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# Regulating Sex Work: Assimilation, Erotic Exceptionalism & Beyond

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**REGULATING SEX WORK: ASSIMILATIONISM, EROTIC EXCEPTIONALISM  
& BEYOND**

by

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*Regulating Sex Work: Assimilationism, Erotic Exceptionalism and Beyond*  
Adrienne D. Davis<sup>1</sup>

Most commentators on sex markets focus on the debate *between* abolitionists and those who defend and support professional sex work. This paper, instead, looks at debates *within* the pro-sex work camp, uncovering some unattended tensions and contradictions. It shows that, within this camp, some stress the labor aspect, urging that sex markets perpetuate a “vulnerable population” of workers, similar to others who perform highly risky and/or exploited labor, and should be regulated accordingly. In this view, sex work would be assimilated into other labor. Others, though, take a more anti-regulatory stance. They exceptionalize this form of labor, arguing that because it is *sexual* it should be exempt from state scrutiny and interference, claims which can quickly sound libertarian. In sum, while both camps agree that professional sex work should be decriminalized, when one turns from the criminal to the regulatory perspective, the paper shows how erotic exceptionalists and assimilationists could not be more opposed. The paper contends that neither of these views is satisfactory. Sex work could very well be legalized and regulated—if we have the political and moral will to do so. The paper explores a regulatory structure that might govern sex markets. Doing so requires a break with both assimilationism and erotic exceptionalism.

This paper attempts two interventions into the sex work debate. The first move is a conceptual one, shifting the focus from disputes between abolitionists and sex work advocates to uncovering contradictions and ambivalences within the pro-sex work camp. It gives significant attention to these latent tensions, as I anticipate some readers steeped in feminist theory may dispute this as an issue. The second is a governance move, comparing sex work to other types of work to consider to what extent various risks and injuries of sex work, physical and otherwise, could be ameliorated by legalization—that is by appropriate state regulation. It pairs two regulatory claims. One contends that risk reduction is best served by correlating regulation to institutional form, or what I call sexual geography, which I do not anticipate will be that controversial. Another, which tackles discrimination from the demand side, that is, through the erotic preferences that comprise sex markets, should be provocative to many. In the end, my goal is to launch a conversation about whether the sex workplace really is like the factory floor.

Underlying all of this is an effort to break the feminist pro-sex work position out of an impasse. While increasing global attention to sex trafficking has resulted in the

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<sup>1</sup> Vice Provost and William M. Van Cleve Professor of Law, Washington University. The conceptualization of this project has benefitted immensely from conversations with Susan Appleton, Adam Badawi, Kate Bartlett, Scott Baker, James Boyle, Guy-Uriel Charles, Marion Crain, Deborah Dinner, Emily Danker-Feldman, Jane Green, Elizabeth Glazer, Jayne Huckerby, John Inazu, Holning Lau, Greg Magarian, Goldburn Maynard, Eric Miller, Mireille Miller-Young, Adele Morrison, Anca Parvulescu, Bob Pollak, Jed Purdy, Gabe Jeff Redding, Gabe Rosenberg, Darren Rosenblum, Laura Rosenbury, Peggie Smith, Susan Stiritz, Rebecca Wanzo, and Deborah Weissman, as well as the Washington University School of Law Faculty Colloquium and the Washington University Political Theory Workshop, the Women Law Student Association Reading Group at Duke Law School, the Hofstra Colloquium on Law & Sexuality, Pace Law School’s Faculty Workshop, the University of California, Irvine Law School Faculty Workshop, the University of Southern California Law & Humanities Workshop, and my Ladies Who Do Theory Writing Group—Jami Ake, Gretchen Arnold, Marilyn Friedman, Ruth Groff, Linda Nicholson, Elisabeth Perry, and Wynne Moskop. For research assistance, I thank Anne Houghten Larsen, Yijie Shen, and especially Jessica Hille.

anti-sex work position becoming more and more refined, evolving into contemporary abolitionism, the pro-sex work camp appears to remain stuck in a set of first generation claims.<sup>2</sup> I do not mean to be dismissive or critical; after all, we would not understand sexual harassment as sex discrimination, marital rape as rape, or domestic violence as criminal assault without feminism. Yet, in the arena of sex work, the feminist regulatory imagination remains stuck, unable to recognize the latent tension between assimilationism and erotic exceptionalism, let alone move beyond it. I call for a quick and purposeful move into second generation issues beginning with the recognition of the sheer complexity of the issue. As the paper shows, there is no one free market for sex work, which is perhaps unintentionally envisioned by assimilationists. Rather, the question is which free market and which of 1,000 switches to throw. Nor is this debate only of interest to feminists. Rather, it sheds light on workplace law, anti-discrimination law, and regulatory effects more broadly, including questions of substitution effects and endowments.

The Article proceeds in four parts. The first part explores the discourse and debate over professional sex, teasing out latent, unexplored tensions among advocates of professional sex as labor. It summarizes, briefly, the abolitionist position, often identified as the dominant feminist position. It then turns its attention to sex work advocates, exploring the discourse in detail to reveal a contradiction between those who emphasize the *sexual* part of sex work to exempt it from state regulation versus those who emphasize the *labor* part of sex work and see this as a way to demand *greater* state regulation of sexual commerce. While both camps view “work” as a legitimizing lens, they ultimately envision starkly different, even contradictory, relationships between sexual commerce and the state. In the end, while both may urge decriminalization, what I call assimilationists and erotic exceptionalists are quite opposed.

The second Section shows how assimilationist rhetoric of sex as “just” labor can be overly simplistic and terribly misleading. From a policy perspective, insisting that commercial sex merely be assimilated into legal work invokes a single, idealized workplace that ignores the starkly different manifestations of work and its regulation in post-industrial global economies. This Section explores how employment, labor, and discrimination law regulate the various hazards, risks, conflicts, and disputes that arise in the modern workplace. In the process, it exposes the complete diversity of work and its regulation. Although assimilationists’ claims rest on a monolithic vision of how “work” is regulated, their claim to a universal workplace or regulatory structure is a miscue from how labor law actually functions. Workplace regulation today is varied, differential, instrumental, and under immense contest.

The second half of the paper then turns its attention to whether sex work *could be* effectively regulated, once we break from both assimilationism and exceptionalism. Section III completes the break and tackles the regulatory question in three moves. It first stresses the extent to which sex workplaces are *not* like most workplaces. *Most* workplaces are not characterized by the particularities of sex work, the culture of alcohol and drinking and drugs; the homosocial “mob” context; the blurred line between re-negotiations and assaults; a similarly blurred line between on-site/off-site (that is on-duty/off-duty) identities; and employer expectations of “free” services that can combine to make commercial sex more dangerous for workers than most other forms of labor.

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<sup>2</sup> See *infra* notes [x] and accompanying text for discussion of feminist abolitionism.

Crucially, the danger is coming largely from customers and patrons (and managers and owners) rather than from machines or mine collapse. Assimilationism misses these key, distinct characteristics of sex work and the corollary hazards they pose.

There is a corollary to this point: the assimilationist “sex work is just work” mantra misses the ways that sexual services differ from *each other*, posing what the paper shows to be radically different regulatory challenges. The Article rejects schema that categorize professional sex according to either a criminal/legal binary or along a continuum of proximity to intercourse, ranging from phone sex to prostitution with lapdancing and sexual massage in the middle.<sup>3</sup> The paper suggests a different framework, predicated on institutional form, or sexual geography. It differentiates the variable hazards posed by phone sex, incall and outcall work, and work in commercial establishments such as brothels and clubs, proposing to categorize and regulate sex work according to the *risk* different institutional geographies pose to worker health and safety. It shows that the degree of risk correlates not with the type of activity but with the proximity and isolation of the interaction. In sum, the sexual geography model replaces the criminal and bodily penetration schema with an analysis rooted in risk reduction.

Other aspects of sex work, though, might be tougher to regulate. Sexual commerce is highly racially stratified, with workers allocated to different market sectors and employment prospects based on race and other legally protected characteristics. Many assimilationists find the idea of dance club or brothel owners or other sex employers empowering patrons’ racial or other bodily preferences offensive and urge that it constitutes impermissible discrimination. They likewise condemn customers who discriminate on their own accounts. The paper demonstrates that while the sexual geography approach can rather straightforwardly regulate for sex workers’ health and safety, and even against sexual harassment, disparate treatment discrimination presents a far more vexed case. This paper questions whether different sorts of discrimination can be defensibly disaggregated, that is whether racial discrimination can be distinguished from gender and other forms of discrimination in sex markets. I pursue this inquiry to show that assimilationists’ embrace of anti-discrimination laws may actually reveal a latent ambivalence towards sex markets and the erotic preferences that comprise them. I contend this results from an exclusive focus on labor and an analytical neglect of the demand side of erotic markets.

The paper concludes by considering the political feasibility of not only decriminalizing but dedicating administrative and regulatory resources to sex work. It contrasts sexual commerce with two industries at opposite ends of the regulatory spectrum, pornography and mining, to consider questions of administrability, political will, endowments, externalities, and substitution effects. It considers how all of these will figure into the calculus as to whether sex work can be effectively regulated.

A quick note about language. Because the paper is exploring the discourse and feasibility of sex as labor, it uses the terms professional sex, sexual commerce, transactional sex, commercial sex, and sex markets interchangeably. In particular, professional sex can be contrasted with the “amateur” sex in which most of us engage, involuntary sex trafficking, and, at a mid-point between the two, “survival sex” in which

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<sup>3</sup> I contend conservatives, liberals, and radicals all are susceptible to this logic. *See infra* notes [sections I and III] and accompanying text.

sex is transacted, typically without meaningful capacity and often directly for drugs.<sup>4</sup> I avoid the term commodified sex as a nod to the argument that much sex, and intimacy, is commodified, sometimes in ways that are far more mercenary than in formal sex markets.<sup>5</sup> On the demand side, I call consumers of paid sexual services customers, patrons, and clients, self-consciously adopting the “customer” language to confront and show how a full embrace of market logic and norms *can be* unsettling. The denomination “customer” suggests the possible legitimacy of their preferences for different kinds of sexual services, which I take up in Section III as putting purposeful pressure on those who advocate for legalizing sex markets to contemplate the logical end of sex markets.

## I. DISCOURSES OF LABOR: ASSIMILATIONISM & EXCEPTIONALISM

The commodification of activities conventionally associated with women—care, sex, and reproduction—has long generated debate and controversy,<sup>6</sup> especially among those whose first principles are feminist,<sup>7</sup> *i.e.*, to sex equality, gender and sex as axes of

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<sup>4</sup> Survival sex can be traded for any basic subsistence needs, including housing, food, and money. The key distinction is the immediacy of the trade versus the labor generating a source of income, however regular or irregular. *See, e.g.*, Jody M. Greene et al, *Prevalence and Correlates of Survival Sex Among Runaway and Homeless Youth*, 89 AM. J. PUB. HEALTH 1406, 1406 (1999) (“Survival sex” refers to the selling of sex to meet subsistence needs. It includes the exchange of sex for shelter, food, drugs, or money.”); UNAIDS Inter-Agency Task Team on Gender & HIV/AIDS, Fact Sheet: HIV/AIDS, Gender and Sex Work 1 (2008), available at [www.unfpa.org/hiv/docs/factsheet\\_genderwork.pdf](http://www.unfpa.org/hiv/docs/factsheet_genderwork.pdf) (“Women and men who have occasional commercial sexual transactions or where sex is exchanged for food, shelter or protection (survival sex) would not consider themselves to be linked with formal sex work. Occasional sex work takes place where sex is exchanged for basic, short-term economic needs and this is less likely to be a formal, full-time occupation.”). Many professional sex workers distinguish their labor from survivalists. *See, e.g.*, ELIZABETH BERNSTEIN, *TEMPORARILY YOURS: INTIMACY, AUTHENTICITY, AND THE COMMERCE OF SEX* (2007) [hereinafter, BERNSTEIN, *TEMPORARILY YOURS*] (add pincite and quote).

<sup>5</sup> *See infra* notes [x] and accompanying text. Of course, one can argue that sex between intimates outside of markets is transactional, etc. These would be species of what Viviana Zelizer calls “nothing but” arguments, that deny any meaningful distinction between sex work and non-market intimacy. *See infra* notes [x] and accompanying text. Because I do think sex performed in markets is different, and in need of different regulation, than sex outside of markets, I resist this effort to collapse the two and employ different language. On the other side, abolitionists, of course, will reject my language of voluntary markets. *See, e.g.*, SHEILA JEFFREYS, *THE INDUSTRIAL VAGINA: THE POLITICAL ECONOMY OF THE GLOBAL SEX TRADE* 8-9, 15-37 (2009) (arguing feminist embrace of language of labor and voluntarism to characterize sex work normalizes injuries of prostitution and capitulates to “economic ideology of neo-liberalism”).

<sup>6</sup> As Viviana Zelizer observes, “Intimate care sentimentalizes easily, for it calls up all the familiar images of altruism, community, and unstinting noncommercial commitment. From there it is only a step to a notion of separate spheres of sentiment and rationality, thence to the hostile worlds supposition that contact between the personal and economic spheres corrupts both of them.” VIVIANA A. ZELIZER, *THE PURCHASE OF INTIMACY* 207 (2005). *See also* KIMBERLY KRAWIEC, *SHOW ME THE MONEY: MAKING MARKETS IN FORBIDDEN EXCHANGES* (2009) (characterizing these as “forbidden markets”).

<sup>7</sup> Elizabeth Bernstein observes:

What Arlie Hochschild has termed “women’s uneasy love affair with capitalism” is made all the more acute when we consider that many of the flourishing sectors of the late-capitalist service economy—such as child care, domestic labor, and sex work—are commercialized refinements of services that women have historically provided for free.

BERNSTEIN, *TEMPORARILY YOURS*, *supra* note [x], at 176 (footnote omitted).

distributive justice, and destabilizing the sex/gender system.<sup>8</sup> While subject to much critique, care activities have long been heavily commodified; much of this activity is unregulated, or, more precisely, occurs in what Elizabeth Emens has called a “litigation-free zone.”<sup>9</sup> Reproduction is currently in a gray area of commodification and regulation, with increased technological capacities generating much debate over the legitimacy of such markets and their regulation.<sup>10</sup> The last of the troika, commodified sex, and more specifically, markets for sex, is the subject of this paper and has been particularly contentious. Although commodification pervades sexual intimacy,<sup>11</sup> social condemnation of sexual labor has a long history.<sup>12</sup> Sex markets are diverse, and so is

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<sup>8</sup> There are, of course, many, contested definitions of feminism. I adopt Gayle Rubin’s classic formulation that feminism is dedicated to destabilizing the sex/gender system and supplement it. Gayle Rubin, *Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality*, in PLEASURE AND DANGER: EXPLORING FEMALE SEXUALITY (Carole S. Vance ed., 1984) (discussing sexuality as a political force similar to gender that is used to create and maintain hierarchies of power and oppression of nonconformists).

<sup>9</sup> “Intimate discrimination should remain a litigation-free zone. But this does not mean it should be, or could be, a law-free zone. On the contrary, law should take account of its role in intimate discrimination at a structural level and work to eliminate burdens and biases that currently shape who has access to intimate relationships and on what terms.” Elizabeth F. Emens, *Intimate Discrimination: The State’s Role in the Accidents of Sex and Love*, 122 HARV. L. REV. 1307, 1311 (2009).

<sup>10</sup> For example, contrast Michigan, where statutes prohibit enforcement of surrogacy contracts and parenthood defaults to the birth mother with California where both the judiciary and legislature provide mechanisms to enforce such agreements. *Compare* Mich. Comp. Laws Ann. 722.857 (West 2004) (penalties of up to five years in prison for participants in a gestational surrogacy arrangement involving compensation) *with* Johnson v. Calvert, 851 P.2d 776 (Cal. 1993) (enforcing the surrogacy contract and holding that the couple that initiated the creation of the child are the intended and legal parents); Cal Fam Code § 7961 (2011) (regulating “surrogacy facilitators” and payment/escrow procedures). For discussion of the legitimacy of surrogacy agreements, see for example Marjorie M. Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Equality*, 1990 WIS. L. REV. 297 (1990); Karen Busby & Delaney Vun, *Revisiting The Handmaid’s Tale: Feminist Theory Meets Empirical Research on Surrogate Mothers*, 26 CAN. J. FAM. L. 13 (2010) (presenting empirical data to challenge claims about the vulnerability and exploitation of women who agree to gestate pregnancies for others); Seema Mohapatra, *Achieving Reproductive Justice in the International Surrogacy Market*, 21 ANNALS HEALTH L. 191 (2012) (responding to rise of reproductive tourism); Elizabeth S. Scott, *Surrogates and the Politics of Commodification*, 72 LAW & COMTEMP. PROBS. 109 (2009) (noting how the “moral panic” about commodification sparked by *Baby M* has dissipated over time). Elizabeth Bartholet condemns reproductive technology in different terms, as devaluing children in need of adoption.

<sup>11</sup> See generally ZELIZER, *supra* note [x]; RETHINKING COMMODIFICATION: CASES AND READINGS IN LAW AND CULTURE (Martha M. Ertman & Joan C. Williams eds., 2005).

<sup>12</sup> As noted, commodification pervades sexual intimacy and the question of when commodification tilts sex into a “professional,” market transaction is deeply contested. See, e.g., ZELIZER, *supra* note [x], at 94-157 (discussing legal cases on the borderline of prostitution and non-commercial interactions). Moreover, Zelizer notes that race and class norms and rituals often differentiate prostitution from dating as money changes hands. *Id.* at 114-18. Recent cultural phenomena, including the Girlfriend Experience and Sugar Babies, both demonstrate how seamless the line can be, as the former explicitly “sells” non-market ideals in markets for sex and the latter explicitly brings market ideals into nominally non-marketized sex. *Id.* at 83, 97, 111.

In explaining the widespread repugnance of commodified intimacy, including sex work, Zelizer notes, it is rarely the actual commodification of intimacy that troubles us, as economics plays a large role in intimacy, but the “payment systems” that are employed. In the case of professional sex, or cash for sex, abolitionists condemn the mixing as what Zelizer calls “hostile worlds.” This hostile worlds approach, “which frequently involves questions of social justice” rests on and reinforces the idea of “intimacy as a fragile flower that withers on contact with money and economic self-interest.” Opposition to sex work

their treatment by the state. Almost everywhere in the U.S. purchase of actual sex is currently criminalized,<sup>13</sup> but filming and distribution of sex acts, *i.e.*, pornography, erotic performances which may include sexual acts performed on customers, (*e.g.*, lapdances), erotic massages, and sexual interactions that do not involve touching (*e.g.*, internet and phone sex) are all legal. While sex markets and their regulation are diverse, the stigma associated with them is not. Neither commodified reproduction nor commodified care entail the social and moral reprobation commodified sex does.<sup>14</sup>

### A. *The Debate over Professional Sex: A Primer*

Interestingly, many self-identified feminists join conservatives in opposing legal markets for sex. However, while conservatives typically target both the sale and purchase of sex, many feminists urge criminalizing only its sale.<sup>15</sup> In addition, while

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often rests on the belief that “intimacy corrupts the economy and the economy corrupts intimacy.” Sometimes it is intimacy that corrupts the “commercial,” *e.g.*, insider trading and sexual harassment and sometimes it is economics that corrupts intimacy. Prostitution is a classic example of the latter. Ironically, she contends the contamination hypothesis draws on nineteenth century ideologies of domesticity and separate spheres, which have been much criticized by feminists. ZELIZER, *supra* note [x], at 40, 1, 5, 297, 24, 24.

<sup>13</sup> The United States leaves the status of prostitution to the individual states, but it is criminalized everywhere except for eleven rural counties in Nevada, with populations of less than 700,000. N.R.S. 244.345.8. Between 1980 and 2009, “indoor” prostitution was legal in Rhode Island because of an unintentional legislative loophole. The state enacted new legislation criminalizing all prostitution in November 2009. Rhode Island: 2009 R.I. Pub. Laws 185-186 “Prostitution and Lewdness.” Some jurisdictions have contemplated decriminalization or non-enforcement of state laws at the local level. *See, e.g.*, Proposition K, City of San Francisco: Changing the Enforcement of Laws Related to Prostitution and Sex Workers (2008, defeated), text available at <http://www.smartvoter.org/2008/11/04/ca/sf/prop/K/>; *see also* Sylvia A. Law, *Commercial Sex: Beyond Decriminalization*, 73 S. CAL. L. REV. 523, 583-585 (2000) (discussing New Jersey, Rhode Island, and San Francisco); Leigh, *supra* note [x] (discussing San Francisco Task Force recommendations to suspend enforcement of state laws against prostitution and redirecting resources to services for sex workers and enforcing nuisance laws).

Although prostitution is itself illegal, Viviana Zelizer notes that “in practice courts and judges have not maintained a simple dichotomy of legitimate, nonmonetary sexual relations versus illegal, monetized prostitution.” Instead, they carefully parse how and when commodified relations are permitted within intimate connections. ZELIZER, *supra* note [x], at 148-51.

<sup>14</sup> While people debate the ethics of commodified care work, critics do not generally condemn care providers as immoral, unethical, criminal people. Similarly, most tend to see reproductive surrogates as themselves victims of reproductive markets and the wealthy. Sex workers, however, are often viewed as immoral, bad people. *See, e.g.*, Bernstein, *supra* note [x], at 7 (“prostitution has . . . been the paradigmatic example of the moral difficulties that ensue when bodily attributes are commodified for a wage.”); *see also* Martha C. Nussbaum, “*Whether from Reason or Prejudice*”: *Taking Money for Bodily Services*, 27 J. LEGAL STUD. 693 (1998) (using other forms of labor to question extreme opposition to prostitution.).

<sup>15</sup> *See, e.g.*, Michelle Madden Dempsey, *Sex Trafficking and Criminalization: In Defense of Feminist Abolitionism*, 158 U. PA. L. REV. 1729, 1776-77 (2010) (“Meanwhile, whether because they are victims of male patriarchy or because they are victims of social deviance, women prostitutes should not be penalized themselves but instead should be the target of rescue and rehabilitation efforts.”); Chuan, *supra* note [x], at 1669. This is the model adopted by Sweden. *See infra* notes [x] and accompanying text.

Complicating this argument, though, Levitt and Dubner observe that “most governments prefer to punish the people who are supplying the goods and services rather than the people who are consuming them” even though the resulting scarcity inevitably raises prices, which “entices more suppliers to enter the market.” They speculate that a more effective mechanism would be to target demand in a different way: if “men convicted of hiring a prostitute were sentenced to castration, the market would contract in a hurry.”

conservatives typically condemn professional sex in *moral* terms, feminists do so in a different register. For instance many feminists characterize commercial sex as abusive of women<sup>16</sup> and a human rights violation<sup>17</sup>—it is an inherently “degraded exchange.”<sup>18</sup> They reject it as a legitimate form of labor, instead seeking its prohibition and eradication. According to philosopher Carol Pateman, “When women’s bodies are on sale as commodities in the capitalist market, the terms of the original contract cannot be forgotten; the law of male sex-right is publicly affirmed, and men gain public acknowledgment as women’s sexual masters – that is what is wrong with prostitution.”<sup>19</sup> Catharine MacKinnon has a similar formulation, “Women are prostituted precisely in order to be degraded and subjected to cruel and brutal treatment without human limits; it is the opportunity to do this that is exchanged when women are bought and sold for sex.”<sup>20</sup> Kathleen Barry puts it perhaps most strongly: “The sex men buy in prostitution is the same sex that they take in rape—sex that is disembodied, enacted on the bodies of

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STEVEN D. LEVITT & STEPHEN J. DUBNER, *SUPERFREAKONOMICS: GLOBAL COOLING, PATRIOTIC PROSTITUTES, AND WHY SUICIDE BOMBERS SHOULD BUY LIFE INSURANCE* 25 (2009).

<sup>16</sup> One of the most famous opponents, Kathleen Barry, explains:

This misogyny, the use of prostitutes to act out one’s contempt for the lower and degraded sex, is the single most powerful reason why prostitution has always been considered a cultural universal—the oldest profession, the indestructible institution, the necessary social service. It intersects with the domination of women at all levels of society.

KATHLEEN BARRY, *FEMALE SEXUAL SLAVERY* 137 (1984).; *see also* KATHLEEN BARRY, *THE PROSTITUTION OF SEXUALITY* 37 (1995) [hereinafter *THE PROSTITUTION OF SEXUALITY*]; JEFFREYS, *THE INDUSTRIAL VAGINA*, *supra* note [x], at 1 (“the growing market sector [of prostitution] needs to be understood as the commercialization of women’s subordination”); Andrea Dworkin, *Prostitution and Male Supremacy* (1992) (rejecting prostitution as male dominance); Mary Ann Becker, *A Review of The Prostitution of Sexuality: The Global Exploitation of Women* (reviewing Kathleen Barry), 52 *DEPAUL L. REV.* 1043, 1044-45 (2003) (“while pornographic media are the means of sexually saturating society, while rape is paradigmatic of sexual exploitation, prostitution, with or without a woman’s consent, is the institutional, economic, and sexual model for women’s oppression.”).

<sup>17</sup> “The abolitionist position treats all prostitution as a problem of human rights, to be condemned uncompromisingly, like slavery, and never to be equated with acceptable practices like work, or with legitimating ideas like consent and contract.” Jane E. Larson, *Prostitution, Labor, and Human Rights*, 37 *U.C. DAVIS L. REV.* 673, 680 (2004).

<sup>18</sup> Bernstein, *supra* note [x], at 109. Some contend that legalized sex markets “effectively places the government in the role of pimp.” Carrie Benson Fischer, *Employee Rights in Sex Work: The Struggle for Dancers’ Rights as Employees*, 14 *LAW & INEQ.* 521, 552 (1996). *See also* Almog, *supra* note [x], at 735 (“The Victoria government, apparently motivated by the profits brought in by the prostitution market, is ignoring the accumulating evidence regarding the sorry situation of women in the ‘sex industry,’ the growing violence towards them and the normalization of this violence.”); *Sex Workers and Sex Work*, *supra* note [x], at 5 (“Under legalization . . . [t]he state becomes a licit pimp . . .”).

<sup>19</sup> CAROLE PATEMAN, *THE SEXUAL CONTRACT* 208 (1988). *See also* Laurie Shrage, *Should Feminists Oppose Prostitution?*, 99 *ETHICS* 347 (1989) (“most feminists find the prostitute’s work morally and politically objectionable. In their view women who provide sexual services for a fee submit to sexual domination by men, and suffer degradation by being treated as sexual commodities.”).

<sup>20</sup> Catharine A. MacKinnon, *Prostitution and Civil Rights*, 1 *MICH. J. GENDER & L.* 13, 13 (1993). *See also* CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 168 (1991) (“Because the stigma of prostitution is the stigma of sexuality is the stigma of the female gender, prostitution may be legal or illegal, but so long as women are unequal to men and that inequality is sexualized, women will be bought and sold as prostitutes, and law will do nothing about it.”); CATHARINE A. MACKINNON, *WOMEN’S LIVES, MEN’S LAWS* 159 (2005) (“Perhaps when women in prostitution sustain the abuse of thousands of men for economic survival for twenty years, this will, at some point, come to be understood as nonconsensual as well.”).

women who, for the men, do not exist as human beings.”<sup>21</sup> Legal philosopher Margaret Radin makes a different point, that commodified sex cannot co-exist with our aspirations for its decommodified form.<sup>22</sup> These insightful and influential feminists conclude that the injuries and harms of commercial sex warrant its continued criminalization, and many contend the state does not do enough to eradicate it.<sup>23</sup> Indeed, for some, ending prostitution is “feminist abolitionism.”<sup>24</sup> (And within abolitionism, some limit their criticisms to prostitution while others are all encompassing criticisms of commercial sex more generally.<sup>25</sup>) In sum, opposition to sex markets has a long and rich feminist pedigree.

On the other side, different strains of feminist thought argue the legitimacy of professional sex. Some do so from a pro-sex perspective, arguing that [add quote].<sup>26</sup> Relatedly, some contend that decriminalized sex exchanges have the potential to subvert patriarchy, challenging the social mechanisms by which some women are socially slotted and raised to be “good girls.” In this conceptualization, commercial sex becomes a “category of radical sexual identity.”<sup>27</sup> Others argue that all women bargain and “work” for sex, a claim that dates back to nineteenth-century critiques of the dichotomy between marriage and prostitution as a false one.<sup>28</sup> Still others root their support for sex markets

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<sup>21</sup> BARRY, THE PROSTITUTION OF SEXUALITY, *supra* note [x], at 37.

<sup>22</sup> MARGARET JANE RADIN, CONTESTED COMMODITIES. *See also* Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1915-1917 (1987) (characterizing prostitution as double bind where both commodification and non-commodification can be harmful); ELIZABETH ANDERSON, VALUE IN ETHICS AND ECONOMICS (1993) (commodified sex has negative influences on gratuitous sex); Elizabeth Anderson, *Is Women’s Labor a Commodity?*, 19 PHIL. & PUB. AFF. 71 (1990) (add parenthetical).

<sup>23</sup> *See also* Bernstein, *supra* note [x], at 93 (“Radical feminists usually have argued that legalization is the state’s official endorsement and the ultimate patriarchal expression of ‘the traffic in women.’”).

<sup>24</sup> *See, e.g.,* Dempsey, *supra* note [x], at 1733 (“Feminist abolitionism, as I understand it, is action taken in an effort to end sex trafficking that is motivated by a belief that such trafficking harms women in ways tending to sustain and perpetuate patriarchal structural inequalities.”). Dempsey emphasizes “the ways in which feminist abolitionism is importantly distinct from conservative and reactionary flavors of abolitionism.” *Id.* Elizabeth Bernstein provides a comprehensive and insightful discussion of the neo-abolitionist advocacy movement. *See* Elizabeth Bernstein, *The Sexual Politics of the “New Abolitionism*, 18 DIFFERENCES 128 (2007) [hereinafter Bernstein, *New Abolitionism*] (focusing on the converging factors underpinning the neo-abolitionist movement); Elizabeth Bernstein, *Militarized Humanitarianism Meets Carceral Feminism: The Politics of Sex, Rights, and Freedom in Contemporary Anti-trafficking Campaigns*, 36 SIGNS 45 (2010) [hereinafter Bernstein, *Militarized Humanitarianism*] (add parenthetical).

<sup>25</sup> Compare Barry, *supra* note [x], with Pateman, *supra* note [x], and Radin, *supra* note [x].

<sup>26</sup> *see also* Mary Joe Frug, *A Postmodern Feminist Legal Manifesto (An Unfinished Draft)*, 105 HARV. L. REV. 1045, 1059 (1992) (“The arguments that sex workers are making to assimilate their work into the wage market appeal to a sexualized femininity that is something other than a choice between criminalized and maternalized sex or a choice between terrorized and maternalized sex.”).

<sup>27</sup> Bernstein, *supra* note [x], at 112. The sex work advocacy group COYOTE concurs that open markets for sex subvert gender roles, in which some women are socially slotted and raised to be “good girls.”

<sup>28</sup> This argument has a long pedigree, dating back to nineteenth-century gender activists and earlier. *See, e.g.,* MARY WOLLSTONECRAFT, A VINDICATION OF THE RIGHTS OF WOMAN (1792) (calling marriage “legal prostitution”); Lucinda B. Chandler, (“when prostitution ceases inside of marriage it will cease outside”); *see also* JEFFREYS, THE INDUSTRIAL VAGINA, *supra* note [x], at 40-44 (offering genealogy of feminist equations of marriage with prostitution). More recent invocations include PATEMAN, *supra* note [x], at 123 (“The husband’s conjugal right is the clearest example of the way in which the modern origin of political right as sex-right is translated through the marriage contract into the right of every member of the fraternity in daily life.”); Prabha Kotiswaran, *Wives and Whores: Prospects for a Feminist Theory of Redistribution*, in SEXUALITY AND THE LAW: FEMINIST ENGAGEMENTS (Carl F. Stychin & Vanessa E.

in liberalism, making agency arguments that women should have the ability to determine their own trade-offs after discerning and evaluating their options.<sup>29</sup> In fact, one sociologist finds that, ironically, prostitution may be the first time some women feel empowered regarding sex, including to refuse it.<sup>30</sup> Those who embrace what they conceive of as erotic autonomy criticize criminal law for labeling sex workers as sex *offenders*, despite the consent of both parties.<sup>31</sup> In this sense they invoke *Lawrence v. Texas*-like analyses over the scope of sexual autonomy and what the state should criminalize. Most recently, some advocates for transactional sex have made arguments from the “demand” side, pointing out that sex markets may be the only chance that the

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Munro eds.). Elizabeth Bernstein’s ethnography of prostitutes found this sentiment alive and well. According to one San Francisco sex worker: “‘All fucks are tricks anyway, and you’re always doing it for the money. If you sleep with your husband and later he gives you \$50, it amounts to the same thing.’” BERNSTEIN, *supra* note [x], at 51. A classic example linking marriage’s mercenary element with prostitution comes from Jenny Livingston’s documentary on drag queens in New York City:

I feel like, if you’re married? A woman, in the suburbs, a regular woman, if you want your husband to buy a washer and dryer set, I’m sure she’d have to go to bed with him, to give him something he wants, to get what she wants. So, in the long run, it all ends up the same way. Jenny Livingston, *Paris Is Burning* (Venus Xtravaganza). See also ZELIZER, *supra* note [x], at 125 (describing how some professional sex workers view nonprofessionals as gullible). A slightly different view is expressed by Laura Kipnis, who contends that normative, marital love and intimacy entails a significant amount of emotional labor and participation in an ongoing commerce of affect. LAURA KIPNIS, *AGAINST LOVE: A POLEMIC* (2003). Cf. JEFFREYS, *THE INDUSTRIAL VAGINA*, *supra* note [x], at 38-61 (from abolitionist side showing how child, forced, and trafficked marriages can literally be prostitution).

<sup>29</sup> One activist/scholar contends that feminist opposition to sex work flies in the face of feminism’s insistence on women’s agency in other matters regarding their bodies:

This hypocrisy is evident in the abortion debate. Many feminists champion a woman’s right to choose—as long it is abortion that is being discussed. But let someone suggest that women have a right to sell their bodies and suddenly these women no longer advocate choice. Prostitution must be the same issue for feminists as abortion. It is the right to choice. Both involve the right of a woman to control what happens to her body. If one claims self-ownership as the basis of a woman’s right to choose an abortion, then the logical implication of such ownership cannot be limited to abortion. If a woman owns her body, she should be able to choose to do with it what she will.

Norma Jean Almodovar, *For Their Own Good: The Results of the Prostitution Laws as Enforced by Cops, Politicians and Judges*, 10 HASTINGS WOMEN’S L.J. 119, 122 (1999); see also Cynthia Chandler, *Feminists as Collaborators and Prostitutes as Autobiographers: De-Constructing an Inclusive Yet Political Feminist Jurisprudence*, 10 HASTINGS WOMEN’S L.J. 135, 136 (1999) (“Many feminists champion a woman’s right to choose—as long as it is abortion that is being discussed.”).

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Prostitution may, nevertheless, be experienced by some of these women as both an economically and sexually liberating option. Given the range of economic and sexual alternatives in a society in which female sexuality is already appropriated, in which rape, incest and forced sex with boyfriends have been the routine litany of their coming of age, prostitution may ironically be the first time that they have experienced the notion of “consent” as at all meaningful.

Bernstein, *supra* note [x], at 105 (footnotes omitted). See also BERNSTEIN, *supra* note [x], at 180 (“for many women, the quid pro quo of cash for sex made sex work *less* morally troubling than other economic options, and *more* personally empowering than other forms of heterosexual intimacy.”).

<sup>31</sup> See, e.g., Almodovar, *supra* note [x], at 123 (“For mutually agreed upon financial transactions it should not matter to anyone outside the relationship how many times sexual activity occurs, or with how many sexual partners.”); Law, *supra* note [x], at 526 (“The exchange of sexual services for money is the only form of consensual adult sexual activity that is systematically subject to criminal sanctions in the United States at the end of the twentieth century.”).

disabled and other sexually marginalized groups have for non-autoerotic sex.<sup>32</sup> Finally, some make anti-exceptionalism arguments, that professional sex is just like any other form of labor and should be respected and regarded as such.

Of course, these arguments are not mutually exclusive, and there is significant overlap. In particular, erotic autonomy overlaps with labor discourse. Moreover, increasing international attention to human trafficking has deepened the stakes for both sides. Since the 1990s the rise of both trafficking and anti-trafficking advocacy has put substantial pressure on the pro-sex work position. Many abolitionists make a persuasive cases that “voluntary” commercial sex cannot be meaningfully disaggregated from sex trafficking. Abolitionists’ denial of a sphere of autonomous sexual transactions has caused the opposing camp to double-down on their labor claims. The remainder of this paper will explore the discourse of professional, transactional sex as legitimate labor.

### B. *The Labor Claim*

Grounded in labor discourse, the term “sex worker” originated in the 1970s to legitimate professional sex in the face of the then-dominant feminist thought that objected to prostitution as exploitation and sought to abolish it and “rescue” the women who did it.<sup>33</sup> Unlike earlier reform efforts, based on tolerating prostitution either to preserve men’s sexual privilege or to end women’s victimization, the new discourse of sex as labor emerged from the prostitutes’ rights social movement.<sup>34</sup> Sex work emerged in this context as “a term that suggests we view prostitution not as an identity—a social or psychological characteristic . . . often indicated by ‘whore’—but as an income-generating activity or form of labor.”<sup>35</sup> Elizabeth Bernstein concurs: “Unlike the word ‘prostitute,’ with its connotations of shame, unworthiness or wrongdoing, the term ‘sex-worker’ tries to suggest an alternative framing that is ironically both a radical sexual identity (in the

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<sup>32</sup> See *infra* notes [x] and accompanying text. This is also the case for commodified reproduction, or surrogacy. See, e.g., JOHN A. ROBERTSON, CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES (1994) (arguing a “right” to use assisted reproduction for those who cannot otherwise reproduce); Lindsey Coffee, *A Rights-Based Claim to Surrogacy: Article 23 of the Convention on Rights of Persons with Disabilities*, 20 MICH. ST. J. INT’L L. 259 (2012).

<sup>33</sup> The term is attributed to Carol Leigh, an activist for prostitutes and member of COYOTE. Oliver J. McKinstry, *We’d Better Treat Them Right: A Proposal for Occupational Cooperative Bargaining Associations of Sex Workers*, 9 PA. J. LAB. & EMP. L. 679 n.18 (2007). Many credit the 1975 strike of prostitutes in France as the start of a movement to conceive of sex bargainers’ rights in the language of labor. Sylvia Law, however, documents an earlier strike in Hawaiian during World War II, in which prostitutes used their alliances with the military to resist and renegotiate legal restrictions and police surveillance. Law, *supra* note [x], 563-64. For a comparison of the relative weakness of prostitute rights movement with more successful contemporaneous gay and abortion rights movements, see generally Ronald Weitzer, *Prostitutes Rights in the United States: The Failure of a Movement*, 32 SOCIOLOGICAL Q. 23 (1991).

<sup>34</sup> See, e.g., Carol Leigh, *A First Hand Look at the San Francisco Task Force Report on Prostitution*, 10 HASTINGS WOMEN’S L.J. 59 (1999) (“The current movement includes a recognition of the rights of prostitutes to autonomy and self-regulation.”). For discussion of “rescue” criticisms of prostitution, see, for example, BERNSTEIN, *supra* note [x], at 8-10.

<sup>35</sup> GLOBAL SEX WORKERS: RIGHTS, RESISTANCE AND REDEFINITION 3 (Kamala Kempadoo & Jo Doezema eds., 1993).

fashion of queer activist politics) and a ‘normalization of prostitutes as ‘service workers’ and ‘care-giving professionals.’”<sup>36</sup> More recently, sex-as-labor advocates also derive their claim from human rights discourse, which guarantees choice of occupation as a right.<sup>37</sup>

Others embrace the term sex worker to invoke other associations. For instance, influential theorist and activist Kamala Kempadoo endorses “sex worker,” but analytically substitutes “gender” for “sex.” In her view, the denomination *sex worker* “insists that working women’s common interests can be articulated within the context of broader (feminist) struggles against the devaluation of women’s work and gender exploitation within capitalism.”<sup>38</sup> Relatedly, some urge the term to call attention to the multiplicity of people—men, women, heterosexual, homosexual, transgender, etc.—who sell sex.<sup>39</sup> Thus some adopt “sex worker” to invoke identitarian or coalitional discourses and critiques. Overwhelmingly, though, those who endorse the sex worker rubric do so to embrace a discourse of transactional sex as legitimate labor. Hence, the website for the *Live Nude Girls Unite!*, a documentary about erotic dancers’ efforts to organize, takes care to proclaim: “This site is about a labor film.”<sup>40</sup>

Yet, among those who advocate professional sex-as-labor there is a deep split that has gone largely unnoticed. Universally, this contingent urges decriminalization of professional sex, contending that criminalization results in stigmatization, marginalization, and punishment.<sup>41</sup> They observe that the long-standing criminalization of markets for sex has invited both organized crime and police corruption, while also heightening the vulnerability and isolation of those who transact sex.<sup>42</sup> Criminalizing

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<sup>36</sup> Bernstein, *supra* note [x], at 111.

<sup>37</sup> Perhaps unsurprisingly, both sides use human rights frameworks. While sex work advocates urge a right to work and privacy guarantees, abolitionists invoke a different set of norms against sexual discrimination, state-sanctioned patriarchy, and rights to be free from inter-personal violence. The dominant human rights agencies have taken a strong stand against forced prostitution and trafficking, but have largely remained neutral on the question of prostitution itself. *See, e.g.,* A Modern Form of Slavery: The Human Rights Watch Global Report on Women’s Human Rights 196-273 (1995); Nussbaum, *supra* note [x], at 710 (noting human rights organizations have focused attention on forced sexual labor and also on alleviating material conditions that give rise to prostitution).

<sup>38</sup> KEMPADOO, *supra* note [x], at 8. *See also* Heidi Tinsman, *Behind the Sexual Division of Labor: Connecting Sex to Capitalist Production*, 17 *YALE J. INT’L L.J.* 241, 241, 245 (1992) (contending “sex is central to the way in which all women are exploited in all types of work” and hence “all types of women’s work should be treated alike under the law”).

<sup>39</sup> McKinstry, *supra* note [x], at 683.

<sup>40</sup> Live Nude Girls Unite, at <http://www.livenudegirlsunite.com/>.

<sup>41</sup> Prabha Kotiswaran points out how criminal, prohibitory laws have become fetishized by both sides of the decriminalization debate. “While the normative status of sex work remains deeply contested, abolitionists and sex work advocates alike display an unwavering faith in the power of criminal law; for abolitionists, strictly enforced criminal laws can eliminate sex markets, whereas for sex work advocates, decriminalization can empower sex workers.” Kotiswaran, *supra* note [x], at 579. In sum, contra Michel Foucault’s injunctions against juridical understandings of modern regulation, “Both camps thus view the criminal law as having a unidirectional repressive effect on the sex industry.” *Id.* at 613. *See also* Nussbaum, *supra* note [x], at 708 (“Criminalization and regulation are not straightforwardly opposed; they can be closely related strategies.”).

<sup>42</sup> Kathleen Barry notes that

Separating women from their neighborhoods into distinct red-light districts and brothels [as a result of the Contagious Diseases Acts] identified the women as prostitutes more specifically and thereby made their ability to leave prostitution much more difficult...In turn, this social and

prostitutes' labor also serves as an obstacle to their reporting sexual assaults, enforcing their consensual contracts for transactional sex, and even accessing public health services. But, while unanimously endorsing lifting criminal bans on professional sex, sex-as-labor advocates disagree whether there is a further role for the state in regulating this market. Frequently, this is cast as a disagreement between those who limit their arguments to calls for decriminalization and those who urge full legalization and regulation.<sup>43</sup> Overlooked, though, is the extent to which these positions actually embed contradictory views of sexual labor itself.

### 1. Decriminalization, or, Erotic Exceptionalism

Emblematic of the decriminalization without regulation position, two commentators insist, "Sex workers' ability to control their lives is most undermined by state regulations that criminalize, penalize, stigmatize, and therefore isolate sex workers, rendering them unable to counter harassment and abuse."<sup>44</sup> In this view, not only criminalization, but also affirmative regulations lead to further vulnerability and social isolation. In its strongest form, these arguments embrace decriminalization but oppose the regulation and protectionism full legalization would entail.<sup>45</sup> For instance, the World Charter for Prostitutes' Rights insists that "It is essential that prostitutes can provide their services under the conditions that are absolutely determined by themselves and no one else."<sup>46</sup> Activist and writer Norma Almodovar puts the case even more bluntly: "Decriminalization would . . . repeal all existing criminal codes applying to non-coercive adult commercial sex activity. *It would require no new legislation to deal with harmful effects of prostitution, as there are already plenty of laws which cover problems outside the realm of personal choice.*"<sup>47</sup> The International Prostitute Rights organization is more specific: "There should be no law which implies systematic zoning of prostitution. Prostitutes should have the freedom to choose *their place of work* and residence."<sup>48</sup> Feminist theorist Anne McClintock concurs: "A central tenet of the prostitution movement is the demand that sex workers be given the right to exchange sexual services on *their* terms and on *their* conditions, not on the terms of the state, the police, pimps,

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geographic isolation facilitated the criminal organization of prostitution, compete with pimps, procurers, and organized brothels.

BARRY, THE PROSTITUTION OF SEXUALITY, *supra* note [x], at 111.

<sup>43</sup> I rehearse the decriminalization/legalization distinction in my earlier work on polygamy. *See e.g.*, Adrienne D. Davis, *Regulating Polygamy: Intimacy, Default Rules, and Bargaining for Equality*, 110 COLUM. L. REV. 1955 (2010) [hereinafter Davis, *Regulating Polygamy*] (disagreeing with many polygamists who urge decriminalization but not full legalization).

<sup>44</sup> Mgbako & Smith, *supra* note [x], at 1193. Elsewhere Mgbako and Smith contend that "Illegality renders sex workers dependent upon pimps, brothel owners, clients, and police officers." *Id.* at 1206.

<sup>45</sup> *See, e.g.*, Fischer, *supra* note [x], at 526 (equating regulations and restrictions with "condemnation" of prostitutes).

<sup>46</sup> World Charter for Prostitutes' Rights; International Committee for Prostitutes' Rights February 1985, Amsterdam, reprinted in 37 Social Text 183 (1993) [hereinafter World Charter for Prostitutes' Rights].

<sup>47</sup> Almodovar, *supra* note [x], at 132 (emphasis added).

<sup>48</sup> <http://www.bayswan.org/ICPRChart.html>. They also oppose public health regulations of sex work. "Since health checks have historically been used to control and stigmatize prostitutes, and since adult prostitutes are generally even more aware of sexual health than others, mandatory checks for prostitutes are unacceptable unless they are mandatory for all sexually active people." World Charter, *supra* note [x], at 184.

male managers, or clients.”<sup>49</sup> Indeed, she contends “most prostitutes regard legalization as legalized abuse.”<sup>50</sup> In sum, this camp opposes state regulation, arguing the only role of government in sex work is to enforce contracts and respond to complaints of assault.

Parsed more finely, they claim professional sex is just like any other labor in that it should not be subject to criminal bans and should instead be a matter of individual choice, but, because it is *sex*, it should be exempt from any government regulation or supervision, such as zoning, licensing, or public health protocols. While modern labor contracts are intensely regulated, to this camp, the sexual contract remains exceptional. It operates, in effect, as sex, or erotic, exceptionalism.<sup>51</sup>

Of course, such insistence on complete workplace autonomy is unrecognizable to most working adults. But several ideological positions can account for this set of arguments. Most obviously, erotic exceptionalism reconciles easily with a classical freedom of contract perspective, in which the state has little role to play beyond enforcing agreements between consenting adults.<sup>52</sup> This view, that the state should not intervene in otherwise voluntary agreements, also aligns with constitutional and social sexual privacy norms. Indeed, implicit in these strong-form claims for a completely deregulated sex market is the decisional privacy ideology that both constitutional norms and political liberalism often associate with sex.<sup>53</sup> Rooted in *Griswold v. Connecticut*, and most recently elaborated in *Lawrence v. Texas*, decisional privacy casts sex and reproduction as within a sphere of intimacy liberty into which government should not intrude.<sup>54</sup>

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<sup>49</sup> Anne McClintock, 37 SOC. TEXT 2, 2 (1993) (emphasis in original). McClintock also claims, “Removing sex workers fundamental right to choose—whether to work, how to work, when to work and where to work is a flagrant infringement of basic working rights, their integrity, their humanity, not a universal and inherent feature of the sexual exchange.” *Id.* at 6.

<sup>50</sup> “A recent call has gone up from some quarters for the legalization rather than the decriminalization of sex work. But most prostitutes regard legalization as legalized abuse. Despite its benign ring, legalization places prostitution under *criminal* instead of *commercial* law, where it is tightly curtailed by the state and administered by the police.” *Id.* at 2 (emphasis in original)

<sup>51</sup> In an earlier article, I discuss sexuality exceptionalism. See, e.g., Adrienne D. Davis, *Bad Girls of Art and Law: Abjection, Power, and Sexuality Exceptionalism in (Kara Walker’s) Art and (Janet Halley’s) Law*, 23 YALE J.L. & FEM. 1 (2011) [hereinafter *Abjection, Power, and Sexuality Exceptionalism*] (labeling Janet Halley’s urge that left/liberals “take a break from feminism” as sex exceptionalism). Hence, I label the sex work decriminalization position as erotic exceptionalism both to distinguish it from my earlier claim and because the business is often referred to in that term.

<sup>52</sup> Gregg Aronson, *Seeking A Consolidated Feminist Voice for Prostitution in the US*, 3 RUTGERS J. L. & URB. POL’Y 357 (2006) (COYOTE “regard[s] prostitution as a contract between two consenting adults, and believe[s] that these contracts should be respected by law like other legitimate contracts.”).

<sup>53</sup> Although much-criticized, the legal protection for women’s sexual autonomy that emerged in the 1960s and 1970s was grounded in constitutional privacy doctrine. More recently, constitutional protections for sexual minorities have similarly been articulated in the language of privacy. See, e.g., *Lawrence v. Texas*, 539 U.S. 558 (2003). Cultural and social norms of sex as part of private and not public life supported this, as well.

<sup>54</sup> The plurality opinion in *Griswold v. Connecticut*, upholding married couples’ rights to contraception, discusses privacy in both spatial terms, i.e., the marital bedroom, and decisional terms, i.e., married couples making decisions about their private life together. This decisional logic was elaborated in *Eisenstadt v. Baird*, which extended *Griswold*’s holding to unmarried individuals. (“If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”). *Roe v. Wade* further developed the constitutional ideology of decisional privacy, although it shifted the grounding to the fourteenth amendment’s protection of due process. In declaring criminal bans on sodomy unconstitutional, *Lawrence v. Texas* extended the decisional privacy logic into the explicitly

Others register their concerns in a more explicitly feminist register; in language that echoes that of the strongest abolitionists, Anne McClintock insists, “Legalizing female prostitution serves only to put women more firmly under male control.”<sup>55</sup> Liberalism similarly promotes autonomy, consent, and choice within this sphere, construing these as the definitive principles that guarantee sexual and reproductive rights.<sup>56</sup> Drawing on these strong legal and cultural norms, the International Prostitute Rights charter “affirms the right of all women to determine their own sexual behavior, including commercial exchange, without stigmatization or punishment.” This view of sex work thus embraces a hybrid position, often urging commercial sex as labor while simultaneously claiming the legal and social autonomy and privacy that sex often brings.

Finally, at least some arguments are better understood as anti-statist in nature, rather than as claims to state-sponsored legal privacy or liberal autonomy. The anti-statist argument is that the state has rarely acted in the interests of sex workers and almost uniformly against them.<sup>57</sup> These views align forcefully with gender theorist Wendy

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sexual arena. Like Griswold, Justice Kennedy’s opinion noted both the decisional and the spatial dimensions of privacy. Sodom laws, he wrote, “touch[] upon the most private human conduct, sexual behavior, and in the most private of places, the home.” *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Roe v. Wade*, 410 U.S. 113 (1973); *Lawrence v. Texas*, 539 U.S. 558 (2003).

Hence, sex work activist Norma Amodovar proclaims, “A woman’s body belongs to herself and not to the government. The individual’s rights to own, use and enjoy her body in any manner that she deems appropriate, as long as she does not violate the rights of others has long been protected in this country.” Almodovar, *supra* note [x], at 132. Discussing the California Constitution, Almodovar notes it “explicitly grants a right to privacy, and although this right is not absolute, it should be interpreted to say that as long as no coercion is involved, any private consenting adult activity is none of the government’s business. But this is apparently not the case when private activity involves money!” *Id.* at 129.

<sup>55</sup> McClintock, *supra* note [x], at 4.

<sup>56</sup> See, e.g., Nussbaum, *supra* note [x], at 706 (arguing “the issue of choice is the really important one”). Sylvia Law uses consent to impose some interesting limits on the professional sex as labor position. While interviewing welfare rights organizers in Nevada, Law learned that some of them feared that if sex work were fully legalized, the government would require it as a condition of receiving need-based entitlement programs. Law grounded an exemption of sex work from universal requirements to labor in liberalism:

A society could address this paradigm conflict by saying that the norm of authentic consent, generally applicable to sexual relations, should control and that people should not be forced to engage in commercial sex, as a condition of subsistence. Even if commercial sex is legal, many women regard it as inconsistent with their deepest sense of self and inconsistent with moral and religious principles. We should recognize that choice with respect to sexual relationships is so integral to individual identity and integrity that sex should not be compelled, even if it could provide subsistence to a person who would otherwise depend on the state.

Law, *supra* note [x], at 590. Cf. Kotiswaran, *supra* note [x], at 581 (citations omitted) (“the feminist critique that this work position is undertheorized, with the result that it falls back on the liberal discourse around choice, consent, work, and the market.”).

<sup>57</sup> Consider observations from sex professionals working in legal jurisdictions in Nevada:

Under Nevada’s regulatory system, the “pimp/prostitute” relationship is redefined. It is clear that the only kind of prostitute who is legal and protected is the licensed brothel prostitute. Equally clear is that individual pimps controlling a number of prostitutes are replaced by a small number of legal brothel owners who are closely monitored by the government. The only legal pimps then become these limited numbers of brothel owners who have direct links with the local government. Some might consider this arrangement to mean that the state becomes the pimp by exploiting and abusing prostitutes through the system of licensed brothels.

Micloe Bingham, *Nevada Sex Trade: A Gamble for the Workers*, 10 YALE J.L. & FEMINISM 69, 93 (1998) (citing WENDY CHAPKIS, *LIVE SEX ACTS: WOMEN PERFORMING EROTIC LABOR* 163 (1997)).

Brown's critiques of leftist calls for regulations as "wounded attachments."<sup>58</sup> In this view, left liberalism should maintain a healthy suspicion of the state, not embrace positions that enhance and increase state power.<sup>59</sup>

Anti-statism, decisional privacy, and autonomy each are seductive rationales for stark deregulationism. Yet, when erotic exceptionalism enters the conservative space of the market, its claims to conduct commerce free from government intervention or regulation can begin to sound a lot like libertarianism.

## 2. Legalization, or, Assimilationism

Other sex work advocates, though, urge not only decriminalized, but fully legalized and regulated markets for sex. This camp views sex workers as deeply vulnerable to exploitation and risk and envisions an active role for the state in regulating sex markets and workplaces.<sup>60</sup> "Like traditional prostitutes, women working in the legal sex industry have been treated as though they are not entitled to the same legal protections as other 'socially accepted' workers."<sup>61</sup> Monica Moukalif concurs, "organizing around decriminalization is part of organizing for better occupational health and safety."<sup>62</sup> Less tied to erotic exceptionalism than their erotic exceptionalist counterparts, these advocates view professional sex work as not meaningfully different

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<sup>58</sup> WENDY BROWN, *STATES OF INJURY: POWER AND FREEDOM IN LATE MODERNITY* 53 (1995). *See also* Wendy Brown & Janet Halley, *Introduction*, *LEFT LEGALISM/LEFT CRITIQUE* 1, 5 (Wendy Brown & Janet Halley eds., 2002) ("the left's current absorption with legal strategies means that liberal legalism threatens to defang the left we want to inhabit, saturating it with ant-intellectualism, limiting its normative aspirations, turning its attention away from the regulatory norms it ought to be upending, and hammering its swords into boomerangs.").

<sup>59</sup> Perhaps implicit in the anti-statist view is the radical claim articulated above—that all sex, and particularly normative, marital sex, has an economic dimension. (Similarly, both feature affective labor.) Hence sex work should not be regulated the same way that marital sex work is not regulated; commodified sex is no more commercial than other forms of non-market sex. *See supra* note [x] and accompanying text.

<sup>60</sup> Indeed, sex workers are a classic vulnerable population. According to the UCLA nursing school, "The term 'vulnerable populations,' refers to social groups with increased relative risk (i.e. exposure to risk factors) or susceptibility to health-related problems . . . VPs are often discriminated against, marginalized and disenfranchised from mainstream society." *Who Are Vulnerable Populations?*, Ctr. for Vulnerable Populations Research, <http://www.nursing.ucla.edu/orgs/cvpr/who-are-vulnerable.html> (last visited Dec. 21, 2010). Legal feminist Martha Fineman views the framework as

an alternative to traditional equal protection analysis; it is a "post-identity" inquiry in that it is not focused only on discrimination against defined groups, but concerned with privilege and favor conferred on limited segments of the population by the state and broader society through their institutions. As such, vulnerability analysis concentrates on the structures our society has and will establish to manage our common vulnerabilities. This approach has the potential to move us beyond the stifling confines of current discrimination-based models toward a more substantive vision of equality.

Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 *YALE J.L. & FEMINISM* 1 (2008).

<sup>61</sup> Fischer, *supra* note [x], at 551. *See also* Bindman & Doezema, ("[T]heir vulnerability to human and labour rights violations is greater than that of others because of the stigma and criminal charges widely attached to sex work."); Adrienne Cuoto, *Clothing Exotic Dancers With Collective Bargaining Rights*, 38 *OTTAWA L. REV.* 37, 48 (2006) (If not viewed as criminals, sex workers are at the very least considered to maintain "deviant lifestyles, roles and identities.").

<sup>62</sup> Monica R. Moukalif, *No Evil: Applying a Labor Lens to Prostitute Organizing*, 20 *HASTINGS WOMEN'S L.J.* 253, 271 (2009).

from other forms of marginalized labor. For instance, Moukalif “constructs a margins-oriented labor lens and then applies it to sex labor discourse,” in the process showing how “[p]rostitutes are organizing and advocating in ways that could be beneficial to all marginalized workers.”<sup>63</sup> This camp thus urges assimilating sex work into our existing, heavily regulated labor and employment law regime.<sup>64</sup>

Influential legal feminists Sylvia Law, Jane Larson, and Martha Nussbaum all embrace versions of this assimilationist view. For instance, Jane Larson views prostitution as a “laboratory” to determine “what makes certain voluntary labor so dangerous or so exploitative as to violate the worker’s human rights?”<sup>65</sup> Sylvia Law makes a strong protectionist case when she argues that not only should criminal prohibitions be repealed, but “legal remedies and programs to protect commercial sex workers from violence, rape, disease, exploitation, coercion and abuse should be enhanced.”<sup>66</sup> Finally, legal philosopher Martha Nussbaum combines an assimilationist approach with the straightforwardly liberal feminist emphasis on choice to make a case for legalized sex work as a constrained or bounded autonomy claim: “[A] fruitful debate about the morality and legality of prostitution should begin from a twofold starting point: from a broader analysis of our beliefs and practices with regard to taking pay for the use of the body and from a broader awareness of the options and choices available to poor working women...”<sup>67</sup> In sum, contrary to erotic exceptionalists, the assimilationist camp contends sex work is truly no different than other forms of marginalized, vulnerable, and

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<sup>63</sup> Moukalif, *supra* note [x], at 253.

<sup>64</sup> Akin to hostile worlds and abolitionism, intimacy theorist Viviana Zelizer offers a framework to understand assimilationism as well. If hostile worlds proclaims the intrinsic incompatibility of economics and intimacy, another approach rejects this primitive dualism by proffering a single, prior principle that purports to “actually explain[] what is going on” through a powerful rhetorical device Zelizer calls “nothing but.” In this view, “the ostensibly separate world of intimate social relations . . . is nothing-but a special case of some general principle,” typically, economic rationality, culture, or politics.” Akin to how hostile worlds pervades abolitionism, nothing but logic is rampant in assimilationism, as advocates proclaim professional sex to be “nothing but” work or labor, thereby staving off serious inquiries of how work might be distinctive from other forms of labor and from “amateur” sex, and hence in need of special consideration and regulation. (Zelizer characterizes Kathleen Barry as exemplifying “nothing but” power and patriarchy; in contrast, I would locate Barry within the hostile worlds camp.) ZELIZER, *supra* note [x], at 29, 31. In the end, Zelizer rejects both hostile worlds and nothing-but ideologies: “As long as we cling to the idea of hostile worlds we will never recognize, much less explain, the pervasive intertwining of economic activity and intimacy. Yet nothing-but reductionism fails to allow for the distinctive properties of coupling, caring, and households.” She offers as an alternative framework “connected lives” or “differentiated ties”, which focuses on how people “create connected lives by differentiating their multiple social ties from each other, marking boundaries between those different ties by means of everyday practices, sustaining those ties through joint activities . . . , but constantly negotiating the exact content of important social ties.” *Id.* at 28, 32.

<sup>65</sup> Larson, *supra* note [x], at 676.

<sup>66</sup> Law, *supra* note [x], at 524.

<sup>67</sup> She continues:

Most, though not all, of the genuinely problematic elements turn out to be common to a wide range of activities engaged in by poor working women, and the second inquiry will suggest that many of women’s employment choices are so heavily constrained by poor options that they are hardly choices at all. I think that this should bother us and that the fact that a woman with plenty of choices becomes a prostitute should not bother us, provided that there are sufficient safeguards against abuse and disease, safeguards of a type that legalization would make possible.

Nussbaum, *supra* note [x] at 696. In this sense, revulsion against payment for bodily services results from class biases.

risky labor. Rebelling against the privacy rubric many exceptionalists invoke to cloak labor that is sexual, this camp advocates full legalization and assimilation of sex work into our current regulatory regime.

### *C. Summary*

Thus, while both camps view the labor framework as a way to access both legitimacy and power for workers in the sex industry, there is a split, a contradiction even, within the movement. For assimilationists, “worker” empowerment stems from full legalization. Seeking to intervene in the oppression and exploitation of a highly vulnerable population, they envision the full integration of sex workers into the existing labor and employment regulatory regime. Erotic exceptionalists embrace the labor lens from a classic freedom of contract perspective—that the state should not interfere in otherwise voluntary agreements. Unrecognizable to modern democratic marketplaces, this claim finds support in constitutional and cultural sexual privacy norms, liberalism’s emphasis on autonomy, choice, and consent, and leftist anti-statism. In sum, erotic exceptionalists, insisting on a regulatory exemption for sex work, claim it is just like any other consensual sexual act. Labor assimilationists, embracing a deeply regulatory stance, say it is just like any other work. Just like sex or just like work—that is the underlying question.

This latent contradiction between assimilationist and exceptionalist discourses of professional sex undergirds the remainder of this paper, which tries to push through into a robust second-generation discussion about regulation and what it might look like. First, Section II considers the assimilationist claim that “sex is like any other work.” As facially persuasive as this argument is, it rests on the idea of a monolithic workplace subject to monolithic regulation. In contrast, what this next Section demonstrates is that modern workplaces, and work, vary drastically, and are subject to diverse regulatory regimes. Law regulates work differentially, and it is unclear which model professional sex advocates seek to invoke. As much as assimilationists urge us to treat professional sex as any other labor, Section III shows that sex markets have distinctive characteristics that it would be irresponsible to ignore in crafting regulatory policy. Nor is sex work itself monolithic; rather it exhibits vastly different working conditions and risks. This Section also answers assimilationists’ concerns with a set of proposals that will hopefully address the specificity of sex work, while Section IV takes up the erotic exceptionalists’ claims that because the labor is sexual, it should be outside of and beyond regulation.

## **II. TESTING ASSIMILATIONISM**

At bottom, the assimilationist invocation of sex as “just like any other work” is a recognition claim—that sex professionals should be considered legitimate laborers with the protections of the “applicable legal standards relating to labor rights.”<sup>68</sup> This Section explores this set of claims within the context of the relevant state and federal law. It first sets out the sex workplace hazards and conditions that prompt assimilationists to seek regulatory protection, and then summarizes the main bodies of extant law—health and

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<sup>68</sup> Audrey Macklin, 37 INT’L MIGRATION REV. 464, 493.

safety, workers' compensation, and discrimination—that address them. By exposing the diversity of workplaces and their regulation, the Section complicates the assimilationist claim in a few ways.

A. *The Assimilationist Claim*

Assimilationists anticipate a host of benefits from recognizing sex professionals as legal workers, primarily ameliorating their substantive work conditions.<sup>69</sup> As an initial matter, legal status would give sex workers access to courts to enforce their contracts with customers and third party intermediaries alike.<sup>70</sup> Primarily, though, assimilationists make specific labor claims.

First, they seek recognition of sex workers as legally employees. Workers classified as full-time employees rather than part-time workers or independent contractors are entitled to basic employment benefits, including unemployment, health insurance, retirement, social security benefits, and minimum wage and overtime. Neither prostitutes, whose work is illegal, nor dancers, whose employers often classify them as independent contractors, qualify for these benefits under federal and state laws.<sup>71</sup> (In addition, in Nevada, where prostitution is legal, brothel owners often classify prostitutes as independent contractors.<sup>72</sup>) One crucial benefit of legal recognition is that workers classified as employees have the right to unionize and collectively bargain for improved working conditions.<sup>73</sup> Rather than relying solely on the state to enforce minimal, universal benefits, collective action and bargaining allows workers to craft terms and conditions of employment that are tailored to their needs.<sup>74</sup> Sex professionals, especially

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<sup>69</sup> One important benefit, not immediately linked to work itself, is that legalization would enable sex workers to access more social support services. See, e.g., Kate DeCou, *U.S. Social Policy on Prostitution: Whose Welfare Is Served?*, 24 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 427, 438-39 (1998) (“due to criminalization, prostitutes on the street are isolated from health and social services.”).

<sup>70</sup> Michèle Alexandre, *Sex, Drugs, Rock & Roll and Moral Dirigisme: Toward A Reformation of Drug and Prostitution Regulations*, 78 UMKC L. REV. 101, 116, 118-19 (2009) (“It is long settled legal doctrine that illegal contracts are unenforceable. Consequently, persons who enter into illegal drug or sexual transactions are incapable of seeking legal protection in the event of breach of the underlying contract. This incapacity renders the most vulnerable members of those transactions subject to abuse and victimization.”).

<sup>71</sup> The current case law is split on whether to classify dancers as employees. Compare *Bosco v. Tampa Food & Beverage, LLC*, 8:11-CV-1651-T-26AEP, 2013 WL 49477 (M.D. Fla. Jan. 3, 2013), *Reich v. Circle C. Invest., Inc.*, 998 F.2d 324 (5th Cir.1993) (holding that topless dancers are employees under the FLSA), and *Yard Bird, Inc. v. Virginia Employment Comm'n*, 28 Va. App. 215, 219, 503 S.E.2d 246, 248 (1998) (exotic dancers were employees for the purposes of unemployment compensation, despite the existence of an “Independent Contractor Agreement.”) with *Lewis v. L.B. Dynasty, Inc.*, 400 S.C. 129, 732 S.E.2d 662 (Ct. App. 2012), reh'g denied (Oct. 18, 2012) (holding that the South Carolina Workers' Compensation Commission did not err in finding that an exotic dancer was an independent contractor and not an employee).

<sup>72</sup> See, e.g., Law, *supra* note [x] (“[b]rothel owners typically regard women as independent contractors and do not provide them with health insurance, workers' compensation, unemployment insurance, vacation pay, or retirement benefits.”).

<sup>73</sup> The National Labor Relations Act, 29 USC §157 (1988).

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Unions have often played a critical role in raising and negotiating over issues of health and safety. Because they implicate working conditions, safety issues are a mandatory subject of bargaining in a unionized workplace, and employers are therefore obligated to provide safety information upon

dancers, have sought to unionize, although with little success.<sup>75</sup> Still, many assimilationists continue to urge collective action through unionization as sex workers' best chance to achieve decent working conditions.<sup>76</sup> Thus, assimilationists view recognition as legitimate labor as the first step toward the basic but significant rights that inure to all workers recognized legally as full-time employees.

Even more so than basic employee benefits, charges of unabated risks and hazards pervade assimilationist arguments to legalize and regulate professional sex as work.<sup>77</sup> The two dominant forms of risk that most endanger sex workers are injuries or illnesses from working conditions and violence. Sex professionals often work in unsanitary workplaces that expose them to infection and other health risks.<sup>78</sup> Dancers are at risk from both accidents and chronic injuries from poor lighting, disrepair of equipment, *e.g.*, poles and stage floors, and dancing in high heels.<sup>79</sup> The second major axis of risk is violence. Sex professionals—dancers, masseuses, and prostitutes—all have significantly higher rates of assault, rape, and even murder than other workers. Importantly, physical and sexual assault comes from not only customers and third parties but also club and

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the union's request. . . . In addition, unions frequently negotiate for improved safety measures, or alternatively, higher wages to compensate for the risks, through the collective bargaining process. MARION CRAIN ET AL, *WORK LAW: CASES AND MATERIALS* 2d ed. 946 (2010) [hereinafter *WORK LAW*] (describing different states' statutory language).

<sup>75</sup> In addition to the challenges of organizing an itinerant and relatively powerless group of workers, pro-union sex workers encounter resistance from unions themselves, which, though desperate for new members, still often reject sex traders as illegitimate workers. *See, e.g.*, Law, *supra* note [x], at 599 (“[w]here women have sought to organize a union, they have been rebuffed by established labor organizations.”); Margot Rutman, *Exotic Dancers' Employment Law Regulations*, 8 *TEMP. POL. & CIV. RTS. L. REV.* 515, 553, 554 (1999) (“Exotic dancers, because they are a stigmatized group of women, often have problems finding outside labor support or unions that will allow them to join.”). *See supra* note [x].

<sup>76</sup> As Sylvia Law notes, “One of the most effective ways for commercial sex workers to promote decent working conditions and protect themselves from violence, abuse, and health and safety hazards, is to work in a collective context.” Law, *supra* note [x], at 598. *See also* Chun, *supra* note [x] (advocating unionization as best route to empowerment for exotic dancers). Others are more skeptical, however. Margot Rutman observes that in the first successful effort to unionize a dance club, the Lusty Lady, the dancers got 1 sick day and 1 holiday. “The union contract is impressive because it exists despite the challenges that the exotic dancers faced, but generally, the contract fails to offer work benefits comparable to those of other more established unions.” Rutman, *supra* note [x], at 555.

<sup>77</sup> As Monica Moukalif observes, “[o]ccupational health and safety is the major organizing point for prostitutes and other sex labor activists.” Moukalif, *supra* note [x], at 270.

<sup>78</sup> Dancers complain that employers do not properly sanitize the stage poles and floors, club furnishings, and props with which their bare genital areas come into contact. Moreover, lapdancing requires intimate contact with customers and their clothing, over which employers have less control. Constant exposure to body fluids and unsanitized surfaces puts dancers at high risk for infection and disease. Prostitutes often work in unclean hotels, brothels, or worse, in cars, on the street, or in alleys. *See, e.g.*, Maticka-Tyndale, *supra* note [x], at 95, 99; *Exotic Dancing Health and Safety*, <http://www.nnewh.org/images/upload/attach/7098star-policy-brief.pdf> (dancers spend eight hours or more in high heels, which can cause injuries to their feet); A VINDICATION OF THE RIGHTS OF WHORES 109, 141, 142-143 (Gail Pheterson ed., 1989) (“Criminalization of prostitutes for purposes of public health is unrealistic and denies human rights to healthy work conditions. As outlaws, prostitutes are discouraged, if not forbidden, to determine and design a healthy setting and practice for their trade. . . . [Criminalization] forces prostitutes into medically unhygienic, physically unsafe and psychologically stressful work conditions.”); Ronald Weitzer, *Sociology of Sex Work*, 35 *ANN. REV. SOC.* 213, 217 (2009) (finding correlation between public sex work and worker risk).

<sup>79</sup> *See, e.g.*, *Exotic Dancing Health and Safety*, *supra* note [x].

brothel owners and operators, pimps, other employees, *e.g.*, bouncers, bartenders, and servers, and even their own intimate partners.<sup>80</sup> The statistics bear out that stakeholders in sex markets, customers, co-workers, and employers, feel entitled to physically abuse the workers, making sex work among the most dangerous forms of labor.<sup>81</sup> Assimilationists call for regulators to develop and mandate standards to protect sex workers' health and safety.

Finally, assimilationists anticipate that legalization would bring access to discrimination law. Those with whom sex professionals interact at work—customers, employers, and other employees—can treat them with contempt, frequently using misogynist slurs and epithets. Ironically, then, the stakeholders within this market sector reinforce its image as filled with immoral, sexually promiscuous women who are not entitled to the basic human respect or dignity accorded other workers. Assimilationists contend that this behavior, much of it intensely gendered, comprises illegal sexual harassment under Title VII's anti-discrimination provisions. Ann McGinley argues that “[a] business that creates a risk of serious harassment should develop systems to prevent and correct harassing behavior.”<sup>82</sup> Other commentators agree that even within sexualized workplaces workers should be entitled to be free from unwelcome sexual behavior.<sup>83</sup>

Assimilationists also identify a second axis of discriminatory behavior. A pointed critique of sex markets is that they erect hierarchies along the lines of race and other forms of body capital. Hence, one study of prostitution found women sorted along lines of race, with white, Asian, and lighter-skinned black women dominating the higher-end “strolls” and darker-skinned and older women relegated to less lucrative, and more harassing and dangerous, ones.<sup>84</sup> Similarly, as the *Live Nude Girls Unite!* documentary

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Women who provide commercial sex, particularly streetwalkers, are subject to violence. Many studies of women who work the street report that eighty percent have been physically assaulted during the course of their work. Women who provide commercial sex are often the victims of rape. They are murdered, perhaps at a rate forty times the national average. Police systematically ignore commercial sex workers' complaints about violence and fail to investigate even murder. Indeed, police officers rape and beat sex workers, and are rarely prosecuted for their wrongdoing. Customers, pimps, police and other men inflict these harms on women.

Law, *supra* note [x] at 553 (footnotes omitted). See also LEVITT & DUBNER, *supra* note [x], at 29 (“Most of the incidents of violence by johns is when, for some reason, they can’t consummate or get erect.”); Mimi Silbert, Sexual Assault on Prostitutes, research report to the National Center for the Prevention and Control of Rape (1980) (detailing high rates of assault among sex workers); Vicki Neland, Council for Prostitution Alternatives Handbook, Portland, Oregon (1995). Even their own intimate partners assault them at higher rates.

<sup>81</sup> Sylvia Law points out that, “Since the 1980s there have been dramatic changes in the legal and social understanding of violence against women in the United States. These new understandings, laws, practices and services have not been extended to commercial sex workers.” Law, *supra* note [x], at 572.

<sup>82</sup> Ann C. McGinley, *Harassment of Sex(y) Workers: Applying Title VII to Sexualized Industries*, 18 YALE J.L. & FEM. 65, 98 (2006).

<sup>83</sup> See *infra* notes [x] and accompanying text for discussion of the debate over sexual harassment liability in sexual workplaces.

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The predominantly White, Asian and light-skinned Black women on the crowded and brightly lit Geary-Mason stroll command the highest prices. They are young, slim and expensively dressed; their tightly-fitted suits, sweater sets and fur or leather coats code them for a relatively upscale market. Physically, only their shorter-than-average skirts, “big hair” and heavy makeup set them

described, racial minorities in the dancing industry have fewer opportunities, and less lucrative ones, than white dancers. Siobhan Brooks' recent study of three dance clubs in New York and Oakland found:

When women of color are working in predominately White clubs that offer more security and are located in areas with higher property values, they often are paid less than their White counterparts, marginalized as token hires, or employed in lower-tier job positions. Women of color working in clubs predominately employing people of color, may make good money, but are subject to unjust working conditions, customer expectations that services will be cheaper, and unsafe neighborhood spaces . . . .<sup>85</sup>

Thus, racial groups have very different "erotic capital," and this translates into very different work opportunities in sex markets.<sup>86</sup> Assimilationists such as Brooks make much of this disparity. She observes: "Racism against Black women in this industry is usually viewed as normal because, like other appearance-based industries (such as modeling, acting), the sex industry is based on ideas of customer taste and preference."<sup>87</sup> Yet she contends that racialized desire in the erotic industry is no less socially constructed than in other areas of social interaction<sup>88</sup> and should be considered impermissible employment discrimination.<sup>89</sup> While less visible in the assimilationist discourse, presumably older sex workers and disabled ones experience discrimination in mainstream markets for sex.<sup>90</sup>

Discrimination against sex workers then takes two forms. Women working in sex markets are routinely subject to a degree and form of gendered harassment that is exceptional compared to other contemporary U.S. workplaces. In addition, disparate treatment of women with non-normative bodies is pervasive, resulting in hierarchies along lines of race, age, and ability. Legal norms have shifted in the last fifty years, to

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apart from many of the dressed-up female tourists or theater and restaurant goers who walk past them, and the differences may be quite subtle.

Bernstein, *supra* note [x], at 103 (footnotes omitted). Bernstein's article then gives the pricing structures per class.

<sup>85</sup> BROOKS, *supra* note [x], at 3-4, 101. She finds that clubs where women of color are concentrated have the worst terms and conditions, e.g., higher stage fees, more harassment, and coerced prostitution. *See also* Tanya Kateri Hernandez, *Sexual Harassment and Racial Disparity: The Mutual Construction of Gender and Race*, 4 J. GENDER RACE & JUST. 183 (2001) (discussing how race is at work in sex tourism industry).

<sup>86</sup> By erotic capital Brooks means the extent to which desire is inflected by historical structures of subordination.

<sup>87</sup> BROOKS, *supra* note [x], at 99.

<sup>88</sup> In sex work as elsewhere, these consumer preferences mirror broader systems of oppression. And, of course, the same identity characteristics that put these workers at the bottom of the consumer preference ladder also make them the most economically vulnerable more generally, i.e., more likely to experience adverse economic shocks and with less cushion to absorb them.

<sup>89</sup> *See also* Rutman, *supra* note [x], at 534 ("Despite the seemingly obvious requirement that dancers be attractive, Title VII protections still adhere to prevent discrimination against protected classes.").

<sup>90</sup> In fact, the propensity for marginalizing older dancers was one point of contention at the Lusty Lady. And Margot Rutman speculates: "Obese exotic dancers might be protected under the ADA from discrimination in some instances." Rutman, *supra* note [x], at 534 n.165.

hold employers liable for discriminatory practices, including, of course, disparate treatment and harassment. Assimilationists want access to this set of rules.<sup>91</sup>

In sum, assimilationists lay claim to labor discourse to access greater regulation and protection for sex workers. They anticipate that recognizing sexual labor as legitimate work will give sex professionals protection from hazardous working conditions and degrading discriminatory practices, as well as basic benefits and rights, including wage and hour legislation and unionization and collective bargaining, that inure only to those workers classified as employees. This next part explores the web of laws—OSHA, workers’ compensation, sexual harassment, and disparate treatment doctrine—that regulates the modern workplace. It also briefly summarizes the guidelines for determining who is an employee, which is often a threshold for accessing the other, crucial benefits and rights sex bargainers seek.

## B. *Hazards*

One of the most significant transformations of twentieth-century American employment law was the increasing liability of employers for protecting employees from workplace hazards. Workplace health and safety are regulated primarily through two sets of doctrine, state workers’ compensation laws and the federal regulations and guidelines enacted by the Occupational Health & Safety Act (OSHAct).<sup>92</sup>

Workers’ compensation is, in effect, a state-based insurance system that covers injuries stemming from “accidental injuries” that “arise out of” or “in the course of” employment.<sup>93</sup> Originally inspired by industrial accidents, the system has two signal features.<sup>94</sup> It limits employer liability,<sup>95</sup> and, in exchange, injured workers do not have to

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<sup>91</sup> Of course, not every assimilationist is optimistic about legalization and assimilation. Regarding dancers, Margot Rutman’s extensive analysis of how bona fide occupational qualifications interact with statutory protections leads her to conclude that “[e]ven if ordinary employment law protections were available to exotic dancers, many benefits would be negated by unique factors within the industry.” For instance, most dancers already earn above minimum wage, and, in those instances in which dancers have succeeded in classifying themselves as employees, employers often re-structure the relationship to maintain the same level of compensation. *See, e.g.,* Chun, *supra* note [x], at 234-35 (footnotes omitted) (“Dancers at one San Francisco club successfully challenged the twenty-five dollar ‘stage fee.’ In response, the club reclassified the dances performed at ‘property’ of the club and charged dancers a one hundred fifty dollar commission for using club ‘property.’”); Rutman, *supra* note [x], at 536 (footnote omitted) (“Wages are not beneficial to dancers because the form of compensation is mostly derived from the performance of private dances, which is revenue for the club if dancers are classified as employees.”).

<sup>92</sup> There are also state plans, supervised by the federal OSHA.

<sup>93</sup> WORK LAW, *supra* note [x] (describing different states’ statutory language). There are some federal iterations as well. *See, e.g.,* Federal Employees’ Compensation Act, 5 U.S.C. sects. 8101-93 (federal employees); Longshore and Harbor Workers’ Compensation Act, 33 U.S.C. sects. 901-50 (ship, harbor, and railroad employees).

<sup>94</sup> Initially, workers’ compensation was designed to address industrial accidents. As legal historian John Fabian Witt observes, “Nineteenth-century observers believed both that the number of accidental injuries was increasing and that the cause of the increase was the mechanization of production.” Coal mining and railroads topped the list for workplace accidents, followed by logging, bricklaying, and masonry. These industrial accidents devastated not only the worker, but also their families. “Work accidents, it seemed, threw the ambiguous status of the industrial worker into bold relief, compelling victim and observer alike to ask hard questions about the relationships among capital, labor, and the public.” Of course, as the title of Witt’s book, *Crippled Workingmen and Destitute Widows*, suggests, this was all intensely gendered. The jobs that dominated the public and regulatory imaginary as “dangerous” were ones limited to male workers.

prove employer fault.<sup>96</sup> Workers' compensation transforms workplace liability questions from ones of employer fault and causation (and accompanying common law tort defenses<sup>97</sup>) to worker need. While there is significant variance across states, these statutes now cover most workplaces, providing workers with a safety net.<sup>98</sup>

Operating alongside state workers' compensation statutes are federal health and safety regulations, which are aggregated under the Occupational Health & Safety Agency (OSHA).<sup>99</sup> Unlike workers' compensation, which functions primarily as an insurance scheme, labor reformers and Congress conceived the OSHAct explicitly to deter risk and achieve safer workplaces.<sup>100</sup> Indeed, the prophylactic stress of OSHAct-type hazard *prevention* stems in part from the failure of workers' compensation to provide adequate *ex post* protection. Although criticized by employers and workers alike, OSHA is credited with helping to reduce the number of annual workplace fatalities from 70,000 to approximately 5,000 in the last decade.<sup>101</sup>

Together, workers' compensation and the OSHAct are the primary mechanisms for achieving healthy and safe workplaces. Yet, workers receive vastly different degrees and types of protection, depending on their workplace, the work they do, and the type of risk they confront in the workplace.<sup>102</sup> Under the OSHAct workers receive the most

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Similarly, the ideal of a worker who would provide the sole or primary "family wage" was imagined to be a male head of household. Hence, in its initial formulation, workers' compensation was actually legally and culturally conceived as *workman's* compensation. JOHN FABIAN WITT, *THE ACCIDENTAL REPUBLIC: CRIPPLED WORKINGMEN, DESTITUTE WIDOWS, AND THE REMAKING OF AMERICAN LAW* 2 (2004).

<sup>95</sup> Importantly, actual loss is not part of the equation, and in the vast majority of states neither punitive damages nor emotional pain and suffering are available. "[T]he concepts of punishment and deterrence that lie behind punitive damages are absent from the system." *WORK LAW*, *supra* note [x], at 954. In addition, the exclusivity of remedies rules limit employees to workers' compensation claims, barring them from bringing claims through tort suits, which could yield much greater awards. For further discussion of this doctrine, see *infra* note [x].

<sup>96</sup> Instead, an administrative agency addresses claims, typically more rapidly and inexpensively than litigation would. *See, e.g.*, *WORK LAW*, *supra* note [x], at 953 (it is a "fundamental compromise—no fault compensation in exchange for limited liability").

<sup>97</sup> *WORK LAW*, *supra* note [x], at 946 (describing how fellow-servant rule, assumption of risk, and contributory negligence operated as employer defenses to liability for workplace injuries).

<sup>98</sup> "[T]he various state laws vary greatly in their details on such issues as what types of injuries are compensable and how benefit levels are determined." *WORK LAW*, *supra* note [x], at 953.

<sup>99</sup> Congress created OSHA in 1970 and charged it with "promulgating regulations, inspecting workplaces, and prosecuting violations of its regulations and standards." *WORK LAW*, *supra* note [x], at 1000.

Operating within the Department of Labor, OSHA oversees private workplaces, regulating "more than 100 million workers in more than eight million workplaces." *Id.* at 1001. In addition, states are authorized to enact their own OSHA's, using the federal statute as a floor. *Id.*

<sup>100</sup> Of course, as an insurance scheme, workers' compensation, too, has some deterrence function. Employee pay-outs affect employers' contributions, thus giving them incentives to reduce injuries.

<sup>101</sup> *WORK LAW*, *supra* note [x], at 939. "Today OSHA is perhaps best known for being one of the most criticized agencies that regulates the workplace." *Id.* at 1000. OSHA's goal is to "assure so far as possible every working man and woman in the Nation safe and healthful working conditions . . ." 29 U.S.C. sect. 651(b). However, because of the political difficulties it faces in enacting new regulations, "OSHA has promulgated far fewer permanent standards than was originally contemplated, and it often relies on other means to enforce its statutory mandate." Instead, OSHA "commonly relies on . . . [its] general duty clause" or temporary standards in lieu of enacting specific regulations. *WORK LAW*, *supra* note [x], at 1001, 1004, 1005.

<sup>102</sup> Some OSHAct regulations, for instance requiring appropriately placed exit signs and fire extinguishers, translate well into enforceable regulations across workplaces.

comprehensive protection from the unpredictable, single-incident workplace risk, often industrial injuries that animated the initial workers' compensation system.<sup>103</sup> *Ex post*, after a single-incident injury, workers' compensation provides medical benefits to cover rehabilitation, as well as benefits to cover temporary and permanent loss of income.<sup>104</sup> However, beyond these single-incident injuries, there remains significant uncertainty regarding what kinds of worker injuries are covered and when. "In particular, coverage of occupational diseases, repetitive stress injuries and mental injuries have [sic] proven controversial."<sup>105</sup> Hence, even miners, whose workplace hazards inspired workplace regulation, have found it more difficult to recover for black-lung and related chronic diseases than for incident-related injuries.<sup>106</sup>

In addition, both workers' compensation statutes and the OSHAct have developed categories of inclusion and exclusion. For instance, professional athletes playing contact sports are statutorily or functionally excluded from workers' compensation in many states. Although these athletes are frequently injured and disabled from working, legislators and courts, "lobbied heavily by sports team owners,"<sup>107</sup> have concluded this category of worker does not warrant coverage because the "deliberate" nature of the physical contact meant injuries were not "unexpected."<sup>108</sup> In these workplaces, *e.g.*, football and boxing, regulations are designed to minimize injury through equipment specifications and codes of conduct that govern the workers, but are excluded from compensation. In this sense, injury is a tolerated, and uncompensated, residuum of the

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<sup>103</sup> See *supra* note [x]. For instance, OSHA has developed adequate standards to address worker risk posed by machines and other equipment typically found in factories and manufacturing workplaces.

<sup>104</sup> As noted above, these benefits are paid according to a pre-determined schedule, and workers receive only partial compensation.

<sup>105</sup> WORK LAW, *supra* note [x], at 955. After decades of struggle, workers won the inclusion of "disease" in workers' compensation statutes, yet, "those suffering from work-related diseases still face considerable hurdles" in obtaining benefits. *Id.* at 955.

<sup>106</sup> The first two workers' compensation statutes were for miners. Arthur Larson, *The Nature and Origins of Workmen's Compensation*, 37 CORNELL L.Q. 206, 231 (1952). OSHA, meanwhile, has struggled to gain authority over this type of chronic workplace risk. In the 1990s, the agency tried to establish ergonomic standards to address repetitive-motion injuries, but was hindered by a powerful employers' lobby and a hostile Congress. WORK LAW, *supra* note [x], at 1004-05. After its ergonomic standard was rescinded by the Bush Administration, the Department of Labor issued guidelines for discrete industries. *Id.*

<sup>107</sup> Stephen Cormac Carlin & Christopher M. Fairman, *Note, Squeeze Play: Workers' Compensation and the Professional Athlete*, 12 U. MIAMI ENT. & SPORTS L. REV. 95, 108 (1994).

<sup>108</sup> *Palmer v. Kansas City Chiefs Football Club*, 621 S.W.2d 350, 357 (Mo. Ct. App. 1981). See also Frederic Pepe & Thomas P. Frerichs, *Injustice Uncovered? Worker's Compensation and the Professional Athlete*, in SPORTS AND THE LAW 18, 19 (Charles E. Quirk ed., 1996) (noting misconception that all professional athletes are overpaid and arguing that professional athletes need same legal protection as ordinary working people precisely because they do not earn large salaries); Rachel Schaffer, *Grabbing Them by the Balls: Legislatures, Courts, and Team Owners Bar Non-Elite Professional Athletes from Workers' Compensation*, 8 AM. U.J. GENDER SOC. POL'Y & L. 623 (2000); Carlin & Fairman, *supra* note [x], (noting how both workers' compensation statutes and their own contracts limit professional athletes' claims for injury); PROFESSIONAL AND AMATEUR SPORTS 15-1, 15-17, at 15.04 (Gary A. Uberstine ed., 1991) (contrasting temporary disability benefits and permanent disability benefits).

activity.<sup>109</sup> These categorical exclusions are most apparent, however, when it comes to one workplace hazard targeted by sex work assimilationists—nonconsensual violence.<sup>110</sup>

Over two million workers are victims of workplace violence each year.<sup>111</sup> In fact, homicide, not cave-ins or machine malfunctions, is the fourth leading cause of workplace fatalities and the leading cause for women workers.<sup>112</sup> OSHA nominally is charged with protecting workers from violence in the workplace. Although the agency does not have specific standards for workplace violence, its general duty clause imposes a broad obligation on employers to guarantee their employees a safe working environment.<sup>113</sup> However, as numerous critics have pointed out, “there has been virtually no enforcement of this duty with regard to workplace violence,” and workplace violence seems to fall through the regulatory cracks.<sup>114</sup> As with other workplace hazards, risk of violence is not equally distributed across workplaces—workers in health care, service jobs, and late night retail, *i.e.*, convenience stores, are the most vulnerable to workplace violence.<sup>115</sup> Convenience stores also share with sex businesses a particular form of violence, sexual assault. OSHA has issued specific guidelines and recommendations for three of these high-risk industries, health care and social service workplaces, taxi driving, and late-night

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<sup>109</sup> Duncan Kennedy uses tolerated residuum to describe how law under-regulates sexual violence and harassment, thereby benefitting heterosexual men. DUNCAN KENNEDY, *SEXY DRESSING, ETC.: ESSAYS ON THE POWER AND POLITICS OF CULTURAL IDENTITY* (1993).

<sup>110</sup> I characterize it as nonconsensual to distinguish it from the consensual violence in contact sports.

<sup>111</sup> “Workplace violence is any act or threat of physical violence, harassment, intimidation, or other threatening disruptive behavior that occurs at the work site...Nearly 2 million American workers report having been victims of workplace violence each year.” U.S. Dept. of Labor, “Workplace Violence,” Occupational Safety and Health Administration, accessed 22 Jan. 2012 at <http://www.osha.gov/SLTC/workplaceviolence/> (“Workplace Violence”).

<sup>112</sup> Bureau of Labor Statistics Census of Fatal Occupational Injuries n. 137 (CFOI). “In 2009, approximately 572,000 violent crimes (rape/sexual assault, robbery, and aggravated and simple assault) occurred against persons age 16 or older while they were at work or on duty, based on findings from the National Crime Victimization Survey (NCVS). This accounted for about 24% of nonfatal violence against employed persons age 16 or older. Nonfatal violence in the workplace was about 15% of all nonfatal violent crime against persons age 16 or older.” Erika Harrell, US Dept. of Justice “Special Report: Workplace Violence, 1993-2009,” (March 2011), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/wv09.pdf>.

<sup>113</sup> The general duty clause states: “[e]ach employer [] shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees[.]” 29 USC 654 (a)(1).

<sup>114</sup> Note, Sheryl L. Erdmann, *Eat the Carrot and Use the Stick: The Prevalence of Workplace Violence Demands Proactive Federal Regulation of Employers*, 43 VAL. U.L. REV. 725, 727 (2009) (footnote omitted). See also Davis, *supra* note [x], at 726-27 (“The Occupational Safety & Health Administration . . . holds employers to a general duty to shield employees from hazards and injury. However, there has been virtually no enforcement of this duty with regard to workplace violence.”) (footnote omitted). In addition, in 1995 there was an administrative law ruling that strict liability would not be imposed on employers for hazards that were not recognized by the employers’ industry. *Id.* at n. 47.

<sup>115</sup> For homicide, “most of the victims work in retail trade, security services, or transit services occupations.” Jane Lipscomb et al, *Preventing Injuries & Abuse: Perspectives on Legal Strategies to Prevent Workplace Violence*, 30 J.L. MED. & ETHICS 166, 166 (2002). On the other hand, “[t]he majority of non-fatal workplace injuries occur in settings in which the victim and the attacker are in a custodial or client-caregiver relationship, such as in health care or social services.” *Id.* These statistics also vary according to geography. For instance, in New York City, in [dates] the workers at greatest risk from violence were taxi drivers and grocery store workers. Susan L. Pollett, *Violence in the Workplace: Are Employers Legally Responsible?*, 22 WESTCHESTER B.J. 133, 138 (1995).

retail stores, but the guidelines remain advisory only, and no workplace is subject to mandatory rules from OSHA with regard to violence prevention.<sup>116</sup>

In the absence of effective deterrence from OSHA, workers' compensation has emerged as the "primary compensatory remedy" for workplace violence.<sup>117</sup> While OSHA has issued guidelines covering only three high-risk industries, workers' compensation statutes facially cover 90% of workers for violence. Yet, state systems have developed their own doctrinal exclusions, which disproportionately affect many workers at highest risk. For instance, while late-night retail is a high-risk industry, many courts have denied workers' compensation claims for convenience store assaults as not meeting the requirements that injuries "arise out of" or "in the course of employment."<sup>118</sup> Moreover, there is no statutory recovery for emotional suffering, which can severely limit relief. Ironically, the gender dynamics of violence exacerbate the problem, making women's injuries more likely to be excluded from workers' compensation. Male workers are more likely to be assaulted by strangers; female workers by someone they know. Because the "arising out of employment" requirement bars "private" or "personal" assaults, which courts construe as including both stalkers and domestic violence, women victims of workplace violence are more likely to be excluded from relief.<sup>119</sup> The same is true for another gendered form of violence prevalent in both sex businesses and convenience stores: sexual assault.<sup>120</sup> Like assaults deemed "personal," many courts have found that workplace rapes do not "arise from the employment" and hence are exempt from workers' compensation benefits.<sup>121</sup> Moreover, a rape victim may not suffer the kind of lasting physical impairment required for workers' compensation benefits, and the emotional suffering and trauma many sexual assault victims do experience is excluded.<sup>122</sup> In sum, the workplace hazard many sex workers fear most, violence, and specifically sexual assault, is ineffectively and sporadically regulated by existing law.

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<sup>116</sup> U.S. Department of Labor Occupational Safety and Health Administration, Guidelines for Preventing Workplace Violence for Health Care and Social Service Workers, OSHA 3148-01R (2004), available at <http://www.osha.gov/Publications/OSHA3148/osha3148.html>; U.S. Department of Labor Occupational Safety and Health Administration, Recommendations for Workplace Violence Prevention Programs in Late-Night Retail Establishments, OSHA 3153-12R (2009), available at <http://www.osha.gov/Publications/osha3153.pdf>; U.S. Department of Labor Occupational Safety and Health Administration, Preventing Violence Against Taxi and For-Hire Drivers, OSHA Fact Sheet (April 2010), available at [www.osha.gov/Publications/taxi-driver-violence-factsheet.pdf](http://www.osha.gov/Publications/taxi-driver-violence-factsheet.pdf).

<sup>117</sup> Goldberg, *supra* note [x], at (footnote omitted).

<sup>118</sup> *See, e.g.*, WORK LAW, *supra* note [x], at 974-75. In some jurisdictions, this has become a categorical exclusion. *See, e.g.*, Goldberg, *supra* note [x].

<sup>119</sup> Goldberg, *supra* note [x].

<sup>120</sup> "For time of day, the 1990 National Crime Victimization Survey reports that seventy-one percent (71%) of rapes occur at night which is consistent with our finding of eight-nine percent (89%) occurring at night." NACS Online, Convenience Store Security Report, National Association of Convenience Stores, July 1, 2007, available at <http://www.nacsonline.com/NACS/Resources/Research/Pages/ConvenienceStoreSecurity.aspx>.

<sup>121</sup> It is an interesting question whether courts would be more likely to conclude that sexual assaults in *sex workplaces* meet the link to employment. This is addressed *infra* notes [x] and accompanying text.

<sup>122</sup> *See, e.g., Doe v. Purity Supreme*, 664 N.E. 2d 815 (1996) (holding that rape victim's claims against employer for negligence, assault and battery, intentional infliction of emotional distress and negligent infliction of emotional distress were barred by the exclusive remedy provision).

OSHA does not reach it, and workers' compensation has effectively declined to insure these workers.<sup>123</sup>

In sum, not all work or workers are treated alike when it comes to risk. Some workplace injuries are the object of both deterrence and compensatory regulation. But workers susceptible to other kinds of risk continue to struggle for legal attention and intervention. This differential is particularly noteworthy with regard to workplace violence. Some industries enjoy special, targeted regulation to ameliorate workplace violence. However some of the most hazardous workplaces are the ones where the risk is largely unregulated or the injury is uncompensable. Hence, the assimilationist invocation of an ideal "workplace" is a miscue when it comes to health and safety regulation. It does not account for the highly differential regimes and rules. Equally importantly, absent specific guidelines, it is very likely that given the nature of the risk and its gendered dimensions, sex work would largely fall outside the scope of both deterrence and compensatory regulation.

### C. *Discrimination*

Assimilationists also anticipate that recognizing transactional sex as work will bring sex professionals access to anti-discrimination law, especially racial discrimination law. Several federal laws curb the extent to which employers can discriminate against their workers. Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating in hiring, promotion, termination, training, and other employment terms on the basis of race, sex, religion, color, or national origin.<sup>124</sup> Passed shortly after Title VII, the Age Discrimination in Employment Act of 1967 (ADEA) bars employment discrimination against workers aged 40 or older.<sup>125</sup> The final piece of employment discrimination legislation came in 1990 with the Americans with Disabilities Act (ADA),

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<sup>123</sup> Other state and federal regulations have stepped into this regulatory void, to target some of the most dangerous workplaces. For instance, responding to a massive increase in violence against workers at all-night convenience stores, Florida passed the Convenience Business Security Act, which imposed security obligations on stores that had experienced a violent incident. Florida's statute has emerged as a model for other states. Similarly, the state of Washington passed a statute that imposes certain obligations on health care employers to prevent workplace violence. Violence against workers at abortion clinics led both the federal government and the state of California to enact clinic access laws that give "local police and district attorneys a clearer mandate to prosecute anti-abortion violence." Finally, some commentators have responded to the regulatory void by urging a return to the common-law system as the best option for victims of workplace violence. Convenience Business Security Act, FLA STAT. § 812.173 et seq. (1997); Workplace Violence Prevention Law, Safety--Health Care Settings, Rev. Code Wash. (ARCW) § 49.19.005 et seq. (2011); "The success of the [Gainesville, FL] ordinance has prompted more than 260 communities nationwide to request copies of the law for conducting their own studies." Ann E. Phillips, *Violence in the Workplace: Reevaluating the Employer's Role*, 44 BUFFALO L. REV. 139, 146-147, fn. 46 citing Dale D. Buss, *Combating Crime*, NATION'S BUS., Mar. 1, 1994 at 19.

<sup>124</sup> 42 U.S.C. § 2000e et seq. (1964). Within this doctrine, courts recognize both disparate treatment and disparate impact claims. The former bars intentional acts of discrimination while the latter extends Title VII to hold employers liable for policies that have a disproportionate impact on one group and cannot be justified by a valid business necessity. See, e.g., *Phillips v. Martin Marietta Corp.* (1971) (holding employer's refusal to accept applications from women with pre-school aged children constituted disparate treatment based on sex); *Griggs v. Duke Power, Co.*, (1971) (establishing disparate impact).

<sup>125</sup> 29 U.S.C. § 621-634 (1967).

a broad mandate prohibiting discrimination, including in the workplace.<sup>126</sup> Finally, Section 1981 of the 1866 Civil Rights Act also offers protections from racial discrimination, but is limited to private employers and in other ways.<sup>127</sup> Taken together, these anti-discrimination laws sharply limit the extent to which employers can indulge their preferences and biases, and, equally crucially, the preferences and biases of their customers.

Importantly, courts do not treat all categories of discrimination the same, carving significant exceptions into some legislation, but not all. Although regulated under different statutory regimes, in age, religion, national origin, and sex discrimination cases employers can defend against charges of disparate treatment by showing that the contested selection criteria is a bona fide occupational qualification (bfoq).<sup>128</sup> Classic bfoq's include mandated retirement ages for bus drivers and airline pilots and "authenticity" of a service or product, mainly exempted for religion and national origin.<sup>129</sup> In particular, authenticity reaches gender, as filmmakers can hire men to play male parts and women to play female ones.<sup>130</sup> Beyond authenticity, gender has

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<sup>126</sup> 42 U.S.C. § 12101 et seq. (1990). The Act requires employers to make "reasonable accommodations" for employees with disabilities.

<sup>127</sup> Section 1981 provides:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Although Section 1981 was the first law to prohibit discrimination in employment, for historical reasons litigants opt for Title VII's protections in far greater numbers. See Danielle Tarantolo, *From Employment to Contract: Section 1981 and Antidiscrimination Law for the Independent Contractor Workforce*, 116 YALE L.J. 170 (2006) (describing origins of Section 1981, its historic and contemporary limitations, and urging a more expansive interpretation of its protections).

<sup>128</sup> The corollary exemption under disparate impact claims is business essence.

<sup>129</sup> Hence, the Catholic Church can hire only Catholics (and men) as priests, and Chinese restaurants can hire Chinese chefs. In one controversial decision, the religion bfoq was even extended to hiring a philosophy professor at a religious university. *Pime v. Loyola Univ. of Chicago*, 803 F.2d 351 (7th Cir. Ill. 1986) (holding that hiring a Jesuit to teach philosophy at a Jesuit university was a BFOQ and did not violate Title VII). But see Stacey M. Brandenburg, *Employment Law: Alternatives to Employment Discrimination at Private Religious Schools*, 1999 ANN. SURV. AM. L. 335 (1999) (arguing, inter alia, that 42 U.S.C. 2000e-1(a) (1994), the section allowing for religious exemptions to employment discrimination in Title VII, should be repealed); Jane Rutherford, *Equality as the Primary Constitutional Value: The Case for Applying Religious Discrimination Laws to Religion*, 81 CORNELL L. REV. 1049 (1996) (arguing that equality, as described in the Fourteenth Amendment, is the most important component of the Constitution, and that anti-discrimination laws like Title VII should be enforced even against religious institutions). Consistency, however, is required. Hence, a Chinese restaurant that hired French, Italian, and Japanese chefs could not then exclude Mexican applicants.

<sup>130</sup> In fact, the acting bfoq is included in a comment in the EEOC Guidelines. The Guidelines purport to authorize sex discrimination in casting insofar as it is "necessary for the purpose of authenticity or genuineness." EEOC Guidelines on Discrimination Because of Sex, 29 CFR § 1604.2(a)(2) (1965), available at <http://law.justia.com/cfr/title29/29-4.1.4.1.5.0.21.2.html>. Mary Anne Case called it "bizarre that sex is considered a BFOQ, in the interests of 'authenticity or genuineness,' for the job of actor or actress . . . . After all, the very essence of this job is to be something one is not. All that a producer should be allowed to require is that the pretense be convincing." Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE

developed its own, complex jurisprudence of bona fide occupational qualifications, which is especially apparent in the service sector. Service workers are the last stage in satisfying and fulfilling customer needs.<sup>131</sup> Unlike, for instance, manufacturing, where customers typically differentiate among products, in service work, customers can develop strong preferences for particular kinds of workers or characteristics.<sup>132</sup> Employers develop and exploit these preferences to market their business in ways the law has deemed both legitimate and illegitimate.<sup>133</sup>

In a series of 1970s cases courts rejected employer efforts to justify discriminatory treatment practices based on gender stereotypes, including both nurturing and what Kimberley Yuracko calls sexual titillation. Most famously, faced with airlines' efforts to limit the position of flight attendant to young, "attractive" women, courts held

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L.J. 1 (1995). Russell Robinson elaborates, "Actors generally do not face authenticity requirements regarding many character traits; for example, an actor need not be gay or have a disability or pregnant in order to play a character with that trait. Indeed, good acting is often defined as the ability to pull off a role quite different from the actor's own identity." Russell K. Robinson, *Casting and Caste-ing: Reconciling Artistic Freedom and Antidiscrimination Norms*, 95 CALIF. L. REV. 1, 31-32 (2007). However, the reverse is not true. An actor with a non-concealable disability probably would not be cast to play a non-disabled person. In addition, actresses often struggle to work around pregnancy. In what is probably the most famous case actress Hunter Tylo received a jury award of \$4.8 million for her pregnancy discrimination suit for being fired from *Melrose Place*. Many speculate the jury was influenced by the fact that producer Aaron Spelling had accommodated previous pregnant actresses on the same show, including lead Heather Locklear.

<sup>131</sup> "[S]ervice sector employers are more dependent upon front-line employees' loyalty and willingness to go the extra mile to further the firm's mission than manufacturing employers because service businesses offer no tangible product; the firms' service *is* the product, and it cannot be separated from the workers who provide it." WORK LAW, *supra* note [x], at 65.

<sup>132</sup>

Two types of customer preferences define each business: preferences for products and preferences for people. . . . Businesses are also shaped, however, by customer preferences for certain types of employees or service providers. Customer preferences to have certain services provided by employees of a particular sex may . . . be grounded in (1) a belief that individuals of one sex are superior in all or particular activities to individuals of the other sex, (2) socially, or perhaps biologically, conditioned feelings of discomfort at having certain services performed by an individual of a particular sex, (3) a desire to experience or avoid sexual titillation, or (4) a sense of socially or aesthetically appropriate gender roles.

Kimberly A. Yuracko, *Private Nurses and Playboy Bunnies : Explaining Permissible Sex Discrimination*, 92 CAL. L. REV. 147, 164 (2004). Of course, many businesses may use their workers to try to link their products to an idea or image. Frequently, this is an effort to turn a product into a service. The Saturn car exemplifies this. "In ads, Saturn describes itself as: 'A different kind of car. A different kind of company,' hoping to win over buyers who might otherwise shop for a competitive foreign or American car." Doron P. Levin, *Saturn Stands Out Brightly Amid the Car-Sales Gloom*, NY TIMES, Dec. 17, 1991, available at <http://www.nytimes.com/1991/12/17/business/saturn-stands-out-brightly-amid-the-car-sales-gloom.html?scp=2&sq=saturn+different+kind+car&st=nyt>.

<sup>133</sup> Dianne Avery and Marion Crain describe employer efforts to differentiate their business and create consumer loyalty through the "brand." See, e.g., Dianne Avery & Marion Crain, *Branded: Corporate Image, Sexual Stereotyping, and the New Face of Capitalism*, 14 DUKE J. GENDER L. & POL'Y 13, 84 (2007) ("In entering new gaming markets outside the orb of Las Vegas and the Strip, Harrah's, like other casino operators, has struggled to negotiate delicately the boundary between commercially viable sexiness and unpalatable (if not clearly illegal) sexual exploitation of female service workers."). See also Marion Crain, *Managing Identity: Buying into the Brand at Work*, 95 IOWA L. REV. 1179 (2010) (describing how employers use "brand" to induce worker loyalty in absence of traditional incentives such as retirement benefits and job security).

that their exclusions of men, as well as their subjecting women but not men to weight restrictions and other grooming, age, and marital status requirements violated Title VII.<sup>134</sup> Other cases used a similar logic to limit employers' discriminatory practices. Yet, the sex discrimination bfoq remains robust. Courts have upheld gender as a valid criterion in hiring nurses who work in labor and delivery rooms, nursing home attendants who bathe and dress patients, restroom attendants, and, in some cases, for prison guards.<sup>135</sup> Courts cite as the relevant factor the employer's reasonable regard for its patrons' privacy.<sup>136</sup> Unlike the decisional privacy associated with sexual acts and also reproduction that underlies some erotic exceptionalism, this is spatial privacy, rooted in the comforts of homosociality.<sup>137</sup>

Yet decisional privacy is arguably operative in as well. Yuracko observes a second exemption in which courts have affirmed the right of employers to employ only women (or, presumably, only men) in workplaces that sell sex.<sup>138</sup> Myriad businesses use sex to market other goods or services, *e.g.*, meals, clothes, transportation, gambling, etc., and to enhance revenues. But Yuracko distinguishes these from businesses that *actually charge for and derive receipts* from the sale of sexual services, or what I call erotic receipt businesses. Unlike stripping, prostitution, and phone sex, in Hooters and Abercrombie and Fitch the cash register has no provision for ringing up erotic sales.<sup>139</sup>

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<sup>134</sup> See, *e.g.*, *Diaz v. Pan American Airways*, 442 F.2d 385 (5<sup>th</sup> Cir. 1971) (holding airline could not exclude men from position of flight attendant); *Wilson v. Southwest Airlines Co.*, 517 F. Supp. 292 (1981) (holding that being female was not a BFOQ for flight attendants or ticket agents and finding Southwest's single-sex hiring practices to be sex discrimination); *Sprogis v. United Air Lines*, 308 F. Supp. 959 (N.D. Ill. 1970) (holding that a requirement that female flight attendants be unmarried was sex discrimination under Title VII); *Laffey v. Northwest Airlines*, 366 F. Supp. 763 (D.D.C. 1973) (holding, *inter alia*, that rules prohibiting eyeglasses for female flight attendants and height and weight restrictions applied only to female flight attendants violated Title VII).

<sup>135</sup> Yuracko observes a spectrum of privacy from touching (labor room and other care givers) to seeing to embarrassment but not touching or seeing (rest-room attendants). Yuracko, *supra* note [x], at 157. See also Michael J. Frank, *Justifiable Discrimination in the News and Entertainment Industries: Does Title VII Need a Race or Color BFOQ?*, 35 U.S.F. L. REV. 473, 491 (2001) (noting that "within the privacy cases, the courts deem the interests of ordinary customers in their privacy to be less than those of patients in nursing and health care facilities").

<sup>136</sup> "The courts that have permitted the privacy-based sex BFOQ believe that the very sex of the excluded individuals prevents them from giving customers adequate privacy. Accordingly, the test for the privacy-based sex BFOQ is whether the excluded applicants can satisfactorily respect the privacy of customers in the performance of the job." Frank, *supra* note [x], at 490. While Yuracko notes the "symmetry" in privacy preferences, Frank notes that the privacy bfoq defense typically only is applied to women's privacy preferences, not to men's. *Id.* at 489-91; Yuracko, *supra* note [x], at 181-83.

<sup>137</sup> See *supra* note [x] and accompanying text.

<sup>138</sup> See, *e.g.*, *Wilson v. Southwest Airlines Co.*, 517 F. Supp. 292, 301 (1981) ("Generally, a male could not supply the authenticity required to perform a female role. Similarly, in jobs where sex or vicarious sexual recreation is the primary service provided, *e.g.* a social escort or topless dancer, the job automatically calls for one sex exclusively; the employee's sex and the service provided are inseparable. Thus, being female has been deemed a BFOQ for the position of a Playboy Bunny, female sexuality being reasonably necessary to perform the dominant purpose of the job which is forthrightly to titillate and entice male customers.").

<sup>139</sup> By the same token, even when sexual services are not actually provided, *e.g.*, a phone sex or prostitution interaction in which the parties talk non-sexually, they could be. In addition, even outside of erotic receipt businesses, workers often receive an erotic premium in wages or tips. See, *e.g.*, Dianne Avery, *The Female Breast as Brand*, in *Invisible Labor* (forthcoming). Compare Ohio's General Assembly defined a "sexual encounter establishment" in a 2001-2002 bill as "'Sexual encounter establishment' means a business or

Yuracko shows that employer efforts to assert bfoq's in the former instances rarely win, while courts have been more willing to permit employers to practice sex discrimination for erotic receipt businesses, in which selling sex is the "inherent business essence."<sup>140</sup> Yuracko distinguishes these erotic receipt cases from the privacy ones. Yet, one might understand the erotic receipt exemption as extending the logic of decisional privacy, that decisions about sex lie in a zone of protected intimacy liberty, to the commercial sphere.

Hence, spatial privacy and decisional privacy for erotic receipt businesses are noteworthy as the only forms of sex discrimination in which customer "tastes for discrimination" trump workers' rights to equal treatment.<sup>141</sup> There is overlap—both embed a sexual logic.<sup>142</sup> Yet they are conceptually distinct, and Yuracko contends that courts "are far more permissive" of sex discrimination on behalf of spatial privacy concerns than they are of discrimination on behalf of what I characterized as decisional privacy in erotic receipt businesses.<sup>143</sup> Thus service remains a deeply complicated and contested terrain for sex discrimination claims.

In an important contrast, when it comes to race, employers cannot defer to their own or their customers' preferences or biases. Unlike sex, race and disability have no explicit bona fide occupational qualification. The standard for disability is that employers must make "reasonable accommodations" and not deny an opportunity to an otherwise qualified individual.<sup>144</sup> And race is straightforward:<sup>145</sup> the only explicit

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commercial establishment that, as one of its principal business purposes, offers for any form of consideration a place where two or more persons may congregate, associate, or consort for the purpose of specified sexual activities or when one or more of the persons is nude or seminude." Ohio S.B. No. 251 (2002) (introduced), available at [http://www.legislature.state.oh.us/bills.cfm?ID=124\\_SB\\_251](http://www.legislature.state.oh.us/bills.cfm?ID=124_SB_251).

<sup>140</sup> "Attempts to discriminate on the basis of sex in hiring for plus-sex businesses are virtually always unsuccessful." Yuracko, *supra* note [x], at n.28. She claims that airlines and related cases demonstrate that "courts simply do not permit employers to explicitly sell sexual titillation along with other goods and services." *Id.* Yuracko also believes that most employers would not risk association as an erotic receipt business. "Businesses explicitly selling sexual titillation may do so only by positioning themselves within the traditionally marginalized and stigmatized sex industry. Businesses that seek to bring sexual titillation into the mainstream by combining sexual titillation (and sex-based hiring) with the sale of other goods and services are not permitted to exist." *Id.* at 196. Ann McGinley, on the other hand, is not as sanguine about the plus-sex/sexual gratification dichotomy. McGinley finds "[t]he lines between sex work, work in a highly sexualized environment, and other work requiring employees to 'sell' their sex or gender to give up control over their intimate emotions are hazy." McGinley, *supra* note [x], at 95 (footnote omitted). Instead, "[o]ften, a woman's job prospects and ability to advance within an enterprise are linked to her setting the proper gender tone on the scale of commodification." *Id.* at 94 (footnote omitted).

<sup>141</sup> See Avery & Crain, *supra* note [x] (showing that employers are successfully recasting appearance discrimination in the language of "branding").

<sup>142</sup> While sexual gratification rests on an explicitly sexual logic, privacy too can be implicitly sexual. It assumption that people are comfortable with care attendants of the same sex are heteronormative. Although lesbians may also object to male invasions of their privacy, rooted in perceptions of male supremacy and objectification rather than in assumptions of heterosexual desire.

<sup>143</sup> Yuracko, *supra* note [x], at 152.

<sup>144</sup> Americans with Disabilities Act, 42 U.S.C. 12112(b). As used in subsection (a) of this section, the term "discriminate against a qualified individual on the basis of disability" includes... (5)(A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity."

<sup>145</sup> "The bona fide occupational qualification ("BFOQ") defense is an extremely narrow exception, . . . and is *not* available for racial discrimination." 10 (citations omitted). See also *Dothard v. Rawlinson*, 433 U.S.

exception is a narrow one recognized by the Seventh Circuit for correctional officers.<sup>146</sup> But there appear to be other exemptions operative in race jurisprudence. For instance, one judge speculated that law enforcement could assign undercover agents by race, *i.e.*, limit Klan infiltration to white officers.<sup>147</sup> In a radically different context, Michael J. Frank and Russell Robinson have both observed that race has been effectively exempted from discrimination law in the highly influential and profitable filmmaking industry.<sup>148</sup> Writing in 2001 and 2007, neither author found any published adjudication of the highly prevalent racial preferences in casting decisions.<sup>149</sup> Robinson observed, “the EEOC carves out casting as an arbitrary exception to the normal requirement that an applicant be considered as an individual and not saddled with group-based stereotypes and the ban on catering to customer preferences.”<sup>150</sup> These racial breakdowns are defended as protecting authenticity, but, unlike cuisine, religion, and Klan infiltration, in film casting authenticity is linked to first amendment protection for artistic expression, including character and plot creation. Robinson rejects the authenticity exemption, contending, “Indeed, when it comes to casting, an entire industry effectively disregards Title VII.”<sup>151</sup> Judicial dicta similarly suggests protection for another market sector that regularly employs racial preferences, advertising. A district court noted that advertisers might

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321, 334 (1977); *Swint v. Pullman-Standard*, 624 F.2d 525, 535 (5th Cir.1980), *overruled on other grounds* by 456 U.S. 273 (1982) (omission of race as bfoq was intentional on part of Congress and that the defense is not available in race discrimination cases); *Burwell v. Eastern Air Lines, Inc.*, 633 F.2d 361, 370 n. 13 (4th Cir.1980) (same); *Knight v. Nassau County Civil Serv. Comm'n*, 649 F.2d 157, 162 (2d Cir.1981) (same); EEOC Guidelines, 29 C.F.R. § 1604.2 (describing bfoq for gender but not race).

<sup>146</sup> *Wittmer v. Peters*, 87 F.3d 916 (7th Cir.1996) (adopting narrow, judicially-crafted racial bfoq for correctional officers). See also Robinson, *supra* note [x], at 41 (“A few courts have suggested without holding that Title VII could permit a BFOQ for race in certain contexts, like police forces and prison security.”).

<sup>147</sup> Some have also suggested that newspapers might send white reporters to interview Klan members. Frank, *supra* note [x], at 506 (“Discriminatory practices may also exist in the television news industry, where it sometimes may be necessary to use reporters of a particular race to do undercover work, such as an expose on the Ku Klux Klan, or where an Asian-American reporter might have better success getting other Asians to volunteer information during an interview.”).

<sup>148</sup> Frank, *supra* note [x]; Robinson, *supra* note [x].

<sup>149</sup> Frank, *supra* note [x], (“There is not a single reported case in which an actor has sued a director for race-based casting decisions, even though it is common.”); Robinson, *supra* note [x] (noting his research “did not turn up a single published decision in which a court adjudicated an actor’s Title VII claim of race or sex discrimination.”).

Robinson contrasts race and sex specifications in casting breakdowns, finding that 45.2% had racial codes, compared with 94% for gender and “women over 40 [who] are as much a minority as any ethnic group.” “This common sequencing suggests that sex forms the foundation of a character more than the traits that follow, such as race and age.” Robinson, *supra* note [x], at 19.

<sup>150</sup> Robinson, *supra* note [x], at 34. Compare Robinson, *supra* note [x], at 40 (“advocat[ing] a different approach that acknowledges First Amendment concerns and focuses not on whether a female can ‘authentically’ play a male, but on whether the sex of the character could be changed without doing substantial harm to the narrative.”) with Frank, *supra* note [x], at 498 (“Despite Congress’ omission of race from the BFOQ provision, people accept the reasonableness and morality of recognizing a BFOQ for race, at least in some instances involving the entertainment industry. Indeed, to demonstrate the necessity of a race BFOQ, some scholars use as their prime example the need to employ black actors to portray black characters.”).

<sup>151</sup> Robinson, *supra* note [x], at 5.

select actors based on race in order to “solicit products to a certain group.”<sup>152</sup> An appellate court further clarified and refined the hypothetical test as employers’ ability to take racial *appearance* into account.<sup>153</sup> A final looks-based profession that appears to inhabit at least a litigation-free zone with regard to anti-discrimination law is modeling. Fashion designers and editorial directors routinely use race as an organizing principle, either excluding non-white models from highly lucrative runway shows and editorial campaigns, or, alternatively, use race to organize how they showcase clothes and trends. Thus, while nominally there are no bfoq’s for race discrimination (Section 1981 follows Title VII in denying one), the reality is that some appearance industries, film, advertising, and modeling, routinely make hiring and other employment decisions based on race.<sup>154</sup> Perhaps ironically, it is these looks-based, or “appearance,” markets that enjoy expressive protection to discriminate.

A second form of sex discrimination prohibited by Title VII is sexual harassment, another characteristic of sex workplaces that assimilationists anticipate fuller recognition and regulation would ameliorate. In 1986 the U.S. Supreme Court recognized that sexual harassment comprised impermissible sex discrimination under Title VII.<sup>155</sup> This included both *quid pro quo*, *i.e.*, conditioning terms and conditions on sex, and creating a hostile work environment, *i.e.*, holding employers liable for failing to prevent unwelcome sexual advances, including from customers. While nominally a universal norm, commentators dispute whether there should be different standards, depending on the type of workplace, with some urging that sex workplaces should be excluded or held to a lower standard.<sup>156</sup>

In sum, anti-discrimination law doctrine operates in two registers in disparate treatment cases. Age, religion, national origin, and sex have formal exemptions for bona fide occupational qualifications. Bfoq’s for sex are complex and unpredictable, with some courts giving deference to discrimination motivated by both spatial privacy and decisional privacy for erotic receipts. Reasonable accommodations governs disability,

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<sup>152</sup> “The District Court expressed some concern that its decision ‘might well prevent advertisers from employing, based on race, actors to solicit products to a certain group.’ This conclusion, however, does not necessarily follow. A film director casting a movie about African-American slaves *may not exclude Caucasians from the auditions*, but the director may limit certain roles to persons having the physical characteristics of African-Americans. Indeed, the drafters of Title VII expressly anticipated this issue. In their interpretative memorandum, Senators Case and Clark explained that although there is no exemption in Title VII in which race might be deemed a bona fide job qualification, a director of a play or movie who wished to cast an actor in the role of a Negro, could specify that he wished to hire someone *with the physical appearance* of a Negro.” 110 Cong. Rec. 7213, 7217 (1964) (emphasis added). *See also* Miller, 615 F.2d at 654 (suggesting that a director wishing to cast the role of Henry VIII may announce that only applicants of sufficient physical likeness to Henry VIII will be considered). As applied here, TPG could have legally assigned jobs based on accent, speech pattern or dialect, but not expressly on race.) (emphasis added). “Although the statutory language allows gender to be a valid BFOQ for hiring an actor or actress where it is necessary for the ‘purpose of authenticity or genuineness.’” 29 C.F.R. sect. 1604.2(a)(2). Congress specifically rejected race as a BFOQ. *See generally* 110 Cong. Rec. 2550-63 (1964) (House discussion on inclusion of race and color in the BFOQ exception).

<sup>153</sup> *Ferrill v. Parker Grp., Inc.*, 168 F.3d 468, fn. 10(11th Cir. 1999).

<sup>154</sup> Siobhan Brooks recasts these as “desire industries.” “Desire industries can include various forms of media and industries, which operate on ideas of desire and attractiveness such as fashion modeling, acting, and selling retail.” BROOKS, *supra* note [x], at 6.

<sup>155</sup> *See, e.g.*, *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986).

<sup>156</sup> *See infra* notes [x] and accompanying text.

and race doctrine facially does not have bfoq's but appears to still have exemptions based either on an implied bfoq analysis (the Seventh Circuit's exception for corrections officers) or on first amendment law trumping anti-discrimination law in expressive, appearance industries. Finally, sex discrimination law holds employers liable for conditioning employment on sex or failing to protect workers from unwanted and unwelcome sexual conduct. It is unclear whether and how sex work would fare as an object of anti-discrimination law.

#### D. *Threshold Tests*

Finally, a threshold test for accessing many of these protections is that workers be employees rather than independent contractors. While all workers are entitled to work in conditions defined as safe by OSHA and can collect workers' compensation, as described above, only full-time employees can unionize, have access to basic benefits, including unemployment and health insurance, retirement, and social security, and are entitled to minimum wage and overtime. Tests vary according to the statute with the National Labor Relations Act, Fair Labor Standards Act, ERISA,<sup>157</sup> IRC, Social Security Act, and workers' compensation statutes all adopting different tests. With the exception of Section 1981, the same holds true for discrimination law.<sup>158</sup> The Americans with Disabilities Act and the Age Discrimination in Employment Act both limit protection from discrimination to those classified legally as employees. Although the language of Title VII states that "individuals" are protected from discrimination in law, courts still distinguish between employees and independent contractors, restricting protection to the former. While the various statutory and legal tests are diverse, all entail a substantial assessment of the allocation of control over work between the employer and the worker.<sup>159</sup> What remains universal though, across these distinct employee jurisprudences, are employers' efforts to characterize workers as independent contractors rather than employees to lessen costs and liability.

#### E. *Summary*

In the end, then, the assimilationist claim that professional sex is just work and could be easily assimilated into extant regulatory structures is a miscue from the diversity of workplaces and their regulation. Regulation for health and safety and against violence,

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<sup>157</sup> See, e.g., *Nationwide Mutual Insurance Company v. Darden*, 503 U.S.318, 323-24 (factors for assessing employee status include skill, source of tools, location, duration of relationship, rights to assign, discretion, method of payment, incorporation of work into hiring party's regular work, provision of benefits, and tax treatment).

<sup>158</sup> Because Section 1981's language is not limited to employees, Danielle Tarantolo urges it could become a broad remedy for workers in private workplaces. Tarantolo, *supra* note [x]. She notes, though, that in order for Section 1981 to emerge as an effective remedy, several procedural and doctrinal obstacles would need to be overcome, including that it only applies to racial discrimination, its inability to reach disparate impact claims, its restriction to private causes of actions, and similarly the fact that it only reaches private employers. *Id.*

<sup>159</sup> Judicial interpretation has contributed significantly to the thick "employee" jurisprudence, elaborating the various tests, including common law agency, economic realities, [complete].

as well as anti-discrimination law, applies in varying ways to different market sectors and types of work. To gain maximum protections in a world of decreasing regulation, workers have to define themselves as certain kinds of workers doing certain kinds of work. Workers successfully gained regulatory interventions in the factories, mines, slaughterhouses, and other worksites that labor reformers targeted after the industrial revolution. These regulatory interventions aligned particularly well with Fordist factories in which employers' efforts to standardize production also showcased their control, responsibility, and liability. Applying anti-discrimination law to these same workplaces was similarly straightforward: neither employers nor consumers have any legitimate interest in the race or gender of the worker who produces their coal, car, or widget.<sup>160</sup> But as many commentators have noted, labor's golden age ended with the manufacturing economy. Workers in the service economy struggle to make their needs legible to regulatory agencies and gain access to protections. Even the OSHAct, despite efforts to expand it, continues to envision an historical, increasingly non-relevant workplace.

Despite over a century of effort by labor activists and reformers, workplace law remains unpredictable and many workers find its protections remain inadequate for their needs. Beyond that, the regulation of work is deeply instrumentalist. It is neither natural nor inexorable, and assimilationists should be thoughtful about *which* type of labor sex work would be most likely to be assimilated into. While assimilationists might be envisioning those laborers *and labor* with the most conventional set of protections, *e.g.*, manufacturing, which features relatively strong protections from both single-incident injuries and racial and other forms of discrimination, it is just as likely that sex work would be assimilated into labor in which workplace hazards are un- or under-regulated. Regulators might find sex work to be akin to in-home health care providers, late-night retail, or other relatively invisible, powerless service work. Or modeling.<sup>161</sup> In addition, as the next Section shows, the assimilationist claim is a miscue not only from the diversity of workplaces, but also from the *diversity of sex workplaces*. Sex workplaces differ not only from many other workplaces, but also from each other. The next Section explores both the diversity of sex markets, and the distinctive challenges of regulating them, in order to contemplate whether and how sex workplaces could be more effectively regulated in order to ameliorate both danger and the degradation of discrimination.

### III. PROFESSIONAL SEX: A NEW MODE OF WORK

“*[J]ust what is so unique about sex-work?*”<sup>162</sup>

Even determining the status of one contested form of sex work, prostitution, is complicated. While some countries completely criminalize prostitution, in most it has some sort of legally liminal status, in which some aspects are criminalized and others are

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<sup>160</sup> *But see* DAVID ROEDIGER, *THE WAGES OF WHITENESS: RACE AND THE MAKING OF THE AMERICAN WORKING CLASS* (1991) (describing economically irrational behavior in which white workers accept lower wages for racial premium of not working with blacks).

<sup>161</sup> As explored in Section III, modeling and sex work have much in common. *See infra* notes [x] and accompanying text. According to [x], modeling is one of the worst jobs.

<sup>162</sup> Tinsman, *supra* note [x].

not.<sup>163</sup> Importantly, many jurisdictions differentiate between prostitution itself, *i.e.*, selling sex, brothels, or operating an establishment in which prostitution occurs, and “pimping,” defined variously as “assistance” or “living off the earnings of prostitution,” “controlling prostitution for gain,” or “exploitative” or “coercive” behavior.<sup>164</sup> In one study, of 100 countries surveyed, thirty-eight currently completely criminalize prostitution.<sup>165</sup> In every country that criminalizes prostitution, brothel ownership and pimping likewise are illegal.<sup>166</sup> Liability and penalties vary by country, and, within some countries, by jurisdiction.<sup>167</sup> In seven countries prostitution, brothels, and pimping all are legal.<sup>168</sup> Another forty countries have partially decriminalized sex work, otherwise

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<sup>163</sup> Procon.org is a website that surveyed 100 countries, seeking to be “inclusive of major religions, geographical regions, and policies towards prostitution.”

[http://prostitution.procon.org/view\\_resource.php?resourceID=000772](http://prostitution.procon.org/view_resource.php?resourceID=000772); *see also*

<http://www.justice.govt.nz/policy/commercial-property-and-regulatory/prostitution/prostitution-law-review-committee/publications/international-approaches/3-directory-of-countries>. Germany exemplifies how difficult it can be to discern the status of prostitution. Some set Germany’s legalization date at 1927, when the country passed its Law for Combating Venereal Diseases. Others though insist that the relevant date is the 2002 passage of the Prostitution Act because prior to that, although prostitution was legal under the German Constitution, both regulations and court decisions restricted the legal and social welfare rights of prostitutes because prostitution was considered in violation of Germany’s *moral* code.

<sup>164</sup> Rationales differ. Some jurisdictions target brothels and pimping to prevent “organized” prostitution. Others are concerned about trafficking or gender equality.

<sup>165</sup> 100 Countries and Their Prostitution Policies, ProCon.org, Nov. 4, 2009, available at

[http://prostitution.procon.org/view\\_resource.php?resourceID=000772](http://prostitution.procon.org/view_resource.php?resourceID=000772). These include China, Egypt, India, both North and South Korea, Jamaica, Afghanistan, Slovenia and Romania, and Kenya and South Africa.

<sup>166</sup> In China prostitution is criminalized “as a social practice that abrogates the inherent rights of women to personhood.” (Taiwan, on the other hand, legalized prostitution in 2009.) Another primary rationale is to combat trafficking. *See, e.g.*, United States Department of State, Trafficking in Persons Report (2004), available at [www.state.gov/documents/organization/34158.pdf](http://www.state.gov/documents/organization/34158.pdf) (“The United States government takes a firm stance against proposals to legalize prostitution because prostitution directly contributes to the modern-day slave trade and is inherently demeaning.”); Nicholas Kulish, *Bulgaria Moves Away from Legalizing Prostitution*, NY TIMES, Oct. 5, 2007 (“The Bulgarian government Friday abruptly reversed its longstanding move toward legalizing prostitution, part of a broader trend in Europe to make prostitution illegal as a way to combat sexual trafficking.”).

<sup>167</sup> In Egypt, the penalty for prostitutes is 3-36 months in prison and/or a fine. In Iran, prostitutes can be imprisoned, lashed, or executed by stoning; brothel owners can be imprisoned for up to ten years, and customers also face criminal penalties. Some countries impose only fines; others differentiate punishment by gender or by role, *i.e.*, prostitutes and customers. For instance, in Bangladesh, prostitution is legal for women over 18, but male prostitution is illegal. US Department of State Bureau of Democracy, Human Rights, and Labor, 2008 Human Rights Report: Bangladesh, Feb. 25, 2009, available at <http://www.state.gov/j/drl/rls/hrrpt/2008/sca/119132.htm>). And Sweden is emblematic of Iceland and Norway in criminalizing the purchase, but not the sale of sex. In both the United States and Australia penalties differ by jurisdiction. BROTTSBALKEN [BrB] [Criminal Code] 6:8 (Swed.); General Civil Penal Code 22 May 1902 nr. 10 §202-206.

[http://www.aic.gov.au/documents/F/B/5/%7BFB5E3FDC-1AB5-4F04-A1B8-](http://www.aic.gov.au/documents/F/B/5/%7BFB5E3FDC-1AB5-4F04-A1B8-9D4B5C30B42C%7Dti22.pdf)

[9D4B5C30B42C%7Dti22.pdf](http://www.aic.gov.au/documents/F/B/5/%7BFB5E3FDC-1AB5-4F04-A1B8-9D4B5C30B42C%7Dti22.pdf) ; *see also* Barbara Sullivan, *When (Some) Prostitution Is Legal: The Impact of Law Reform on Sex Work in Australia*, 37 J.L. & Soc’y 85 (2010).

<sup>168</sup> These seven are Ecuador, Germany, Greece, Indonesia, the Netherlands, New Zealand, and Venezuela. As in jurisdictions that have criminalized sex work, jurisdictions that have legalized it embrace different rationales. For instance, Argentina’s constitution provides, “The private actions of people that do not offend in any way the public order and morality, nor damage a third person, are only reserved to God, and are exempt from the authority of the magistrates.”

known as restricted legality. In addition to the brothel/pimping differentiation,<sup>169</sup> countries can restrict legality by geography,<sup>170</sup> gender,<sup>171</sup> jurisdiction,<sup>172</sup> “role,” that is buying or selling,<sup>173</sup> sex act,<sup>174</sup> and the role of the state.<sup>175</sup> Finally, the “status” of prostitute can influence the worker’s other rights and capabilities, almost uniformly negatively.<sup>176</sup>

Despite the complexity of how countries impose and implement criminalization, the overwhelming majority have a narrow vision of regulatory options. These are limited to complete criminalization, or variations on decriminalization. Those jurisdictions that

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<sup>169</sup> For instance, in ten countries, prostitution and brothel ownership are legal, but pimping is not. *See, e.g.*, (Belgium, Columbia, Costa Rica, El Salvador, Guatemala, Panama, Peru, Singapore, Switzerland, and Turkey). Other countries criminalize both brothels and pimping. As noted above, in no country is pimping legal if brothel ownership is not. *See supra* note [x] and accompanying text.

<sup>170</sup> Several countries ban prostitution from “public” places. France and Canada both explicitly restrict prostitution to “private” places and make solicitation in public places illegal. The United Kingdom recently replaced its “kerb crawling” provisions with ones banning street or public solicitation. section 51A of the Sexual Offences Act 2003. Other countries, such as Singapore, take the opposite approach, limiting prostitution to designated “red-light districts.” In Mexico, prostitution is legal, but many cities restrict it to certain districts. *See, e.g.*, Criminal Code, R.S.C. 1985, c. C-46, s. 213 (Can.).

<sup>171</sup> Some countries engender the criminalization or liability for prostitution. In Bangladesh female prostitution is legal but male prostitution is not. In Egypt, the man, assumed to be the customer, is considered a witness and is exempt from punishment in exchange for testifying against the prostitute, assumed to be a woman.

<sup>172</sup> In Mexico and Australia, prostitution is left to the individual states, although it is criminalized in the former and legal in the latter. The United States leaves the status of prostitution to the individual states, but it is criminalized everywhere except for eleven rural counties in Nevada, with populations of less than 250,000. *See supra* note [x], and accompanying text. Between 1980 and 2009, “indoor” prostitution was legal in Rhode Island because of an unintentional legislative loophole. The state enacted new legislation criminalizing all prostitution in November 2009. Rhode Island: 2009 R.I. Pub. Laws 185-186 “Prostitution and Lewdness.” Some municipal jurisdictions, such as San Francisco, intermittently contemplate decriminalization. Proposition K, City of San Francisco: Changing the Enforcement of Laws Related to Prostitution and Sex Workers (2008, defeated), text available at <http://www.smartvoter.org/2008/11/04/ca/sf/prop/K/>. *See also* Law, *supra* note [x], at 583-585 (discussing Rhode Island and San Francisco). Some call for explicit non-enforcement of state laws at the local level or for implicit deprioritizing. *See, e.g.*, Law, *supra* note [x], at 584-85 (discussing San Francisco and New Jersey Task Forces as case studies of local reform); Leigh, *supra* note [x] (discussing San Francisco Task Force recommendations to suspend enforcement of state laws against prostitution and redirecting resources to services for sex workers and enforcing nuisance laws).

<sup>173</sup> In some countries, selling sex is legal, but buying it is criminalized. This is the case in Iceland, Norway, and Sweden. These countries recently introduced this differentiation, influenced in large part by sex work advocacy groups.

<sup>174</sup> For instance, Japan criminalizes only intercourse; other sexual acts are legal. KEIHō [KEIHō] [PEN. C.] 1907 art. 182 (Japan).

<sup>175</sup> In Turkey, the brothels are state-owned, and it is illegal to “shelter a person for prostitution.” Turkish Criminal Code, Law No.: 5237 Official Gazette [Resmi Gazete = R.G.], 12 October 2004 No. 25611, enacted: 26 September 2004..

<sup>176</sup> For instance, in Turkey sex workers cannot be married and their children are barred from occupying high rank in the army or police, or marrying persons of such rank, although they can work in other areas of government service. *ProCon.org*, Nov. 4, 2009, available at [http://prostitution.procon.org/view\\_resource.php?resourceID=000772#turkey](http://prostitution.procon.org/view_resource.php?resourceID=000772#turkey). In the United States, prostitution can preclude an alien from obtaining a visa. Immigration and Nationality Act, 8 U.S.C. 1001, et. seq., as amended (naming as ineligible for a visa anyone who “is coming to the United States solely, principally, or incidentally to engage in prostitution, or has engaged in prostitution within 10 years of the date of application for a visa, admission, or adjustment of status.”).

have moved from decriminalization to active “legalization” through regulation mainly confine it to mandating age limits, health requirements, and registration for sex workers.<sup>177</sup> A very few countries have, following the erotic exceptionalist call, decriminalized prostitution without enacting any other accompanying regulation.<sup>178</sup> The absence of positive laws appears to be a regulatory vacuum rather than an intentional alignment with exceptionalism.<sup>179</sup> The lone exception is New Zealand, whose Occupational Health and Safety agency has issued a comprehensive set of guidelines for the sex industry.<sup>180</sup> In sum, the regulatory imagination seems extraordinarily constrained. What would an approach look like, that took professional sex, prostitution and other forms, seriously as work, while simultaneously confronting the real and high vulnerability its workers experience?

### *A. Markets for Sex*

Section II argued that assimilationists’ insistence that sex work be regulated like “any other labor” ignores the diversity of workplaces and their regulation. This Section makes an additional point. In the strong form version, the homogeneity of labor claim insists and in the weak form version it assumes that sexual labor is no different from other, non-sexual work. Jane Larson offers a case in point: “commercial sex workers, like other part-time, self-employed, and contingent workers, confront problems of economic and social insecurity that are particularly acute in fields, like commercial sex, where most of the workers are women. It seems more likely that such problems would be addressed through measures applicable to all workers, and extended to commercial sex workers if commercial sex were legal, rather than through special programs for commercial sex workers.”<sup>181</sup> But, as this next part shows, sex workplaces are not like most workplaces. Rather, they are distinct in ways that have regulatory significance.

Sex workers are disproportionately cis-women or trans-women but cater to a customer base that is overwhelmingly male.<sup>182</sup> Sex work is not alone in these ratios;

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<sup>177</sup> Compare Austria (requiring prostitutes to register, undergo periodic health examinations, be 19 years old or older, and pay taxes); Latvia (requiring monthly health check); Netherlands (prostitutes must be over 18 and clients must be over 16 and prostitutes must register and pay taxes); Singapore (requiring mandatory health checks, that prostitutes be 16 years or older, and confine their work to designated districts); Switzerland (requiring prostitutes register with city authorities and health authorities and get regular health checks). Other countries impose far more intrusive requirements and restrictions. In Turkey and Greece, health checks can be as often as twice a week and in Turkey workers must carry an identity card indicating the dates of his or her health checks. Costa Rica has minimal requirements. Prostitutes “must be over 18 years old and carry a health card showing how recently they had a medical check-up.”

<sup>178</sup> See, e.g., [fill in Brazil code and regulation].

<sup>179</sup> Some countries do not address or define prostitution at all, leaving its status unclear. This is the case in long-standing nations such as Bulgaria, Spain, and Indonesia, as well as newer ones. In Kyrgyzstan, for instance, prostitution is not a crime but its exact legal status is unclear.

<sup>180</sup> A GUIDE TO OCCUPATIONAL HEALTH AND SAFETY IN THE NEW ZEALAND SEX INDUSTRY.

<sup>181</sup> Law, *supra* note [x], at 599 (footnote omitted). See also Moukalif, *supra* note [x], at 258 (“the issues that affect sex work are essentially labor issues common to all marginalized workers.”).

<sup>182</sup>

There exists a great gender asymmetry in prostitution: it is almost always the man that is paying for sex. Even male prostitutes have mainly male clients. Research by Atchison, Fraser, & Lowman provide evidence for the idea that women do not pay for sex: in a study using several multi-method searches for clients of prostitution they only found two women. Of interest is that both

historically secretarial work also manifested these dynamics. However in sex markets, these ratios can engender distinct dynamics that pose real risk to the workers. For instance, exotic dancers typically cater to a male customer base, working for multiple customers simultaneously, either in clubs or for parties—bachelor, fraternity, work, etc.—held in private or rented places, *i.e.*, at outcall locations. While clubs typically have regular customers who may come alone, many men patronize dancers together seeking homosocial bonding through group interaction with the worker.<sup>183</sup> Several sociological studies have found that in these spaces patrons may experiment with and negotiate social norms and expectations of masculinity that differ from and would be condemned as unacceptable in other social contexts.<sup>184</sup> These same homosocial masculinities can trigger violence against male sex workers. Violence against men in the sex trade is well documented. Overwhelmingly, this violence is perpetuated against them by male customers, not women, and is triggered by perceived threats to the same masculinity that degrades women sex workers.

Customers' significant alcohol consumption can further loosen social inhibitions and lubricate behavior that puts workers at risk of both verbal abuse and violence. Moreover, sex workplaces are some of the only ones in which the *workers* are not only permitted but expected to themselves consume alcohol. In dance clubs in particular, operators may require dancers to “hustle” drinks from customers, which the dancers are then expected to drink.<sup>185</sup> Hence, not only are the customers often intoxicated but the workers are

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women did not purchase sex on their own, but rather were engaging in group sexual activity with a male partner.

Kathleen D. Vohs & Jannine Lasaleta, *Heterosexual Sexual Behavior Is Governed by Social Exchange and Basic Economic Principles: Sexual Economics Theory*, 9 MINN. J.L. SCI. & TECH. 785, 791-792 (2008). See also Chancer, *supra* note [x], at 151 (describing sex work as “an overwhelmingly female work force that services an overwhelmingly male clientele); Posner, *supra* note 5, at 91-92 (“Even in societies in which women are prosperous and independent (modern Scandinavia, for example), and therefore could easily afford to patronize prostitutes, there is no demand for prostitutes of either sex to service women.”). But see [add citations] (observing women do not seek out sex in brothels or on the street but increasing numbers partake of sex tourism).

<sup>183</sup> According to one of Siobhan Brooks' informants, men “show off in front of their friends and may refer to you as a bitch or a ho, you just never know what can happen, especially at a bachelor party where you don't even know if security will be there.” BROOKS, *supra* note [x], at 67.

<sup>184</sup>

For the male customers, the stripping experience initially seems to provide opportunities to enact masculinity by using economic power to achieve emotional and sexual intimacy. The setting of the club reinforces the general social construction of women as ubiquitously available sex objects, despite the fact that dancers actually maintain a certain form of power in their particularized interaction. It is power, though, that does not really challenge male authority, and ultimately embeds even the con woman in stigmatizing, exhausting and dangerous work. The money may be good, but the social consequences for the women are profound.

Lisa Pasko, *Naked Power: The Practice of Stripping as a Confidence Game*, 5 SEXUALITIES 49-66 (2002). See also Viva Las Vegas, MAGIC GARDENS: THE MEMOIRS OF VIVA LAS VEGAS 39 (2009) (“Lawyers were always the worst. They seemed to feel they could get away with murder. Probably could. At the Magic they were constantly getting tossed for taking out their erect cocks.”).

<sup>185</sup>

In the clubs that serve alcohol, management expects the dancers to accept drinks from the customers because most club owners make the bulk of their profit from alcohol purchases...Customers invariably want dancers to drink alcohol and are savvy to the tricks dancers use to stay sober. A client reasons that if he can get a woman sufficiently intoxicated, it might loosen her inhibitions enough that she'll have sex with him later.

required to work in a state in which their own judgment is definitionally impaired.<sup>186</sup> Compared to other workers, then, sex professionals endure a combination of gender ratios, homosociality, masculinity threats, and alcohol consumption that heightens workplace risk.

A second distinctive characteristic of the work is the dangerous blurring of when sex professionals are “on” versus “off” duty. In sex work, part of what is being “sold” is a fantasy of interpersonal connection.<sup>187</sup> Customers purchase vastly differing fantasies, but, with the exception of domination fantasies, the scenario typically entails erotic attraction from and personal interest in them by the worker. Hence the popularity of The Girlfriend Experience, which Elizabeth Bernstein dubs “bounded authenticity.”<sup>188</sup> Good

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BERNADETTE BARTON, STRIPPED: INSIDE THE LIVES OF EXOTIC DANCERS 55-56 (2006). See also Panagos v. Industrial Commission, 524 N.E.2d 1018, 1021 (Ill. App. 1988) (holding that dancer injured in an alcohol-related automobile accident after her shift at a club could receive worker’s compensation because her drinking on the job arose out of and occurred in course of employment) *discussed in* Margaret A. Baldwin, “A Million Dollars and an Apology”: Prostitution and Public Benefits Claims, 10 HASTINGS WOMEN’S L.J. 189, 201-202 (1999) (“The common-sense acknowledgment by these courts that drinking is a job requirement for women in strip clubs—affecting women’s lives inside and outside the club—has potentially radical ramifications for women’s benefit eligibility.”). In contrast, Elizabeth Bernstein’s study of prostitutes in Stockholm, Amsterdam, and San Francisco found that many “career” prostitutes were “vigilant” about working “straight”, *i.e.*, not drunk or high, carefully distinguishing themselves from “survival” prostitutes who bartered their bodies for drugs. BERNSTEIN, TEMPORARILY YOURS, *supra* note [x], at 49.

<sup>186</sup> In one case, the court upheld a worker’s claim to compensation when she accepted a ride after work from an intoxicated driver who then had an accident. The court concluded:

We find the commissioner’s conclusion that claimant’s intoxication was caused by her drinking while at work is supported by substantial evidence. *The employer required its dancers to socialize with customers and to hustle the purchase of drinks for the dancers. It should expect this requirement to result in intoxication of the dancers.* This practice also benefited the employer in two ways. First, it profited from the sale of the drinks, which customers paid for. Second, the dancers’ socializing contributed to the lounge’s goodwill by creating an atmosphere appealing to its customers.

2800 Corp. v. Fernandez, 528 N.W.2d 124, 128 (Iowa 1995) (emphasis added).

<sup>187</sup> “What a john wants is for the woman to *act* like the woman he wants, and for the woman to maintain a credible performance as part of the bargain. She is to act as if she *is* the role he wants her to play.” Baldwin, *Split at the Root: Prostitution and Feminist Discourses of Law Reform*, 5 YALE J.L. & FEMINISM 47, 118 [hereinafter, Baldwin, *Split at the Root*]. Discussing dancers, Brooks says that dancers circulating with patrons “allows for increased individual attention to the male guests and the formation of relationships between ‘regulars’ and the dancers. Gentlemen’s clubs rely on fantasy to run their businesses. The fantasy is that the dancer is sexually and personally interested in the customer.” BROOKS, *supra* note [x], at 78 (footnote omitted).

<sup>188</sup> “One of the most sought after features in the prostitution encounter has . . . become the ‘girlfriend experience,’ or GFE. Ads for escorts in print media and online now routinely feature this in their advertisements, and there are entire Web pages where people who specialize in this service can advertise.” Sex workers market “the Girlfriend Experience” by “advertis[ing] themselves as “girlfriends for hire” and describe[ing] the ways in which they offer not merely eroticism but authentic intimate connection for sale in the marketplace . . .” BERNSTEIN, *supra* note [x], at 126, 7. Although the emotional and erotic authenticity they offer is sincere, they remain, as Bernstein notes, “bounded,” in large part by the market mediated nature of the transactions. Neither the clients nor the workers want unbounded eroticism as demonstrated by the fact that many sex workers report that when they offer favored clients “freebies” or discounts the men often do not return. “For many clients, one of the chief virtues of commercial sexual exchange is the clear and bounded nature of the encounter” and the “clarifying effect of payment.” *Id.* at 120, 121. The Girlfriend Experience is not a substitute or second-best to conventional, amative

sex workers deliver the fantasies their customers want.<sup>189</sup> It should not be surprising that some customers confuse the fantasy with reality and attempt to pursue the relationship beyond the transactional contract.<sup>190</sup> One regular customer at a dance club in New York, who often volunteers to escort dancers to the subway or help them hail a cab after their shifts, observed, “It’s leaving the club that’s dangerous.”<sup>191</sup> This happens to other service workers, as well, who may be stalked or harassed by clients or customers, but the risk is higher in sex work, given that the customer’s fantasy is embedded in an actual sexual relationship and interest, feigned or not.

Heightening the risk is the fact that some employers appear to purposely blur lines between on-work/off-work. They may demand sexual favors, or “entertainment” as they put it, for themselves or for friends, as a condition of employment or receiving favorable treatment, such as good shifts or referrals to clients. In contrast, factory workers *typically* are not asked to make widgets for free, for the boss’s personal use after hours. Both of these dynamics are exacerbated by the attribution to sex professionals of an identity as always sexually available and willing, or, alternatively, as a lesser human being, deserving of exploitation, because s/he has explicitly commodified he/r sexuality. Both beliefs can lead to threatening behavior towards workers, including stalking, harassment, and even assault and murder. While many customers do get and respect the boundaries between “on” and “off” duty, the nature of the work lends itself to confusion, thereby heightening risk.

Similarly, the line between re-negotiating terms and harassment or assault also can be blurry. A dancer who is asked to perform a sexual act on a client may prefer not to do so, be offended, or even feel threatened or coerced. Another dancer, or the same dancer in different circumstances, might be open to the request, depending on the price point, client, or context. The same is true for a prostitute who has agreed in advance to a certain set of transactions but who may or may not be open to expanding the sexual menu. While workers in non-sexual contexts might characterize the request for *additional* work or *more* work or *different* work as unpleasant, exploitative, and/or coercive, law and society typically do not perceive such requests as criminal behavior the way that violations of sexual contracts can easily cross into sexual assault.

A third meaningful distinction stems from the fact that sexual labor entails a social stigma that is almost unique. The stigma results in significant social isolation, as it interferes in the worker’s relationships with friends and family and, importantly, with other workers. For instance, dancers trying to unionize have found their organizing

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relationships; it, or bounded authenticity, is itself the desired experience. *See also* ZELIZER, *supra* note [x], at 17 (complicating idea of authenticity in intimate relationships).

<sup>189</sup> “This emotional labor, which she describes as more tiresome than the work of exotic dance, is crucial to the financial success of the dancer.” Bernstein, *supra* note [x], at 80 (footnotes omitted). One sociologist observed “the interactions between dancer and customer become complicated because the dancer not only displays her body, but also sells versions of her ‘self’—including her personality, attention, and conversation—in order to sustain the relationship with the customer.” McGinley, *supra* note[x], at 79 (footnote omitted).

<sup>190</sup> “The dancer uses emotional labor to develop clients into ‘regulars’ who spend hundreds of dollars at each visit to the club. The emotional labor, which is invisible to the regular clients, results in clients’ belief that they are ‘boyfriends’ rather than customers.” BROOKS, *supra* note [x], at 80-81 (footnotes omitted);

<sup>191</sup> BROOKS, *supra* note [x], at 96.

efforts rejected by several unions.<sup>192</sup> In addition, while other workers who labor in stressful or high-risk jobs can find solace from family, friends, and community, many sex professionals hide their work from those closest to them, resulting in profound social isolation.<sup>193</sup> Some commentators also attribute the isolation to the extreme control that employers exert over sex workers which “leads to the erosion of other relationships and thwarts personal autonomy.”<sup>194</sup> Importantly, the stigma runs both ways; it also afflicts customers, who are largely unwilling to admit they consume professional/commercial sexual services.<sup>195</sup> Unlike, say, those who consume fossil fuels produced by coal miners, “[m]any people watch pornography, but few are willing to write to their assemblyperson about it.”<sup>196</sup>

Of course some contend this stigma is a *product* of the criminalization of sexual labor. Stigma is associated with most illegal activities (and many legal ones associated with lower classes) and can be exacerbated by gender.<sup>197</sup> Yet other criminalized activities do not incur the *intensity* of the stigma associated with sex work. Some law-breakers, including drug dealers and even, ironically, pimps, enjoy cultural valorization.<sup>198</sup> In contrast, the stigma associated with commercial sex appears to stem

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<sup>192</sup> Margot Rutman notes that “[T]he Screen Actors Guild excludes such performers from membership and their independent-contractor status precludes their protection under the National Labor Relations Act.” Rutman, *supra* note [x], at 519.

<sup>193</sup> “[B]ecause of the stigmatized nature of their work, many dancers cannot tell their families or friends about what they do for a living.” Chun, *supra* note [x], at 233. The main dancer featured in the documentary *Live Nude Girls Unite!* had more difficulty coming out to her mother as a sex worker than as a lesbian, even though her mother works with prostitutes.

<sup>194</sup> Baldwin, *supra* note [x], at 197 (footnote omitted). Baldwin, who is an anti-prostitution activist and scholar, further contends that the isolation of women who work in the sex industry is not unlike that of battered women. She also speculates that “[p]rostitution and stripping also require women to create an illusion of personal interest in the customer, a dynamic that in and of itself hedges the difference between work and personal life.” Baldwin, *supra* note [x], at 197-98, 198 (footnote omitted).

<sup>195</sup> *But see* CHESTER BROWN, *PAYING FOR IT: A COMIC-STRIP MEMOIR ABOUT BEING A JOHN* (memoir in form of graphic novel recounting self-described “john’s” sexual encounters with prostitutes); *see also* Dwight Garner, *A Graphic Memoir that Earns the Designation*, *N.Y. Times*, May 25, 2011, at C6. (“It’s a factual and often graphic recounting of the author’s many erotic sessions with sex workers; it’s a bitter critique of the inanities of romantic love; and it’s a sustained argument in favor of decriminalizing prostitution.”); Annie Sprinkle, *A John’s Story*, *N.Y. Times*, Sunday Book Rev. July 3, 2011, at BR15 (noting that in her forty years among sex workers she has only known one john, and arguably Charlie Sheen, “to come out voluntarily — with honesty, integrity and pride”).

<sup>196</sup> Rutman, *supra* note [x], at 558 (footnote omitted).

<sup>197</sup> Martha Nussbaum offers an interesting contrast with the stigma she associates with domestic workers. In domestic service as in prostitution, one is hired by a client and one must do what that client wants or fail at the job. In both, one has a limited degree of latitude to exercise skills as one sees fit, and both jobs require the exercise of some developed bodily skills. In both, one is at risk of enduring bad behavior from one’s client, although the prostitute is more likely to encounter physical violence. Certainly both are traditionally professions that enjoy low respect, both in society generally and from the client. Domestic service on the whole is likely to have worse hours and lower pay than (at least many types of) prostitution, but it probably contains fewer health risks. It also involves no invasion of intimate bodily space, as prostitution (consensually) does.

Nussbaum, *supra* note [x], at 702.

<sup>198</sup> The most recent example is the movie *Hustle and Flow* about a pimp striving to become a musician. The theme song, *It’s Hard Out There for a Pimp*, won the 2006 Academy Award for Best Achievement in Music Written for Motion Pictures, Original Song.

from deep-seated biases, discomforts, and ambivalences about sex itself, which, while culturally specific, are almost universal in their attribution of differential meaning to men and women and particularly to prostitutes.<sup>199</sup>

Finally, while autonomy is a concern for all workers, sex work puts a distinct spin on it. Feminists have fought long and hard for consent to be the determining principle in the legal governance of sex.<sup>200</sup> These liberal iterations of sexual agency and autonomy that characterize our current legal and moral moment mandate that a person can change their mind and withdraw consent at anytime during a sexual encounter.<sup>201</sup> In keeping with this autonomy premium, sex professionals insist they should be able to refuse their services to *any* customer for *any* reason and change their mind and withdraw consent at *any* time while a sexual service is being provided. Importantly, they include among these reasons racial and gender preferences and biases. Sex workers may, and do, restrict their clientele based not only on a potential customer's gender (which should not be surprising), but race as well. Disability proves to be a fascinating category of its own in sexual commerce.<sup>202</sup> Thus, although this autonomy premium puts sex professionals in direct conflict with public accommodations and consumer protection law, many embrace and insist on the same norms of personal choice and preference that govern non-market intimacy.<sup>203</sup>

In sum, while it may be tempting to “view[] them through the same labor lens as other workers,” professional sex is not like “most” work.<sup>204</sup> Contrary to assimilationists’

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<sup>199</sup> Certainly prostitutes can be romantic figures in literature, for instance the work of Dostoyevsky, but one is hard pressed to find actual prostitutes who enjoy status and influence in their communities due to their work.

<sup>200</sup> Consent governs not only rape law, but also sexual harassment. The main exception is statutory rape, which is a strict liability regime.

<sup>201</sup> See, e.g., *State v. Baby*, 404 Md. 220, 271-72 (Md. 2008) (“We conclude that post-penetration withdrawal of consent negates initial consent for the purposes of sexual offense crimes and, when coupled with the other elements, may constitute the crime of rape.”); *In re John Z.*, 60 P.3d 183 (Cal. 2003) (the first state supreme court to hold that post-penetration continuation of intercourse after consent is withdrawn constitutes rape); *State v. Robinson*, 496 A.2d at 1067, 1069 (Me. 1985) (instructing jury that “if a couple consensually engages in sexual intercourse and one or the other changes his or her mind, and communicates the revocation or change of mind of the consent, and the other partner continues the sexual intercourse by compulsion of the party who changes his or her mind, then it would be rape. The critical element there is the *continuation under compulsion*.”) (emphasis in original); *State v. Siering*, 644 A.2d at 961 (Conn. App. Ct. 1994) (instructing jury that “if there exists consensual intercourse and the alleged victim changes her mind and communicates the revocation or change of mind of consent and the other person continues the sexual intercourse by compelling the victim through the use of force then it would be sexual assault in the first degree.”). A Kansas statute “proscribes *all* nonconsensual sexual intercourse that is accomplished by force or fear, not just the initial penetration.” *State v. Bunyard*, 281 Kan. 392, 133 P.3d 14, 28 (Kan. 2006) (emphasis in original) (but also requires use of force or fear in addition to absence of consent).

<sup>202</sup> See, e.g., Adrienne D. Davis, *Erotic Entitlements Part I: A Reply to “Sex Therapy in the Age of Viagra,”* 35 WASH U. J. L. & POL’Y 421 (2011) [hereinafter Davis, *Erotic Entitlements Part I*] (discussing disability and erotics).

<sup>203</sup> In this sense they embrace the exceptionalist stance, that the sexual nature of their work trumps its role as labor. The 1964 Civil Rights Act prohibits discrimination against consumers in places of public accommodation. 42 U.S.C. §2000a (“All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, and privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.”).

<sup>204</sup> Moukalif, *supra* note [x], at 254.

claim of homogeneity, *most* workplaces are not characterized by the particularities of sex work: the culture of alcohol, drinking, and drugs; the homosocial “mob” context; the blurred line between legitimate re-negotiations and criminal assaults; a similarly blurred line between on-site/off-site (that is on-duty/off-duty) identities; and employer expectations of “free” services that all can combine to create distinct risks and hazards. Nor does *most* work entail the stigma and resulting isolation or threaten entrenched liberal norms of autonomy in the same way.

Hence, on the one hand, sex professionals share many basic concerns with non-sexual workers, *e.g.*, exploitation by management, weak rights, dangerous and unsanitary working conditions, as well as distinctly gender-based harms, *e.g.*, wearing stiletto heels and sexual harassment. If recognized as employees, many existing workplace regulations would also apply to sex workplaces. For example, exit signs and fire extinguishers are mandatory in brothels and dance clubs as they are in factories and restaurants. Other requirements will be relatively straight-forward to enforce, for instance that stages, poles, sex toys, beds, *i.e.*, “equipment,” be safe and meet specified standards of hygiene. However some types of risks and hazards, such as the violence, sexual harassment, and discrimination described in Sections II.A and III.A, tend to be specific to or intensified by sex work. Importantly, many of these are areas in which current workplace law is especially weak and constrained. OSHA and workers’ compensation are characterized by constrained enforcement powers and both categorical and gendered exclusions of much of the risk that characterizes sex workplaces. Many urge exclusions or limitations on the application of Title VII’s sexual harassment prohibitions to for erotic receipt businesses. Bfoq defenses similarly complicate the application of discrimination law to race and gender. Finally, sex workers will battle with employers over their characterization as employees, which is necessary to access many protections.

In the end, Section II showed how much of standard workplace law will almost certainly fail sex workers. As that Section concluded, the assimilationist claim obscures the distinctive characteristics of much sexual labor and the distinct regulatory challenges it poses. The remainder of this Section explores a potential regulatory structure that would try to take account of and ameliorate these risks.

## B. *Sexual Geography & Mitigating Violence*

### 1. Violence

As described above, violence poses one of the biggest risks to sex professionals’ well-being. But because sex work is highly internally differentiated, violence threatens some sex workers more than others. Face-to-face interactions that occur in isolation from others pose the biggest threat. Elizabeth Bernstein finds that “while it is true that streetwalkers are at exceptionally high risk of physical violence, by their own accounts, the chief danger exists when they’re alone with a john—in a car or hotel room—not standing on the street.”<sup>205</sup> Audrey Macklin’s study of lapdancing in Canada observes the same dynamics at work: “It requires little imagination to recognize that the risk of harm to performers in the form of non-consensual contact could only be exacerbated in

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<sup>205</sup> She continues, “In this regard, the pimps are of little or no use . . .” Bernstein, *supra* note [x], at 107 (footnote omitted).

circumstances where the patron and the performer are secluded from observation.”<sup>206</sup> Hence, although some municipal codes associate public sexual acts with “indecent,” from the workers’ perspective, the more “private” the sexual activity, the greater the risk. In this view, the degree of risk correlates not with the *type* of activity but with the *proximity* and *isolation* of the interaction.

We might map this sexual geography as follows. Organizational forms of sexual labor that do not require personal contact, that is, that entail no proximity, pose the least risk. This would include phone sex or other new media sexual services, as long as the workers remain “virtual” and unidentifiable.<sup>207</sup> Importantly, because employers, co-workers, and third party intermediaries can pose as great a threat to workers as customers do, another crucial factor is the degree of contact between workers and these actors. The more limited these interactions, the lesser the risk. In sum, in sexual geographies with no proximity, *i.e.*, physical or face-to-face interactions, between the worker and customers and employers, the risk of violence is minimal. These types of activities ought not require significant regulation to protect workers from violence, other than clear rules and protocols to prevent cyberstalking and also to preserve the virtual nature of the interaction and also.<sup>208</sup>

In contrast to the anonymized, virtual institutional form, proximate, or face-to-face, sexual services that occur in commercial establishments can pose a greater risk for workers. Brothels typically have private rooms or spaces in which prostitutes provide services to clients; similarly, some dance clubs offer separate rooms or lounges for customers who want private lapdances or massages. It is during these proximate interactions, while isolated from others, that clients are most likely to assault or threaten workers. In addition, as described above, many assaults and threats against sex professionals occur when they are leaving the establishment, *i.e.*, while they are alone in parking lots, on the street, etc.

Although commercial establishments have a heightened risk of violence, these institutional geographies are arguably the most straightforward to regulate for worker safety. Mandatory protections for the commercial institutional form might include bodyguards, panic buttons, a security service, escorts out of the workplace, and surveillance if appropriate.<sup>209</sup> All of the regulations of this institutional form rest on two principles. The first is to ameliorate the risk correlated with both proximate and isolated sexual transactions through surveillance, security, and/or empowering the worker to quickly call on other stakeholders. The second principle is to make the establishment operator, not the worker, responsible for the risk reduction. Many sex establishments try to shift this cost, often by construing workers as independent contractors, but the point is that in commercial establishments the operator is best situated to maximize economies of

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<sup>206</sup> Macklin continues, “The curtain shielding what happens on the other side of it from the public and, therefore, judicial scrutiny is precisely what heightens the performer’s vulnerability; the parallels between the regulation of public and private space in these cases and historic patterns of judicial treatment of domestic violence are patent.” Macklin, *supra* note [x], at 165.

<sup>207</sup> Otherwise, stalking, both physical and cyber, becomes a severe threat.

<sup>208</sup> On the other hand, virtual workers might seek protections from privacy law to control their images and how they are used. I thank Emily Danker-Feldman for this insight.

<sup>209</sup> Some brothels and clubs already include these safeguards. Workers recognize and discuss risk management as they differentiate among worksites. See, *e.g.*, BROOKS, *supra* note [x].

scale and the geographic infrastructure. As in other workplaces compliance with these requirements would be a condition of licensing. “Scores” akin to restaurant sanitation ratings could be publicly posted to alert workers and customers alike to the degree of risk and any conditions that might compromise their safety.<sup>210</sup>

It is the final institutional form that generates the greatest risk of violence. In this sexual geography, workers transact sex in proximity to their clients and isolated from others, but outside of dedicated commercial establishments. Unlike those who work in brothels or clubs, these sex workers largely provide their sexual services in private homes, rented spaces such as hotel rooms, or on the street or other public places. (Sexual services provided in the worker’s home is known as incall; services in other non-public venues is known as outcall.) They might transact sex independently or for a third party intermediary, such as an escort service or pimp. The defining characteristic of this sexual geography is its absence of an institutional infrastructure. Unlike brothel or club workers, outcall, street, and incall workers serve clients in unregulated private contexts without any structural supports. Dancers in particular may serve multiple clients simultaneously, but do so without co-workers, managers, or even other customers who have a stake in the on-going stability of the enterprise, including the safety of its workers. The presence of other stakeholders can provide formal or informal security for sex workers.

In addition, in outcall or street work, unlike brothels, clubs, and commercial establishments, the law cannot mandate a thick security apparatus—panic buttons, security guards or bouncers, surveillance—because there is no stable worksite to regulate. Sex professionals who provide incall services, working out of their own homes, have greater control over their circumstances, but even they may struggle to reduce risk.<sup>211</sup> If the worker is an independent contractor, working without a manager or intermediary, then she must absorb the costs of security completely on her own and cannot achieve the economies of scale that brothel and club operators can with security systems and guards. Independent sex professionals may also be reluctant to reveal their profession to others and resist the security apparatus that could compromise their privacy. Hence, because of its lack of institutional infrastructure and isolation, this sexual geography, which I classify together as “outcall,” poses the greatest risk of violence and is the hardest to regulate.

Recognizing the particular risks posed by the outcall form, New Zealand has issued specific guidelines and protocols that include panic buttons, cell phones, as well as recommendations to carry flashlights in case of poor lighting.<sup>212</sup> Another protocol could

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<sup>210</sup> Sex workplaces could be subject to the same random audits by regulators as restaurants, day care centers, etc.

<sup>211</sup> Many high-end prostitutes would resist this regulation, contending that they rely on closely monitored referral networks to carefully screen their clients and protect themselves. My point is that if they miscalculate, there are no protections in place from client violence. In particular, those who work out of their homes are vulnerable to stalking and harassing behavior.

<sup>212</sup> From the health axis of risk management, the New Zealand guidelines also encourage outcall workers to inspect the premises and take other precautions. For instance, the guidelines encourage workers to note whether the house is well lit and listen as she/he approaches the front door for voices that may indicate more than one person. If the client is not alone, then the sex worker may require the driver to accompany her/him inside. The sex worker should try to ascertain whether the client is too intoxicated. If the sex worker feels uncomfortable or endangered at any stage, she/he should leave immediately.

be check-in systems, in which sex workers could confidentially document their schedule, including the relevant customer information, location of the rendez-vous, and anticipated time until the next check in. This could function akin to an answering service or we could anticipate software companies creating apps that would manage such information. Regulations might also mandate body guards for incall and outcall work, or other isolated venues, although this might make the cost unaffordable to most customers. Finally, hotels or landlords could market to sex professionals, offering rooms that provide security akin to brothels.<sup>213</sup> For both third party intermediaries and sole proprietors performing incall or outcall work, adhering to regulations would be a condition of licensing.

In sum, when viewed on a continuum of sexual geographies, isolation and proximity are the biggest predictors of worker risk. The virtual form is the safest as long as it remains anonymized, *i.e.*, workers preserve their unidentifiability and minimize or avoid physical interactions with third party intermediaries. The commercial form, *i.e.*, club dancing and brothel prostitution, can pose significant risks but are the most susceptible to regulatory interventions that can increase worker safety. Regulations can require operators to provide a thick security apparatus as a condition of licensing. Finally, unlike brothels and clubs, in informal sexual geographies without a stable infrastructure workers are at the most risk. In the outcall form, there is no stable worksite to regulate, *i.e.*, require panic buttons, security, and surveillance, and the worker is isolated from other stakeholders who might provide formal or informal security. These workplaces will pose the greatest regulatory challenge, but New Zealand's protocols provide a starting point.<sup>214</sup> As is the case with extant regulation of workplaces, we can imagine a range of regulatory approaches—mandatory requirements, guidelines, aspirations supported by incentives. Regardless of the geographic structure and its regulatory regime, compliance would be a condition of licensing. This would be as true for sole proprietors as for commercial establishments and third party intermediaries. No regulation will eliminate the risk of violence of course; that is as impossible as it is in non-sexual workplaces. However, by taking seriously the institutional forms violence takes in sexual workplaces, we can certainly align sex work with the harm reduction approach found in other workplace safety regulation.

Others have distinguished kinds of sex work, of course, typically along the lines of legality or bodily penetration. The former approach distinguishes illegal prostitution from the legal forms of professional sex: dancing, phone sex, etc.<sup>215</sup> The latter approach

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Occupational Safety & Health Service, New Zealand Department of Labor, *A Guide to Occupational Health and Safety in the New Zealand Sex Industry*, "Fact Sheet 1: Safety and Security Guidelines for Sex Workers Who Provide Outcall" 82-84 (2004). See *infra* note [x] and accompanying text.

<sup>213</sup> Kotiswaran, *supra* note [x] (describing complex relationships between lessors and sex workers in India).

<sup>214</sup> See *supra* notes [x] and accompanying text.

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Even absent criminal law complications, there are vast differences among trades within the sex work industry. Consider, for example, organized dancing in direct contrast to organized prostitution. Exotic dancing is generally legal and is performed at a specific worksite (club) for a set hourly duration. Exotic dancers who work at a club or specific worksite arguably have a single employer—the club/site owner. Prostitution, however, is generally illegal, performed on a per client basis, and not necessarily at a single location for a set duration. Prostitutes are arguably self-employed.

classifies sex work along a continuum of its proximity to sexual penetration. Embraced by conservatives, liberals, and radicals alike, the spectrum ranges from phone sex to dancing without sexual contact to dancing with sexual contact to prostitution, which is assumed to entail penetration, vaginal, anal, or oral.<sup>216</sup> This paper has reorganized sex work along the lines of sexual geography. The innovation of the sexual geography approach is that it rejects both the legalistic binary of criminal/legal and the bodily penetration approaches, replacing them with one based on institutional form and risk.<sup>217</sup> In this sense it is highly attuned to the internal differentiation and structure of sex work.<sup>218</sup> In sum, the sexual geography approach blurs the moral and criminal lines between prostitution and other legal forms of sex work in favor of a risk-based approach to regulation.

## 2. Internal Differentiation and the Threshold Employee Test

Internal differentiation also recalls the question of when and whether sex workers are employees, the threshold test for access to many legal protections.<sup>219</sup> Basic benefits, including unemployment and health insurance, retirement, social security benefits, and minimum wage and overtime, are only available to those legally classified as employees. In addition, access to most discrimination law is only available to employees. Finally, the ability to unionize also turns on employee status. Unionization offers an important alternative to state regulation or industry self-regulation, *i.e.*, improving worker protections through collective bargaining.<sup>220</sup>

As described above, the employee tests vary and are complex. A key recurring factor is the allocation of control over how work is done between the worker and the employer. Internal differentiation means that sex work differs radically in the allocation of autonomy and control between sex professionals and those who operate their workplaces. Those working in the commercial form, in dance clubs and brothels, are most susceptible to employer control. Still, even within this form arrangements and conditions can vary drastically. Outcall workers may be more likely to both seek and exercise autonomy in

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Moukalif, *supra* note [x], at 255.

<sup>216</sup> The continuum privileges touching over looking and contact over looking and penetration over contact. As described in Section I, liberals and conservatives both can condemn commodified sex, although for different reasons. Following conservative logic, the closer sexual acts come to penetration the closer they are to religious sin, or, in secular terms, the threat to the family. For liberals and some radicals, the closer to penetration a sexual act, the closer the act to the degradation of women, people who stand in for women, and dignity and rights. Hence both subscribe to the penetration continuum. *See supra* note [x].

<sup>217</sup> Viviana Zelizer uses a site-based continuum in analyze caring relations. ZELIZER, *supra* note [x], at 163-85.

<sup>218</sup> As Prabha Kotiswaran notes, “Sex workers are highly internally differentiated according to their mode of organization of sex work and their relationship to the institution of the brothel.” Kotiswaran, *supra* note [x], at 581. She identifies several axes of differentiation: wage; conditions of labor, *i.e.*, bonded labor, sharing income with brothel keeper, or independent. She also incorporates scale of the institution as influencing the autonomy of worker. *Id.* at 585-88. *See also* Law, *supra* note [x] (discussing brothels as institutions).

<sup>219</sup> *See supra* notes [x] and accompanying text.

<sup>220</sup> Although unionization has thus far not been very helpful to sex workers, and indeed is becoming less effective generally, some assimilationists and activists view it as a potential path to sex worker empowerment. *See supra* notes [x] and accompanying text.

their daily conditions and decisions.<sup>221</sup> Finally, the virtual form presents an intriguing case. For instance, phone sex can as easily be done from one's own home, as an entrepreneur or independent contractor, as it can from a conventionally Fordist call center. Margot Rutman's analysis of several highly contested disputes between dance club and brothel owners and sex professionals suggests that these crucial classifications remain uncertain and unpredictable.<sup>222</sup>

### 3. Other Risk

To be clear, I propose the geography model specifically to regulate against violence, where I contend proximity and isolation are better predictors. However, the nature of the activity will continue to dictate other regulatory structures. Most obviously, health regulations would be pegged to the potential for exchange of bodily fluids, genital contact with surfaces, etc. Thus, other forms of risk do continue to map onto activity.

### 4. Summary

In sum, the assimilationist claim obscures the diversity of sex work. It does not take account of how sex work is internally differentiated and how these very real differences translate into worker risk. By the same token, erotic exceptionalists ignore the very real hazards posed by sex work, insisting that the sexual nature of the labor should shield it from regulation. I have sympathy with both of these views. Yet, neither does very much to accomplish goals of reducing the very real risks of sex work. To combat and manage this risk, this Section has proposed a sexual geography approach that parses sex work according to its institutional form and how that affects worker risk. Mapping sex work in this way provides a pragmatic approach to harm reduction. It should also appeal to feminists, on both sides of the debate, in that it suspends the typical classifications of sex work grounded in binaries of criminality or moralizing continua of penetration and instead assesses it according to risk assessment and reduction.<sup>223</sup>

## C. Discrimination

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<sup>221</sup> Of course under the current criminal regime pimps exercise such extreme control that few would mistake that for an independent contractor arrangement. Yet, this paper is gambling on the reduction of pimping as we know it under legalized regimes. If my optimistic bet is right, then outcall prostitution will be more autonomous than it currently is, and more akin to outcall dancing.

<sup>222</sup> Rutman, *supra* note [x]. There have been some recent successes. In a recent class action between dancers and club owners in seven states, the clubs settled for almost \$13 million dollars and agreed to no longer treat dancers as contractors and instead to treat them as either employees or part owners. *Trauth v. Spearminth Rhino*, 2012 WL 4755682 (C.D. CA 2012) (upholding attorneys' fees and incentive awards).

<sup>223</sup> An episode of the popular Tyra Banks Show discussed how sex workers themselves perpetuate this hierarchy. "It's always seemed odd that women in such a controversial line of work would even bother to be judgmental of what the next person does, but there's a silent hierarchy that exists within the sex industry, e.g., topless models look down on girls who go bottomless, girls who go bottomless look down on girls who strip, strippers look down on porn stars, porn stars look down on hookers, etc. During the episode, Tyra had the women rank one another in order from most respectable to least respectable..." Tracie Egan Morrissey, *Sex Workers Go at It on Tyra*, JEZEBEL, Nov. 17, 2008, available at <http://jezebel.com/5091460/sex-workers-go-at-it-on-tyra>.

If violence and safety are relatively straightforward, if controversial, to regulate, the final major workplace challenge is far less so. A goal for many assimilationists is accessing anti-discrimination laws. As described in Section II they want sex professionals to have the same remedies against invidious bias that other workers do. Can harassment and discrimination be regulated and ameliorated in sexual labor? Yes—and maybe. Let me elaborate.

### 1. Sexual Harassment

As discussed earlier, sexual harassment is prevalent in markets for sex, and sex workers are particularly vulnerable to it.<sup>224</sup> As in other workplaces, *unwanted and unwelcome* sexual propositions and behavior should comprise impermissible harassment in sex markets. This is relatively straightforward to implement in cases of quid pro quo harassment, in which employers and intermediaries demand sex in exchange for employment or favorable terms. In fact, in sexual workplaces quid pro quo rules should be rigorously enforced precisely because of the prevalence of the practice and the particular vulnerability of sex workers to it. This is a prime area in which law can play a crucial role in shifting cultural norms and combating operators' views of sex workers as their own personal sex slaves.<sup>225</sup> In sum, there is nothing about the sexual nature of the labor that should subject workers to quid pro quo demands. In contrast, hostile environment doctrine is not such a neat fit with professional sex.

For instance, some commentators contend that employers should be excused from hostile environment liability because exotic dancers, prostitutes, and other sex workers have “assumed the risk” of harassment.<sup>226</sup> Alternatively, one Note characterizes sex workers' comparatively generous tips.<sup>227</sup> Margot Rutman, who is largely sympathetic to the assimilationist cause, is less optimistic about sexual harassment claims in such “sexy workplaces.”<sup>228</sup> According to this view, by its nature, sex work should be exempt from sexual harassment liability.

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<sup>224</sup> See *supra* notes [x] and accompanying text.

<sup>225</sup> Quid pro quo liability raises a fundamental question regarding the potential implications of legalizing sex work: what was the legal logic behind making quid pro quo part of Title VII rather than bringing it under the rubric of tort or blackmail law, as some urged? On the one hand, if the quid pro quo norm was based on the inalienability of sex, grounded in the illegality of its explicit trade, then legalizing sex work would undermine the rationale for quid pro quo harassment. However, this was not the logic. Rather, the stated logic of quid pro quo liability was that demanding sex in exchange for work comprised sex discrimination and an abuse of power. At the time it was largely men who used their power in the workplace, and also schools, as a powerful mechanism to coerce sex.

<sup>226</sup> See, e.g., Kelly Ann Cahill, Note, *Hooters: Should There be an Assumption of Risk Defense to Some Hostile Work Environment Sexual Harassment Claims?*, 48 VAND. L. REV. 1107 (1995); Jeannie Sclafani Ree, *Redressing for Success: The Liability of Hooters Restaurant for Customer Harassment of Waitresses*, 20 HARV. WOMEN'S L.J. 163 (1997); see also Robert J. Aalberts & Lorne H. Seidman, *Sexual Harassment of Employees by Non-Employees: When Does the Employer Become Liable?*, 21 PEPP. L. REV. 447 (1994) (arguing for a sliding scale of protection from sexual harassment based on classification of jobs as high, mid-level, or low risk).

<sup>227</sup> Cahill, *supra* note [x].

<sup>228</sup>

Realistically, exotic dancers do tolerate much more than women in other professions. In fact, one might suggest that in actuality exotic dancers harass customers by touching and cajoling the customers to purchase private dances. When true sexual harassment does occur it may be difficult

Others though, disagree. For instance Ann McGinley charges that exempting these workplaces from liability for sexual harassment constitutes a windfall for employers. She argues that because sexual commercial establishments rely on the fantasy that “the dancer is sexually and personally interested in the customer” to maintain their profits, “[t]o maintain this fantasy, the club walks a fine line between permitting the customers to believe that the exotic dancers are completely available to the customers and protecting the dancers from sexual harassment and criminal assault.”<sup>229</sup> McGinley rejects the assumption of risk and combat pay constructions as “plac[ing] on women the responsibility of regulating the sexualized aggression of heterosexual men without placing any responsibility on the individual men, on the employer, or on society in general.”<sup>230</sup> Finally, McGinley notes the class discrimination lurking in the assumption of risk defense. She contends that the best economic option for some working-class women may be to work in “sexy” work environments, and assumption of risk doctrine imposes a penalty on them for trying to find economic security.<sup>231</sup> Indeed, McGinley finds that at least some commercial establishments already are sensitive to harassing behavior.<sup>232</sup>

Instead, McGinley and others contend that hostile environment doctrine should apply to sex workplaces, although the “welcomeness” standard should be adjusted to take account of the sexual nature of the work.<sup>233</sup> Thus, because the work is to transact sex,

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to distinguish from ordinary conduct of the dancers and customers. Zoning laws provide some guidance to help determine when harassment has occurred because conduct that goes too far is considered lewd conduct or prostitution, but this is not harassment if this conduct is consensual. Applying the traditional notions of sexual harassment in an environment like a strip club becomes virtually impossible.

Rutman, *supra* note [x], at 532-33 (1999) (citations omitted). Compare Yuracko, *supra* note [x] (“It seems plausible to think that sexual comments that might otherwise be actionable might not be when aimed at employees who are explicitly selling sexual titillation - either alone or with other goods and services.”).

<sup>229</sup> McGinley, *supra* note [x], at 78, 81 (footnote omitted). She elaborates: “[A]dvocacy of the assumption of risk defense fails to recognize that employers whose businesses rely on the display of masculine practices consciously create and benefit from an environment in which harassment is likely to occur.” McGinley, *supra* note [x], at 91; see also Burstein, *supra* note [x], at 307 (“Even if strippers are treated as sexual objects as part of their jobs, they still can claim Title VII protection. It is the employers who profit from the fact that male customers may react in a certain way who must assume the risk of that misbehavior.”).

<sup>230</sup> McGinley, *supra* note [x], at 91. Reinforcing this point, from a “cost of accidents” perspective, the operator who “create[] the sexualized environment is on notice that customers will likely harass her employees and has the means to prevent and correct such harassment.” *Id.* at 67. See also Yuracko, *supra* note [x], at 229 (“Even if the law allows businesses to create jobs that involve selling sex appeal, why is it that so often women alone are perceived to have that sex appeal?”).

<sup>231</sup> McGinley, *supra* note [x], at 90.

<sup>232</sup> “[I]t is usually obvious to the bouncer when a customer goes too far” at a dance club and “[t]he good bouncer will respond immediately, telling the customer to stop.” McGinley, *supra* note [x], at 104, 105. Similarly, if “the john goes beyond the behavior agreed to and the brothel acts negligently in preventing or correcting this behavior, the brothel prostitute should be able to establish a hostile work environment.” *Id.* at 105.

<sup>233</sup> She contends that, “[w]hile the context of sexualized work environments is significantly different from non-sexualized work environments, Title VII should account for this context in determining whether a hostile work environment exists, rather than rejecting a cause of action altogether.” McGinley, *supra* note [x], at 92; see also Joshua Burstein, *Testing the Strength of Title VII Sexual Harassment Protection: Can It Support a Hostile Environment Claim Brought by a Nude Dancer?*, 24 N.Y.U. Rev. L. & Soc. Change 271,

sexual conduct and advances in and of themselves cannot constitute a hostile environment. Rather, “[b]ehavior that creates a cause of action for sexual harassment in a non-sexualized workplace may actually constitute agreed-upon terms or conditions of the employment of workers in sexualized workplaces.”<sup>234</sup> Sexual harassment liability then should turn on whether the complained of behavior is a term or condition of the job.<sup>235</sup> Staring, comments on body parts, sexual propositions, and general lewd comments all could be terms and conditions of an erotic receipts business.<sup>236</sup> Still, “aggressive sexual behavior such as derogatory name-calling, clearly unwanted touching, stalking, or physical assault may alter those terms or conditions of the dancer’s employment and may create a legally cognizable hostile work environment.”<sup>237</sup> In these instances, employers should have an obligation under Title VII to implement policies and procedures to protect workers.<sup>238</sup>

This may seem overly complex. But then I would answer that law still hasn’t figured out the nuances of sexual harassment in *non sex-work* context. Thus we shouldn’t give up on tackling sexual ones. Others may take a more pragmatic approach, doubting that we can realistically apply sexual harassment law in these overtly sexual workplaces. To this second concern I would say, skeptics made exactly the same reservations about the very creation of sexual harassment law. Many doubted it was possible to make the pinching of bottoms outlier behavior it currently is in most workplaces. Sexual

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307 (1998) (“Perhaps the problem lies within male biology and socialization, and not within the jobs that women take.”).

<sup>234</sup> McGinley, *supra* note [x], at 68.

<sup>235</sup> “Because the essence of the business and the prostitutes’ role in the business is selling sexual acts to customers, sexual harassment will depend in large part on the negotiations and behavior agreed upon by the prostitute and the john.” McGinley, *supra* note [x], at 86. Put differently, “[t]here can be no alteration of a term or condition of employment if acquiescing to certain behavior is a term or condition of the job.” *Id.* at 99.

<sup>236</sup> Regarding comments that would be deemed harassing in other workplaces, “dirty” talk for many people is an inherent part of sex, for some verbal stimulation is the most exciting part, and for yet others it simply is sex. *See, e.g.*, McClintock, *supra* note [x] (discussing S/M practices that involve role playing in which there is often no intercourse or even touch, just “talk”). “[For example, a term or condition of employment for exotic dancers in gentlemen’s clubs may require tolerating hooting or staring from the audience.” McGinley, *supra* note [x], at 102. She elaborates “[a]n exotic dancer who strips in a gentlemen’s club should reasonably expect more customer sexual behavior than the blackjack dealer or the cocktail waitress.” *Id.* at 104.

<sup>237</sup> McGinley, *supra* note [x], at 104. I would change the sentence to “does alter” and “should create.”

<sup>238</sup> Similarly, punishing workers who do not accept the impermissible behavior or who complain about it would violate Title VII.

When confronting harassment by customers, the fact finder should therefore consider the three-way relationship between the supervisor, the customer, and the worker. If the supervisor *punishes or otherwise discriminates against women who refuse to accept harassing customer behavior or if there is an expectation that the employee not complain or respond negatively to the customer’s harassment*, the jury should consider this fact as evidence that the woman did not welcome the behavior, even though she may have acquiesced to it.

McGinley, *supra* note [x], at 99 (emphasis added). Dianne Avery’s recent work on “breastaurants” suggests that lines will continue to be blurry. For instance, although touching clearly is not a term and condition of employment at a breastaurant such as Hooters or others Avery studies, is flirting? And, does drawing such a clear distinction then anger customers who feel “teased” and put workers at risk for stalking or retaliation by customers? Avery, *supra* note [x].

harassment law is not yet thirty years old; there is no reason to believe that it cannot evolve standards to define and manage outlier behavior even in sexual workplaces.

## 2. Disparate Treatment

That leaves disparate treatment discrimination claims, a harder case. As described in Section II, sex work is highly racially stratified.<sup>239</sup> Racial discrimination against sex workers occurs not only in hiring but also in terms and conditions of employment, which include lucrative shift and private lounge assignments and referrals to desirable customers. Discrimination can also take another form, expectations by employers and customers that racial and ethnic minorities will perform racial fantasies that some find degrading. The assimilationist claim that anti-discrimination norms should apply to sexual commerce as they do to other service work is persuasive at first glance. It resonates with the generations of scholarship criticizing Jim Crow doctrine and the particular role that employment segregation played in the U.S. system of racial caste. Assimilationists contend that sex work is no different from other service jobs in which Title VII bars discriminatory preferences, however strong, by both employers and customers.<sup>240</sup> In fact, one of the most significant interventions of employment discrimination law is prohibiting employers from using customers' "taste for discrimination" as a rationale to discriminate against employees. As one prominent feminist theorist argued, lawyers are no different than prostitutes or club dancers:

Law firms aren't allowed to hire only white lawyers on the ground that most of their clients are white and would prefer to work with lawyers of the same race, and I doubt that courts would allow that excuse if any other racial or ethnic group were involved. So why not apply the same reasoning to sex and sexual services?<sup>241</sup>

Siobhan Brooks, one of the leaders of the first Title VII suit brought by dancers, strongly concurs.<sup>242</sup> Hence, discrimination is a realm where assimilationists make a strong and persuasive case.

What should be made of the assimilationist claim regarding discrimination law? Can someone legitimately prefer one sex worker to another based on appearance? Is sex work just like "all other work" in this realm? And what is the role of race relative to other axes of discrimination, including gender, disability, and age? This Section attempts an answer to these vexed questions. It argues that, in contrast to regulating sexual commerce for health and safety and against sexual harassment, applying standard discrimination law to sexual markets may not work the way assimilationists anticipate.

First, assimilationism may rest on an indefensible disaggregation of racial preferences from other sorts of erotic discrimination. Imagine a brothel's heterosexual male customer

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<sup>239</sup> In sex work as elsewhere, these consumer preferences mirror broader systems of oppression. And, of course, the same identity characteristics that put these workers at the bottom of the consumer preference ladder also make them the most economically vulnerable more generally, *i.e.*, more likely to experience adverse economic shocks and with less cushion to absorb them.

<sup>240</sup> Presumably Section 1981 would also apply to such cases. For the sake of simplicity I confine my analysis to Title VII as the assimilationists do.

<sup>241</sup> Vicki Schultz, *Sex for Sale: Sex and Work*, 18 *YALE L.J.* 223, 229 (2006) (footnote omitted).

<sup>242</sup> See *supra* note [x] and accompanying text.

requests a woman sex worker. On its face, this should disturb assimilationists. Title VII issues a clear prohibition against discrimination based on sex. A customer cannot request a male librarian, flight attendant, or restaurant server. Yet, intuitively, to many, a market for erotic services in which customers cannot request the gender of their worker does not seem like much of an erotic market at all.<sup>243</sup>

Courts have translated this intuition into doctrinal terms. As described in Section II, law permits sex discrimination in two instances, to protect customers' spatial privacy and also for what I characterized as decisional privacy in erotic receipt businesses.<sup>244</sup>

Explaining the second bfoq exemption, Kimberly Yuracko observes:

Prostitution is, of course, broader than heterosexual intercourse, and sex work is broader than prostitution. Sex work also includes lap dancing, stripping, and acting as a sexualized gaze object. Unlike heterosexual intercourse, these activities can technically be performed by individuals of either sex. Yet, all these other forms of sex work might also be thought to have inherent essences that require customer sexual stimulation. Therefore, sex discrimination might be required by the inherent essences of these broader forms of sex work—not because individuals of the disfavored sex are unable to perform the acts desired, but because of the depth and relative stability of customers' sexual preferences.

That is, the sex of the person trying to arouse them really does matter for people's sexual stimulation.<sup>245</sup>

Yuracko concludes, "The sex industry may be one of the few arenas in which the conception of inherent business essence has some traction."<sup>246</sup> Judicial recognition of a bfoq for decisional privacy in this context puts pressure on the assimilationist claim that anti-discrimination law should apply to professional sex like any other job. Sex work,

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<sup>243</sup> In fact, in discussions with many audiences, which included vociferous opponents of my claim, I have yet to encounter anyone who contended that customers should not be able to exercise discretion regarding the gender of their sex worker.

Elizabeth Emens echoes this argument in the non-market context, observing that "Most people believe the sex of another is the starting point for their desire. That is, most people understand themselves to be monosexual rather than bisexual, so another person's maleness or femaleness is a prerequisite for desire, or at least for sexual intimacy." Hence, raising the legitimacy of sex in economies of desire serves a useful conversation-forcing function, because it tends to frustrate the generalized assertion that desire in its ideal form would operate independently of "superficial" identity traits and instead would track something "deeper" in the self. Most people would, of course, not make the same assertion about the role of sex in their desire. And so including sex forces the recognition that some of these traits make a difference for many or most of us, and not necessarily in ways that are readily described as morally problematic. Although Emens is writing about erotic preferences in the non-market context, her observations arguably support my argument that the gender bfoq in sexual commerce should be extended to other suspect characteristics, including race. Emens, *supra* note [x], at 1313-14 (footnote omitted).

<sup>244</sup> See *supra* notes [x] and accompanying text. See also Crain, *supra* note [x] (observing an emerging third doctrine, employer "branding").

<sup>245</sup> Yuracko, *supra* note [x].

<sup>246</sup> She elaborates, "This view may justify courts' allowance of sex discrimination in the hiring of sex workers. Consider prostitution aimed at heterosexual men. Arguably, the inherent essence of heterosexual prostitution is vaginal intercourse. If this is so, then the essence of heterosexual prostitution requires sex discrimination in the hiring of prostitutes." Yuracko, *supra* note [x]. Vicki Schultz resists the sexual gratification bfoq. "Even if the law allows businesses to create jobs that involve selling sex appeal, why is it that so often women alone are perceived to have that sex appeal?" Schultz, *supra* note [x], at 229.

*doctrinally*, is *not* like other work in which sex discrimination is impermissible and illegitimate.

If customers have a doctrinally protected preference in the sex of their service provider, then what does that mean for the assimilationist claim that *racial* preferences are illegitimate and violate anti-discrimination mandates? Would decisional privacy extend beyond sex to race? Nor are race and sex the only suspect characteristics operative in sexual markets. Although assimilationists have limited their arguments to race, their concerns about discrimination clearly implicate the entire range of legally protected categories, including disability and age. Returning to our hypothetical brothel, imagine a customer declined a sex worker the age of his grandmother. Or, in the alternative, requested a “young” worker, under age 30. Similarly, a customer might refuse a sex worker who was deaf, legally blind, or in a wheelchair. Or the customer might *request* a sex worker with a disability, for any number of reasons. These preferences might stem from active hostility to the elderly and the disabled, or they could stem from fantasies or endogamous preferences.<sup>247</sup> But they also could be byproducts of unconscious biases and preferences rooted in an idealized erotic image that embodies age and disability as well as race and gender. Can racial, sexual, and other identity preferences be meaningfully disaggregated in sexual markets?

For spatial privacy doctrine, the answer is yes. In the classic sex discrimination spatial cases discussed in Section II, gender and race are doctrinally separable. A consumer can prefer a woman “attendant” in certain settings—*e.g.*, locker rooms, restrooms, nursing homes, labor delivery room nurse (although not doctor)—but not a white one.<sup>248</sup> In contrast, the only judicially recognized exemption for racial preferences has been in some prison cases.<sup>249</sup> (And some contend that the gender privacy cases should be extended to guarantee same-sex prison guards.<sup>250</sup>) The doctrine is clear—in spatial privacy, courts disaggregate gender from race, finding a bfoq defense for the former but not the latter. In this sense, courts defer to social conventions that gender has a defensible meaning, *e.g.*, separate bathrooms, that race does not.<sup>251</sup>

In contrast, I would contend that gender and race are *not* disaggregable for erotic preferences, which are based not on spatial privacy concerns but on sexual preference and desire that underlie decisional privacy. To disaggregate them would be to believe either that Title VII’s bans on sex discrimination are less compelling than its racial ones, or that there are not meaningful erotics of race. Racially discriminatory erotic preferences come

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<sup>247</sup> See *infra* notes [x] and accompanying text.

<sup>248</sup> See, *e.g.*, Kimberly Shayo Buchanan, *Beyond Modesty: Privacy in Prison and the Risk of Sexual Abuse*, 88 MARQUETTE L. REV. 751 (2005) (rejecting modesty or privacy framework in favor of fear of sexual abuse).

<sup>249</sup> See *supra* notes [x] and accompanying text.

<sup>250</sup> See, *e.g.*, Brenda V. Smith, *Watching You, Watching Me*, 15 YALE J.L. & FEMINISM 225, 285 (2003) (articulating a human rights approach that balances prisoner privacy with guards’ employment rights); Jennifer R. Weiser, *The Fourth Amendment Right of Female Inmates to Be Free from Cross-Gender Pat- Frisks*, 33 SETON HALL L. REV. 31, 65-66 (2002) (urging a general right to bodily integrity as a factor in assessing reasonableness of cross-gender body searches because “[a]lthough privacy is genderless, concern for symmetry in the treatment of searches must not mean that critical differences in the sexualization of power get overlooked”).

<sup>251</sup> Of course current controversies of transgender access to bathrooms troubles this easy determination. See, *e.g.*, Adrienne D. Davis, *The Potty Is the Hardest Part: Irregular Intimacy, Gender Segregation, and the Search for Equality* (work in progress).

in different forms. In the weak form, appearance can be a crucial part of erotic stimulation, so integral, in fact, that Elizabeth Emens notes that “antidifferentiation” or “not to notice someone’s race or disability” would be insulting.<sup>252</sup> Yet, it can be difficult to disentangle racial preferences from other appearance-based erotic preferences, such as for large breasts, red hair and freckles, large rear end, boyish figure, almond-shaped eyes, deeply defined muscles, hairy chest, plump lips, tall, short, milky or bronze skin, each of which are associated with racial phenotypes, if imperfectly so. Many would argue that these characteristics function akin to gender, as intrinsic sexual preferences, necessary to their sexual arousal and stimulation.<sup>253</sup> The strong-form argument in erotic markets is for explicit statements of racial preference. Many people limit their intimate relationships to those of the same racial or ethnic background. But the same social forces that underlie endogamy also produce fetish markets as well as run of the mill sexual fantasies about the taboo and the forbidden, often termed race play. Even as some look to sex markets to mirror the same preferences they pursue in their non-market lives, it should not surprise us that others turn to sex markets in order to explore preferences that are considered taboo in their amateur intimate lives.<sup>254</sup> And while some find race play reprehensible others find these racial fantasies therapeutic. It would be difficult to engage in race play or satisfy one’s dream of sleeping with a woman who looks like Miley Cyrus, or Beyonce, if one cannot specify appearance, in either the weak or strong form.<sup>255</sup> These fantasies may be as crucial to that customer’s erotic stimulation as specifying “male” or

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<sup>252</sup> Emens, *supra* note [x]. For a discussion of how visually impaired people perceive and understand race, see generally OSAGIE K. OBASAGIE, *BLINDED BY SIGHT: SEEING RACE THROUGH THE EYES OF THE BLIND* (2013). She elaborates: “In the realm of sexual intimacy, [not noticing appearance] seems a particularly odd way to understand the ideal treatment of others.” Emens, *supra* note [x] (footnote omitted). “Think how offended a lover can be if a partner fails to notice trivial aspects of appearance, such as new glasses or a haircut; imagine if it were the partner’s sex that went unnoticed.”

<sup>253</sup> This is *not* to say that sexual preferences are any less socially constructed than are privacy ones; only that they are distinct and almost certainly equally strong. These preferences might be the product of social norms and constructions, but scholars make the same case for sexual orientation and gender identity more broadly. See, e.g., Davis, *Abjection, Power, and Sexuality Exceptionalism*, *supra* note [x]. My point is not that physical appearance has the same fixity as sexual orientation. Many will date people of varying physical types, but still limit themselves to one gender rather than another. But fixity is not required in order for the underlying case to be true: that physical attributes and appearance are part of the inherent essence of the business of sexual markets. They believe that gender has a prior essence which race etc do not. Viviana Zelizer’s hostile worlds framework provides some insight. She notes that the suspicion that markets corrupt also rests on what Foucault articulated as the pre-social notion of sexuality. She uses as an example Talcott Parsons who “saw society as providing the normative and social context for markets, but assumed economic and personal spheres were highly differentiated from each other and operated on the basis of contradictory principles.” ZELIZER, *supra* note [x], at 40, 43. ; use for point that those who don’t believe race/appearance has a role seem to embrace this pre-social notion of a pure sexuality.

<sup>254</sup> For instance, some disabled people prefer to date other disabled individuals. At the same time, there is an active fetish market for disabled people as sexual partners, e.g., amputees. See, e.g., Emens, *supra* note [x], at 1343-45 (describing “acrotomophilia,” or desire for amputees).

<sup>255</sup> Indeed, one need only look at the dizzying array of ethnic pornography genres to comprehend how much the accentuation of social categories can yield sexual pleasure. See, e.g. Xavier Livermon & Mireille Miller-Young, *Black Stud, White Desire: Black Masculinity in Cuckold Pornography and Sex Work* (unpublished manuscript, on file with author) (exploring genre of white heterosexual couples having “cuckold” sex with black men).

“female.”<sup>256</sup> This is *not* to say that decisional sexual preferences are any less socially constructed than are spatial privacy ones; only that they are distinct and almost certainly equally strong.<sup>257</sup> If this is the case, it would appear that the decisional privacy logic could be extended from gender to racial preferences.

Of course, as this paper has shown, sex work is not monolithic, and not all of it warrants an exemption from disparate treatment law. The exemption should inure to sexual commerce in which there is a visual element to the business essence of sexual stimulation and in which customers exercise individual discretion in satisfying their preferences. Where they do not, the inherent business essence presents a far weaker case and may be outweighed by Title VII’s equality norms.

In sum, discrimination doctrine is where I join with erotic exceptionalists. Assimilationists urge that one cannot prefer the race, and by extension, the gender or age, of one’s sex worker any more than of one’s secretary or lawyer. But, when we filter personal preferences through the doctrinal lens of the essence of the business, clients do not have a legally defensible interest in whether a secretary or lawyer is in a wheelchair, African-American, or male. Filtering sex work through the same lens, clients do have an interest in whether their sex worker is male, and, I would contend, in whether they have other traits and characteristics that in almost all other instances would be protected categories but in sex markets are prerequisites to the essence of the business, the customer’s sexual preferences for stimulation and gratification.<sup>258</sup> Hence, contrary to the assimilationist claim, in sex work, body type and physical appearance, including race, gender, and other traits, are uniquely integral to the commodity and service. It would be a bitter irony if sex markets became the ultimate policing mechanism for sexual desire, only enabling and authorizing normative, vanilla sexualities. Thus, I embrace erotic exceptionalism, but narrowly drawn, around the sex act itself. I endorse exemption from state regulation to enable workers to refuse sex, for any reasons, and to enable customers to exercise their sexual preferences.

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<sup>256</sup> One finds similar preferences at work in adoption “markets.” See, e.g., R. Richard Banks, *The Color of Desire: Fulfilling Adoptive Parents’ Racial Preferences Through Discriminatory State Action*, 107 YALE L.J. 875, 899-900 (1998) (citations omitted) (“Prospective adoptive parents are generally allowed to express preferences in a wide variety of areas. Health, age, sex, appearance, and prior experiences are all areas in which parents may say what type of children they want. Race is recognized as one of many reasonable preferences parents are likely to hold.”); Andrew Morrison, *Transracial Adoption: The Pros and Cons and the Parents’ Perspective*, 20 HARV. BLACKLETTER L.J. 167, 181 (2004) (citations omitted) (“During the application process, parents often request particular characteristics of the child they would like to adopt. Most adoption agencies allow parents to specify the child’s race, age, gender, level of disability, or any combination thereof.”).

<sup>257</sup> The sexual gratification bfoq differs with privacy in another way as well.

Michael Frank notes that the privacy bfoq defense typically only is extended to “protect the sensibilities and preferences only of women.” Frank, *supra* note [x], at 490. In markets for sexual gratification in contrast, it would be the reverse: the overwhelmingly male customers for sexual services whom the exemption would protect.

<sup>258</sup> It is worth noting that, although the paper has made the case for both sex workers and their customers to exercise discretion/preferences in sex markets, they are grounded in very different logic. For the workers, the rationale is the autonomy imperative, that sex professionals should not be compelled to do anything they don’t feel comfortable doing. This is a nod to the need for heightened autonomy for sex professionals, grounded in the goal of preventing their subordination. The rationale for customers to be able to exercise discretion is very different. For them it is rooted in the essence of the business, erotic arousal, stimulation, and gratification.

My first point, then, was to argue that in sex industries discriminatory preferences, including for race, would receive a very limited exemption, or erotic exceptionalism. This would expand the existing doctrinal exemption for sex, based on the disaggregation principle. This leads to a second intervention. On the one hand, one would imagine that, following Yuracko's analysis, this exemption would be unique to sexual gratification, or erotic receipt, industries. In fact, though, sex work is on a continuum with other market sectors in which appearance is an intrinsic part of demand and "production." As discussed in Section II, while facially there are no bona fide occupational qualification defenses for race in employment law, there appear to be various exemptions effectively operative. These include the first amendment based exemption for racial breakdowns in casting observed by Robinson and Frank, judicial dicta suggesting similar exclusions for racial specification in advertising, and, finally, modeling seems to operate in a litigation-free zone, as runway shows and magazine editorials routinely use race—and age and ability—to construct an aesthetics of fashion, as exclusionary and offensive as many, including myself may find it.<sup>259</sup> Hence, rather than being unique, sex work may be on a continuum with other "appearance" industries.

If conceived as a continuum, I would argue sex work would be at the strongest far pole. This is partially because I find persuasive scholarly critiques of the film industry exemption. Mary Anne Case has called it "bizarre that sex is considered a BFOQ, in the interests of 'authenticity or genuineness,' for the job of actor or actress . . . . After all, the very essence of this job is to be something one is not. All that a producer should be allowed to require is that the pretense be convincing."<sup>260</sup> Russell Robinson elaborates, "Actors generally do not face authenticity requirements regarding many character traits; for example, an actor need not be gay or have a disability or pregnant in order to play a character with that trait. Indeed, good acting is often defined as the ability to pull off a role quite different from the actor's own identity."<sup>261</sup> Together Case and Robinson make a persuasive case to eliminate the racial exclusion in Hollywood casting breakdowns. And their logic could be easily extended to advertising and modeling. Yet, sex work is meaningfully different, or at least proximate sex work that involves physical contact or face-to-face interactions, which I have argued implicates decisional privacy. "Acting" is much harder naked.<sup>262</sup>

### 3. Assimilationism Redux

The point that appearance can matter in sex markets should be an obvious one. And yet, discrimination assimilationists resist this intuition. Contemplating whether people

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<sup>259</sup> See, e.g., Robin Givhan, <http://nymag.com/thecut/2013/09/givhan-confronting-the-lack-of-black-models.html> (criticizing absence of racial diversity in modeling). Of course, the distinction between litigation-free zones and formal bfoq's is a significant one. Unlike the sex-based bfoq for sex gratification industries, these other appearance-based exemptions are not formal; they are recognized by courts only in dicta. Given the stakes in sex work, I am calling for the same clear-cut and certain doctrinal guidelines and mandates, i.e., formally recognized bfoq's, as exist currently for sex to other forms of discrimination. See *supra* notes [x] and accompanying text.

<sup>260</sup> Case, *supra* note [x].

<sup>261</sup> Robinson, *supra* note [x], at 31-32.

<sup>262</sup> Although I mean this as a tongue-in-cheek remark, it is also literally true. See, e.g., Davis, *Erotic back to erotic exceptionalism* [identified men can achieve and maintain the erections necessary for the job].

can pursue their various preferences for sexual gratification in sex markets raises the very real question whether assimilationists truly do endorse professional sex. Ironically, like abolitionists who adamantly oppose commercial sex, many who proclaim to be pro-sex work seem to display a suspicion of markets for sex. They purport to advocate sexual commerce, yet, the prerequisite for sexual markets, the *underlying commodification of erotic preferences*, seems to trouble them. Of course, feminist critiques of capitalism and its deleterious effects on women are tried and true. Yet, in the case of sex work assimilationism, I suspect something else is at work. I believe the gap stems from assimilationists' devoting their analytic and regulatory energy to the supply side of the market, workers and their employers, while giving little theoretical or empirical attention to the demand side, customer desire and preferences. Their emphasis is on safety, justice, and full citizenship for sex workers, and laudably so. Largely absent from their analysis is what demand looks like in markets for sex—erotic preferences and consumption of sexual stimulation and gratification. Assimilationists may proclaim it as “just work,” while at the same time doubting the legitimacy of customer tastes and preferences that we find in most (all?) markets.

Ironically, abolitionists have developed thick accounts of demand in sex markets. Kathleen, Barry, Sheila Jeffreys, Carol Pateman, and, of course legal scholar Catharine MacKinnon, have offered rich accounts of demand as based in what Pateman calls “the male sex right.”<sup>263</sup> In stark contrast, assimilationists have largely declined to wrestle with the demand side, either conceptually or ideologically. Indeed, as this Section has shown, the demand side is where many of the challenges and the problems reside. As a conceptual matter, the absence of a theory of demand prevents assimilationists from tackling complex regulatory problems of institutional design and reconciling sex markets' distinct characteristics with broader goals for just and fair workplaces. Most keenly, we have forbidden discriminatory demands, productions, and biases in other service sectors. Ideologically, neglecting the demand side leads assimilationists to an almost certainly unintentionally conservative view of sex markets.<sup>264</sup>

Indeed, there is a sense in which assimilationist arguments can begin to sound a bit Soviet: there is a strong rhetoric of worker solidarity and dignity from the supply side, and yet a rejection of market logic from the demand side. In fact, the model may be the Soviet car, that is, you can have any car you want as long as it is the state car. And you will like it (envisioning legalized sex for hire as perhaps a sort of moral education of customers.) This is in stark contrast to visions of sex markets as liberating sexual desire, enabling fantasies that allow customers to explore the taboo and the verboten.<sup>265</sup> In sum, when confronted with a fully commodified market for sex, and all that it entails, assimilationists may be more squeamish about sex work than they know.

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<sup>263</sup> See *supra* notes [x] and accompanying text. Erotic exceptionalists too have a theory of the demand side, as facilitating sexual pleasure, often cast in therapeutic terms. See, e.g., BERNSTEIN, TEMPORARILY YOURS, *supra* note [x] (describing how many who urge what i call erotic exceptionalism embrace a therapeutic, affective embrace of their work).

<sup>264</sup> At bottom, many assimilationists are probably closer to the abolitionist Swedish model than they know: protect the seller and buyer be damned. Like feminist abolitionists, they genuinely really care about the workers, but they do theorize the market in which the workers labor.

<sup>265</sup> In this sense it taps into a deeper debate within feminist theory about sexuality. See, e.g., Janet Halley, *Queer Theory by Men*; Davis, *Abjection, Power, and Sexuality Exceptionalism*, *supra* note [x].

Something has to give: either we use Title VII and other discrimination law to impose tight restrictions on demand, producing vanilla sex markets, or we allow these preferences but give up the basis of the assimilationist claim that sex work is no different from any other labor. I recognize that permitting an exemption for racial preferences, even a limited one, is a real cost of sex markets, and for some that cost may be too high. But we would need a set of principled criteria to distinguish these costs of sex work from the costs that flow from other appearance-industries, most notably the film industry, modeling, and advertising. Not to mention the constant and relentless shaping of the meaning of race, gender, ability, and age to our youngest citizens by toys, video games, books, and, my personal favorite, child beauty pageants.<sup>266</sup> These billion dollar industries, too, shape gender roles and their racial and other content. There may not be a way to disaggregate sex work that does not rest on and reiterate anti-sex moralism.

#### D. Summary

The assimilationist claim is a miscue not only from the diversity of work and its regulation, but also from the ways that sex workplaces differ from many other workplaces and, crucially, from each other. Taking account of when, how, and to an extent, why, various risks and problematic behavior occur is a prerequisite to fashioning an effective regulatory regime. In its recognition that commercial sex is labor deserving of recognition and regulation, assimilationism is an important first step. But its labor essentialism rapidly can become an active impediment to regulating sex markets.<sup>267</sup> The question is not to enable markets in sex; rather, *which* market to enable? As this Section has shown, there are many regulatory switches that need to be thrown to begin to imagine effective regulation of sex markets.

This Section has suggested that some workplace risk can be ameliorated in a fairly straightforward fashion, once we embrace the right regulatory lens. The Section rejects the common approach of differentiating sex work according to a legalistic binary of criminal/non-criminal or a bodily integrity framework of proximity to heterosexual intercourse. Instead, it urges an approach that rests on how institutional form influences the risk to sex workers. This sexual geography approach has the benefit of actually addressing the causes of risk, isolation and proximity, distinguishing virtual, commercial, and outcall institutional forms, while also trying to preserve at least some of the tradeoffs between risk reduction and autonomy that seem to matter deeply to sex workers.

In contrast with health and safety, addressing discrimination is far more vexed. When it comes to markets for sexual gratification, protected categories of race, disability, and age may be built into erotic preferences and fantasies, as gender is. We may not be able to defensibly disaggregate racial and other preferences from the doctrinal exemptions for gender. In addition, sexual commerce appears to be on a heretofore unnoted continuum with other appearance markets that enjoy implied defenses and exemptions or at least litigation-free zones, for racial discrimination. This Section has

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<sup>266</sup> In an intriguing parallel to sex work, New Zealand and Australia have criminalized child beauty pageants. I thank Carisa Showden for pointing this out to me.

<sup>267</sup> Writing about the commodification of care work, Viviana Zelizer observes, “[T]he way to make such levers effective is not to deny that households have special properties but to identify those special properties and show they work.” ZELIZER, *supra* note [x], at 215. The same holds for sex work.

argued that erotic preferences are at the stronger end of the pole than businesses for which there seem to already be exemptions in effect.

The discrimination analysis also sheds some light on one of the pro-sex work camps. Their effort to eradicate customers' racial and other preferences from sex markets reveals an important analytic gap: assimilationists have theorized the supply side of sex markets but sorely neglected the demand side. They may be pro-sex work, but seem to be anti-sex market. In this sense, they more share more with abolitionists than they assume.

This last section, Section IV, tries to answer assimilationists' concerns with a set of proposals that address the specificity of sex work, while also taking up the erotic exceptionalists' claims that professional sex should remain beyond regulation.

#### IV. POLITICAL FEASIBILITY, OR, IMAGINING SOSHA

Although this paper has not included pornography in its discussion and analysis, a recent conflict raises some of the potential challenges posed by regulating sex work. Last spring the city of Los Angeles began to contemplate whether it should exert jurisdiction over policing condom usage in pornography and claim it as a municipal role.<sup>268</sup> After the private clinic that had monitored HIV and other health status for the pornography industry "abruptly shut its doors" in December of 2010, city lawmakers voted to draft an ordinance that would require condoms in adult films made in the city.<sup>269</sup> Los Angeles's plan would end the pornography industry's long-standing self-regulation: "The city law would be the first to impose safety standards specifically on the pornographic film industry, which has largely been allowed to police itself."<sup>270</sup> Plagued with little oversight and enforcement power, the California division of OSHA had unsuccessfully struggled to impose condom requirements.<sup>271</sup> Yet, here, as elsewhere, OSHA is.<sup>272</sup> Instead, after several adult-film actresses contracted HIV in the 1990s and sued production companies, the industry implemented a mandatory testing regime, creating and funding a not-for-profit clinic that established a health status data base.

The adult-film industry has long touted the efficacy of its self regulation, citing only five instances of HIV among performers since 2004.<sup>273</sup> Yet critics contend that "Testing just acts as a fig leaf for producers, who suggest that it is a reasonable substitute for condoms, which it is not."<sup>274</sup> Observers predict that the Los Angeles plan will spark a regulatory stand-off, as the city lacks jurisdiction over public health, while county

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<sup>268</sup> See, e.g., Ian Lovett, *Condom Rule Sought for Sex-Film Sets*, N.Y. Times, Feb. 10, 2011, at A18. The proposed ordinance would implement mandatory condom usage as a condition of issuing film permits. In January the City Council gave final approval to the new requirement. The text of the ordinance can be found at <http://documents.latimes.com/condoms-porn-los-angeles-ordinance/>.

<sup>269</sup> One city councilman said bluntly, "We can't keep our heads in the sand any longer. These people should be using condoms. Period." Lovett, *Condom Requirements Sought for Sex-Film Sets*, *supra* note [x], at A18.

<sup>270</sup> *Id.*

<sup>271</sup> Since 2004 the state's agency "has maintained that existing state workplace safety laws require condoms and other protections for performers in the pornographic film industry." *Id.*

<sup>272</sup> OSHA issued only a handful of fines for filming unprotected sex. *Id.*

<sup>273</sup> *Id.*

<sup>274</sup> Michael Weinstein, President of AIDS Healthcare Foundation, NY Times.

officials claim they lack the resources to effectively monitor condom usage.<sup>275</sup> Not surprisingly, faced with this new regulatory regime, the film industry is threatening to leave the state for more “friendly” jurisdictions.<sup>276</sup>

This last Section turns its attention to the question lurking behind this entire paper: the political feasibility of regulating professional sex in the ways suggested above. Stakeholders from all political persuasions may be highly skeptical that sex work will ever be effectively regulated.<sup>277</sup> The stand-off between regulators and pornographers in California suggests the potential challenges of monitoring and enforcement in markets for professional sex. If all sex work were to be legalized, some laws would apply to it as they would to any other form of labor, *e.g.*, requirements for exit signs and asbestos levels. But regulating the *substance* of sex markets and how they operate is a different matter. The controversy over condoms in pornography suggests several things about the pragmatics of legally recognizing other sexual labor. California Rather than making sweeping arguments about the pragmatics, this Section breaks the feasibility calculus concerns down into its component parts raised by the California condom controversy—administrability, *i.e.*, type of regulation, political will, which includes concerns over externalities and endowments, and, through the lens of substitution effects, whether sex markets are an effective target for bringing “above ground.” It will address each of these in turn, briefly contrasting sex work with not only pornography, but another case that has drawn much attention to regulatory strategy—mining. Importantly, these two are opposite ends of the regulatory spectrum. Understanding why sheds light on sex markets and how they might fare under a legalized light.

## A. *Administrability*

### 1. Type of Regulation

The controversy over the condom mandates suggests the initial question of regulatory strategy. The pornography industry is emblematic of self-regulation; indeed, it holds itself up as a poster child for that approach. Yet the condom controversy and its underlying prompt, the abrupt closing of the industry-funded clinic, demonstrates the limits, and indeed the serious deficiencies, of leaving risky sexual labor to the sole regulatory purview of the industry itself. Apart from HIV, sexually transmitted diseases are diagnosed in a quarter of all adult-film performers each year and are seven times higher than in general population.<sup>278</sup> Hence self-regulation can hardly be viewed as successful. Assimilationists might envision a different self-regulating regime, one in which sex workers themselves would set the standards, not corporate interests. However, as a practical matter, it will be some time before sex professionals enjoy the same discretion to self-regulate that is granted the liberal professions, such as law and

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<sup>275</sup> State health regulators have convened a committee, but not yet acted. *Id.*

<sup>276</sup> As for the clinic, which “abruptly” closed after a performer tested positive for HIV, it has re-opened as a for-profit clinic, now under the auspices of the California Medical Association. *Id.*

<sup>277</sup> People make similar arguments about other uncomfortable and what I call “irregular” forms of intimacy. I explore another case study of such skepticism, polygamy, in Davis, *Regulating Polygamy*, *supra* note [x] (arguing polygamy can be effectively regulated).

<sup>278</sup> *Id.*

medicine.<sup>279</sup> Moreover, the call for self-regulation does not take account of the brothels, dance clubs, as well as other institutional interests that have yet to emerge in sex markets. We can anticipate that these large-scale actors will dominate the regulatory discourse, as they do in other markets.

At the opposite regulatory pole from self-regulation is state control and ownership. Yet state control of sexual commerce is not practical in the United States. Compared to other developed countries, our government operates a relatively narrow slice of the economy, mainly public utilities, parks and wetlands, infrastructure of roads and bridges, services such as schools and transportation, and, until recently, incarceration. In addition, it is difficult to imagine the public, or sex workers, being comfortable with the state setting markets for and making profits from sex. Thus neither self-regulation nor state control seems a realistic possibility for regulating markets for sex.

In between these two regulatory poles are several other options. As described in Section II, the availability of various bodies of federal law, including OSHA and Title VII, will turn as an initial matter on whether sex workers are classified as employees and also the size of the workplace. The federal regimes employ differing criteria, and it is not clear that all sex professionals will qualify as employees under these tests.<sup>280</sup> Beyond this initial litmus test, the experience with condom regulation in the pornography industry suggests other constraints. While the OSHAct's general duty clause would cover many health and safety issues, the agency's own statements conceded that it simply lacked the resources to monitor and remediate violations. It is unclear that other sex work would be different.

## 2. Licensing

A more promising alternative would be to regulate sex work under state law. State regulatory schemes take different forms, but a primary one is licensing. "Before lawfully engaging in business, economic actors must, in almost all jurisdictions, satisfy certain administrative requirements, notably to obtain licences or authorizations [sic]."<sup>281</sup> State registration requirements vary greatly, from simple notification of intent to do business to "an intense investigation of the applicant." At the mere notification end of the spectrum licensing requires no judgment, but can facilitate information disclosure.<sup>282</sup> At the other

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<sup>279</sup> Some might contend that sex workers already self regulate, pointing to collectives in India and elsewhere. However these collectives mainly advocate on sex workers' behalf against violent customers and intermediaries and also child abuse. They do not appear to exercise any control over condition of work, set standards, etc. I thank Jayne Huckerby for this insight.

<sup>280</sup> See *supra* notes [x] and accompanying text.

<sup>281</sup> Anthony Ogus & Qing Zhang, *Licensing Regimes East and West*, 25 INTL. REV. OF LAW & ECON. 124 (2005) (comparing licensing regimes in developing and developed countries).

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While sellers of higher quality products and services may be motivated to provide relevant information, this may not be reliable, because private legal instruments to verify and enforce the validity of the information are costly to activate. However, there are usually cheaper ways of meeting the problem than subjecting all suppliers to prior quality approval. Information which might have been voluntarily given can be the subject of mandatory disclosure obligations enforced by public agencies and, as has always been observed, certification systems effectively provide this form of regulatory protection.

*Id.*

end of the continuum, the state exercises substantial discretion and scrutiny, which can vary in intensity. Licensing controls also differ in emphasizing entry versus operational systems. Entry licenses typically require “universal scrutiny at the ex ante stage combined with periodical renewal,” while operational licenses impose “selective monitoring at the ex post stage.”<sup>283</sup> Regulators have to decide whether to concentrate administrative resources at the ex ante screening stage, ex post monitoring stage, or both. Finally, failure to comply with licensing requirements can result in administrative and/or financial penalties, or more extreme sanctions including license revocation and/or criminal sanctions.

Some regulatory controls are “general licensing regimes” that apply to all “business entrants.” But licensing systems can be structured to serve different purposes. Standard functions include controlling competition or quality, as is the case with lawyers or doctors, raising revenue, regulating natural monopolies, and ensuring the safety of both workers and consumers through risk control and monitoring. Licensing then can establish highly specific standards for a variety of behaviors, conduct, and interactions. In service markets a standard component for ex ante licensing is to require standardized training and a proficiency test, such as the bar exam or cosmetology test. We could envision that entry license training for sex workers would include at the most basic level safe-sex practices, how to ensure their own security, ethics, hygiene, and perhaps instruction in counseling.<sup>284</sup> Ex post, sex workers would be subject to operational monitoring. Restaurants, saunas, and liquor stores all are subject to ex post scrutiny to manage and ameliorate risk. Some ex post regimes emphasize random checks; others focus on continuing education; still others rely on customer complaints to detect non-compliance. We can imagine that all of these would be at work in sex work: checks on commercial establishments to ensure compliance with safety and hygiene protocols, on-going education for workers, and a robust system of customer complaints. Importantly, as with doctors, therapists, and realtors, licenses can be required of corporate establishments and sole proprietors alike.

Licensing may also have a secondary, collateral effect on sex work—legitimizing it. As suggested earlier, some sex professionals urge that their work is akin to that of professional therapists. Sex work is a profession with a high quotient of human need fulfillment, and sex workers are the last stage in the delivery of that fulfillment. “As sex workers have themselves suggested, one goal would be for prostitution to become a kind of sex therapy, professionalized and no longer stigmatized.”<sup>285</sup> These sentiments

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<sup>283</sup> *Id.* (“on-going standards can be enforced by only ex post entry and then in practice only in response to suspensions, complaints, or some policy of sample monitoring.”).

<sup>284</sup> In contrast, in what Ogus and Zhang call “certification” regimes, “the suitability of actors and their circumstances for engaging in the activity are evaluated, but this is not legally required as a condition for the activity. The system thus functions primarily as a signal of quality to consumers who can choose nevertheless to deal with uncertified suppliers.” Ogus & Zhang, *supra* note [x].

<sup>285</sup> Chancer, *supra* note [x], at 161. Another example is the market for bondage, domination, and sado/masochism, as workers in this erotic sector need to be especially skilled regarding both physical and emotional safety for themselves and their clients. See, e.g., S&M: STUDIES IN DOMINANCE (Thomas Weinberg ed., 1995) (foundational collection of essays from contemporary BDSM theory, examining the history, current theory, norms and practices); PEGGY J. KLEINPLATZ & CHARLES MOSER, SANDOMASOCHISM: POWERFUL PLEASURE (2006); DARREN LANGDRIDGE & MEG BARKER, SAFE, SANE AND CONSENSUAL: CONTEMPORARY PERSPECTIVES ON SANDOMASOCHISM (2007).

envision the legalization of sex work not only legitimizing sex work, but actually unmasking it for the high-status, skill-intensive work it is.

Finally, the licensing approach answers erotic exceptionalists' insistence that sex work should be exempt from state regulatory oversight and subject solely to private legal remedies. Contrary to exceptionalists' libertarian lens, few economic actors are exempt from scrutiny and regulation. More than 1,100 professions and twenty-three percent of American workers require licenses to do their jobs. State-issued licenses govern professions as diverse as florists, realtors, liquor sales, manicurists, shampoo specialists, interior designers, therapists, caterers, contractors, and of course, doctors and lawyers. Anthony Ogus and Qing Zhaung provide a more comprehensive and eclectic list: "ice cream buyers; hair dressers; funeral directors; pet shops; sellers of second-hand cars; tattoo artists; astrologers and fortune-tellers; nuclear installations; consumer credit; tree fellers; sex shops; massage establishments; saunas; motels; milk vendors; zoos; residential care homes; and pawnbrokers" are all areas in which the state licenses market transactions.<sup>286</sup> One can give ice cream to one's guests, style a beau's hair, and allow friends to stay overnight, but commodifying and *selling* these services requires a license and charging for these services without one subjects the violator to civil and possibly criminal penalties. This is consistent with the state's interest in the health and well-being of not only its workers but also consumers. There is no compelling reason to exempt sexual commerce. In fact, it would seem quite odd that a state would require a license to wash hair or arrange flowers, but that those engaged in sexual acts with the potential exchange of body fluids, not to mention the risk of violence, should be exempt.

### 3. A Sex Occupational Safety & Health Agency?

OSHA's struggles to effectively enforce condom usage in California's pornography industry raise a related issue, whether it is feasible and desirable to create a dedicated agency to administer the regulation. Some sex workers themselves endorse such a turn with several organizations urging the creation of separate and discrete agencies and commissions to monitor the industry.<sup>287</sup> Unlike their self-regulation counterparts, they call for OSHA-like regulatory structures that can be attentive to the specificities of sexual labor and empathetic to the concerns of the workers. There are, of course, precedents for such targeted agencies. A classic example is the Mine Safety and Health Act, which

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<sup>286</sup> Ogus & Zhang, *supra* note [x]. Or in the state of Illinois alone: "bowling alleys, circuses and carnivals; amusement arcades; gaming tables and implements; shooting galleries and gun clubs; skating rinks; auctions; florists; liquor outlets; horse drawn vehicles; taxicabs; theatres; sale of tobacco; vendor stands in particular locations; itinerant selling, peddling or soliciting; dwarf-tossing; tour service vehicles; and children's hospitals." *Id.*

<sup>287</sup> The World Charter for Prostitutes' Rights urges, "There should be a committee to insure the protection of the rights of prostitutes and to whom prostitutes can address their complaints. This committee must be comprised of prostitutes and other professionals like lawyers and supporters." World Charter, *supra* note [x], at 184. Exotic dancing organizations largely concur: "Provisions exist under the *Occupational Health and Safety Act* that are relevant to club owners and dancers. The current requirements, however, are often too general to be applied as measurable standards. Public Health Units need to establish specific criteria for what constitutes adequacy or sufficiency under each provision so that dancers and club owners alike know when they have met the standards for occupational health and safety." Exotic Dancing Health and Safety, *supra* note [x]. Whether they envision federal or state regulation is unclear, and perhaps irrelevant, as many of the endorsing organizations are international ones.

regulates mining, an archetypically risky workplace. Mine workers are at high risk of injury and accidental death from both single incidents and long-term hazards such as black-lung disease and other forms of cancer. As noted in Section II, the severe hazards and injuries in mining prompted the first two workers' compensation laws.<sup>288</sup> Decades later, in 1969, seven years after the passage of OSHA, Congress passed the first comprehensive miner safety act.<sup>289</sup> According to the legislative history, "the existence of unsafe and unhealthful conditions and practices in the Nation's coal or other mines is a serious impediment to the future growth of the coal or other mining industry and cannot be tolerated."<sup>290</sup> Federal law carefully details standards for equipment, ventilation, shelters, and training. It also prescribes benefits for making health claims, such as for black lung disease. Importantly, this regulation envisions regulation of both mine operator and mine workers themselves.

Mining presents an interesting case because the work remains intrinsically dangerous and, to many, unpleasant. Despite, or probably because, of this, it is also high paying, relative to other blue-collar work and hence attractive to many. The regulatory strategy for mining has been to ameliorate risk. (Importantly, miners themselves played a key role in gaining these regulatory structures; historically their advocacy groups have not counted exceptionalists among them.) But are professional sex workers likely to be treated like miners? Can we imagine an STD Fund akin to the Black Lung Fund? This raises the next question, of political capital and will.

### *B. Political Feasibility*

Several factors account for the special regulatory attention miners have received. Through-out the twentieth century, when coal was the country's primary source of energy, their labor was perceived as highly valuable. As described in Section II, the nation valorized miners, politically and culturally. Their efforts to assert their rights provoked violent resistance from mining companies and legendary stand-offs, now immortalized in the history of unionization.<sup>291</sup> Importantly, miners were also what feminist scholar Joan Williams has called "ideal workers."<sup>292</sup> As described in Section II, they inspired workers' compensation because they were bread-winning men who

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<sup>288</sup> See *supra* note [x].

<sup>289</sup> Federal Coal Mine Health and Safety Act of 1969 (Coal Act), Pub. L. 91-173; Federal Mine Health and Safety Act of 1977 (Mine Act), 30 USC § 801 et seq., amending the Federal Coal Mine Health and Safety Act of 1969, Pub. L. 91-173.

<sup>290</sup> 30 USC § 801(d).

<sup>291</sup> See, e.g., Philip Taft & Philip Ross, *American Labor Violence: Its Causes, Character, and Outcome*, in THE HISTORY OF VIOLENCE IN AMERICA: A REPORT TO THE NATIONAL COMMISSION ON THE CAUSES AND PREVENTION OF VIOLENCE (Hugh Davis Graham & Ted Robert Gurr eds., 1969), available at <http://www.ditext.com/taft/vio-con.html> (reviewing the history of violence in the unionization movement in the United States, particularly in the mining industry, including Coeur d'Alene, the Colorado Labor Wars, and the Pennsylvania Anthracite Coalfields). See also PRICE V. FISHBACK, "VIOLENCE DURING STRIKES," SOFT COAL, HARD CHOICES: THE ECONOMIC WELFARE OF BITUMINOUS COAL MINERS 1890-1930, 212-220 (1992) (reviewing the use of violence by strikers and management during strikes around the turn of the century); CURTIS SELTZER, FIRE IN THE HOLE: MINERS AND MANAGERS IN THE AMERICAN COAL INDUSTRY (1985) (analyzing labor relations in the coal industry and the role of the United Mine Workers union).

<sup>292</sup> JOAN C. WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 5 (2001).

performed crucial labor for the economy, whose workplace deaths left economically devastated families.<sup>293</sup> In addition, during the heyday of mining, its substantial environmental costs were not widely perceived. In other words, the substantial externalities mining imposes remained largely invisible. All of this translated into political influence.<sup>294</sup> Of course, MSHA was not a palliative. Miners continue to struggle against both corruption and lack of enforcement, and several recent disasters demonstrate how such dedicated agencies can be even more susceptible to industry capture.<sup>295</sup> In sum, MSHA can be understood as a product of miners' substantial, if contested, political influence.

The analogy to mining, an archetypically risky form of labor, and one that has enjoyed substantial, if not completely effective, regulation, is helpful in thinking about the political feasibility of regulating sex work. While mining may be an iconic form of labor, it is less clear that most Americans view sex work as of similar social value. To the contrary, sex work occurs against the strong gravitational pull of marriage and the firm entrenchment of sex as a non-market private sphere set of relations. Prostitution has long been cast as a threat to the companionate model of marriage that arose in the late eighteenth century. Today's critiques have hardly changed in tenor or fervor, with feminists and social conservatives alike condemning prostitution as threatening "family values."<sup>296</sup> Thus, in today's nominally sexually "enlightened" era, no less than in

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<sup>293</sup> "A workingman free to be injured at work was a workingman at risk of not being able to support his wife and children. Industrial accidents thus undid free labor's distinction between home and work. Like slavery, injuries to male wage earners threw women and children into the labor market and broke up previously intact families." WITT, *supra* note [x], at 130.

<sup>294</sup> See also Robert H. Stropp, Jr., *Walkaround Rights for Miners' Representatives Under MSHA: A Compatible Statutory Scheme*, 96 W. VA. L. REV. 795 (1994).

<sup>295</sup> This year the deadliest mining disaster in forty years killed 29 workers at Massey Energy's Upper Big Branch Mine killed. Investigations uncovered systematic violation and concealment of lethal health and safety violations, including two sets of books, one for mine managers and one for MSHA inspectors. In the wake of this political maelstrom, Don Blankenship, CEO of the Massey Mines, was forced to resign. "In 2007, MSHA established the Office of Accountability in order to provide better oversight of MSHA's enforcement programs." However, investigations of the 2012 Upper Big Branch disaster concluded that "MSHA failed to use its toughest enforcement tools at the mine before the explosion."

<http://www.npr.org/blogs/thetwo-way/2011/06/16/137213027/still-no-criminal-charges-in-2007-utah-mine-disaster>; Howard Berkes, West Virginia Prosecutor Defends Long Mine Disaster Investigation, *The Two Way: NPR's News Blog*, Oct. 28, 2011, available at <http://www.npr.org/blogs/thetwo-way/2011/10/28/141794861/west-virginia-prosecutor-defends-long-mine-disaster-investigation>; Justice for Upper Big Branch, *NY Times*, A24, Feb. 28, 2012, available at [http://www.nytimes.com/2012/02/28/opinion/justice-for-upper-big-branch.html?\\_r=1&ref=donlblankenship](http://www.nytimes.com/2012/02/28/opinion/justice-for-upper-big-branch.html?_r=1&ref=donlblankenship); Office of Accountability Audits, Mine Safety and Health Administration, available at <http://www.msha.gov/readroom/FOIA/AccountabilityAudits/AccountabilityAudits.asp>.

<sup>296</sup> Both for instance criticized former New York governor Eliot Spitzer for wronging his wife. See, e.g., Joanna Grossman & Linda McClain, *Eliot Spitzer's Fall from Grace: Reflections from a Feminist Perspective*, Findlaw.com, 18 Mar. 2008, available at <http://writ.lp.findlaw.com/grossman/20080318.html> (summarizing coverage of Spitzer prostitution scandal and unifying disparate feminist responses through lens of disgust); Bill O'Reilly, *New York Governor Eliot Spitzer in Big Trouble*, FoxNews.com, 11 Mar. 2008, available at <http://www.foxnews.com/story/2008/03/11/new-york-governor-eliot-spitzer-in-big-trouble/> (bemoaning damage to Spitzer's family). More recently, Maureen Dowd condemned disgraced Congressman Anthony Weiner, claiming his behavior was "creepy and compulsive." Although Anthony Weiner's scandal did not involve prostitution, Maureen Dowd consolidated them all together as emblematic

Victorian times, many view prostitution as a threat to marriage and that institution's role in preserving the social order, or, from a more feminist lens, the possibility of marriage as a site of gender egalitarianism.<sup>297</sup> In stark contrast, most workers labor firmly in the so-called public sphere and do not have to do so against this powerful gravitational pull.

In addition, sex professionals are viewed in many ways as the opposite of Williams' ideal worker. People find it difficult to envision prostitutes as workers with families, let alone as the primary bread-winner, which many of them are. To the contrary, as just described, prostitutes are viewed as threatening to families. Much political and cultural work would need to be done for the public to perceive prostitution as work that supports, rather than threatens, families. In sum, unlike miners and other iconic workers, sex professionals have notoriously low political capital.<sup>298</sup>

### C. Endowments

Endowments are another factor in predicting the political will to regulate sex work. The controversy over condom mandates in the pornography industry, a long-standing legal sex market, manifests the difficulty in administering a regulatory regime for sex markets. On the other hand, the opposite might be true. Institutional endowments form differently in legal versus illegal markets. A frequent effect of decriminalization is to disrupt endowments that have become entrenched in the shadow of illegality. In fact, decriminalization is often urged precisely to disrupt these interests, as evidenced in instances as diverse as the legalization of alcohol, gambling, and emerging legal markets for marijuana. In sex markets, part of pimps' power over prostitutes comes from the former's close and complex relationships with law enforcement institutions.<sup>299</sup> Prostitution then might actually be *easier* to regulate than pornography because the current institutional endowments will be disrupted, and it will take some time for them to re-form and re-organize in the legal economy. Thus, it is unclear how current endowments would transform in legalized markets for sexual labor.

### D. Substitution Effects

Of course, there are limits to regulation. Equally important are its unintended effects. Contrasting regulation of mining and pornography sheds light on real restraints and limits. Recall that the pornography industry easily threatened to leave collectively

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of powerful politicians who are "marrying up and dating down," a fascinating class-biased articulation of the injury to their wives. *Id.*

<sup>297</sup> Of course others contend that prostitution *preserves* marriages by giving husbands' presumed greater sexual appetites a market outlet. *See infra* notes [x]. Dan Savage has recently updated this claim, encouraging sexual accommodations if one's partner desires more or a different kind of sex than one does. <http://www.colbertnation.com/the-colbert-report-videos/391692/july-12/2011/dan-savage> .

<sup>298</sup> Levitt and Dubner observe that "[U]nlike the sugar and steel industries, [prostitution] holds little sway in Washington's corridors of power—despite, it should be said, its many, many connections with men of high government office. This explains why the industries fortunes have been so badly buffeted by the naked winds of the free market." LEVITT & DUBNER, *supra* note [x], at 31-32.

<sup>299</sup> *See also* LEVITT & DUBNER, *supra* note [x], at 40-41 (discussing negotiations between pimps and police).

relocate the business out of California.<sup>300</sup> Sex work comprises a labor sector that is highly susceptible to substitution effects. That is, as the costs of operating a legal business increase, employers, workers, and customers migrate, or substitute, to illegal, underground economies. In economic language, changing the cost structure of a market produces an equilibrium response. Classic examples include markets for house-keeping and yard work. Workers in these sectors self-sort into four markets. They can work for a legal company, independently and legally, independently “underground,” or underground for a company. Workers opt for underground labor for a variety of reasons. Of course some do not have a choice, *i.e.*, they may lack the paperwork for legal labor, face structural discrimination, or are coerced into illegal markets. Others, though, are enticed into illegal labor by autonomy, convenience, or “wedge” effects, *i.e.*, a substantial difference between the amount the employer pays into the system and the amount the worker receives.

Market sectors that are either capital intensive and/or require a fixed business site have the lowest substitution effects. For instance, a manufacturing plant cannot easily go “underground.” Similarly, restaurants must operate out of a specific site. This lack of mobility means they cannot easily evade inspection.<sup>301</sup> (Of course, with manufacturing, there is a different substitution effect at work, outsourcing to a different, less regulated jurisdiction, whether domestic or foreign. However, outsourcing exchanges one legal regime for another; it does not go completely underground.) Arguably, one of the reasons that mining can be so heavily regulated is that it is unsusceptible to substitution effects. It is *both* capital intensive and site specific. Mining companies must be situated where the natural resources are located. In addition, they invest heavily and, unlike manufacturing, cannot outsource the work.

Sex work would seem to be the opposite of mining. Sex work requires neither a high investment of conventional capital nor does much of it require a fixed business site. Dance clubs and brothels can be run out of almost any space, and the work itself is highly mobile, as evidenced by its appearance in streets and cars. Thus, like housekeeping, yard work, and drug dealing, sex work is highly susceptible to substitution effects. This generates a concern that if decriminalized and *then regulated*, sex work would remain in the underground economy.

My gamble, though, is that because much sex work already *is* illegal, the effects would flow the other way. Instead of people fleeing the legal sector for the illegal one, we are trying to induce people to move out of the underground economy to the legal one. At least some owners, workers, and customers, I am betting, would prefer the lower risk and lesser stigmatization of a legal market, as opposed to an illegal one. While it is undoubtedly true that the more regulations that are imposed, the less illegal work will “substitute up” to legal markets, it is also the case that some who currently opt out of professional sex because of the criminal and other risks would almost certainly be drawn into a decriminalized, legalized, fully regulated market.

Importantly, there is also substitution between different sectors of sex markets, *e.g.*, incall, outcall, and street prostitution (or in dancing, club versus outcall).<sup>302</sup> There is an

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<sup>300</sup> [insert cite]

<sup>301</sup> Pop up restaurants, “underground restaurants,” and trucks are the exceptions and pose regulatory challenges for just these reasons.

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interesting divide within the sex work industry. In the case of prostitution, some workers seem to value community, predictability, and safety and choose to work in brothels. Others, though, place a premium on autonomy, discretion, and privacy, and prefer incall or outcall work. As described above, many incall and outcall prostitutes are drawn to the work precisely because of the relative autonomy compared to other options. A similar dynamic is at work in dance markets. All of this should be taken into account as regulators try to establish equilibrium, both between legal and illegal markets and among sex markets.

#### D. Summary

In sum, contrary to invocations of professional sex as “just work,” the political feasibility calculus turns on several factors. Important questions include whether a regulatory regime would be best administered by federal, state, or local law, or industry self-regulation, and whether a dedicated agency is possible or desirable. Political will also needs to be considered, which entails a variety of issues, including public perception of sex work and sex professionals, the gravitational pull of marriage and the relegation of sex to the private sphere, and the management of externalities and spill-over effects. Policy must take account of endowments, too, and how these may transform and affect regulatory efficacy. Finally, substitution effects demonstrate that not all work can be regulated to the same degree of efficacy. Sex work may be a classic instance in which there is a highly elastic trade-off between regulation and substitution. Thus, all work can be regulated, but, because of administrability concerns, political will, and substitution effects, not all work can be regulated to the same degree.

### CONCLUSION

Sex work advocates claim that it is “just work” to great rhetorical effect—to normalize sex for hire, decriminalize it, destigmatize it, de-exceptionalize it, and, in the case of legalization advocates, entitle its workers to basic labor protections. Much of this scholarship and activism is insightful and has moved the debate over markets for sex out of mere moralizing and into a substantial policy and legal debate. Yet the rhetoric of sex as “just” work elides, obscures, and confuses issues raised by legal markets for sex.

This paper has made two arguments about the debate over explicitly commodified sex. The first argument is a conceptual one—that the emphasis on the sex work debate between abolitionists and sex work advocates has hindered serious grappling with the question of whether sex work could be governed and regulated consistent with liberal goals of protecting workers within well-functioning, minimally exploitative markets. This Article has teased out different strands within the pro-sex work camp in order to showcase some latent contradictions and also test some regulatory hypotheses. Both

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Experience suggests that if brothels are closed street prostitution and escort services become more popular. Thus, as a practical matter, the question is whether we prefer street prostitution and escort services to brothels. Street prostitution raises the most serious risks of violence, sexually transmitted disease, and offence to community sensibility and public life. Thus, the Inquiry recommended that prohibitions on street solicitation be retained, but within a context that allowed alternative means of negotiating commercial sex relations.

Law, *supra* note [x].

erotic exceptionalists and assimilationists want to legitimize professional sex and reduce workers' vulnerability. Yet they could not be more opposed in the regulatory end-states they envision. Erotic exceptionalists call for a radically non-interventionist approach to sexual labor, stressing that it should not be treated any differently than non-market sex with the latter's attendant protections from state interference. In stark contrast, assimilationists want to do just that, assimilate or integrate sex work into the existing regulatory employment regime. They envision a thick set of rules that will actively intervene in the worker/employer *and* worker/customer relationships.

The Article's second argument is a set of governance moves. By casting sex work as like any other labor, assimilationists anticipate a array of effects, including normalizing and legitimizing the work, changing endowments through enforceability, and accessing legal regulation to ameliorate some of the worst aspects of contemporary sex markets. From a harm reduction perspective, assimilationism is a persuasive and tempting rubric; sex workers truly are a vulnerable population. But is the sex worksite really like the factory floor? This paper has contended the answer is no. That for all of its good intentions, at bottom assimilationism misunderstands work, sex work, and the regulation of both. And yet, the assimilationist claim is revelatory—about both the discourse and the regulation of commercial sex.

Assimilationism is deeply essentialist. It invokes a monolithic workplace that is governed by a uniform and universal set of rules. At the same time, assimilationist discourse essentializes professional sex itself into a singular form of work. Assimilationists anticipate that once sex work is legitimated it will be integrated into the universal regulatory regime they imagine, without need for attention to the particularities of sexual labor. This Article has demonstrated how assimilationist claims are first, miscues from regulatory realities and second, bound to be unhelpful if not actively harmful to the cause of legitimizing and protecting sex workers.

Contrary to the assimilationist discourse, workplaces and work are extraordinarily diverse and subject to varying and differential regulation. Some workers have decent protections from workplace hazards, while others, including those who labor in some of the riskiest workplaces, struggle for protection. Workplace violence remains almost universally under-regulated; yet even within that bleak regulatory landscape some workers enjoy more protections than others. Finally, employment discrimination remains contested terrain. Employers continually recast verboten discriminatory forms in new ways, sometimes with success. Age, sex, disability, and race are treated differently, with bfoq exemptions formally permitted for some but not others. And even in those areas that formally ban bfoq's, commentators have observed implied ones at work. The Article has demonstrated that the assimilationist claim misses the point. The question is not whether sex can be legitimate work, but, rather, what kind of work will it be considered?

Equally importantly, the assimilationist claim fails to grapple with the distinctive characteristics and challenges commercial sex poses for labor regulation. Sex workplaces differ not only from non-sexual ones, but also, crucially, from each other. Only by taking account of the particularities individual of sex workplaces—both institutional form, or sexual geography, and the preferences that comprise the markets—can meaningful and effective regulation be crafted. Finally, regulation is neither natural nor inevitable, but deeply political and instrumentalist. Many factors will influence the political calculus that will determine whether and how sex work will be regulated.

Yet the paper does not then fully concede the pro-sex work terrain to erotic exceptionalists. At bottom, erotic exceptionalists argue that commercial sex work should be viewed as legitimate labor, but that it should not be subject to any more restrictions or regulations than is non-market sex. Given the range of commodified activity currently regulated—florists, tattooists, astrologers, lawyers—there is no defensible way to exempt professional sex. The activity poses risks to both workers and consumers, and those risks—of disease, violence, and emotional trauma—warrant regulatory attention no less than does providing massages or spa services. People are free to engage in non-commodified sexual activity free from state intervention, but sex, like many other activities, becomes a different case when explicitly commodified. In the end, erotic exceptionalists undermine their own cause. To call it work and then insist on exempting it from the labor regulation that characterizes the modern democratic workplace is assuredly a strategy designed to fail. If its sexual nature exempts it from regulation then people will certainly call it sex, and not work. And fairly so.

Many will believe that this paper is unrealistic, utopian even, in believing that sex work could ever be regulated effectively. They will make the persuasive case that changing such longstanding entrenched norms is impossible. Yet, other feminist regulatory efforts suggest some cause for optimism. Consider sexual harassment; thirty years ago skeptics believed it impossible to get people to stop pinching their co-workers' bottoms or linking sex to terms and conditions of employment. Skeptics similarly expressed doubt about law's capacity to bring domestic violence or marital rape within the regulatory imagination. Yet in each of these instances feminism aligned with law to effect massive cultural shifts, not ending any of this behavior, but reconstruing it as outlier behavior and the object of both legal and cultural reprobation.

This Article is a first step—an effort to jumpstart “second-generation” questions in sex work debates, that is, to move beyond the abolition/advocacy stand off to consider whether and how sex work could be effectively regulated.<sup>303</sup>

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<sup>303</sup> Samuel Brunson characterizes his work and my own on polygamy as second generation questions. Samuel D. Brunson, *Taxing Polygamy: Married Filing Jointly (and Severally?)*, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1941860](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1941860). See also Davis, *Regulating Polygamy*, *supra* note [x] (defeating dominant analogy between polygamy and same-sex marriage and using commercial partnership law to consider whether and how polygamy could be regulated on its own terms.)