

Prostitution - A feminist jurisprudential perspective

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Belinda Cheney examines the reasons for prostitution, and then sets it within conservative, liberal, and feminist perspectives. She argues that a feminist perspective presents a challenge to generally received perceptions of the problem of prostitution, but concedes that little work has been done by feminists to address prostitution as such. After examining the current law, she makes a case for both legal and social-economic reform, concluding that Christine Littleton's philosophy of "equality as acceptance" provides the best theoretical framework for these reforms.

I. INTRODUCTION

Prostitution is not openly discussed in our society, but few New Zealanders can pretend it does not exist. We see obvious "red light" signs of prostitution after dark on Vivian Street in Wellington and Karangahape Road in Auckland. We are implicitly aware that massage and sauna parlours offer more than steam baths and spas. A glance at the Wellington Area Yellow Pages reveals:¹

the parlour that offers plush, tasteful surroundings, a wonderful intimate atmosphere and friendly, really pretty ladies giving massages you'll just love; our promise you'll leave happy. The girls are also happy to visit you in your hotel or motel room.

Temptations abound. New Zealand caters for the full range. Men in every socio-economic stratum can find "company" if visiting or residing in New Zealand. In Wellington, ship girls can be seen on wharves when vessels arrive in port. Street walkers can be found in the known "sex" streets. Massage parlours proliferate, and of a number in Wellington only one does not appear to offer sexual services. Escort agency advertisements can be found in magazines, visitors' guide books and in some telephone directories. Prostitutes can be found in upmarket hotel cocktail bars if the management will tolerate them. Exclusive invitation only clubs can be attended where "hostesses" cater to every whim of the patrons.²

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1 Wellington Yellow Pages Telephone Directory (Government Printer, Wellington, 1987) 714.

2 This information is from Jan Robinson's research, *The Dominion* (Wellington) 21 July 1986. Also from my interview with Detective Sergeant Steve Waters, formerly of the Wellington Vice Squad, and with Nina, a Wellington prostitute.

"Yes gentlemen, we cater for your every need ... and due to the law and social stigma attached to prostitution, discretion is assured." To a very large extent the clients are male. There appears to be little, if any, evidence of women in New Zealand seeking the services of prostitutes. There are nevertheless some male prostitutes - some of whom are transvestite, others of whom service homosexual men. However, the vast majority of prostitutes are women and the clients are male. Prostitutes, like their clients, come from all walks of life. There is a wide range of ages, family backgrounds and educational qualifications.³ Clients, while having similarly diverse backgrounds, tend to be married men between the ages of 30-55 years.⁴ They appear to come to prostitutes for a variety of reasons - because their marital sexual relations are unsatisfactory; because their wives will not do as they wish; or because they want sex without commitment. Whatever one's personal stance on this issue of prostitution, its continued existence and relatively static demand and supply over centuries must tell us something about our society and about the relations between men and women in society.

Different groups of people have different views on what prostitution tells us and what should be done about it. In this paper, I propose to explain why women enter prostitution, describe what this tells us about society from a feminist perspective, then tackle the question of the law. Conservatives and liberals differ from each other and from feminists in their perception of the role of the law in the area of prostitution. I will attempt to explain their views before specifically describing the law and then concluding that it is unsatisfactory to all concerned. At this stage, the situation looks depressing, but hope in the form of legislative and social reform programmes is at hand. These look even more positive when placed in a feminist context that sees in the future an answer to many of the problems confronting us today.

II. WHY WOMEN BECOME PROSTITUTES - THE FACTS OF STREET LIFE

Not so long ago it was thought that women who became prostitutes did so because they were mentally deficient nymphomaniacs who were not mature enough to face the life society expected of them - as wives and mothers. Many psychoanalytical theories were developed to explain why women would sell their bodies for money rather than give them for love.⁵ First, the women have to be mentally abnormal and to have lost all sense of identity. Secondly, they are likely to fear sexual intimacy with men in any "normal" sense. Thirdly, and best of all, in good Freudian terms, the women have never progressed beyond the childhood stage of sexually loving their fathers to the adult stage of non-erotic love.

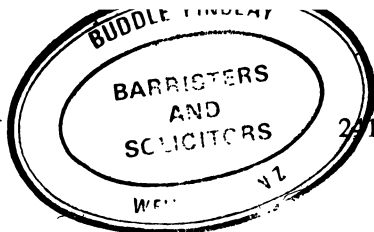
The client, the "strange man" who pays for her favours is the deteriorated image of her father; at the same time, [she] registers her violently jealous disapproval of her mother's marriage by, as it were, debasing her own feminine currency.⁶

3 Lewis Diana *The Prostitute and Her Clients* (U.S., 1985) 43-77.

4 *Ibid.*, 180-196. See also *supra* n.2, and *infra* n.8.

5 Edward Glover *The Psycho-Pathology of Prostitution* (2ed., I.S.T.D., London, 1957).

6 B.J. George "Legal, Medical and Psychiatric Considerations in the Control of Prostitution" (1962) 60 *Mich.L.Rev.* 712, 750.



Economic and other practical explanations as to why women become prostitutes were either ignored or explicitly rejected. The 1957 Wolfenden Committee Report on Homosexual Offences and Prostitution stated:⁷

... we believe that whatever may have been the case in the past, in these days, in this country at any rate, economic factors cannot account for it to any large or decisive extent. ... Our impression is that the great majority of prostitutes are women whose psychological make-up is such that they choose this life because they find it a style of living which is to them easier, freer and more profitable than would be provided by any other occupation.

The Committee believed that women, due to the economic prosperity of Britain in the 1950s, could not have had an economic need driving them to prostitution. Rather, the Committee suggested a psychological need attributable to the abnormal and deviant make-up of prostitutes differentiating them from their good and pure sisters. This reasoning, that a psychological need rather than an economic need leads prostitutes to this more profitable life, is, it is suggested, defective, as are a number of the Committee's underlying assumptions. It assumes that prostitutes must be deranged to seek an easy, free and profitable life when the doors are open to a harder, controlled and profitless life as a factory worker, shop assistant or perhaps wife and mother. Women who labour "decently" or for love, who have sex to please their husbands and have children to populate England are rewarded by the applause of society. They are awarded a "normal" badge. Prostitutes who seek material rewards for their work are condemned by society. They are given an "abnormal" badge.

More recent explanations of prostitution have been more pragmatic. The Canadian and New South Wales Committees which investigated and reported on prostitution both cited economic factors as the overwhelming motivating force for women entering into prostitution.⁸ The New South Wales Report cites an investigation conducted by Roberta Perkins into the reasons for women entering prostitution.⁹ An overwhelming majority of the women (97%) stated that their reasons for entering prostitution were purely economic. The majority claimed that their decision to enter prostitution had, at the time, been a matter of sheer survival. 44% of the women surveyed had children living with them and appeared to be solely responsible for them. Perkins concluded that the presence of dependent children was an important reason for the women remaining in prostitution.

- 7 Great Britain Home Office and Scottish Home Department Committee on Homosexual Offences and Prostitution Report (H.M.S.O., London, 1957), (Referred to as the Wolfenden Report after its Chairman, Sir John Wolfenden).
- 8 Report of the Special Committee on Pornography and Prostitution, Canada, 1983; (referred to as the Fraser Report). Select Committee of the Legislative Assembly upon Prostitution, N.S.W., 130-136.
- 9 Roberta Perkins *Female Prostitution in Sydney I & II* (Australia, 1983) 25,27. Roberta Perkins was a founding member of the Australian Prostitutes' Collective, and conducted surveys of Sydney prostitutes. The preliminary findings of her surveys were made available to the Committee.

It had been proved that women suffer far more severe economic hardship than men upon the dissolution of marriages and de facto relationships. In a California survey, for instance, it was found that while *male* ex-spouses' standard of living increased by a factor of 43%, *female* ex-spouses' standard of living fell by a factor of 73%.¹⁰ Usually, the women are left with the children and must cope in the face of severe economic disadvantages. Property division upon dissolution of established relationship shows the courts' willingness to enforce the ideal of equality between the sexes but the judges do not take into consideration the services of the non-earner spouse (usually the women) to be performed after dissolution.¹¹ It is ironic that the cause of these unfortunate statistics is the courts' preparedness to implement equality in this one area. It is not surprising then that one sociologist has concluded:¹²

While poverty now wears a younger face, it continues to wear a female face. Income units headed by women comprise one quarter of all income units in poverty. One half of women-headed single parent families and one quarter of single women are living in poverty.

The economic plight experienced by women overseas appears to be shared by New Zealand women.¹³

Implicit in any discussion of women's relative economic plight is the fact that women are concentrated in relatively low-paid sales, services and clerical positions, many of which are part-time. The March 1987 Labour and Employment Gazette Figures reveal that the average weekly wage of women working in paid employment is \$337.52 while for men it is \$465.94. More telling still is the fact that women are seldom in the upper income brackets. In 1985, 3,927 men and 210 women civil servants received an annual salary of \$30,000 or more.¹⁴ However, many women are not in paid employment at all. A recent New Zealand Woman's Weekly article¹⁵ stated that 90% of married women not in paid employment never have any say in family finances or see the money - bar a housekeeping allowance. They have to ask their husbands for money if they want to purchase anything.

Prostitution, in most countries, is the only occupation in which women can earn, on average, more than men. Few occupations offer, particularly to women, a net income of \$50,000 or more. Prostitution also offers relative job autonomy. The women work for

- 10 Lenore J. Weitzman "The Economics of Divorce" (1980) 28 U.C.L.A. Law Rev. 1181.
- 11 Christine A. Littleton "Reconstructing Sexual Equality", unpublished article, U.C.L.A. School of Law, June 1986, 88-89. [This paper has been published in (1987) 75 Calif. L.J. 1279 - Ed.]
- 12 B. Cass "The Changing Face of Poverty in Australia: 1972-1982", a paper delivered at a Continuing Education Seminar in the Department of Social Work, University of Sydney, 1984.
- 13 *New Zealand Women's Weekly*, Auckland, June 29 1987, 60.
- 14 Figures supplied by the Ministry of Women's Affairs.
- 15 *New Zealand Women's Weekly*, Auckland, June 29 1987, 60.

themselves and take most, if not all, of the money for themselves and they do not pay income tax. Unlike their overseas counterparts, New Zealand prostitutes do not appear to have pimps and if they work in massage parlours all money for "extras" is their own. This economic autonomy is more questionable in an escort agency situation, but even so the women are paid for the services they perform and the agency only takes an "introduction" fee. It is estimated that most street and massage parlour workers earn in excess of \$1,000 per week although this will be reduced during the Christmas vacation period when clients are holidaying with their families.¹⁶

Prostitution also offers flexibility in respect of working hours which other jobs do not. When there are so few good child care options available to New Zealand women working in paid employment, this flexibility of working hours is an attraction for women with dependent children.

Another very important cause of women choosing to become prostitutes is the socialization of women who are brought up to believe that their bodies are their only valued asset. There is an alarming correlation between incest and assault on young girls and women and their later involvement in prostitution. Although there are no official New Zealand figures on this, the Canadian and American statistics show that around 75% of prostitutes have been the victims of sexual abuse.¹⁷ These figures are borne out by New Zealand research, although not officially documented.¹⁸ As Jan Robinson, a Wellington researcher, states:¹⁹

Sexual abuse by a family member is a very direct powerful way of teaching a young girl that her only value resides in her body.

Unfortunately, many women, not only prostitutes, see their only value as residing in their bodies. While some women deal with this by trading their bodies for the security that a marriage contract offers, others trade their bodies for money to live on. Society teaches women this self image, reinforcing it daily through the media and social institutions, yet society recoils from the undesirable results. As Elizabeth Fry says:²⁰

A society that continues to define women as sexual objects and allows men to act as if women are fit to be the recipients of male aggression cannot be surprised when women accept that definition of themselves and market themselves as a commodity when their own limited resources fail.

No woman is proud to think consciously of herself as a marketable commodity yet subconsciously she has been taught that that is what she is.

16 Supra n. 2.

17 Jillian Riddington and Barb Findlay "Prostitution: The Visible Bargain" Broadsheet, 20-24; Gail Sheehy *Hustling: Prostitution in our Wide Open Society* (New York, 1971).

18 Supra n. 2.

19 Jan Robinson, Draft Chapter on Prostitution, for *Public and Private World: Women in Contemporary New Zealand* (eds. S. Cox and B. James) (forthcoming).

20 Fraser Report, supra n. 8, 351.

Prostitutes are as aware of these facts as other women. Few prostitutes enjoy their "job" and most know that their occupation is derogatory of them. One prostitute comments as follows:²¹

The worst part about prostitution is that you're obliged not to sell sex only, but your humanity. That's the worst part of it: that what you're selling is your human dignity. Not really so much in bed, but in accepting the agreement to become a bought person.

This woman is very aware that she is exploited but she does not suggest by whom she is exploited.

III. THE "EXPLOITED" HOOKER'S POINT OF VIEW - A FEMINIST APPROACH

Arguably few women have escaped prostituting themselves for a dinner, a present, for love or for security. The prostitute is really at the extreme end of a continuum few women ever escape. We have all grown up in a male-dominated society in which men define women's assets as residing in their sexuality to a greater or lesser extent. The prostitute suffers for this in a particular way. I submit that prostitutes are exploited by a society that treats women as second class citizens fit to be recipients of men's domination and exploitation. Prostitutes are prosecuted for soliciting in a way "respectable women" who flirt are not. They are prosecuted for running a brothel if they take money for sex in a way "respectable women" who have sex in their homes are not. Their mistake, their punishable mistake, is that they get paid for work women are supposed to do as part of their "duty". Women are supposed to have sex for love, not money.²²

The problem however is not in accepting money for sex. The problem lies in the unequal sexual construction which operates in society. Society says it is wrong to take money for sex yet offers many women no viable alternative bar marriage - which radical feminists identify as a variation on the same theme. Our society is built around a sexual class system which frustrates the legitimate aspirations of half the population for economic, social and sexual freedom. It creates a demand for prostitution, then punishes the suppliers.

Prostitution must be seen in its broadest context. If we accept that the prostitute is exploited and there needs to be an end to this exploitation, the prostitute's exploitation must be seen in the context of the exploitation experienced by all women. The status of

21 Comment by a prostitute quoted in Kate Millett *The Prostitution Papers* (U.S., 1976), 84.

22 Frances Olsen "The Stigma of Money", unpublished article presented at the National Conference on Women and Law, Chicago, Illinois, March 22 1986.

women in society, politically, economically and socially, is far from satisfactory and much needs to be done to erode the innate sexism that pervades all spheres of our lives. Male dominance in the social hierarchy depends on the continued definition of women as sexually valuable exchange commodities who are not yet accorded a more equitable status.²³ Unfortunately, the law seems instrumental in the oppression of women as it identifies itself with maleness and masculine values and is intolerant of the abilities and values of women.²⁴

For centuries,²⁵ perhaps since the time of Plato,²⁶ people have structured their thinking around a complex series of dualisms. Frances Olsen examines a number of these dualisms or opposing pairs: rational/irrational; active/passive; thought/feeling; reason/emotion; culture/nature; power/sensitivity; objective/subjective; abstract/contextualized; principled/personalized.²⁷ These dualistic pairs divide things into contrasting spheres or polar opposites. Olsen identifies three characteristics inherent in the dualisms. First, they are sexualized in that one half of each dualism is considered or identified as masculine, while the other half is feminine. Thus men are seen as rational, active, reasoning, powerful, objective, etc, while women are seen as irrational, passive, emotional, sensitive, subjective, etc. Secondly, the terms of the dualisms are not equal, but are thought to constitute a hierarchy. The male side of the dualisms is identified as superior, the female inferior. Thirdly, law is identified with the "male" side of the dualisms. Law, like men, is supposed to be rational, objective, abstract and principled.

Yet the hierarchization of the dualisms appears to be obscured in relation to women. Men have oppressed and exploited women on the basis of their inferiority in the real and public world, yet placed them on a pedestal and treasured those "inferior" qualities in a fantasy or domestic world. Men simultaneously exalt and degrade women and the concepts which represent the "feminine" side of the dualisms. Law, identified with maleness and traditionally controlled by men, reflects this contradictory attitude. The law may simultaneously condemn and protect women. Women's reproductive and child-bearing and nurturing capacity is a prime example of a feminine trait used to condemn

- 23 See Janet Rifkin "Toward a Theory of Law and Patriarchy" (1980) 3 *Harvard Women's Law Journal*; and Diane Polan "Toward a Theory of Law and Patriarchy", in *The Politics of Law - A Progressive Critique* ed. David Kairys (New York, Pantheon, 1982).
- 24 See J.C. Smith "The Sword and Shield of Perseus: Some Mythological Dimensions of the Law" (1983) 6 *International Journal of Law and Psychiatry* 235-261; and "Gods and Goddesses of the Quadrant: Some Further Thoughts on the Mythological Dimensions of the Law" (1984) 7 *International Journal of Law and Psychiatry* 219-247.
- 25 See T. Hobbes *Leviathan* (1651 ed., Oxford, Clarendon Press, 1943); J. Locke *The Second Treatise of Government* (P. Laslett ed., Cambridge U.P., 1967); J.S. Mill "The Subjection of Women" in J.S. Mill and H.T. Mill *Essays on Sex Equality* (A. Ross ed., Univ. of Chicago Press, 1970) 125.
- 26 For a discussion of Plato's dualistic thought, see J. Clegg *The Structure of Plato's Philosophy* (Bucknell U.P., Lewisburg, 1977) 18, 100-1, 188-91.
- 27 Frances Olsen "Feminism and Critical Legal Theory: An American Perspective", unpublished paper, 1985.

(or discriminate against) women and to protect them in a paternalistic sense at the same time. Women's ability to become pregnant has been seen as a reason for keeping them out of the workforce or for restricting their hours in paid employment "for their own good". The following quote illustrates the way judges have used pregnancy to justify unequal treatment of men and women.²⁸

The paramount destiny and mission of women are to fulfil the noble and benign offices of wife and mother. This is the law of the creator. And the rules of civil society must be adapted to the general constitution of things.

More recent examples of this are the American decisions in *Geduldig v. Aiello*²⁹ and *Gilbert v. General Electric*³⁰, of which Christine Littleton says:³¹

The Supreme Court announced, apparently with a straight face, that singling out pregnancy, and only pregnancy, for disadvantageous treatment was not discrimination on the basis of sex.

Prostitution, however, holds a unique position in a feminist analysis of the law because prostitutes, by virtue of their work, challenge many of the basic assumptions inherent in the dualisms identified by Olsen. If "normal" women are seen by men and the law as irrational, passive, feeling, emotional, sensitive and personalized both in their domestic and working lives it is hard to explain prostitutes' lives in terms of the feminine dualisms. Prostitutes have the same basic resources as other women by virtue of their "womanhood". However, rather than hiring out their sexuality and caring selves long-term as wives and mothers or as secretaries, nurses, or in other gender stereotyped employment, prostitutes hire themselves out short term in a rational, active, unemotional and seemingly insensitive way. Prostitutes use for profit what other women use for love and applause. A prostitute is simultaneously condemned for using her essential "womanhood" and for using it in a male way. She plays the same game "normal" women play but by different rules - which very unfairly invokes the wrath of good citizens and the law. As one woman writer says:³²

The smug stupidity with which people are accustomed to discuss [prostitution] is fairly outrageous: the victim, the prostitute, rather than the institution that victimizes her, is condemned ... As the causes of female prostitution lie in the economic position of women, together with the psychological damage inflicted upon them through the system of sex-role conditioning in patriarchal society, this conventional satisfaction with the prostitutes' fate is not only unjust, but simplistic.

People are too often willing to condemn without asking why the problem is there. In this case, prostitution is but one manifestation of women's unequal and therefore disadvantaged position.

28 *Bradwell v. Illinois* (1873) 83 U.S. (16 Wall.) 130, 141.

29 (1974) 417 U.S. 484.

30 (1976) 429 U.S. 125.

31 *Supra* n. 11, 39.

32 *Supra* n.21.

Feminists do not provide an easy solution. The majority of feminists have not written anything about prostitution. They have been too busy focussing on problems in the daily life of "normal" women such as economic disadvantages in employment, rape and abortion. The feminists who have addressed the issue of prostitution have been divided. Some believe, along with more conservative theorists, that the laws ought to be tightened which feminists hope would end the exploitation of women. Other feminists, adopting more liberal ideas, believe adult women should be free to choose what they do.

IV. ON THE STREET/IN THE BEDROOM - A PUBLIC/PRIVATE SPHERES ANALYSIS

The public/private dualism has provided a fertile source of debate for feminists, conservatives and liberals. The public sphere is usually associated with the communal world of work and politics; the private sphere encompasses the personal or domestic worlds of individuals and their families. The debate focuses on the appropriateness of the law interfering in these areas, particularly in the private. Invariably the public/private spheres argument involves a public/private morality discussion as well. Public morality may be seen as either the popular morality of the masses or critical morality - which is an objective standard to be applied to everyone by those who know best. The law usually involves elements of both popular and critical morality as is evident in the hypocritical prostitution-related laws discussed in depth later in this article. Private morality then is the morality of individuals within their own homes, or specifically in this context, bedrooms. The law has traditionally been opposed to interfering in the private sphere as can be seen by the establishment's resistance to becoming involved in domestic violence.

V. BONDAGE IN THE BEDROOM - A FEMINIST ANALYSIS

Feminists see the public/private dichotomy as a further sexualized, hierarchized and legally entrenched dualism. In analysing this public/private dichotomy feminists have associated public with the masculine side of the dualisms.³³ The public sphere then is the male sphere, more important than the private "domestic" sphere of women. The law will not interfere in the private sphere whereas the public realm is believed to be a proper arena for legal or social regulation. Feminists see that the legal system has functioned to legitimate a public/private distinction by assessing it as a natural, rather than socially imposed, ground for different treatment. By withdrawing from regulation of the private sphere it is easy to see that the legal system has actually lent its support to men's exploitation of women. In largely ignoring the area, the law has permitted men to dominate and control women in their imposed private role. Feminists then, like conservatives, would hope for legal regulation of the private sphere but for different reasons. If one accepts the feminist analysis of the public/private spheres argument it follows that both the conservative's reasons for legal intervention in public and private spheres and the liberal's reasons for intervention in public sphere only are defective.

33 *Supra* n. 23.

IV. ONLY STRAIGHT SEX IN THE BEDROOM - A CONSERVATIVE ANALYSIS

The conservatives believe that the law must embody and enforce traditional moral values or society will lose its "moral cement" and gradually disintegrate. A conservative approach allows for significant intervention by law to proscribe immoral conduct even when it is fully chosen by the individual or individuals concerned, conducted in private and of no harm to anyone else. Conservatives, like Lord Devlin,³⁴ see society as being quite right in prescribing minimum moral standards of conduct "of which the reasonable man approves". He sees law as instrumental in upholding the morality of society. To the conservative mind prostitution damages the moral welfare of society. It corrodes the Christian notion of monogamous marriage by providing temptation to wicked men. It poses a threat to the health of society through the spread of sexually transmitted diseases. It opens the door to emotionally uncommitted sex. Conservatives also justify the intervention of the law beyond the private sphere on the basis that prostitution is a public eyesore, and is linked to other criminal offences. However, many of these assertions are untrue, and it is therefore questionable whether the law should be involved in an essentially private sphere.³⁵ The conservative arguments against prostitution reflect a Victorian attitude to sex and sexuality. Their underlying fundamental assumption is that the ideal society is one in which women have subordinate and submissive roles and in which sexual expression of all but the most orthodox type is to be stamped out.

VII. ANY HARMLESS SEX IN THE BEDROOM OR THE STREET - THE LIBERAL VIEW

The liberal view, stemming from the philosophy of John Stuart Mill, is that the law has no legitimate function in prohibiting anyone from choosing or practising the lifestyle of prostitution, or in penalizing adults who, by consent, engage in sexual activity for money as long as no physical harm is caused or threatened to either participant and neither physical nor mental harm is done to others. Liberals take the view that prostitution is here and will be so for some time. They believe the law may only interfere legitimately with those who forcibly coerce others to become prostitutes and who exploit them against their wishes. It may also be invoked to control the nuisance caused to others by prostitution.

One has to beware of a harm analysis for similar reasons that one has to beware of conservatives' reasons for condemning prostitution.³⁶ The harms most often alleged to be caused by prostitution and thereby used to justify its prohibition are that:

1. Prostitution provides an opportunity for the commission of crimes which may be ancillary to prostitution.

34 See Patrick Devlin, *The Enforcement of Morals* (O.U.P., Oxford, 1965).

35 See H.L.A. Hart *Law, Liberty and Morality* (O.U.P., Oxford, 1963).

36 See Madeline S. Caughley "The Principle of Harm and Its Application to Laws Criminalizing Prostitution" (1974) 51 *Denver L.J.* 235.

- 2 Prostitution provides a breeding ground for the activities of organised crime.
3. Prostitution is a significant factor in the spread of Sexually Transmitted Diseases (STD's).
4. Prostitution results in the subjection of citizens to offensive public solicitation.
5. Prostitution contributes to the destruction of public morals.

However, there is nothing about an act of intercourse for hire which, in itself, makes the commission of other crimes likely. There is no evidence that prostitution is responsible for the encouragement of organized crime. Recent studies show that prostitutes are not a major cause of the spread of STDs. They are more likely than any other people to insist on the use of condoms and to be regularly (weekly) checked at VD clinics. In New Zealand it is unlikely that prostitution will be seriously offensive to citizens unless they plan a family picnic after dark. Whether or not prostitution destroys the morals of society and whether it is the law's function to uphold public morals is a continuing debate between conservatives and liberals.³⁷

Whether the law should or should not involve itself with morals is immaterial for the purpose of this discussion. The law does, in the area of prostitution, concern itself with morals - public and private - in a most unsatisfactory way. While the law may appear to strike a balance between conservative and liberal values it is essentially conservative and it is oblivious to any feminist perspective.

VIII. THE BODY OF LAW

In common with Britain, Canada and Australia, New Zealand does not make prostitution itself a criminal offence. Rather, a range of offences exists which may be committed in association with acts of prostitution.

Section 26 of the Summary Offences Act 1981 makes soliciting - offering one's body for the purpose of prostitution - and offence punishable by a maximum fine of \$200.

Section 147 of the Crimes Act 1961 prohibits brothel keeping, which involves the managing of rooms or any kind of place for the purposes of prostitution, whether by one woman or more than one.

Section 148(a) of the Crimes Act makes it illegal for anyone to live wholly or in part on the earnings of the prostitution of another person and under section 148(b) it is an offence to solicit or receive payment for any prostitute.

37 See Devlin/Hart debate, *supra* n.34 and n.35.

Section 149 of the same Act makes it an offence for anyone to engage for reward in the procuring of any woman or girl to have sex with a man who is not her husband.

All these offences specified in the Crimes Act carry the same maximum penalty of imprisonment for up to five years.

The provisions are similar to prostitution-related provisions in other countries. One legislative feature peculiar to New Zealand, however, is the Massage Parlours Act 1978. The Act provides for the licensing (section 5) and regular investigation (section 35) of massage parlours. To be eligible for a licence (section 8) one must be over 18 years, have no criminal or drug convictions in the past 10 years, and have had no previous licence cancelled within five years. Employees must also be 18 years and over and be free from drug and criminal convictions as above. A licence will be terminated if any employee is convicted of any offence involving an act of prostitution or if they perform an act of prostitution and the performance of that act was facilitated by the failure of the licensee to supervise effectively the conduct of the business (section 30 (1)(e)). An act of prostitution (section 2(2)) means the offering by a man or woman of his or her body for purposes amounting to common lewdness for payment. Under section 35 the Police are given the power to enter and inspect the premises and licence at any time.

IX. THE OBJECTIVE - TRICK OR TREAT

What the law seeks to achieve is difficult to ascertain. Prostitution itself is not an offence yet it is an offence to offer one's body for the purpose of prostitution. If the law is primarily directed at the public nuisance aspect of prostitution, why is it illegal for one woman alone "to keep a brothel"? The Wolfenden Committee Report gives us some guidance:³⁸

We clearly recognize that the laws of any society must be acceptable to the general moral sense of the community if they are to be respected and enforced. But we are not charged to enter into matters of private moral conduct except in so far as they directly affect the public good. [The State's] function ... is to preserve public order and decency, to protect the citizen from what is offensive or injurious, and to provide sufficient safeguards against the exploitation and corruption of others, particularly those who are specially vulnerable because they are young, weak in body or mind, inexperienced, or in a state of special physical, official or economic dependence.

This quote raises a number of issues. First, it is not the business of the state to interfere in the "private" spheres of people's lives. Presumably, following a liberal analysis, this is particularly true of the sexual private sphere. Yet, if this is true, why the need to legislate against massage parlours and brothels? The offence of soliciting³⁹ specifically requires a public place and yet New Zealand courts have held a massage parlour to which customers were given entry after having rung a buzzer and been

38 *Supra* n. 7, 9-10.

39 Summary Offences Act 1981.

scrutinized by those inside, to be a public place.⁴⁰ Similarly, a locked massage room in which an undercover police officer was invited to be masturbated for an extra fee was deemed a public place and the woman was charged under section 26 of the Summary Offences Act 1981.⁴¹ This is a clear extension of the public place requirement beyond the public nuisance sphere. Apparently the New Zealand legislation as thus interpreted attempts to cover both the private morals and public nuisance aspects of the argument.

New Zealand is quite alone in its intrusion into the private morals area. Here, unlike England, the description of a brothel includes a place in which one woman operates alone.⁴² It has been argued in Canada that if one or two women were permitted to operate on their own premises they would be free from the exploitation of brothel owners or madams who might take up to 50% of the profits.⁴³ The women could run their businesses as they choose, determine who they service, and consequently be better protected against violence and exploitation.

Another feature of New Zealand law is that customers are not prosecuted for soliciting; only the prostitutes are. In effect, if a prostitute suggests sex for a price to a customer, she is liable, whereas a customer who suggests sex for a price to the prostitute is not liable. This is a completely discriminatory treatment of women by the law. Not to criminalize the soliciting customer seems to violate the fundamental principle of equality and perpetuate double standards in sexual commerce. In Canada the offence of soliciting was extended in 1972 to cover every person soliciting any person for the purpose of prostitution. New South Wales has provisions allowing for the prosecution of clients too. The main reason stated for change was the increasing opposition to the maintenance of an offence which discriminated against women. There is no justification for making only the prostitute liable for soliciting. As the Fraser Report states:⁴⁴

As in other areas of the law, the relatively powerless are controlled, accused and convicted and the relatively powerful are ignored, excused and acquitted.

The legislation concerning soliciting, the keeping of a brothel, or the using of a massage parlour for the purposes of prostitution is clearly not concerned solely with public nuisance. It attempts to control private morality in the sense of an individual's moral welfare too. Nevertheless, the official attitude to prostitution has tended to blame women who supply the service rather than the men who create the demand. Prostitutes are seen as a menace to society, to marriage, and to public health. Their clients, on the other hand, are seen as normal men with a healthy sex drive. The Fraser Report expands on this:⁴⁵

40 *Stephens v. Police* [1985] 2 N.Z.L.R. 732.

41 *M. v. Police* [1985] 2 N.Z.L.R. 737.

42 Crimes Act 1961 s. 14. Also see *R. v. Barrie* [1978] 2 N.Z.L.R. 78,81.

43 Fraser Report, supra n. 8. Submissions were made by various women's groups to this effect.

44 *Ibid.* 390.

45 *Ibid.* 403.

The philosophy seems to have been that the male population was entitled, without sanction, to seek the services of prostitutes, but in so far as the morality or health of the community might be compromised by such activity, the target of the law was properly the purveyors and not the customers of the business.

Another contradiction arises in that prostitutes were traditionally seen as legal and moral outcasts, but also as weak women in need of protection from wicked men who sought to exploit them. This paternalistic concern continues to be reflected in the offences of procuring a living off the proceeds of prostitution.⁴⁶ While such a paternalistic concern shows a degree of care it is less appropriate today for the law to interfere in this area. What any woman does with her earnings is entirely her affair and a prostitute who chooses to share her earnings with a partner, or her family, should be free to do so. In New Zealand, where there is so little evidence of pimping, those who "live off the proceeds" tend to do so for legitimate reasons.

X. LEGAL REFORM ALTERNATIVES

The law relating to prostitution is in need of reform. It is out of date in that it reflects a Victorian attitude to sex, and it is sexually discriminatory and misguidedly paternalistic. However, there are a number of possible ways that the law could be reformed. The four options considered by Canada and New South Wales were:

1. *Suppression* - legal suppression.
2. *Legalisation* - legal recognition with full Government controls.
3. *Decriminalisation* - removal of all prostitution specific laws and no Government regulation of the trade.
4. *Decriminalisation with controls* - legal recognition with Government regulation of some aspects of prostitution.⁴⁷

Suppression is favoured by those who believe prostitution is wrong by its very nature and so should be stamped out. This approach has not received much support because it is against the principles of a free and democratic society and it would be unlikely to achieve the desired effect of ridding society of prostitution. It would not stem the demand for prostitutes' services and would effectively drive prostitution further underground where crime and STDs would become a real problem. Suppression could not eliminate prostitution any more than prohibition could eliminate the consumption of alcohol. While the demand is there, suppliers will find a means of satisfying that demand. On a more practical level, there would be major difficulties with enforcement. Presently, for example, the Wellington Vice Squad numbers only three. Those three police officers are responsible for coping with prostitution, bookmaking and indecent publications. It would be a very expensive and time consuming exercise to eliminate prostitution and, realistically, it could not be done by suppression. The world's oldest profession has withstood such attacks before and has always re-emerged, albeit in altered form.

⁴⁶ Crimes Act 1961 ss. 148 and 149.

⁴⁷ Fraser Report, supra n.8, 514-520; Select Committee N.S.W., supra n. 8, 236-242.

Legalisation, in the alternative, would involve formal recognition and therefore state sanctioning of the trade. Prostitutes might be registered and subject to regular health checks. Red-light districts might be established while prohibition was maintained elsewhere. Brothel premises and management might also be registered. This appears at first glance to be quite feasible but there has been a number of objections to legalisation and regulation of prostitution. First, legalisation implies the official recognition and acceptance of prostitution as a legitimate occupation and that is undesirable. The objection stems from the moral issue discussed earlier - whether society should see prostitution as a regular, and even desirable, business like any other, or rather as a social aberration which, through legal and social policies, should be abolished. A further objection is that the state, in effect, becomes the pimp and benefits, through taxes, from an activity which is exploitative of women. The state should attempt to alleviate the need for women to enter prostitution rather than enjoy "living off the proceeds" of prostitution.

Decriminalisation does not provide a complete answer either, for it leaves open to abuse some of the worst aspects of prostitution. The police must have the power to prevent any crime or drug offences related to prostitution and to protect women and especially very young women from being forced into prostitution.⁴⁸

Decriminalisation with controls is the most favoured option. Prostitution-related activities such as soliciting would be removed from the control of the criminal law unless other forms of criminal conduct are involved. This option involves the recognition that prostitutes are essentially victims of a sexist society and as such should not be treated as criminals. The state would not condone prostitution but would recognize that it can only be eliminated through long term social and economic measures, and not through legal restraints. Decriminalisation with controls provides a sensible first step in providing an answer to the problem of prostitution. It is a reasonable, workable compromise between prostitutes, clients and the community. A prostitute would be free from police control; but provisions against the exploitation of minors, and regulations to protect public amenities and to control the nuisance aspects of the trade would be retained.

XI. SOCIAL/ECONOMIC REFORMS

A sensible second step would be to take action in the social and economic spheres. Generally, prostitutes do not enjoy the work they do. Prostitution is not a glamour world nor a paradise for deranged nymphomaniacs. Prostitutes, in common with many women, would welcome a better option but for most of them the stereotyped, low paid jobs offering to "normal" women do not provide such an option. Decriminalisation of prostitution would alleviate some of the surface problems faced by prostitutes but the

48 During my interview with a former head of the Vice Squad, Detective Sergeant Steve Waters, I learned that some crimes are detected while the police watch street prostitution and also that some women are forced into prostitution against their will by male partners.

problem goes deeper than that. Women's groups who made submissions to the Canadian Committee suggested encouraging Governments to introduce a range of programmes to alleviate the causes of women turning to prostitution. These included:

1. Legislative affirmative action programmes.
2. Better enforcement of employment standards legislation.
3. Improved child care facilities.
4. Retraining programmes for women to assist them to enter the higher paying non-traditional jobs.
5. Extension of benefits to part-time workers on a *pro rata* basis with full-time workers.
6. Changes to social benefits legislation in order to allow women to support their families adequately.

All of these recommendations make good sense. On a practical level such reforms would encourage women to try other things, and they would alleviate the pressing economic hardship some women face.

In Sweden a programme of decriminalisation with controls was instituted at the same time as a social and economic reform programme.⁴⁹ The results were very positive. Although Sweden has a very liberal attitude to sex it tightened its laws relating to sexual behaviour largely as a result of pressure by the women's movement. Sweden hit at activities generally associated with prostitution - such as procuring - to discourage landlords, pimps and others who, for personal gain, encourage or exploit another person's "immoral code" of life. Penalties for procuring women under 20 years were also retained.

In the second half of the 1970s a system of outreach programmes was established to attempt to reduce the incidence of prostitution by social rather than legal means. The Government provided prostitutes with sufficient economic and social security for them to leave their trade. In 1977 in Malmo there were 240 prostitutes and in 1980 this number was reduced to 60 following the programme. Massage parlours and sex clubs were completely eliminated from the city. The women were provided with accommodation, money, emotional support and alternative employment. At the same time, the Government instituted education programmes on sexual matters. The results speak for themselves.⁵⁰

The outstanding and distinguishing feature of the Swedish approach to dealing with the problems of prostitution lies in the difference of emphasis that governments, organisations and the population generally appear to place on the need for education and intervention at the social, rather than merely legal level ... the regulatory process is seen as complementary to measures intended to change attitudes and modes of life.

49 Fraser Report, *supra* n.8, 113-116.

50 *Ibid.* 115-116.

If in New Zealand we wish to tackle the problem of prostitution effectively and to provide better alternatives for women becoming, already working as, or likely to become, prostitutes, a programme of decriminalisation with controls with an affirmative social and economic back-up system should be adopted. Decriminalising prostitution would avoid the worst exploitation and abuse of prostitutes. The law would then afford them protection rather than harassment. Their prices then would be likely to rise as would the conditions of work. An affirmative social programme including economic, emotional and vocational support to prostitutes would encourage prostitutes to find an alternative. The Swedish idea of educating the community generally about sexual matters would help, in New Zealand, to open our eyes in an honest way to sex and sexuality and the associated problems.

XII. THE WIDEST REFORM

To achieve reforms that will eradicate the need for women to enter prostitution there will need to be an acknowledgement of society's and the customer's role in prostitution. Prostitution must be seen in its broadest context as only one manifestation of the disadvantaged position of women. The fact that many women's issues are now being openly discussed and that the discussion is being heeded is a positive step. But few feminists have gone further than simply to make us aware of all the problems. There have been very few proposals for a pragmatic scheme for future endeavours in a feminist direction.

Christine Littleton's article "Reconstructing Sexual Equality" attempts, as its title suggests, to reconstruct the concept of equality so that:⁵¹

....(d)ifferences between human beings whether perceived or real, and whether biologically or socially based, should not be permitted to make a difference in the lived-out equality of those persons.

She calls this view "equality as acceptance".

The starting point is that sex is a biological and social construct which has resulted in men and women being treated as different. To date this difference has meant that people who are biologically or socially female have been prejudiced. This group of prejudiced people includes women and men designated socially as women (that is, men who have "female" characteristics or who choose to enter traditionally "female" employment - male nurses and homosexuals are likely to be lumped with women). Christine Littleton maintains that it is more "expensive" now to possess female characteristics in a difference relationship. She explains this:⁵²

Taking parental leave shunts you off the partnership track; crying in a meeting shuts off the discussion; breastfeeding makes you unacceptable at the restaurant table.

51 *Supra*, n. 11, 6.

52 *Ibid.* 94.

The male power system, seen in the phallogentric concepts of society and its institutions, is constructed and perpetuated by men but it oppresses not merely biological women but also men who are classified as women due to their social situation.

Women, due to their sexuality and consequently their ability to become pregnant, are not recognised as socially male in the way that some men are identified as socially female. Even women privileged in racial and socio-economic terms are not seen as anything more than counterfeit men. They may be seen as "almost male" or "like a man" but due to their biological make-up they are always women. And women are deemed to be different - "we cannot perfectly conform".

Littleton believes we must look at men's and women's "real" differences - like pregnancy - but we look further at other socially constructed differences too. Her ideal is to match the genderized complements of emotional, physical and employment traits and make the differences costless between the two parties. She proposes to equalize the differences by using the "currency" of money, status and access to decision-making. Although she acknowledges that these measures are phallogentric she believes we must start somewhere and that the most practical place to start is with "the currency of the day" - redistributing the things that a male-dominated society counts as valuable. The most important of these is access to decision-making which, if spread, would allow men and women to devise new measures of currency to assess the success or failure of changes that propose to advance the concept of equality as acceptance.

On the biological plane she envisages matching sperm loss with pregnancy so that the man and woman involved in the two sides of that difference relationship would be treated equally across that difference. In an area of biological and social differences such as athletics she argues that equality as acceptance would support arguments that equal resources be made available to male and female and genuinely co-educational sports at institutions, regardless of whether the sports are "similar". She advocates this because women have not participated as much as men, and women's sports have been downgraded by the (male dominated) system. A glance at Television New Zealand's *Sport on One* will support this. In the socially constructed difference area Littleton gives the example of matching a soldier with a mother and rewarding their work equally in terms of money, status and access to decision-making roles and positions.

While a soldier/mother example sounds foreign to us it must be remembered that in New Zealand we are familiar only with equal pay for the same work but not equal pay for different work. Canada, on the other hand, is in the process of revaluing people's work to find out what it would be worth if it was not genderized and if "female" work had not been devalued. For example, when men were secretaries in the nineteenth century it was a highly paid, prestigious job. Now that women are secretaries it is a poorly paid, low status occupation. The Canadians seek to rectify that sort of situation. They would weigh the job done by a secretary against a traditionally male occupation, perhaps that of a skilled tradesperson, and level the incomes. This is an effective means

of preventing "real" and cultural gender differences which make men and women unequal. Christine Littleton says:⁵³

Equality as acceptance is not a model of superiority of socially female categories, nor even of the superiority of androgynous categories, but rather a model of the equal validity of men's and women's lives.

Equality as acceptance will admit women's voices to "the dialogue that constructs social meaning".⁵⁴ It would improve the lives of men for they would be freed from the oppressive stereotyped image associated with the masculine side of the dualisms.

XIII. CONCLUSION

Nevertheless, I should not like to see prostitution matched with a male equivalent long-term. Prostitution is degrading to women and exploitative of them. If Christine Littleton's approach were adopted I believe many women would find themselves economically better off and, in time, would not be crippled by a self-image based on their marketable sexuality. My view may be idealistic, but the Swedish experience has given me hope. In the meantime, if prostitution were decriminalised prostitutes could be matched with self-employed business people, giving them more money, more status and more access to decision-making. In time social reforms and a programme of the equality across difference type would remove the causes of prostitution.

53 Ibid. 54.

54 Ibid. 72.

