyers of women. They enjoy the true privacy of anonymity. Linguistically, in most languages I have encountered, they also have the dignity of an identity with no unique non-slang descriptor noun. All the words that apply to them, such as customer or client or buyer, are shared with non-buyer users of women. In the United States, he is given a common real man’s name. We call him ‘john’.

Catharine A. MacKinnon, *Trafficking, Prostitution, and Inequality*, 46 HARV. C.R.-C.L. L. REV. 271, 281–82 (2011).

19. See *infra* Part I.

isn't slang, and unlike "buyer," it doesn't mince words on what it is talking about.

Respectable synonyms for "pimp," the other word missing in action for regulators, are harder to find than buyer or customer as an alternative to "john." The closest that polite English comes is "procurer," a word that says nothing about what this person does to achieve procurement, or—here differing from the neutered terms for our two principals, seller and buyer—whether money plays a role in his efforts. American law has long disapproved of gaining income from the purchase and sale of sexual acts in which others engage,²⁰ and it does use status-nouns for sex-sellers: one would think it would have words to describe people who get money that way and what makes their conduct wrongful.²¹ Though not a legal term, "madam" is another telling instance of English-language slang, a gendered way to say brothel-keeper or –manager that has no counterpart for a man in the same line of work.²²

One might believe that for prostitution regulation there would be one easy domain of naming: the international crisis of sexual trafficking. Sadly, no. People may think they unite in condemnation against it; they don't. For the subset of reformers whose priorities occupy this Essay—those who want more lenient legal rules than what current American law provides—what about "legalization" versus "decriminalization"? More trouble. A crime that proscribes buying but not selling sex ought to have a name: "Nordic Model" does not quite work.

Thus, the accurate statement that "writing about prostitution presents inherent difficulties" because "[n]o neutral language exists," as Scott Peppet says by way of introduction to a reform proposal,²³ understates severely the "difficulties" for anyone who wants to change, or even to understand, American law on the subject of sex-selling. Professor Peppet adverts to challenges for a writer that are amply present. But more than writers suffer.

The difficulty of working sex words explored in this Essay is both cause and effect of the trouble with working-sex regulation. Cause first: The

20. See Nicole Bingham, *Nevada Sex Trade: A Gamble for the Workers*, 10 YALE J.L. & FEMINISM 69, 76 n.57 (1998) (surveying U.S. state crimes that proscribe living off the earnings of prostitution).

21. Some jurisdictions have codified a crime of pimping, but "pimping" as an activity is not the same as "pimp" as a status-noun. See, e.g., CAL. PENAL CODE § 266h (Westlaw through Ch. 248 of 2017 Reg. Sess.); GA. CODE ANN. § 16-6-11 (Westlaw through 2017 Sess. of the Georgia Gen. Assemb.); IOWA CODE § 725.2 (Westlaw through 2017 Reg. Sess.); *infra* text accompanying notes 141–144.

22. See KATIE HAEGELE, SLIP OF THE TONGUE: TALKING ABOUT LANGUAGE 73–74 (2014) (observing that "madam," along with "hussy" and "harlot," started out neutral and then joined other "gendered terms of abuse").

23. Scott R. Peppet, *Prostitution 3.0?*, 98 IOWA L. REV. 1989, 1998 (2013).

extraordinary absence of effective nouns impedes consensus and expository writing on the issue.

Now, effect. Why does this problem persist? Shouldn't better diction be coined? That thoughtful, articulate, well-intentioned reformers have not achieved this gain suggests that language difficulty may inhere in the subject.

What makes working sex words not just a cause but a consequence or symptom of a problem, I conclude, derives from a foundational disagreement in this debate between two sides of a binary, both of which want to lessen the impact of criminalization on sex-sellers. They have contrary answers to a core question: Can the purchase and sale of sexual penetration of a human body ever be acceptable?²⁴

Disputants seem to agree that this activity is sometimes categorically not acceptable. Most of them will readily condemn what they label trafficking and child prostitution. But they have not united on whether the law should ever tolerate the activity known as prostitution or sex work. Aware that they will not come together on this fundamental, they try to talk to one another using what Professor Peppet has labeled neutral language, but neutral language remains elusive. Thus, instead of offering a path to resolution through expression, working sex words compound the problem that law reformers are trying to fix by obscuring clarity at every turn.

In other settings, people who disagree about law and policy sort their description from argument. They can also state what they are discussing and, from there, debate goals and strategies. Law reform in the arena of sex work, however, never gets past the descriptive stage necessary to support its future because it lacks a vocabulary of working sex words. Proposals to change the law must use inadequate language. No surprise that they have all failed. At the end of this Essay, I locate what may offer a little hope.²⁵

I. SELLERS

A. *Gender Unspoken*

Most researchers agree that the large majority of persons who regularly receive money for sex are female.²⁶ A larger majority of persons who buy sex

24. By "acceptable," I mean safe and voluntary enough for persons who participate in, or are directly affected by, the exchange. See Aya Gruber et al., *Penal Welfare and The New Human Trafficking Intervention Courts*, 68 FLA. L. REV. 1333, 1334–35 (2016).

25. See Conclusion, at 266.

26. See Elizabeth M. Johnson, *Buyers Without Remorse: Ending the Discriminatory Enforcement of Prostitution Laws*, 92 TEX. L. REV. 717, 719 n.10 (2014) (noting the difficulty of obtaining accurate data on the ratio of female to male sellers, and the strong consensus that female sellers outnumber male ones).

are male.²⁷ In contrast to girls and women, who do not sell sex dressed to look like men, some male sellers wear feminine garb or otherwise present themselves as transgender²⁸ or female; their customers typically hew to masculine-looking clothing and deportment. These patterns suggest that a noun for sex-seller, not just a respectable one like “prostitute” or “sex worker” but also the slangier “whore” or “hooker,” will put a listener in mind of a woman. Yet one has to reach into the past to find a word set aside explicitly as female: “doxy,” “floozy,” “harlot.” Quaint terms like those that are reserved for women advert vaguely to loose morals, dodging the question of whether money gets exchanged for sex.

Far fewer status-nouns for a buyer exist in English, and all of them veil his identity.²⁹ The lack of a singular noun fit for print in a newspaper or statute implies that buying sex is just an activity or an episode for a man. He can take it or leave it without changing who he is; we feel no more need for a noun here than we need one for “movie watcher” or “spectator-sport ticket holder.” Selling sex, by contrast, constitutes an identity for a woman. Even while doing something else, or figuring to leave this line of work, she is an *X* or a *Z*.

B. *The Trouble with “Prostitute”*

Calling a person a prostitute ascribes immorality, corruption, and degradation to her. Any person might perhaps really be immoral, corrupt, or degraded, but this bundle of status-associations does not necessarily attend the conveying of sex for cash. Ascribed negative traits impede regulation by enlisting the law in an attack on the identity of an individual for no obvious reason.

Status-nouns carrying negative connotations are on the decline in the law. Whereas in decades past a judge might use “idiot” as if it had a literal

27. See generally *Salaiscooper v. Eighth Judicial District*, 34 P.3d 509, 513 (Nev. 2009) (discussing testimony from an earlier hearing, wherein Dr. Roxanne Clark Murphy, a clinical psychologist and the Program Coordinator for the First Offender Program for Men in Las Vegas, stated that buyers of sex are statistically almost always male); JUDITH A. BAER, *WOMEN IN AMERICAN LAW: THE STRUGGLE TOWARD ELIGIBILITY FROM THE NEW DEAL TO THE PRESENT* 280 (2002).

28. See Ginia Bellafante, N.Y. TIMES, *Poor, Transgender and Dressed for Arrest* (Sept. 30, 2016), <https://www.nytimes.com/2016/10/02/nyregion/poor-transgender-and-dressed-for-arrest.html> (describing a loitering statute that equates feminine presentation with solicitation); Ricardo Cortès, VANITY FAIR, *An Arresting Gaze: How One New York Law Turns Women into Suspects* (Aug. 3, 2017), <https://www.vanityfair.com/culture/2017/08/nypd-prostitution-laws> (describing the same statute and noting that transwomen are especially vulnerable to its enforcement).

29. See discussion *infra* Part II.A.

meaning,³⁰ and a few American statutes still speak of illegal aliens,³¹ most law-based condemnation today focuses on bad conduct rather than bad status. A “felon,” “habitual felon,” “co-conspirator,” or “repeat offender” deserves her unpleasant label, we think, having earned the word through action. Persons called prostitutes, by contrast, may not have done anything to warrant an attack on themselves as persons.

This word has an arguably neutral-sounding etymology. It comes from *prostitutio*, meaning something more benign on the surface than corrupt and immoral: “to fix in an upright position.”³² A *prostitutio* is a statue-like thing, in other words. But an ordinary human being sits and stands and walks according to her will. Rather than exercise her autonomy, the *prostitutio* is controlled by other forces.³³

Linguist Anatoly Liberman has assembled historical lexicography about the strongly pejorative nature of a word related to “prostitute.” Negative connotations informed the arrival of “brothel” into Middle English. Old French had come up with “bordel” for a house of prostitution by coupling the German root *-bord*, meaning house, with the suffix *-el*, something small. When English imported *bordel* from French, the word morphed to *brothel* because, to English speakers, this word sounded familiar to the unrelated-to-sex *briepel*, meaning “worthless,” Liberman explains, and also resembled terms of disparagement that ended in *-el*: “scoundrel,”

-
30. See Anita Bernstein, *For and Against Marriage: A Revision*, 102 MICH. L. REV. 129, 133 n.8 (2003) (citing *Marvin v. Trout*, 199 U.S. 212, 213 n.1 (1905) (“the guardian or trustee of a minor, insane person, or idiot”)); *id.* (citing *Thlocco v. Magnolia Petroleum Co.*, 141 F.2d 934, 938 (5th Cir. 1944) (quoting an Oklahoma statute stating that “[p]ersons of unsound mind within the meaning of this chapter are idiots, lunatics, and imbeciles”)); *id.* (citing *Lynch v. Rosenthal*, 396 S.W.2d 272, 275 (Mo. Ct. App. 1965) (explaining that “there are three classifications of subnormal mentality, to-wit: moron, low moron, and idiot; [and] plaintiff is a low moron”)).
31. The ombudsman for the Washington Post consulted a State Department officer and former U.S. consul, Chip Beck, who defended the usage of the phrase “illegal alien” on the record, but the ombudsman explained that the Post uses the phrase “illegal immigrant” because illegal alien “sounds like someone from outer space.” Deborah Howell, *Immigration Coverage in the Crossfire*, WASH. POST, Mar. 2, 2008, <http://www.washingtonpost.com/wp-dyn/content/article/2008/02/29/AR2008022903332.html>.
32. See JILL McCracken, STREET SEX WORKERS’ DISCOURSE: REALIZING MATERIAL CHANGE THROUGH AGENTIAL CHOICE 99 (2013) (explaining the origin of the word “prostitute”).
33. See *id.* (“The passive voice results in the construction of a prostitute as weak and helpless, and this powerless position is equated with dehumanization because the individual is not viewed as a person who is capable of making his or her own choices, but is instead controlled by other forces.”).

“wastrel.”³⁴ In this etymology, the development of English in the Middle Ages actively wanted opprobrium for the prostitution-related words it chose to import. Bordel or bordello, literally just a small house, did not deliver enough condemnation.

Judgmental views of prostitution in the English language carry over to legal judgments. One California decision issued in 1922 is notorious for insisting on condemnation of what it called “fallen women.” “The most casual observer cannot fail to see a vast difference between fallen women as a class and the balance of the human kind. They stand apart,”³⁵ wrote the court in *In re Carey*: “No other body of malefactors constitute so distinctly a class as do the fallen women. They present a greater single element of economic, social, moral, and hygienic loss than is the case with any other single criminal class.”³⁶

A more recent and kinder-minded New York decision ruled that defendants accused of prostitution had a right to a jury trial because the consequences of being adjudicated a prostitute were so severe.³⁷ U.S. Supreme Court precedent provides that exposure to incarceration for more than six months means that a crime is sufficiently serious to qualify for the constitutional right to trial by jury.³⁸ New York law set a shorter maximum sentence for prostitution, but the court granted the jury trial because it shuddered to think of what a conviction for being a prostitute does to a defendant.³⁹ The status label has far-reaching consequences:

[E]ven if there were no incarceration involved, a prostitution conviction results in profound consequences for the person convicted. From biblical times and throughout the world today, to mark a woman a prostitute is to designate her a pariah. Whether she is described as a “hustler,” a “hooker,” a “bawd” or a “harlot,” a “biffer,” a “trull,” “pigmeat” or a “whore,” the prostitute bears the opprobrium of “the fallen woman.”⁴⁰

And more than just bad names befall the prostitute, the court continued. Attacks that permeate this word extend beyond what contemporary discourse would call slut-shaming her. If her “badness” were limited to sell-

34. Anatoly Liberman, *Front Page News: the Oxford Etymologist Harrows an International Brothel*, OXFORD UNIVERSITY PRESS: OUPBLOG (Jan. 15, 2014), <http://blog.oup.com/2014/01/brothel-word-origin-etymology/>.

35. *Ex parte Carey*, 207 P. 271, 274 (Cal. Dist. Ct. App. 1922).

36. *Ex parte Carey*, 207 P. at 274.

37. *People v. Link*, 107 Misc. 2d 973, 979–80 (N.Y. Crim. Ct. 1981).

38. *Baldwin v. New York*, 399 U.S. 66, 73–74 (1970).

39. *Baldwin*, 399 U.S. at 73–74.

40. *Link*, 107 Misc. 2d at 976.

ing sex, that would be bad enough: By selling sex she threatens family stability and spreads infection,⁴¹ but the word “prostitute” says she is even worse than a homewrecker and disease vector. To call someone a prostitute “is to denominate the creature” who gets this label as “unprincipled, a low life, one who would sell out any loyalty, desecrate any covenant, and, literally as well as characterologically as one willing to do just about anything for the right price.”⁴²

Words do change meaning over time. The judicial recitation in *People v. Link*, expressed almost forty years ago, may overstate the force of prostitute as a label. Even today, however, when an English speaker needs a quick word to sum up compensation in exchange for doing something inauthentic or corrupt—in particular, an action that misrepresents feelings or beliefs as more supportive than they really are—and “sellout” is not harsh enough, then “prostitute,” or alternatively the cruder “whore,” is the most likely choice.

The current Oxford English Dictionary lists definitions for prostitute as both noun and verb, adding “*Obs.*” for meanings once present in the word but now gone. Today’s noun means only “A woman who is devoted, or (usually) who offers her body to indiscriminate sexual intercourse, esp. for hire; a common harlot.”⁴³ And today’s verb “to prostitute,” according to this leading lexicon, has three meanings:

1. “To offer (oneself, or another) to unlawful, esp. indiscriminate, sexual intercourse, usually for hire; to devote or expose to lewdness. (Chiefly *refl.* of a woman.)
2. To surrender or put to an unworthy, vile, or infamous use or purpose; to sell for base gain or hire; to defile, dishonour, profane, corrupt.
- 3.c. To expose to shame; to expose, in a degrading manner to public view, or for public sale.”

What remains in this lexicon of current usage of “prostitute,” in sum, is only opprobrium that a speaker might not wish to endorse or include, and a recipient might not deserve.

41. See *Link*, 107 Misc. 2d at 977 (“To great masses of people, the prostitute . . . They associate her with organized crime, public indecency, family instability, the blight of tourist and commercial areas, and the spread of venereal disease.”).

42. *Link*, 107 Misc. 2d at 977.

43. XII OXFORD ENGLISH DICTIONARY 673 (2d ed. 1989).

C. *The Trouble with “Sex Worker”*

This substitute for “prostitute” enjoys support in progressive quarters. The activist who coined it said her goal in making up the term was “to create an atmosphere of tolerance. . . .”⁴⁴ “Sex worker” in place of “prostitute” focuses on labor rather than a demeaned identity.⁴⁵ International organizations favor it.⁴⁶ One can understand its appeal. If “all feminists are in agreement that sex workers should not be penalized for doing sex work,”⁴⁷ then the “prostitute” label, which inherently casts aspersions, becomes another punishment that better diction can avoid. Unfortunately, moving to “sex worker” achieves no improvement.

“Sex worker” strikes a pose of neutrality. The “atmosphere of tolerance” that the term commendably brings to discourse, and from there to law, tolerates not only human beings in a controversial line of work but also refuses to specify who does what to or for whom. Like “prostitute”—but arguably even more than “prostitute”—the phrase airbrushes buyers out of the picture. Sex work could not exist without someone at the other end of the transaction whose tastes and wishes influence supply patterns, but “sex worker” takes note only of the seller and what she sells.

Persons claiming to speak as sex workers may work in the sex business, but they can do different work. “Sex workers” as a descriptor can encompass strippers, dominatrixes, and individuals who provide their services from a remote geographic location typically unknown to customers, offering sex-themed conversation over the telephone or exposure of their bodies via video photography, for example.⁴⁸ Managers in the sex industry can be

44. Carol Leigh, *Inventing Sex Work*, in *WHORES AND OTHER FEMINISTS* 225, 225 (Jill Nagle ed., 1997).

45. See McCracken, *supra* note 32, at 100 (discussing sociologist Kamala Kempadoo’s suggestion that “the term *sex worker* ‘suggests we view prostitution not as an identity—a social or psychological characteristic of women, often indicated by “whore”—but as an income generating activity or form of labor for women and men’”).

46. See Kat Banyard, *The Dangers of Rebranding Prostitution as ‘Sex Work’*, *GUARDIAN*, June 7, 2016, <https://www.theguardian.com/lifeandstyle/2016/jun/06/prostitution-sex-work-pimp-state-kat-banyard-decriminalisation> (noting endorsement of this term by the UN and WHO). See also *Amnesty International Policy on State Obligations to Respect, Protect and Fulfil the Human Rights of Sex Workers*, AMNESTY INTERNATIONAL (May 26, 2016), available at www.amnestyusa.org/sites/default/files/amnesty_policy_human_rights_of_sex_workers_-_embargoed_-_final.pdf [hereinafter *Amnesty International Policy*].

47. Janet Halley et al., *From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism*, 29 *HARV. J.L. & GENDER* 335, 411 (2006).

48. See Sarah Ditum, *Why We Shouldn’t Rebrand Prostitution as Sex Work*, *NEW STATESMAN*, Dec. 1, 2014, <http://www.newstatesman.com/politics/2014/12/why-we>

called sex workers too.⁴⁹ Only some self-identified sex workers sell the opportunity to penetrate their bodies with a penis. Calling managers and owners by this term groups them with people who earn income through much more dangerous activities, and individuals who earn money from the commercial penetration experienced by persons other than themselves have different interests from persons who sell penetration of the orifices of their own bodies. When activists refer to themselves as sex workers while advocating for liberalization of prostitution laws, they could be speaking about offering access to their own interior anatomy, but alternatively could want legal change because they seek benefit for themselves as holders of capital.⁵⁰

Another problem with “sex worker” as a descriptor comes from the significant presence of underage sellers in this industry.⁵¹ Young people whose vaginas are penetrated by strangers who pay for this access receive a label that refers to what they are doing as work. In any society that prohibits child labor for its deleterious effects on the public welfare, children are by definition not workers and workers are not children. When a child regularly does something dangerous in exchange for money from an adult, the “atmosphere of tolerance” that the coinage of “sex worker” in place of “prostitute” sought to achieve is a problem.⁵²

Further incompatibility between status as a child and status as sex worker derives from the age preference of some buyers and procurers. Johns and pimps alike have manifested interest in very young sellers;⁵³ workers seldom continue to be active in this industry into middle age.⁵⁴ In a memoir called *Paid For*, the activist Rachel Moran recalls that during the first of her

-shouldnt-rebrand-prostitution-sex-work (“So what’s wrong with saying ‘sex worker’? For one thing, it’s a deliberately broad term. It covers street walkers and escorts, strippers and phone sex operators, dominatrixes and dildo retailers, as well as their respective managers.”).

49. *Id.*

50. A blogger known as Stella Marr omits her real name but provides links for her claim that six prominent activists do not earn their living at the receiving end of penetration by strangers. Five of them were convicted of crimes codified to cover pimping and promotion of prostitution, and one was the subject of a British documentary that featured him as co-owner of a large brothel. Stella Marr, *Pimps Will Be Pimps Whether Male or Female or Posing as “Sex Worker Activists” & Other Conflicts of Interest*, PROSTITUTION RESEARCH & EDUCATION (May 23, 2012), http://prostitutionresearch.com/pre_blog/2012/05/23/pimps_will_be_pimps_whether_ma/.

51. RONALD B. FLOWERS, *THE PROSTITUTION OF WOMEN AND GIRLS* 15 (1998) (reporting an estimate of “between 300,000 and 600,000 female prostitutes under the age of 18 in the United States”).

52. See *supra* text accompanying notes 44–45.

53. LINDA SMITH & CINDY COLOMA, *RENTING LACY: A STORY OF AMERICA’S PROSTITUTED CHILDREN* 77 (2009).

54. Cf. Janice G. Raymond, *Not a Choice, Not a Job* 150–51 (2013) (surveying long-term health toll of this work).

six years selling penetration of her body, both in brothels and on the streets of Dublin, she made it a point to tell buyers that she was 15 after she learned they would ejaculate—and thus go away—faster if they knew.⁵⁵

Providers in most lines of service emphasize their experience and track records; consumers as a rule prefer to hire or work with someone who they know has furnished the service many times. Discrimination against older workers in sectors other than prostitution certainly occurs, but the more common perception in ordinary age discrimination is that the worker's skills have lapsed. Sex customers have no reason to think that an older provider cannot do the job. Performing oral sex on strangers, or trading an act of vaginal intercourse for cash, is in sum fundamentally different from work as understood in American law and regulation. Except for the possibility of high monetary gain—a reward that sellers do achieve sometimes, but never with the reliability of an enforceable employment contract—this activity is worse than other sources of income grouped uncontroversially under the “work” rubric.

The trouble with sex worker or sex work as a noun-phrase emerges when one looks at the comparators to sex-selling in the workforce that get mentioned most often in discussions of prostitution law reform.

The low-wage, low-future job comparator. Work that pays little and offers little to no opportunity for promotion appears to some observers as either worse than sex work, because sex work generates more income for the seller, or not meaningfully different, because both sex work and low-wage jobs call for labor that can be repetitive, demeaning, and dead-end in the sense of not offering any path to improvement through diligent effort or skill. Fast-food restaurants are a common locus of comparison here.⁵⁶

In the United States, the best-known fast-food business operates through franchises rather than centralized management, which means that no unitary document can describe the relationship between McDonald's as an entity and individuals who earn wage income in restaurants that go by this name.⁵⁷ Two documents available online titled “employee manual” and

55. RACHEL MORAN, PAID FOR: MY JOURNEY THROUGH PROSTITUTION 61 (2013).

56. See Raymond, *supra* note 54, at 63; *Prostitution Must Be Legalized: A Former Sex Worker's Opinion*, IDENTITY THEORY, Jan. 11, 2002, <http://www.identitytheory.com/prostitution-legalized> (“If your options are to make four dollars an hour flipping burgers, or \$500 a day turning tricks, suddenly selling your sex doesn't seem quite so unreasonable.”).

57. CHARLES HILL & GARETH JONES, STRATEGIC MANAGEMENT: AN INTEGRATED APPROACH 418 (2007) (describing how founder Ray Kroc used the franchise model to build McDonald's).

“employee handbook,” to which I will cite here *faute de mieux*, may or may not accurately describe this employment relation in any of the franchises.⁵⁸

They nevertheless provide specifics about the contrast between fast food work and sex work. I daresay that no one reading—or writing—this Article would want to take one of the jobs described in them: but if we had to, these manuals promise us a modicum of decency in this workplace. They include pay information,⁵⁹ summaries of policies on sexual harassment and complaints from workers or customers,⁶⁰ and illustrations of how the kitchen is laid out⁶¹ and what garb complies with the dress code.⁶² One can obtain information about the responsibilities of cashiers, cooks, managers, and drive-through window attendants who work for the franchise before one signs up for this job.

Fast food restaurants also must follow state and federal employment regulations that constrain what they do to their workers. The employee manual does not say much about the tasks of workers, but a reader can identify what people on the payroll have to do: listen to customers’ orders, relay these orders to the kitchen, follow recipes and food-prep protocols, and maintain cleanliness and decorum in the restaurant.

By contrast, work as a sex-seller may require three “skill sets” only, writes the memoirist Rachel Moran:

- “[1.] The ability to control your reflex to vomit.
- [2.] The ability to restrain your urge to cry.
- [3.] The ability to imagine your current reality is not happening.”⁶³

Certainly one individual does not speak for all sex workers, and it seems likely that other people with experience selling sexual access to their bodies

58. The first “manual” by Ana Rodriguez, *McDonald’s New Employee Manual* (2014), http://anakare.weebly.com/uploads/2/5/8/9/25891647/formal_project_employee_manual.pdf, appears to have been written as a class project and lists a McDonald’s franchise in Texas. *Id.* at 2. It is not known whether or not the specific franchise listed is aware of or has ever used this technical writing sample as its employee manual. The second document, titled “Employee Handbook,” appears in the website for a chain of six McDonald’s franchises in Texas on its Policies page. LUTITO McDONALD’S, *Employee Handbook* (2017), <http://www.lutitomcdonalds.com/uploads/8/1/2/7/81277052/employeehandbook-crew2017-pdf.pdf>.

59. LUTITO McDONALD’S, *supra* note 58, at 7, 9

60. Rodriguez, *supra* note 58, at 10–12; LUTITO McDONALD’S, *supra* note 58, at 20–21.

61. Rodriguez, *supra* note 58, at 6.

62. LUTITO McDONALD’S, *supra* note 58, at 12–13; Rodriguez, *supra* note 58, at 2.

63. MORAN, *supra* note 55, at 225.

would draw up different lists of job requirements. Moran is on firmer ground when she criticizes the notion that providers offer services in a market. Skills are not for sale in prostitution, she argues: instead what sellers sell is submission to being violated.⁶⁴ If prowess mattered, customers would seek it out. They don't. Asking rhetorically what the skills of this occupation could possibly be, Moran answers her question with more questions:

Opening your legs? Moving your hips rhythmically in order to get him off? Any woman who's ever fucked in her life knows enough about men's bodies to do the basic job of a prostitute. And if she hasn't? If she has no sexual experience whatever? All the better, as far as the punter [U.K. counterpart to "john"] is concerned—he'll get a great kick out of putting paid to her sexual naïveté. 'Skill' here is redundant. It is simply surplus to requirements.⁶⁵

Sex-sellers receive almost no occupational protection from the law. Take sexual harassment, for example. The fast-food employee manual we looked at tries to regulate it. For sex-sellers, it is an unremarkable fact of working life.⁶⁶ Unpleasant deviations from the exchange deal—for example, hair pulling, choking, unambiguous rape, and refusals to pay—are not complaints that Human Resources will hear. "In McDonald's, you're not the meat," said one former seller at a United Nations conference on prostitution, summarizing the comparison to fast-food restaurant work as she saw it.⁶⁷ "In prostitution, you are the meat."⁶⁸

The dangerous job comparator. Sex-selling endangers a seller, but so do other jobs. Studies find a particularly high risk of death in a few occupations held mostly by men: fishing, logging, farming, mining, and piloting airplanes. Catching fish for a living threatens worker safety with heavy equipment, severe weather, and enough water nearby to drown in.⁶⁹ Hidden and

64. *Id.* at 195.

65. *Id.*

66. See Melissa Farley & Emily Butler, *Prostitution and Trafficking—Quick Facts*, PROSTITUTION RESEARCH & EDUCATION 3 (2012), <http://www.prostitutionresearch.com/Prostitution%20Quick%20Facts%2012-21-12.pdf>. Activist-psychologist Melissa Farley found that "95% of those in prostitution experience sexual harassment that would be legally actionable in another job setting." *Id.*

67. Raymond, *supra* note 54, at 63.

68. *Id.*

69. Jacquelyn Smith, *Fishermen Face the Most Dangerous Work in US*, FORBES, Sept. 4, 2011, <http://www.nbcnews.com/id/44329641/ns/business-careers/t/fishermen-face-most-dangerous-work-us/>.

heavy branches fall on loggers' heads.⁷⁰ "There are three main factors that make flying dangerous," according to one news story: "the man, the machine and the weather."⁷¹ Dangers in mines run from immediate traumatic impact to slow poisoning by inhalation.⁷² Livestock injure the farmers who own these animals; tractor rollovers injure farmers even more.⁷³

Contrast the female worker endangered while selling sex. The risk of violent death and nonlethal violence in this sector is far greater than that in the next-most dangerous job for women, liquor-store cashier.⁷⁴ An academic study of mortality in prostitution found an extraordinarily high death rate during the period of active work in this sector—probably an undercount, the authors add.⁷⁵ The study concludes that "no population of women studied previously has had a crude mortality rate, standardized mortality ratio, or percentage of deaths due to murder even approximating those observed in our cohort."⁷⁶ Men who die in dangerous jobs die accidentally—machines fail, nature ravages—but only 12 percent of women who die in this female-dominated dangerous job category die by accident.⁷⁷ A larger fraction than the accidentally dead, 19 percent, are killed intentionally.⁷⁸ Others die from drug overdoses, alcohol poisoning, and illnesses related to HIV infection.⁷⁹ What unites these varying causes of death for sex workers, and distinguishes them from threats to human life in occupations like mining and farming, is the probability that they originated in conduct prohibited by criminal law (extending beyond criminalization of the activity itself). Dangerous conventional work inflicts harm that, though unpleasant, is benign compared to the harm of sex work.

The physical-appearance jobs comparator. Exploring the possibility that sex-selling could be a regulated form of work, Adrienne Davis notes that this activity shares characteristics with employment as a model or in an

70. Les Christie, *America's Most Dangerous Jobs: Logger*, CNNMONEY, Aug. 22, 2013, http://money.cnn.com/galleries/2011/pf/jobs/1108/gallery.dangerous_jobs/3.html.

71. Les Christie, *America's Most Dangerous Jobs: Airplane Pilot*, CNNMONEY, Aug. 22, 2013, http://money.cnn.com/galleries/2011/pf/jobs/1108/gallery.dangerous_jobs/4.html.

72. James Lee, *Fighting the Good Fight: Why the So-Called "War on Coal" Is Beneficial for Pittsburgh's Future*, 14 U. PITT. J. TECH. L. POL'Y 95, 98–100 (2013).

73. Les Christie, *America's Most Dangerous Jobs: Farmer and Rancher*, CNNMONEY, Aug. 22, 2013, http://money.cnn.com/galleries/2011/pf/jobs/1108/gallery.dangerous_jobs/5.html.

74. See John J. Potterat et al., *Mortality in a Long-Term Open Cohort of Prostitute Women*, 159 AM. J. EPIDEMIOLOGY 778, 783 (2004).

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

occupation where one's physical appearance affects access to opportunity and levels of compensation.⁸⁰ Acting is especially notorious for ranking attractiveness ahead of talent or successful experience, but any public-performance work—singer, dancer, even comedian or lecturer—rewards or punishes the performer in response to opinions of her looks. Sex-sellers, like models and singers and dancers and actresses, have to work under continual reassessment of whether they are attractive enough. Answers of No land harshly;⁸¹ some of these judgments are cast almost literally in stone.⁸²

Workers whose job fates depend on their looks experience employment discrimination that the law does not remedy. Just as an actor denied a role in a play based on his gender, race, age, or national origin will not win compensation for this loss, a person otherwise qualified for sex work who gets turned down by a customer or the management of a house of prostitution cannot recover either, even if the reason for the rejection was invidious discrimination. Race discrimination in particular has severe consequences for sex workers.⁸³

Sex work aligns poorly with employment discrimination law in other respects, not just regarding rejection for a discriminatory reason. Professor Davis has catalogued several of these gaps. She anticipates judicial rejection if sex workers were to complain in court about a hostile environment in violation of Title VII.⁸⁴ She notes the likelihood of unremedied disparate treatment of sex workers by managers in a brothel, including discrimination in the allotment of “lucrative shift and private lounge assignments and referrals to desirable customers,” and “expectations by employers and customers that racial and ethnic minorities will perform racial fantasies that many find degrading.”⁸⁵ Title VII forbids an employer from honoring a customer's request for “a male librarian, flight attendant, or restaurant server,” she continues, but if it cannot lawfully honor the request of a sex buyer for a female seller, then work in this regulated market might collapse.⁸⁶ Similar difficul-

80. Adrienne D. Davis, *Regulating Sex Work: Erotic Assimilationism, Erotic Exceptionalism, and the Challenge of Intimate Labor*, 103 CAL. L. REV. 1195, 1269 (2015) (noting that “sex work may exist on a continuum with other ‘appearance’ industries”).

81. Peppet, *supra* note 23, at 2011–12, 2033 (examining peer-to-peer ratings sites by customers that comment unkindly on sex sellers).

82. See Anita Bernstein, *Real Remedies for Virtual Inquiries*, 90 N.C. L. REV. 1457, 1480 (2012) (noting that hurtful commentary can linger online).

83. See generally Vednita Carter & Evelina Giobbe, *Duet: Prostitution, Racism and Feminist Discourse*, 10 HASTINGS WOMEN'S L.J. 37 (1999) (featuring reflections on the intersection of racism and prostitution from two authors who retired from sex-selling).

84. Davis, *supra* note 80, at 1223 (citations omitted).

85. *Id.* at 1262.

86. *Id.* at 1263 (finding this conclusion “intuitive[] to many”).

ties exist in all appearance-focused employment markets, but work in which an individual experiences repeated sexual penetration by strangers is extraordinarily incompatible with law of the workplace.

Unavoidable regulatory difficulty. Redress for employment discrimination in the context of sex work illustrates a larger problem of treating sex-selling as a form of employment amenable to regulation. Four examples of the misfit between sex work and regulable work are workplace safety rules, workers' compensation, unemployment insurance, and the prohibition of child labor.

The Occupational Health and Safety Administration (OSHA) regulates what it calls "occupational exposure" to hazardous substances.⁸⁷ Semen qualifies for the hazardous substance label because it can transmit not only life-threatening HIV but other serious diseases like hepatitis from an ejaculator-buyer to a receptor-seller.⁸⁸ The philosopher Lori Watson has argued that mandatory condoms for both oral sex and intercourse do not suffice to meet OSHA standards.⁸⁹ Condoms are too likely to break, especially when used during anal intercourse, and too difficult for providers—be they managers of a sex-trade business or individuals who sell access to their own bodies—to demand from customers,⁹⁰ at least in the current market. "Mouth pipetting/suctioning of blood or other potentially infectious materials is prohibited" as a workplace condition, OSHA adds.⁹¹ Flat-out prohibited: not rendered acceptable by the use of risk-reducing safeguards. Performing fellatio as work does not become lawful with the help of protective technologies like gloves, masks, eye protection, face shields, gowns, and aprons—all of which OSHA says are mandatory when needed to protect the worker from infection. Sex work as now practiced is incompatible with American workplace regulation.

Workers' compensation, the insurance scheme that provides payment for injuries incurred on the job in place of tort recourse against the employer, could in principle extend to sex work that occurs in brothels. In the United States, private businesses supply this category of insurance. They collect premiums from employers and pay out benefits when employees are

87. 29 C.F.R. § 1910.1030 (Westlaw through 2017) ("Bloodborne Pathogens").

88. Chris Motyl, Note, *Condom Sense: Regulating and Reforming Performer Health & Safety in the Adult Film Industry*, 32 HOFSTRA LAB. L. & EMP. L. J. 216, 244–45 (2014).

89. *Why Sex Work Isn't Work*, LOGOS (2014), <http://logosjournal.com/2014/watson/>.

90. *Id.* (citing VICTOR MALAREK, *THE JOHNS: SEX FOR SALE AND THE MEN WHO BUY IT* 232 (2009)) ("The WHO failed to understand that the very request to wear a condom can get a woman beaten or even killed.").

91. 29 C.F.R. § 1910.1030(d)(2)(xii) (Westlaw through 2017).

injured on the job.⁹² Insurance for sex work would be very costly, at least initially, given the high level of injury in the sector. Moreover, many of the injuries that sex workers suffer originate in intentional actions by buyers, and American law is vexingly divided on whether workers' compensation governs, and preempts tort liability, when an employee is harmed by a violent attack.⁹³ If the law forced employers to pay for workers' compensation premiums without gaining tort immunity in return, it would violate the "grand bargain" that underlies the Progressive installation of this insurance, and greatly increase the cost of doing business in the sector.⁹⁴

As for unemployment insurance, workers in many countries receive it when they lose their jobs but are willing to remain employed. These recipients are expected to manifest their interest in finding a new job: unemployment insurance does not purport to compensate individuals who stop working because they no longer wish to work.⁹⁵ According to one review of regulated prostitution in the Netherlands, sex workers who leave this sector for any reason other than their inability to do the job become ineligible for unemployment insurance.⁹⁶ They may seek transfer payments from the government, but only in the form of general social assistance.⁹⁷ Regulators might have no quarrel with this policy decision, but because the sector contains a high proportion of workers who say they want out,⁹⁸ that stance in

92. See generally Richard A. Epstein, *The Historical Origins and Economic Structures of Workers' Compensation Law*, 16 GA. L. REV. 775 (1982) (tracing historical trends in workers' compensation law and examining the exclusive remedy provision).

93. See generally Albert B. Randall, Jr. et al., *The Exclusive Remedy Provision: State by State Survey*, A.B.A. (2009), <http://apps.americanbar.org/labor/lel-annualcle/09/materials/data/papers/087.pdf> (surveying state laws on injured employees' right to make a tort liability claim against their employers).

94. See Bob Burke, *The Evolution of Workers' Compensation Law in Oklahoma: Is the Grand Bargain Still Alive?*, 41 OKLA. CITY U. L. REV. 337, 341–43 (2016) (providing a short history of the "grand bargain" characterization of what employers and employees receive through workers' compensation).

95. L. Nayim A. Shuman-Austin, Comment, *Is Leaving Work to Obtain Safety "Good Cause" to Leave Employment?*, 23 SEATTLE U. L. REV. 797 (2000) (discussing the "able, available, and actively seeking" criterion for receiving unemployment insurance, a requirement imposed in all U.S. states).

96. Damián Zeitch & Richard Starling, *The Flesh is Weak, the Spirit Even Weaker: Clients and Trafficked Women in the Netherlands*, in PROSTITUTION AND HUMAN TRAFFICKING: FOCUS ON CLIENTS 67, 89 (Andrea Di Nicola et al. eds., 2009) ("Therefore, a prostitute forced to end her profession because of reasons beyond her control is eligible for unemployment benefit When prostitutes however decide to quit for any reasons other than those beyond their control they are not qualified to obtain unemployment benefit but can rely on social services").

97. *Id.*

98. See Melissa Farley, *Prostitution, Trafficking, and Cultural Amnesia: What We Must Not Know in Order to Keep the Business of Sexual Exploitation Running Smoothly*, 18 YALE J.L. & FEMINISM 109, 113–16 (2006) (finding that rates of rape and other forms of

unemployment insurance law would immiserate persons who no longer wish to sell sex for a living and need money to support their quitting. Allowing a quitter to collect unemployment insurance after choosing to leave this sector is a kinder option but one that would build an anomaly in the law and raise the cost of doing business.

More worrisome than refusing to pay unemployment insurance to persons who abandoned this occupation is the possibility that, once it recognizes sex work as regular and unremarkable work, the law would order individuals who became unemployed in a different sector to join these ranks, if a brothel-keeper employer would have them. In such a regime, persons who lose their jobs in a non-sex sector would have to either accept a job where sexual penetration of their bodies by strangers is mandatory, or forfeit their government benefits. One might defend the Dutch stance mentioned above on the ground that it simply holds a claimant to her earlier occupational choice to exchange sex for money, but telling non-participants they have to do this work would put state-backed financial pressure on individuals to take up an activity that they may find repugnant. Moreover, since third parties do not generally want to hire men as objects of penetration, only women would be pressured into this work.⁹⁹

Does such a regime exist? A 2005 news story reported that when a 25-year-old woman in Germany lost her job and could not find another in her preferred field, information technology, she told a job center in Berlin that she would accept employment in a bar or café, whereupon the job center ordered her to apply for work in a brothel.¹⁰⁰ When she tried to sue in response, she was informed that under German law the center had to treat brothels like any other lawful employer and send potential workers to them—and that brothels could enforce this requirement through legal action if the center did not penalize unemployed workers for declining this job.¹⁰¹ Her experience might not represent a larger pattern, but it follows logically enough from normalizing sex work.

violence, death, and sexually transmitted diseases are much higher for prostituted women than for the general population).

99. See *infra* note 158 and accompanying text.

100. Clare Chapman, 'If You Don't Take a Job as a Prostitute, We Can Stop Your Benefits', TELEGRAPH, Jan. 30, 2005, <http://www.telegraph.co.uk/news/worldnews/europe/germany/1482371/If-you-dont-take-a-job-as-a-prostitute-we-can-stop-your-benefits.html>.

101. *Id.* This compulsion can be prohibited by statute, as the following prostitution law reform in New Zealand illustrates with respect to government-funded social security:

Refusal to work as sex worker does not affect entitlements: (1) A person's benefit, or entitlement to a benefit, under the Social Security Act 1964 may not be cancelled or affected in any other way by his or her refusal to work, or to continue to work, as a sex worker

Last, child labor. An apparent consensus disapproves of the employment of children as sellers in this sector.¹⁰² Some definitions of trafficking omit references to force and coercion when the persons recruited into selling sex are underage,¹⁰³ suggesting that irrespective of whether the law will permit individuals to sell sexual access to their bodies, this activity ought to be prohibited categorically when the seller is a child. But regardless of where the law stands on children working in this sector, the Federal Labor Standards Act (FLSA) restricts children from participating in most categories of work.¹⁰⁴ Accordingly, a shift in the law towards regarding sex work as work would require Congress to take a position on the status of child sellers.

It is not obvious what the federal minimum age for entry into this occupation ought to be. The FLSA provides that “[n]o employer shall employ any oppressive child labor,” and identifies oppressive child labor as any work that endangers a child.¹⁰⁵ An example of a job that the statute regards as too dangerous for a child under 16 is one that involves using a ladder.¹⁰⁶ One might conclude that if climbing a ladder is too dangerous, selling sex must also be too dangerous for a young worker under the FLSA. But maybe not. The level of danger present in this occupation already exceeds that of any other job that women do,¹⁰⁷ and nothing about being an adult in sex work seems to make sellers safe enough the way being an adult makes workers careful enough on a ladder.

Recall also that for this sector youth is in effect a strong qualification, in contrast to the prevailing tendency of employers to regard minors as less qualified than adults but hire them because they are cheaper workers. It could be rational for the sector to lobby Congress to seek exceptions to the federal prohibition on employing younger workers, as exceptions already

Prostitution Reform Act 2003, s 18, pt 2 (N.Z.). For reformers in the United States, questions remain. Is such a codified prohibition necessary to avoid pressing unemployed persons into sex work? Congress could enact it to govern federal benefits, but what about state-based unemployment insurance: are multiple state statutes needed? Absent such a statutory provision, under the United States Constitution may a unit of government impose financial detriment on a person who has refused to engage in sex work as a condition of receiving benefits?

102. See, e.g., Gill Allwood, *The Construction of Prostitutes and Clients in French Policy Debates*, in DEMANDING SEX: CRITICAL REFLECTIONS ON THE REGULATION OF PROSTITUTION, *supra* note 1, at 67–73.

103. E.g. FLA. STAT. ANN. § 787.06 (Westlaw through 2017 First Reg. Sess.); IDAHO CODE ANN. § 18-8602 (Westlaw through 2017 First Reg. Sess. of 64th Legis.); KY. REV. STAT. ANN. § 529.110 (Westlaw through 2017 Reg. Sess.).

104. See *Henderson v. Bear*, 968 P.2d 144, 147 (Colo. App. 1998) (adverting to a “comprehensive enforcement scheme” installed by the statute).

105. 29 U.S.C. § 212 (c)(2014) (Westlaw through P.L. 115-45).

106. 29 C.F.R. § 570.33(g) (Westlaw through 2017).

107. See *supra* Part I.C.

exist in the statute.¹⁰⁸ Employers could draw an analogy between sex work and acting to qualify for the exception.¹⁰⁹

They might not even need an analogy, because sex-selling as work presents no obvious bright line between an adult seller and an underage one. “If there is nothing wrong with prostitution,” wrote Catharine MacKinnon, “if this is freedom and equality and liberation, if it really can make a woman’s life more autonomous and independent, if its harms are negligible or occasional, what on earth is wrong with children doing it or seeing it being done?”¹¹⁰ One might cite statutory age-of-consent minimums as a good reason to forbid underage persons from selling intimate access to their bodies, but age minimums are no less arbitrary than the prohibition of prostitution. These minimums of positive law originate in the same rationale—protecting persons from themselves¹¹¹—that proponents of the label “sex work” consider to be unacceptable paternalism from the state.

D. *Who Speaks for the Sector?*

Not having a neutral noun to denominate persons who sell sex, as we have seen, causes difficulty in debates about if and how to regulate sex-selling.¹¹² Because both sides of the progressive policy binary—those who would ban this activity and those who want it to be lawful—purport to care about the well-being of these individuals and disagree about whether the law ought to tolerate their livelihood, it becomes desirable to consider first-person testimony. Experience on the ground could generate information to aid regulatory priorities. For example, lawmakers would do well to know why individuals take up this work. Their motives and backgrounds might be more, or perhaps less, diverse than non-participants realize. What do police officers need to learn about the purchase and sale of sexual services? How do sex-sellers negotiate terms with buyers and look out for their interests? Which dangers feel most acute on the street or in a hotel room? People who have sold sex have unique insights into the practice.

Researchers do ask questions like these and publish their findings, but researchers also necessarily filter what they learn by imposing their prior beliefs onto their data. For an illustration of how filtering alters the discussion of this sector, consider the divide between “sex worker” and

108. See 29 U.S.C. § 213(c) (Westlaw through P.L. 115-45).

109. See *supra* notes 80–82.

110. MacKinnon, *supra* note 18, at 297.

111. See *Greenman v. Yuba Power Prods., Inc.*, 377 P.2d 897, 901 (Cal. 1963) (noting “protection from themselves” rationale for strict liability); Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 107–09 (1909) (expanding on this rationale in the context of child protection).

112. See *supra* Part I.

“prostitute” as terms: Writers who focus on oppression sometimes add “survivors of prostitution” and “prostituted women” as alternatives.¹¹³ Individuals who exchange or have exchanged sex for money, however, tend to eschew all of these labels to describe themselves. “Sex worker” in particular has encountered pushback.¹¹⁴ “During my career in the New York sex trade,” according to one account, “the prostitutes I worked with used words like *working girl*, *call girl*, *hooker*, *hustler*, and *pro*. We spoke about ‘the life’ when feeling clannish, sentimental, or philosophical—‘the business’ when we were being practical.”¹¹⁵ Nobody defers to what people in the trade call themselves. The activist credited with coining “sex work,” Carol Leigh, praised ambiguity in nomenclature: she claimed that “sex worker” united “peep show dancers, strippers, and prostitutes” so that “we could have some solidarity.”¹¹⁶

Solidarity works well enough when members of a group want the same thing, but it can make things worse when their motives vary. The English journalist Helen Lewis puts a foundational question this way: “Listen to the sex workers—but which ones?”¹¹⁷ Persons who work or have worked in the sector have different views about it, and attacks on prostitution from people who have done it tend to come from retired rather than currently active sex workers. If only active sellers have high authority to speak about the issue and those who choose to flee this line of work—joining the “survivors of prostitution,” to use a label favored on the other side of the binary—are necessarily more removed and thus less credible, then a sex seller forfeits an esteemed status the minute she leaves the trade. Persons who continue to sell sex may be more credible because their experiences are more current, but it’s worth recognizing that they also may be under someone else’s thumb.

113. Farley, *supra* note 98, at 114 (choosing “survivors”); Susan Kay Hunter, *Prostitution is Cruelty and Abuse to Women and Children*, 1 MICH. J. GENDER & L. 91, 91 (1993) (using “prostituted women”).

114. Tracy Quan, *The Name of the Pose: A Sex Worker By Any Other Name?*, in PROSTITUTION AND PORNOGRAPHY: PHILOSOPHICAL DEBATE ABOUT THE SEX INDUSTRY 341, 346–48 (Jessica Spector ed., 2006) (quoting several sex-sellers who express distaste for “sex worker” as a label); Charlotte Shane, *Calling My Work What It Is*, PACIFIC STANDARD, Sept. 12, 2015, <https://psmag.com/calling-my-work-what-it-is-6adbe494141e#.84bszwb8r> (“Lots of people doing occasional or even regular sex work don’t identify themselves as ‘sex workers,’ or think of their identity as tied to their labor.”).

115. Quan, *supra* note 114, at 343 (emphasis in original).

116. *Id.* at 342.

117. Helen Lewis, Opinion, *Listen to the Sex Workers—But Which Ones?*, GUARDIAN, Aug. 8, 2015, <https://www.theguardian.com/commentisfree/2015/aug/09/listen-to-sex-workers-but-which-ones>.

With this problem, we approach the next Part, which considers “john” and “pimp” as missing terms. John and pimp exist as words. I typed them; you read them and know them. But they also manifest absences and omissions. Before we proceed to Part III, it is worth noting that the “Who speaks for the sector?” query makes reference to missing terms too, with respect to sellers past and present. Just as English does not have anything better than “prostitute” or “sex worker” as a noun to describe a seller, it also lacks a past-present distinction for this activity. The distinction matters when “Listen to Sex Workers” guides policy reform.

II. TWO MISSING TERMS

A. Buyer

The most frequently heard American English term for someone who purchases sexual services is mysteriously opaque. Accounts about the origin of “john” are vague, but they agree that in contrast to “sex worker,” a phrase that indicates what an individual does to earn money when she labors, and “prostitute,” a term that judges the character of the individual labeled, this synonym for sex-buyer bestows anonymity by avoiding both moral condemnation and any kind of specificity whatsoever.¹¹⁸ When this word for a sex customer entered common discourse, John was the most popular—which is to say the most generic—male first name in the United States and Britain.¹¹⁹

John signifies everyman, but not as an ideal. A sex customer is not the reasonable man of negligence law who never fails to exercise care,¹²⁰ nor the fiduciary whose decisions about money always track the choices that “men of prudence” would make.¹²¹ Instead, john means unremarkable, anonymous by nature.¹²² This man has no identity that matters.

Veiled from attention, a john eludes law enforcement. Codified crimes of prostitution in the United States classify buyers and sellers as

118. See Jill McCracken, *Johns*, in *ENCYCLOPEDIA OF STREET CRIMES IN AMERICA* 220 (Jeffrey Ian Ross ed., 2013) (summarizing etymological sources of “john”).

119. Press Release, Ancestry.com, Keeping up with the Joneses—John and Mary Smith Officially the Most Popular Names Since 1530 (Mar. 25 2016), <http://www.ancestry.fr/corporate/international/press-releases/Keeping-up-with-the-Joneses—John-and-Mary-Smith-officially-the-most-popular-names-since-1530>.

120. James Fleming Jr., *The Qualities of the Reasonable Man in Negligence Cases*, 16 *MO. L. REV.* 1, 2 (1951).

121. *Harvard Coll. v. Amory*, 9 *Pick.* 446, 461 (1830) (trust management context).

122. Courtney Guyton Persons, *Sex in the Sunlight: The Effectiveness, Efficiency, Constitutionality, and Advisability of Publishing Names and Pictures of Prostitutes' Patrons*, 49 *VAND. L. REV.* 1525, 1529 (1996) (“The very title ‘john’ emphasizes the temporary namelessness granted patrons in the context of prostitution.”).

approximately comparably culpable, but police officers arrest sellers much more than buyers. Federal data for the year 2014 indicate that of all persons arrested on prostitution-related charges, two-thirds were women.¹²³ In prostitution arrests, sellers = women.¹²⁴

Spokespersons for law enforcement have acknowledged how they support the perception of buyers as invisible. One officer testified in court about a “general policy” in a Massachusetts town “that you don’t arrest the male.”¹²⁵ Police, regardless of their predilections, find women easier to arrest because patrolling officers know of them as sex workers:¹²⁶ sellers can be rounded up more easily than buyers to meet an arrest quota. Switching to use female undercover agents to solicit male buyers, a move that would reverse the dominant pattern where male undercover agents solicit female sellers, looks to some police like unjust “entrapment.”¹²⁷ Sellers are conspicuous to neighbors and thereby generate complaints to the police. John-Everyman, in contrast to these women, makes prostitution possible while staying hidden in plain sight.

The missing descriptive content in the word “john” both evidences and encourages indifference about the demand side of sex markets. Considerable effort continues to go into learning why and how sellers enter this industry, but research about the buyer side of the transaction has hewed mostly to the nothing-to-see-here Everyman trope. In his monograph on prostitution, sociologist Ronald Weitzer reports that “customers vary tremendously,”¹²⁸ which is to say that they are like their fellow men: “in age, race, and social class; in their reasons for buying sex; and in their exper-

123. FED. BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES, 2014, <https://ucr.fbi.gov/crime-in-the-u.s/2014/crime-in-the-u.s.-2014/tables/table-37>) (stating that 11,735 men and 22,939 women were arrested for “[p]rostitution and commercialized vice” in 2014).

124. This gender gap was once bigger. For example, during the year 1974-1975, police in the city of Providence enlisted only male undercover officers for prostitution investigations. *Coyote v. Roberts*, 502 F. Supp. 1342, 1353-54 (D.R.I. 1980), *supplemented*, 523 F. Supp. 352 (D.R.I. 1981) (finding that “[i]t was not unreasonable to assert that the Department’s use of a predominantly male undercover force revealed a design to ferret out the women . . . while ignoring the equally guilty men” and that “[i]t was not frivolous to argue that discriminatory intent can be implied from the facts that four times as many women as men were arrested, and possibly eight times as many were charged . . . during the pertinent time period.”).

125. *Commonwealth v. Unnamed Defendant*, 492 N.E.2d 1184, 1186 (Mass. App. Ct. 1986).

126. See MELISSA HOPE DITMORE, PROSTITUTION AND SEX WORK 34 (2011) (“The more visible the sex worker, the more likely arrest or other attention from law enforcement becomes.”).

127. Johnson, *supra* note 26, at 728.

128. RONALD WEITZER, LEGALIZING PROSTITUTION: FROM ILLICIT VICE TO LAWFUL BUSINESS 19 (2012).

iences during paid sex encounters.”¹²⁹ Johns are everymen to the John’s Voice project, an online forum established to articulate the needs and concerns of buyers, and to a Department of Justice-funded study that examined men arrested for prostitution crimes in San Francisco and Portland.¹³⁰

Investigators occasionally resist the Everyman default and look for something different that separates the population of sex buyers from men as a whole. They need a hypothesis to start their work, an alternative to Everyman. Deviation seems to be where they start. A research consensus holds that most men do not habitually pay for sex,¹³¹ which means that buyers of sex are deviant in that they violate the law and are a minority of the population.

No study appears to have started from a premise that persons who deviate in this respect are in any way better than persons who don’t. The divide in expert conclusions is instead Everyman on one side and social pathology on the other. One study commissioned for Safe Exit, a British project opposed to prostitution, agrees with the Weitzer view on variety in the buyer population, stating that “men who pay for sex are diverse in terms of their demographics, circumstances and attitudes,” but then goes on to reject Everyman as a descriptor when it adds that this cohort is “neither socio-culturally deviant nor ‘everyman.’”¹³² Safe Exit asserts that the decision to become a sex-buyer originates “within dominant discourses of gendered sexual mores and local availability of women who sell sex.”¹³³ Sven-Axel Månsson, a Swedish social work professor, also starts with pathology and finds it. Månsson lists five motivations or reasons for this purchase. All appear unhealthy.¹³⁴ An article in *Scientific American* duly concludes that “Månsson believes that johns are usually psychologically disturbed and

129. *Id.* (citations omitted).

130. See *About the Research*, JOHN’S VOICE, <http://www.johnsvoice.ca/> (last visited Sept. 16, 2017); *Clients of Street Prostitutes in Portland, Oregon, San Francisco and Santa Clara, California, and Las Vegas, Nevada, 1996-1999*, NATIONAL ARCHIVE OF CRIMINAL JUSTICE DATA, <http://www.icpsr.umich.edu/icpsrweb/NACJD/studies/2859> (last visited Sept. 16, 2017).

131. ANDREA CAUDURO ET AL., PROSTITUTION AND HUMAN TRAFFICKING: FOCUS ON CLIENTS 6 (2009) (surveying worldwide studies); Nikolas Westerhoff, *Why Do Men Buy Sex?*, SCI. AM., Oct. 2012, at 2 (reporting an estimate that 16 percent of men in the U.S. are in the buyer population).

132. MADDY COY ET AL., ‘IT’S JUST LIKE GOING TO THE SUPERMARKET’: MEN BUYING SEX IN EAST LONDON 25 (2007).

133. *Id.*

134. Sven-Axel Månsson, *Men’s Practices in Prostitution and Their Implications for Social Work*, in SOCIAL WORK IN CUBA AND SWEDEN: ACHIEVEMENTS AND PROSPECTS 267, 270 (Sven-Axel Månsson & Clothilde Proveyer Cervantes eds., 2005). The five reasons are a “dirty whore” sexual fantasy; a taste for types of sex that the buyer cannot obtain without paying for them; the lack of other women due to physical

in need of counseling and treatment.”¹³⁵ This belief about mental disturbance present in persons who pay for sex might well be correct, but it is just as hard to prove as the enduring Everyman.

Buyer, customer, and john all deny pathology. Any antisocial deviance present in sex-buyers that an investigator might look for must first be posited, and there is no *a priori* reason to assume anything about these men. Neither bland normality nor obedience to “dominant discourses of gendered sexual mores”¹³⁶ necessarily motivate individuals who choose to buy sex. Researchers report what they suspect was already there. A non-slang term for sex-buyer, if it could be coined, would permit investigation into the current Everyman default.

B. Procurer-Fosterer

The word that American English lacks here is a respectable synonym for pimp, a harsh plative not welcome in polite conversation unless unavoidably necessary. “Procurer” is the closest we get. Returning to the *Oxford English Dictionary* (“OED”), one finds pimp listed last out of four definitions of the word procurer. The first definition says procurer means “a steward, a manager, an attorney, an advocate, a defender, a deputy, a commissioner, a representative.”¹³⁷ One seldom hears it used that way in American English. The second definition, marked as rare or obsolete, identifies a procurer as an “instigator or prime mover.” Third: “one who procures or obtains.” Last, and dating back to the seventeenth-century: “One who procures women for the gratification of lust; a pander.”¹³⁸

Whereas john used as a synonym for sex-buyer is pure slang, pimp is a noun with a literal meaning. The OED definition of pimp, prefaced by “Origin obscure,”¹³⁹ hews to the procurer understanding of the term. A pimp is “[o]ne who provides means and opportunities for unlawful sexual intercourse; a pander, procurer.”¹⁴⁰

This definition of pimp as one who obtains release for a libidinous clientele has some descriptive truth, but is too narrow for law and regulation. Pimps do not foster the “means and opportunities for unlawful sexual intercourse,” because “unlawful sexual intercourse” includes encounters not involving money—adultery, fornication, statutory rape—while pimps are in

limitations of the buyer; the purchase of sex as a consumer product; and a desire to dominate a woman due to feelings of lost masculine supremacy. *Id.*

135. Westerhoff, *supra* note 131, at 7.

136. COY ET AL., *supra* note 132, at 25.

137. 12 OXFORD ENGLISH DICTIONARY 560 (2d ed. 1989).

138. *Id.*

139. 11 OXFORD ENGLISH DICTIONARY 845 (2d ed., 1989).

140. *Id.*

the sector to reap financial gains. Nor do pimps merely procure “women for the gratification of lust.” What makes a pimp of interest to the law is his connection to persons under his stewardship at least, if not his control. Calling him a procurer focuses on the agent-principal relationship he has with buyers while neglecting what might fairly, at least some of the time, be called the master-servant relationship he has with sex-sellers. Especially in the current century, when electronic technology makes it easier for buyers to do more of their own procuring, the conduct of a pimp about which the law ought to care is what he does to another group of people, those who exchange sex for money with strangers in response to his orders, giving him what he wants.

A few jurisdictions do formally condemn the actions of a pimp with little evasion or euphemism except their avoidance of the word as monosyllable. California and Georgia have made felonies of what their statutory law calls pimping.¹⁴¹ In its codified crime named simply “pimping,” Iowa starts with the familiar understanding of this term as procuring, with a prohibition of solicitation of “a patron for a prostitute.”¹⁴² The Iowa Code then moves closer to the more pertinent conduct of a pimp by adding that a person “who knowingly takes or shares in the earnings of a prostitute” commits a crime.¹⁴³ West Virginia has made the very rare choice to write “the pimp” into codified crime.¹⁴⁴

More commonly, however, state-level statutes use evasive gerunds when they prohibit conduct relating to the sale of sexual access to third parties’ bodies. Penal codes in the United States add to the ill-defined offense of “pandering” a cluster of equally uncertain “-ing” words that speak opaquely about the conduct condemned. “Inducing,” “exploiting,” “compelling,” “promoting,” and “facilitating” in American statutory crimes related to prostitution provide little information about which actions on their part put individuals at risk of prosecution.¹⁴⁵

Uncertainty about which pimp-behaviors violate the law coexists with scholarly uncertainty about who is engaged in this work. According to a

141. CAL. PENAL CODE § 266h (Westlaw through Ch. 859 of 2017 Reg. Sess.); GA. CODE ANN. § 16-6-11 (Westlaw through 2017 Sess. of Ga. Gen. Assemb.).

142. IOWA CODE ANN. § 725.2 (Westlaw through 2017 Reg. Sess.).

143. *Id.*

144. W. VA. CODE § 61-8-5 (b) (Westlaw through 2017 Second Extraordinary Sess.).

145. MICH. COMP. LAWS ANN. § 750.455 (Westlaw through P.A. 2017, No. 167, of the 2017 Reg. Sess.) (“inducing”); UTAH CODE ANN. § 76-10-1305 (Westlaw through 2017 First. Spec. Sess.) (“exploiting”); OR. REV. STAT. ANN. § 167.017 (Westlaw through 2017 Reg. Sess.) (“compelling”); KANS. STAT. ANN. § 21-6420 (Westlaw through 2017 Reg. Sess.) (“promoting”); OHIO REV. CODE ANN. § 2907.22 (Westlaw through 2017 File 25 of the 132nd Gen. Assemb.) (“promoting”); N.D. CENT. CODE § 12.1-29-02 (Westlaw through 2017 Reg. Sess.) (“facilitating”).

recent survey of the literature, pimps “may be the most hidden sub-population of the entire sex work industry,” even though most persons who sell sex are, the author reports, “pimp-controlled.”¹⁴⁶ Similar to the anonymizing function of the word “john,” which shrouds buyers in mystery while maintaining focus on sellers, this passive-voice diction—saying that sex workers “are pimp-controlled” rather than putting pimps up front as the subject—suggests that although experts know that many, perhaps most, sellers work under the control of other people, they know little about who these controllers are or what they are doing to or for the sex-sellers they work with.¹⁴⁷

Sloppy slang in place of a precise noun that gets in the way of coherent regulation is present also in “madam,” the closest that American English has to a term for a female pimp. “Madam,” unlike “pimp,” stays silent on whether this manager gains marginal income from each new purchase of sex: her role in the business is vague. Offering another example of how opacity in a working sex word both manifests and generates lack of clarity, researchers rarely study madams.¹⁴⁸

III. “TRAFFICKING”

At present, almost everybody in the prostitution conversation claims to oppose one thing. A few brave voices refuse to join this chorus,¹⁴⁹ but

146. Elisabeth Jandro, *The Regulation of Sex and Sex Workers*, in *SEX, SEXUALITY, LAW, AND (IN)JUSTICE* 216, 226 (Henry F. Fratella & Jennifer M. Sumner eds., 2016) (citations omitted). This summary gives a wide range for the number of sex sellers who “are pimp-controlled,” 40-80%. *Id.* For larger estimates, see Celia Williamson & Terry Cluse-Tolar, *Pimp-Controlled Prostitution: Still an Integral Part of Street Life*, 8(9) *VIOLENCE AGAINST WOMEN* 1074, 1075 (2002) (gathering data assembled in the 1990s).

147. On the scarcity of research on pimping, see Ronald Weitzer, *Prostitution as a Form of Work*, 1 *SOC. COMPASS* 143, 149 (2007). For one taxonomy of pimps understood by how they manage sex-sellers, see Loretta J. Stalans & Mary A. Finn, *Defining and Predicting Pimps’ Coerciveness Toward Sex Workers: Socialization Processes*, *J. INTERPERSONAL VIOLENCE*, Nov. 2016, at 1. The article names “macks,” who oversee large numbers of sex-sellers and are “the most successful and respectful pimps;” “tennis-shoe pimps,” who use drugs along with the small number of sex-sellers they employ; and “gorilla pimps,” the minority who recruit sex-sellers aggressively and resort to “brute violence.” *Id.*

148. See JACQUELINE B. HELFGOTT, *CRIMINAL BEHAVIOR: THEORIES, TYPOLOGIES, AND CRIMINAL JUSTICE* 302–03 (2008).

149. LAURA MARÍA AGUSTÍN, *SEX AT THE MARGINS: MIGRATION, LABOUR MARKETS AND THE RESCUE INDUSTRY* 8 (2007) (calling “trafficking” central to an unfortunate “victimising discourse”); Noah Berlatsky, “Human Trafficking” Has Become a Meaningless Term, *NEW REPUBLIC*, Oct. 30, 2015, <https://newrepublic.com/article/123302/human-trafficking-has-become-meaningless-term>.

unanimity about the wrongness of trafficking stands out singularly in a debate where disagreement reigns. It turns out, however, that “trafficking” shares in the general problem of working sex words—lack of clarity, tacit reference to a consensus that does not exist, and a refusal to declare any real commitments from the law—while adding new difficulties of its own.

Unlike rivalries between “sex worker” and alternative words for a sex-seller, the unity of trafficking inside one word fends off challengers. Unlike the slanginess of “john” and “pimp”—jocose choices that manifest lack of regulatory seriousness—“trafficking” brings full formal officialdom to its subject matter. We find this solemn gerund in American federal law, state statutes, international and transitional primary materials, white papers, and the agendas of important transnational organizations like the United Nations and Amnesty International. The closer look at trafficking in this Part finds divisions below the veneer. Agreement that trafficking is bad declares a meaningless consensus when persons who claim unity do not share an understanding of the evil denominated by the word.

*A. The Problem as Policy: What Does a Prohibition of Trafficking
Seek to Fix?*

Suppose you could eliminate trafficking, either from the whole world or the country in which you live. After you succeed in this work, what would change? Your answer speaks to the disagreement that centers this Essay. Rivals who agree about condemning trafficking disagree on whether a sex-seller can ever have a nonproblematic relationship—one that the law ought to tolerate: no judgments, no interference—with a person whose efforts drew her into this occupation. This foundational disagreement leads to difference on what to oppose under this rubric.

Any individual who seeks to eliminate trafficking necessarily must first form an opinion about the exchange of sex for money. Such a transaction could be categorically bad. From there, any effort to recruit or encourage sellers by third parties is bad because (among other possible reasons) it enlarges supply, and probably also demand,¹⁵⁰ in markets of paid-for intimate penetration. Alternatively, the exchange could be value-neutral or even desirable, as long as both seller and buyer participate voluntarily.¹⁵¹ Should you hold this view while condemning trafficking, you would have an approximate definition of trafficking as recruitment or management efforts

150. See Janice G. Raymond, *Ten Reasons for Not Legalizing Prostitution and a Legal Response to the Demand for Prostitution*, 2 J. TRAUMA PRAC. 315, 316 (2003) (arguing that in this market, increasing supply causes demand to increase).

151. See AGUSTÍN, *supra* note 149, at 71–72 (so arguing, with reference to selling by poor women).

too aggressive to comport with voluntary work. The two perspectives, at separate ends of a familiar spectrum, are radically incompatible with each other. And you might, of course, take a centrist position, disapproving in some measure of sex markets but not wishing to abolish them.

No matter your view, after you succeed in ending trafficking, the number of people in the population who sell sex for a living (never reliably tallied by researchers¹⁵²) would change. If you are in the first group, a categorical opponent of prostitution, your success in eliminating trafficking would eliminate almost one hundred percent of the sector. If you come from the second group, the one that regards sex work as voluntary by default, the total number of sex workers would stay relatively unchanged. It could even increase if sex-selling does not, in fact, exploit the seller. Intervention from the middle-ground third group would cause a reduction—less than the reduction the first group would install, but more than the reduction from the second.

Understood as a bottom line, then, trafficking equates to sex-selling itself. More trafficking, more sex work. Less trafficking, less sex work. Trafficking eliminated, prostitution eliminated.

Such a bottom line sounds like nothing worse than redundancy, but it demonstrates an active harm. Opposition to trafficking makes a false promise to address sociological pathology by finding common ground. We may disagree about the sex trade, goes the conventional wisdom, but we don't disagree about trafficking, do we? We do. Disagreement about the sex trade maps on to disagreement about trafficking. And the divide has been written into the law, as we will now see through an examination of trafficking crimes.

B. The Problem Codified: Force-Coercion-Deceit as Trafficking Criteria

Most, but not all, participants in the trafficking conversation distinguish between the sale and purchase of sex agreed to by a willing seller, on one hand, and the imposition of pressures to enlist a person into this work, on the other. Excesses in recruitment characterize trafficking, again to many, but not all, who debate prostitution law reform. Several difficulties follow from this implicit binary between (acceptably) voluntarily chosen sex-selling and sex-selling that originates (unacceptably) in wrongful pressure on the individual enlisted.

152. Ronald Weitzer's esteemed monograph contains extensive data on the subject but no estimates of how many persons work in the sector. WEITZER, *supra* note 128. The aggregator prostitution.procon.org asks that question and also comes up with no answer. See <http://prostitution.procon.org/view.answers.php?questionID=000095>.

Historical attention to international covenants on trafficking shows that a focus on the voluntariness *vel non* of sex-selling, today so central to the trafficking debate, arrived relatively recently.¹⁵³ Older instruments like the 1949 Convention for the Suppression of Trafficking in Persons and of the Exploitation of the Prostitution of Others and the 1933 Suppression of the Traffic of Women of Full Age refused to acknowledge voluntary participation in prostitution, banning trafficking categorically even with the consent of the sex-seller.¹⁵⁴ The identification of sex-seller consent as a condition that precludes liability for trafficking came into international law only in the 1990s.¹⁵⁵ It is certainly possible that contemporary thinking about the possibility of free choice to undertake this work is more enlightened, or otherwise desirable, than the older stance of categorically denying that sex-sellers participate voluntarily. In either case, the record shows that legal instruments can condemn trafficking without concerning themselves with consent.

For another locus of disagreement below the surface about what constitutes trafficking as a state-level crime, consider recitations of forbidden behaviors in American criminal codes. These penal provisions overwhelmingly name force and coercion as elements of trafficking.¹⁵⁶ So far so good: prohibitions are on the same page. But then these state crimes go on to diverge about whether fraud or deceit directed to the targeted person will suffice for trafficking liability.¹⁵⁷ Recruiters of sex-sellers have committed, and continue to commit, fraud. They gain cooperation by offering women jobs outside the sex industry: as “maids, nannies, dancers, and models,” for example.¹⁵⁸ Offers like these when the work available in fact is to be sexually penetrated can get the offerors convicted of trafficking in a majority of jurisdictions, but not all.

153. Beverly Balos, *The Wrong Way to Equality: Privileging Consent in the Trafficking of Women for Sexual Exploitation*, 27 HARV. WOMEN'S L.J. 137, 143–44 (2004).

154. *Id.* at 143–44, 148–49.

155. *Id.*

156. See, e.g., IND. CODE ANN. § 35-42-3.5-1 (Westlaw through 2017 First Reg. Sess.); FLA. STAT. ANN. § 787.06 (Westlaw through 2017 First Reg. Sess.).

157. A U.S. government report asserts incorrectly that force, fraud, or coercion is necessary for all trafficking, not just sex trafficking. CHILD WELFARE INFORMATION GATEWAY, DEFINITIONS OF HUMAN TRAFFICKING 1 (2016), https://www.childwelfare.gov/pubPDFs/definitions_trafficking.pdf (published by the Department of Health and Human Services). For examples of American statutory prohibitions of trafficking that omit fraud or deceit as culpable conduct that establishes the offense, see COLO. REV. STAT. § 18-3-502 (2014); 720 ILL. COMP. STAT. 5 / 10-9 (2014); MINN. STAT. ANN. § 609.281 (2016).

158. April Riegler, *Missing the Mark: Why the Trafficking Victims Protection Act Fails to Protect Sex Trafficking Victims in the United States*, 30 HARV. J.L. & GENDER 231, 236 (2007).

Even when a sex-seller entered this line of work at the behest of a sponsor-recruiter who refrained from deceiving her and eschewed force and coercion, severe poverty on her part may have diminished her volition. Of the billions of persons in the world living in poverty, most are girls or women.¹⁵⁹ Large numbers of men are poor too, but men get recruited into this sector at a much lower rate.¹⁶⁰ The combination of poverty and being perceived as eligible for enlistment puts women at a relatively high risk of being brought into the sex trade against their will, even without overt force-coercion-deceit.

Some prohibitions of trafficking evince discomfort with the problem of voluntariness by attempting to split the difference. They provide that when the putative victim is an adult, then a defendant must have used force, coercion, or deception to be convicted, but when the putative victim is under 18, then this showing is not necessary.¹⁶¹ This maneuver splits no difference. It concedes nothing to the half of the binary that opposes sex work and wants to codify a broad prohibition. Minors younger than the jurisdiction's age of sexual consent who have been enlisted into selling penetration of their bodies are already understood to be victims without regard to any expressions of acquiescence they may have made. Gaps of a couple of years between the age of sexual consent and the age of legal majority do not eliminate this problem because minors' contracts are voidable, and prostitution as an industry cannot function if sex-sellers have no obligation to fulfill their contractual promises.

Dropping the force-coercion-deceit requirement for sex-sellers below the age of majority thus adds nothing to the law we already have. But insisting on force or coercion, or alternatively force-coercion-deceit, makes a criminal prohibition difficult to apply, regardless of whether the provision exists only for underage sellers. It also fails to capture all the social harm of this practice.

One might then conclude that force-coercion-deceit as a criterion ought to go. Trafficking could be criminalized without this constituent. From there we would have a new problem: If trafficking does not require

159. Sylvia Chant, *The 'Feminisation of Poverty' and the 'Feminisation' of Anti-Poverty Programmes: Room for Revision?*, 44 J. DEV. STUD. 165, 168 (2008).

160. The International Labour Organization, an agency of the United Nations, estimates the gender divide for victims of sexual trafficking as 98% female, 2% male. International Labour Office, *ILO Global Estimate of Forced Labour* 14 (2012), http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@declaration/documents/publication/wcms_181953.pdf.

161. *E.g.*, ARIZ. REV. STAT. ANN. § 13-1307A-B (Westlaw through the First Reg. Sess. of the 53rd Leg.); VT. STAT. ANN. tit. 13, § 2652 (Westlaw through the laws of the First Sess. of the 2017-2018 Vt. Gen. Assemb.).

force or coercion or deceit, then what does the word mean? How can we know it has occurred?

The best-known and most widely adopted formal condemnation of this conduct tries and fails to answer this basic question. In the United Nations' Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children,¹⁶² ratified by 170 nations, including the United States, after taking effect in 2003,¹⁶³ sexual trafficking is at the fore, even though this Protocol also covers nonsexual labor. Its definition of trafficking regards force, coercion, or deceit as sufficient to violate international law but not necessary.

Its language is hard to parse. See how many times you need to read this paragraph to understand what it prohibits:

“Trafficking in persons” shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.¹⁶⁴

This understanding of trafficking includes in its roster of wrongful conduct “the giving or receiving of payments or benefits” to achieve consent “for the purpose of exploitation.” What “exploitation” might mean is unclear. If it means appropriation of surplus value from labor, then a large fraction of nonsexual work runs afoul of this trafficking prohibition.¹⁶⁵ Nouns in the first line—“recruitment, transportation, transfer, harbouring”—are intelligible enough, but what is “receipt of persons”? Furthermore, while it makes sense that the UN Trafficking Protocol chose to condemn “giving” and “receiving” of payments, because presumably traffickers both give money (to recruit) and take it (after their victims start doing sex work), this breadth suggests that victims too are traffickers when they get paid—unless we

162. G.A. Res. 55/25, annex II, Protocol to Prevent, Suppress, and Punish Trafficking in Persons, U.N. Doc. A/45/49 (Vol. I) at 31 (Nov. 15, 2000), https://treaties.un.org/doc/source/docs/A_RES_55_25-E.pdf (*entered into force* Sept. 9, 2003).

163. U.N. TREATY COLLECTION, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-a&chapter=18&clang=_en.

164. G.A. Res. 55/25, *supra* note 162, Article 3(a).

165. Cf. Cynthia Grant Bowman, *Recovering Socialism for Feminist Legal Theory in the 21st Century*, 49 CONN. L. REV. 117, 121–23 (2016) (exploring applications for feminism from Marx's work on the appropriation of labor by capital).

somehow can find enough content in “exploitation” and “having control over another person” to excuse them.

As the UN Trafficking Protocol illustrates, open-ended compendia of behaviors that can amount to trafficking capture a variety of bad actions at the expense of clarity. Institutions and persons who work in or near sex markets and want to be innocent of trafficking cannot know which paths to choose or avoid. As members of communities and societies, they also cannot clearly know whether people around them are harming others or experiencing harm in violation of the law.

This gap around “trafficking” echoes the working sex words problem expounded in Part II. Modern conversations about trafficking eschew the noun “prostitute”: it sounds obsolete in this setting. For participants who favor the passive adjective “prostituted,” force and coercion are always present in this work. Conversely, if a seller is not a prostitute or a prostituted person but a “sex worker,” then consent is her default and her hirer-procurer-recruiter has committed trafficking only if he deviated from this default by coercing her. Regardless of which path one chooses, the basic difficulty persists.

C. The Problem Expanded: Other Trouble with “Trafficking”

After participants in debates about prostitution reach an understanding about the fundamental question of force-and-coercion *vel non*, they will need to move to other definitional tasks not yet even fully identified, let alone resolved, for the regulation of trafficking. They all matter much less than the basic policy disagreement pervading this Essay—that is, whether all sex-selling necessarily includes trafficking—and so will get only enough treatment here to illustrate yet more indeterminacy present in this working sex word.

1. Sex only?

Prohibitions of trafficking disagree on the centrality of sex-selling to the evil they address. The UN Protocol, as noted, includes nonsexual labor among the activities that a person can be trafficked into.¹⁶⁶ Statutory law in the United States manifests both approaches. The federal Victims of Trafficking and Violence Protection Act is drafted to cover sexual and nonsexual labor, but foregrounds sex trafficking and harms to women and children.¹⁶⁷ All U.S. states have trafficking crimes on their books, but some follow the

166. *See supra* note 163.

167. *See* Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 102(b)(1)–(2), 114 Stat. 1464, 1466.

separation approach while others fold sex trafficking into a larger category of forced labor.¹⁶⁸ The phrase “sex trafficking” might, but might not, imply that trafficking can occur without sexual exploitation or sex work. The unexplained and undefined role of sex in this much-repeated noun suggests that participants in the dialogue may end up talking past each other.

2. Who Trafficks?

Irrespective of whether they require force or coercion or deceit, or choose to criminalize trafficking that does not contain these elements, trafficking statutes continue this Essay’s theme of confusion and unclarity by failing to ask a basic question: Who ought to be legally responsible for trafficking? Several actors who do not profit directly from sex work have appeared plausible candidates for legal responsibility. Statutes that omit attention to the evil they are trying to remedy confuse the issues.

A few states have drafted their trafficking crimes to make customers liable when they buy sex aware that the sellers were trafficked.¹⁶⁹ Tort and restitution actions, if courts permit them, add civil liability to the risk of prosecution.¹⁷⁰ Organizations that support sex-sellers may run afoul of anti-trafficking statutory law. For example, the Danish nonprofit Sexelance, which seeks to lessen the danger of street prostitution by providing a converted ambulance as a work space with well-wishers standing outside ready to call the police in case of trouble,¹⁷¹ might be guilty of “harboring” in violation of several American prohibitions.¹⁷² Same, perhaps, for the Chicago nonprofit that gives free legal aid to persons charged with prostitution.¹⁷³ To some localities and observers, landlords who rent to brothel-keepers look guilty of trafficking.¹⁷⁴

168. For a study of American criminalization of trafficking that explores differences and similarities of these state-level provisions, see *2014 State Rankings on Human Trafficking Laws*, POLARIS, <https://polarisproject.org/sites/default/files/2014-State-Rankings.pdf> (last visited Nov. 27, 2017).

169. *E.g.*, MONT. CODE ANN. § 45-5-705(1) (Westlaw through 2017); S.D. CODIFIED LAWS § 22-49-4 (Westlaw through 2017 Reg. and Spec. Sess. Laws).

170. *E.g.*, TSACHI KEREN-PAZ, *SEX TRAFFICKING: A PRIVATE LAW RESPONSE* (2013) (so advocating).

171. Richard Orange, *Copenhagen’s Sex Ambulance is Safe Space for Capital’s Red Light Workers*, GUARDIAN, Nov. 26, 2016, <https://www.theguardian.com/world/2016/nov/27/sex-ambulance-helps-save-lives-in-copenhagen>.

172. *E.g.*, MINN. STAT. ANN. § 609.321 subd. 7a(1) (Westlaw through 2017 Reg. and First Spec. Sess.); OKLA. STAT. ANN. tit. 21, § 748(6) (Westlaw through 2017).

173. See SEX WORKERS OUTREACH PROJECT CHICAGO, <http://www.swop-chicago.org/> (last visited Sept. 23, 2017).

174. *E.g.*, N.Y. PENAL LAW § 230.15(1) (Westlaw through 2017); S.D. CODIFIED LAWS § 22-23-8(4) (Westlaw through 2017 Reg. and Spec. Sess. Laws); see also Arelis R. Hernández, *New Law Could Make Landlords Liable for Sex Trafficking at Their Rent-*

IV. “LEGALIZATION,” “DECRIMINALIZATION,” AND “THE [SWEDISH]
[NORDIC] MODEL”

In contemporary debates over prostitution law reform, the three main terms of art for what advocates desire and oppose—“legalization,” “decriminalization,” and “the []model” with “model” modified by “Swedish” or “Nordic”—all fail to attain effective description. The first two terms fail because an ever-enlarging discourse about making prostitution law more permissive uses “legalization” and “decriminalization” differently from how American criminal law and policy use these words. Because prostitution law reform requires cooperation from legislatures, activists who want legal change have to work with language familiar to state actors. This particular confusion is not present in “the Swedish Nordic model.” Instability here comes instead from the spread of it to national governments far from Scandinavia.

A. Legalization and Decriminalization

Most of the time, “legalization” in the United States means changing the treatment of an activity from unlawful to lawful, from opposition to toleration. To legalize gambling, or abortion, or possession of marijuana, or acts of homosexual intimacy between consenting adults, or the use of steroids by professional athletes, is to cease imposing law-based penalties for engaging in an activity. What one may not do without facing criminal punishment becomes, after legalization, an action one may take without facing an adverse response from the government. “Legalization represents a rollback of the state’s regulatory authority,” the criminal law scholar Alexandra Natapoff explains, as well as “the elimination of state power to punish certain individual choices, and the concomitant expansion of liberty and privacy zones.”¹⁷⁵

Decriminalization, again most of the time, extends less liberality than legalization. Individuals whose conduct is addressed by regulation cannot be convicted of a crime when they engage in a decriminalized activity, but they can suffer other state-imposed detriment. In contrast to legalization of an activity, as Professor Natapoff continues, “decriminalization maintains the full scope of the state’s intrusive powers, softening the consequences of vio-

als, WASH. POST, Nov. 18, 2016, https://www.washingtonpost.com/local/md-politics/new-law-could-make-landlords-liable-for-sex-trafficking-at-their-rentals/2016/11/18/7d036756-ab6a-11e6-a31b-4b6397e625d0_story.html?utm_term=.1bf068204c46.

175. Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055, 1066 (2015).

lations even while validating the underlying prohibition.”¹⁷⁶ One study of the law covering traffic stops in the United States goes further. Even after certain minor infractions that give reason for traffic stops are decriminalized, individuals suffer from harms associated with law enforcement.¹⁷⁷ State actors who patrol the streets cannot, after decriminalization, initiate formal punishment of the automobile drivers they stop, but they force individuals into the criminal justice apparatus, an entry that makes them “vulnerable to state-imposed privacy, liberty, dignitary, and physical harms that arise from contact with the criminal justice system and actors.”¹⁷⁸ Away from prostitution, the state stops imposing detriment on individuals who engage in an activity when it chooses legalization. When the state chooses decriminalization, it continues to impose detriment, only less of it.

Now move the discussion to prostitution. Legalization in contrast to decriminalization takes on a different meaning, almost an entirely opposite one. Here decriminalization becomes the more liberal alternative. In a much-cited explanation of the distinction in the context of prostitution law reform, Janet Halley and colleagues divide decriminalization into parts.¹⁷⁹ When the state chooses complete decriminalization (in contrast to partial criminalization, taken up below¹⁸⁰), it eliminates more interferences with prostitution than it does when it chooses legalization. Complete decriminalization “involves the repeal of any special criminal legislation dealing with sex work. Various activities involved in sex work can still be prosecuted as criminal offenses” after decriminalization, but only “under generally applicable laws,” not sex-sale specific laws.¹⁸¹

This understanding of decriminalization as *laissez-faire* abandonment of state-enforced penalties for selling sex is widely shared by other legal scholars¹⁸²—and it is far from decriminalization as understood in American criminal law of other activities like possession of marijuana and minor traffic violations. In those settings away from prostitution, the state, having opted for decriminalization, continues to burden participants with non-criminal consequences for what they choose to do: fines, citations, administrative penalties.¹⁸³ Advocates of decriminalizing prostitution want no such

176. *Id.*

177. Jordan Blair Woods, *Decriminalization, Police Authority, and Routine Traffic Stops*, 62 UCLA L. REV. 672, 677 (2015).

178. *Id.*

179. See Halley et al., *supra* note 47, at 338–39.

180. See *infra* Part IV.B.

181. Halley et al., *supra* note 47, at 339.

182. E.g., Nicole Bingham, *Nevada Sex Trade: A Gamble for the Workers*, 10 YALE J.L. & FEMINISM 69, 90–91 (1998); Ane Mathieson et al., *Prostitution Policy: Legalization, Decriminalization and the Nordic Model*, 14 SEATTLE J. SOC. JUST. 367, 378 (2016).

183. See, e.g., Woods, *supra* note 177, *passim*.

lesser measures in place any more than they want selling sex to be a crime. Their goal is what Professor Natapoff would call legalization: “a roll-back of the state’s regulatory authority.”¹⁸⁴

Legalizing prostitution in contrast to decriminalizing it means imposing legal controls aimed at making sex work more comprehensively regulated, physically safer for both seller and buyer, and likely to produce tax revenue for the state. One definition describes legalization as “complete decriminalization coupled with positive legal provisions regulating one or more aspect of sex work businesses. The typical options include labor law, employment law, zoning of sex businesses, compulsory medical check-ups, licensing of sex workers, etc.”¹⁸⁵ This choice moves prostitution indoors, off the streets. It is the regulatory posture taken most famously in the Netherlands, Germany and rural Nevada; it also exists in Austria, Denmark, Switzerland, and the Australian state of Victoria.¹⁸⁶

Noun-trouble in prostitution being what it is, “legalization” and “decriminalization” do not define themselves as separate options for regulators, and confusion ensues. For example, when New Zealand codified the Prostitution Reform Act in 2003, undertaking reform by mostly repealing criminal penalties, the statute’s preamble identified its goal as “to decriminalise prostitution.”¹⁸⁷ Fair enough—most of what the Act does is take law out of participants’ way—but the statute also imposes new regulatory burdens on brothel keepers, in effect adding legalization to decriminalization.¹⁸⁸ The law in the Australian state of New South Wales closely resembles that of New Zealand, with similar uncertainty about legalization-like regulatory increments.

When in 2016 Amnesty International formally announced its stance in favor of worldwide decriminalization,¹⁸⁹ it appeared unsure of where it stood on the decriminalization-legalization divide. First, it confidently said it knew what it wanted: “Legalization is different to [*sic*] decriminalization and it is not the model we are proposing. Instead of the *removal* of laws criminalizing sex workers, legalization means the *introduction* of laws and policies specific to sex work to formally regulate it.”¹⁹⁰ Fair enough, though utterly inconsistent with an American convention.¹⁹¹

184. See *supra* note 175 and accompanying text.

185. Halley et al., *supra* note 47, at 339.

186. Raymond, *supra* note 150, at 317–19.

187. Prostitution Reform Act 2003, s 3 (N.Z.).

188. *Id.* s 8.

189. *Amnesty International Policy*, *supra* note 46.

190. *Q&A: Policy to Protect the Rights of Sex Workers*, AMNESTY INTERNATIONAL Q8 (May 26, 2016), <https://www.amnesty.org/en/qa-policy-to-protect-the-human-rights-of-sex-workers/>.

191. See *supra* text accompanying notes 175–78.

The organization continues, “Amnesty is not opposed to legalization per se; but governments must make sure the system respects the human rights of sex workers.”¹⁹² This concession implies that legalization presumptively oppresses sex workers more than helps them—a possibility that could be correct, but for which Amnesty International renders no evidence in its report. Whatever “legalization” may mean here, an important NGO has used this working sex word to associate law and legal regulation with bad consequences.

B. *The Swedish Nordic [What Next?] Model*

In 1999, Sweden enacted the world’s first national law providing that receipt of sexual services in exchange for payment violates the criminal law, whereas participation on the selling side of this exchange does not.¹⁹³ After Norway followed suit in 2008 and Iceland in 2009,¹⁹⁴ the term for criminalizing sex-buying but not -selling shifted from “the Swedish model” to “the Nordic model.” This reform moved south to the United Kingdom with Northern Ireland’s passage of a buyer-only crime,¹⁹⁵ then across the Atlantic when Canada revised its criminal law to exempt sellers while punishing purchasers of sex.¹⁹⁶ In 2016, the French National Assembly enacted this partial criminalization.¹⁹⁷

With France’s population exceeding that of the other five countries put together—not to mention that democracies, Nordic ones included, always can repeal the laws they codify—a different term for partial criminalization of the sex trade seems needed. This one contains built-in obsolescence.¹⁹⁸ It also contains “model,” a subtle affront to both sides of the progressive binary. To call an approach a model is to imply that it is an exemplar—like a model student, model minority, or a runway model. In the United States, a model statute encourages state governments to read,

192. *Amnesty International Policy*, *supra* note 46.

193. LAG OM FÖRBUD MOT KÖP AV SEXUELLA TJÄNSTER (Svensk författningssamling [SFS] 1998:408) (Swed.).

194. Almindelig borgerlig Straffelov 12. des 2008 nr. 1344 § 202a (Norway); Lagasafn, Íslensk Lög nr. 54 27. apríl 2009, 206. gr. (Iceland).

195. Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015 c. 2, § 1, sch. 2; § 2, sch. 15.

196. Protection of Communities and Exploited Persons Act, S.C. 2014, c 25 (Can.).

197. Loi 2016-444 du 13 avril 2016 visant à renforcer la lutte contre le système prostitutionnel et à accompagner les personnes prostituées [Law 2016-444 of April 6, 2016 to strengthen the fight against the prostitution system and assist prostitutes], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Apr. 6, 2016.

198. *Cf.* Richard B. Stewart, *Evaluating the New Deal*, 22 HARV. J.L. & PUB. POL’Y 239, 244 (1998) (locating built-in obsolescence in American regulation).

learn from, and defer to a text. This label gives substantive endorsement to one half of the binary: advocates of full decriminalization do not presume to call the result they want a model. But “model” also has unflattering connotations for their antagonists who favor partial criminalization. The word model sounds theoretical rather than realistic. It marks a hypothesis or a construct, rather than the real interference with customer prerogative that their side works to codify.

The Nordic-Swedish-What Term Next problem is the only working sex word that can be repaired with relative ease: Substitute “buyer criminalization.” Not a perfect term, but by omitting reference to the seller, it avoids the difficulty present in prostitute versus sex worker;¹⁹⁹ criminalization, for its part, is notably clearer than “decriminalization.”²⁰⁰ And whereas “buyer” as a less slangy alternative to “john” warrants criticism for not being candid enough about what gets bought,²⁰¹ “buyer criminalization” in the context of prostitution law reform says what it means.

V. CONCLUSION: SENSE AND SENSIBILITY FOR WORKING SEX WORDS

In her first novel, *Sense and Sensibility*, Jane Austen created two sisters, Elinor and Marianne Dashwood, and associated each with a separate abstract noun.²⁰² Elinor represents Sense: rationality, logic, prudence. Marianne stands for Sensibility, a word that back in the early nineteenth century meant what modern diction might call in touch with her feelings. Austen approves of both nouns. They balance each other, she implies: for an individual, the path to happiness requires attention to each of these opposing inclinations.

The nouns of working sex words try to balance Sense with Sensibility. Curing the trouble with “prostitute,” “prostitution,” “sex work,” “sex workers,” “john,” “pimp,” “madam,” “legalization,” “decriminalization,” and “trafficking” may appear at first to be a problem only of Sense. These words, as the introduction to this Essay noted, are in the aggregate ambiguous, misleading, too slangy or jocose, absent, or bitterly contested. Bad, in short. Other words exist. Why not throw them out and choose better ones? Rational reformers, acting in the mode of Elinor Dashwood, would know what they want to say about the sex trade and speak accordingly.

Worth a try, and this Essay has made one move toward Sense, proposing “buyer criminalization” as a substitute for “the Nordic model,” a descriptor that replaced something else and is likely to continue unstable in

199. *See supra* Part I.

200. *See supra* Part IV.A.

201. *See supra* Part II.A.

202. JANE AUSTEN, *SENSE AND SENSIBILITY* 10 (1811).

the future.²⁰³ Going forward, it may be possible to repair the difficulties present in “legalization” and “decriminalization.”²⁰⁴ The other working sex words of this Essay, however—especially prostitute, sex worker, john, pimp, and trafficking—have no prospects of improvement through the application of Sense. The reason for their futility is their stubborn Sensibility, a commitment as much felt as reasoned.

“Prostitute” and “pimp” are epithets suffused with hostility that speakers cannot avoid, though they may not feel antipathy or wish to express it. “Sex worker” and “john” have an opposite function. They shroud the person they name in fog and imply “move along, nothing to see here.” As for “trafficking,” it turns out to have no empirical content other than third-party involvement:²⁰⁵ all it means, in the end, is some participation in the sex trade that the speaker condemns and expects others to disapprove. These terms all are rife with warring sensibilities.

It is telling that “the Nordic model” is the easiest working sex word of this Essay to fix. This descriptor, like Marianne Dashwood, knows how it feels and what it wants. “Legalization” and “decriminalization” also have orderly goals in mind, though these nouns themselves lack clarity.

In contrast to these relatively clear terms, a person paid to accept intimate penetration by strangers embodies a profound divide. Disagreement about whether sex-selling and -buying can ever be an activity that the law should tolerate is so fundamental that it has blocked describing, let alone achieving, legal reform. Participants who work toward progressive ends in this debate might do well to keep this fundamental in mind as they consider what they can say productively to the other side of the binary. Until they acknowledge not just their common interest in more humane law and regulation but also their disunity, the working sex words that they now have to use will continue to thwart what they do.²⁰⁶ ❀

203. See *supra* Part IV.B.

204. See *supra* Part IV.A.

205. MacKinnon, *supra* note 18, at 299–300.

206. Cf. Anita Bernstein, *The Trouble with Regulating Microfinance*, 35 U. HAW. L. REV. 1 (2013) (making a related agreement about the term “microfinance” as an object of regulatory attention).