

**A FEMINIST CRITIQUE OF THE  
PROSTITUTION/SEX WORK DEBATE:  
RECOMMENDATIONS FOR LEGISLATIVE  
CHANGE IN SOUTH AFRICA**

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Dissertation submitted in partial fulfilment of the requirements for the  
degree of LL.M in Criminology

Institute of Criminology, University of Cape Town, 1996

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## ***Acknowledgements***

I am particularly indebted to several people whose assistance has enabled me to complete this study. First and foremost, I would like to thank my supervisor, Laurie Rose Innes, most sincerely for his invaluable comments and advice. I would also like to extend my acknowledgement to the Law Faculty and Criminology Institute librarians and administrative staff, who were always willing to help me with any queries I had. Thank you too to Desiree Hansson for her initial comments on my thesis proposal.

To my parents, who never questioned my decision to embark upon my LLM and who provided support that helped me achieve it, I am most grateful and I thank you sincerely and appreciatively. I am also grateful to Jeremy, Eldred and Gavin for their practical and technical help, and wish to extend a special thank you to Jonny for his companionship, comments and support.

I dedicate this work to any person (out there) who is concerned about the position of women in society and finds the sex industry a particularly difficult issue to resolve.

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*"As long as women who are prostitutes are socially labelled as deviants, they will be expendable as throwaway women, and legally defined as criminals"*

Kathleen Barry

## INTRODUCTION

The fact that the exchange of sexual acts for money no longer solely goes by the name 'prostitution', but is now also being referred to as 'sex work', suggests there is a new body of thought tackling the old perceptions and levels of acceptability that the industry has experienced in the past. The movement towards the acceptance of prostitution as just another legitimate commercial activity is not however without controversy. There remains a complex array of opinion, not least within the Feminist Movement, continually raising sensitive questions about particular core values lying at the heart of the debate. Yet the ideological battlefield which characterizes prostitution does not end with the intellectual sparring of interest groups. It is both a practical and a public interest issue which affects health, welfare and labour policies, municipal zoning and critically, the lifestyles of sex workers themselves.

In the past, Cape and Durban city councillors have called for the legalisation of prostitution in South Africa (*Argus* 2/4/93; 3/4/93; 5/4/93, *Cape Times* 31/3/93). These calls however came at a time when there was a fairly long history of prohibitive legislative precedent supported by the Christian National Government and coupled with a lack of recourse to a Bill of Rights. Subsequently there has been a call for decriminalisation by the National Women's Coalition - which represents more than eighty women's groups - but the current Minister of Justice, Dullah Omar, has said that the issue would be addressed at "a later stage" (*Cape Times* 21/5/94). Suggestions for change, such as those called for by the Cape Town and Durban city councillors, have almost exclusively focused upon public interest issues without responding to the dangers and abuse that those involved in the profession experience. As an illegal and 'outsider' group to the rest of society, sex workers have not had adequate recourse to the law and this has added to their vulnerability.

A chilling and tragic consequence of their lack of access to the law, has resulted in violence against them, most of which goes unreported. Their plight has been highlighted by a recent announcement by police that in the Cape at least sixteen prostitutes have fallen victim to a serial killer. For the first time police seem to be taking violence against sex workers seriously and have formed a 40-strong task force to investigate the killings (*Argus* 25/1/96: 6).

As we embark upon carving out a new vision for South Africa, it is an appropriate time to evaluate the various criminal offences that are on our statute books. It is not enough that only criminal acts which relate to racist Apartheid policies be examined and removed; there also needs to be scrutiny of traditional criminal categories built upon restrictive ideas of 'morality' and gender. The drawing up of a new Constitution, which outlines the value system to which all legislation and other relationships will be subject in a future South Africa, has created an opportunity to re-open the debate on the validity of laws criminalising prostitution.

Most previous approaches to prostitution have discounted the hypocrisy inherent in attempting to make invisible an activity which is concurrently being actively encouraged by the visible demand for the service. In the first chapter of this dissertation, the theoretical framework, I examine the philosophy underlying such hypocrisy as evidenced in South Africa's *Sexual Offences Act*. This is followed by four different feminist approaches and an exploration of how aspects of Michel Foucault's theory can be applied to balance these various feminist views. In the second chapter, I look at the various existing policy regimes and how they are applied in foreign jurisdictions. Finally, I critically assess both the South African legislation and a local Draft Bill on prostitution, recommending changes derived from a conglomerate feminist view not unlike that suggested by Foucault's theoretical approach.

In doing so, it is with an awareness of the danger Baldwin exposed in her article on prostitution and feminist discourses: she claims that in writing a paper on prostitution it is impossible to avoid a representation of a 'prostitute' which is 'suitable and desirable for the anonymous reader's temporary, fleeting engagement' (1992: 52). She sees this written construction as a revictimization of the 'prostitute' whose value is quarrelled over and debated, but who herself remains a stranger to the academic endeavour (52). In any debate concerning sex work and representing as many views as possible, the most valuable contributions are ultimately those of sex workers and prostitutes themselves. Even though I will be incorporating material in this dissertation which has been written by sex workers and prostitutes, the way in which the subject is perceived will to some extent be objectified, and undoubtedly different to the way in which people actually involved in the industry perceive themselves. Thus any suggestions made are part of - hopefully - a much wider debate which has begun and which needs to continue.

→ This dissertation discusses female adult prostitution. It is beyond the scope here to address the dynamics of child prostitution or detail issues which are specific to male

sex work, but it is hoped that many of the findings and suggestions may be relevant to both men and women who work in the field. ]

I do not intend to proscribe a definitive set of legislative proposals. Instead I attempt to identify and recommend a framework within which the main areas of concern can be debated and an appropriate policy developed. Specifically, I will provide particular recommendations pertaining to health factors, the issue of zoning, registration and human rights.

## THEORETICAL FRAMEWORK

Choosing not to accept the differences between men and women as a natural given, various feminist theorists have questioned traditional ways of understanding prostitution. Consequently they have ploughed deep into the root of its existence rather than restricting their understanding to a surface manifestation of the phenomenon. The traditional debate on the other hand does not question why prostitution is, and historically has been, a predominantly female profession (Posel 1993: 7). Although both men and women constitute the sex worker population, even where sex workers are men, the customers are mainly men too. Because of this discrepancy and the power relations that lie beneath it, gender is an issue which needs to be recognised and integrated into any approach which arises from the debate.

The restrictive prostitution laws in South Africa were written by male lawmakers without consultation with people in the profession, the majority of which are women. Thus the laws reflect the principles of a traditional moral standpoint. I have included this doctrine in the discussion as it is only by knowing from whence we have come that we can know to where we must travel.

Foucaultian theory approaches the imbalance of power in a novel way. Considering that much of feminist thought is concerned with power relations which shape the way that sex workers and women in general are treated in a patriarchal society, the theory of Foucault is a complementary and useful tool with which to extend the analysis.

The theory that follows below emphasises the various feminist theories; the way that prostitution is perceived by feminist writers and movements will be the starting point for suggestions as to why and how the law in South Africa should change.

**What is in a name?**

Before embarking upon the described journey through the various theoretical positions, there is a need to clarify the terms 'prostitution' and 'sex work' which I have thus far used interchangeably. In the following paragraphs I shall give a brief synopsis of the concerns that underlie the choice of using either term.

In the English-speaking world, the term "prostitution" has a double meaning. It refers to both commercially orientated sexual activity, and the act of debasing oneself for material

male lawmakers  
effort / CE D...  
stuppe

→ pr distinct → former et par → prostitute  
2 sex worker



reward. For some, the latter meaning has become synonymous with the former - exchanging sex for money is regarded as the "paradigmatic form of personal debasement" (Shrage 1994:121). Because of this negative imagery, many people involved in the commercial sex industry prefer to be called sex workers and the profession: sex work.

By invoking a vocabulary of sex as work and prostitutes as sex workers, there is a move away from the rhetoric of immoral, illicit sex and crime, and a shift towards an association of the activity with work, choice and civil rights (Jenness 1993: 6). Thus this semantic evolution can be seen to symbolically support the new legitimacy being afforded sex work, and it may also be a primary vehicle for effecting this change.

Thus the term "prostitution" encapsulates the attitude of people concerned with what they see as the demise of morals and the encroachment of materialistic norms into an area where they should not prevail. The term "sex work" on the other hand captures features more closely allied with legitimate commercial work. When we as writers employ one or the other term, we automatically emphasize a particular subcultural perspective on the topic (Shrage 1994:123).

The terms also serve as vectors of change (or the lack of it). According to Mottin-Sylla, the request to be identified as a sex worker means the request to be seen as a "woman at work", which has a connection with the enjoyment of rights. She contends that in a developing or third world country like her own, Senegal, prostitutes do not have basic rights such as health, security, training and medical assistance. She feels therefore that to call Senegalese prostitutes "sex workers" equates them with sex workers of the western world, many of whom have rights and legality. This, she contends, obscures prostitutes' struggle to both work and proper citizenship by situating them in a category which presumes they have state-recognised legitimacy and the concomitant rights that accompany such status (Mottin-Sylla 1992: 2). Thus although sex work has come to be recognised as the more fashionable and politically correct term, it masks the struggle for the achievement of legitimacy that still lies ahead of many women and therefore must be used with caution.

Bearing in mind that South Africa is categorised as a developing country, that prostitution is a criminal offence here and that the material used for this dissertation draws upon cross-continental research incorporating a host of different opinions, both sets of terms

will be used. The choice of terms will depend upon and support the context of the information.

## A: TRADITIONAL MORAL STANDPOINT

Prostitution is traditionally condemned because it is considered to be an affront to 'decent' morals. These morals are considered to be the norm in our society and are held as values to which the community is expected to subscribe. But morals are no more than a set of learned cultural attitudes. Any dispositions and repugnance that we have towards sexual matters are cultural in origin and are based upon the teaching and training that we experience (Sion 1977: 13).

In the Western world, the dominant pattern of behaviour that has been taught and reinforced is Christianity (13). Stemming from this religious ideology is the assertion that prostitution is hostile to the notion of the family, the union of one man with one woman in the holy estate of matrimony. This is revered as 'the sure foundation of all that is stable and noble in our civilisation, the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement' (Richards 1979: 647). Prostitution denies this powerful vision of society: that 'a woman should engage in sex not only unchastely, but *indiscriminately*, in complete isolation from sentimental attachments of a kind perfected in monogamous marriage', is a moral evil (647).

The law supports this moral vision by identifying appropriate female objects of punishment and contempt. Baldwin contends that:

'to be deemed a "prostitute," whether by the state, a john, or by any other man for that matter, immediately targets a girl or woman for arrest, for sexual assault, for murder or, at the very least, dismissive scorn' (1992: 48).

She compares the way in which society and its legal institutions put female sex workers on trial in the same way that victims of rape, of incest, of domestic battery, of sexual harassment, are treated by the law. 'Declared to be "whores" and "sluts" by the men who abuse them, women confront a legal system which puts the same issue in the form of a question: was she in fact a "slut" who deserved it, as the perpetrator claims, or not-a-slut, deserving of some redress?' (Baldwin, 48). This type of legal bias serves to strengthen the dictate of moral theory with regard to female sexuality. It indicates that 'whoever a "prostitute" is, "other women" are not ' (48).

Thus condemnation of prostitution stems from an ideology that idealises a woman's chastity and stigmatises as morally indecent any deviation from this ideal (Richards 1979: 650). Not only are prostitutes' actions considered to be sinful, the prostitutes themselves are described as 'feeble-minded, mentally disordered, psychopaths ... "hypersexual"... "frigid" or "lesbians"' (Jarvinen 1993: 18). Traumatic childhoods, poor parent relationships, alcohol or drug abuse or criminality in the home are all cited as reasons why women deviate from the path of sexual 'obedience' and 'righteousness'. In sum, prostitutes are characterised and categorised as deviant or mentally, sexually, or socially abnormal (18).

As the idea of non-commercial sexual relations outside of marriage has become more accepted, the emphasis of the moral evil that surrounds prostitution has shifted to the impersonal and unemotional aspects of the sex act. The contemporary form of the moral objection to prostitution is derived from Kantian ethics: 'commercial sex is allegedly morally wrong per se because it involves the alienation of the body to the will of another, and thus undermines the ultimate roots of the integrity of the moral personality' (Richards 1979: 648). A woman selling her sexual services is therefore not seen as being in control of her body; instead the transaction is only seen as the woman's alienation of herself to someone else's will. Thus the Kantian perspective still subscribes unity of sex and love seeing no possibility of a woman wanting to share or use her sexuality for any other reason but romantic love. It is noteworthy that this explanation directs its analysis at expectations of a female's sexuality whilst ignoring the other side of the coin: the male's equal participation in the transaction and his moral responsibility.

Not that there isn't an explanation for the men's actions: Sion states that males possess more intense and insistent sexual urges than females and because of this they desire a variety of sexual partners. He adds that unless this urge is relieved by sexual fulfilment, most men will find themselves unable to function properly in their everyday affairs (25). In addition to this they suffer 'psychological fatigue from prolonged sexual activities with one partner!' (1977: 24) The persistent male sexual needs are associated with sexual potency and physical prowess whereas the absence of these male hormones in females creates a less urgent and an emotionally dependent sexuality in women (24). It is this urgent sexual release that males experience, as well as their desire for variety, which entitles them to transgress the norm of associating sex with love and emotion, a moral ideal which is still expected of women.

This view has been crystallised by Kingsley Davis, an oft quoted proponent of what has become known as the Functionalism. In short, prostitution is considered a necessary complement to marriage as it allows the male to fulfil all his sexual desires without becoming entangled in a meaningful relationship which could lead to an upset in the structure of his family life (Jarvinen 1993: 17).

Thus the traditional explanation of where men fit into the prostitution equation is explained by fundamental biological differences between men and women, such differences being not only 'necessary but also a sufficient explanation for different sexual needs and desires' (Posel 1993: 23-4). Sion backs up his finding that the difference between male and female sexual needs are biologically determined and supported by the fact that such needs are similarly manifested in the behaviour of 'infra-human species of mammals' (26).

But can this biological explanation be accepted as truth? Giddens notes that the number of studies focusing on male clients is far fewer than those researching prostitutes. Additionally it is rare for anyone to suggest that clients may be psychologically disturbed, although this is often implied about prostitutes. The imbalance in research is biased in itself and not surprisingly it produces an uncritical acceptance of traditional stereotypes of sexuality (in Posel 1993: 23).

Because sexual stereotypes are so integral to our living pattern, there is no investigation into how much biological differences may have become imbued with social significance. More specifically, the assumption that sex roles are fixed by some biological given is questioned. Instead, theorists who reject these traditional sex role stereotypes identify biological factors as being a 'set of potentialities' which are transformed, expressed and given meaning according to social circumstances. But because sexual stereotypes are reinforced by social expectations, they become self-fulfilling prophecies and consequently are widely accepted. Notably though, an understanding of how power relations operate in a society indicates that the sexual stereotypes which exist, reflect and support those that have the power to define and regulate social-sexual behaviour (Posel 1993: 25). As one Durban sex worker remarked: 'It's amazing, it is men who make the law and men who are quite willing to pay for sex (27).

In the social setting of prostitution, the expectations of the behaviour of men and women constitute a double standard of sexual morality. And these double standards are translated into legislation which invariably penalise sex workers, who are mostly women,

and ignore the customers, who are mainly men. Besides references to men who have sexual intercourse with children (which is a statutory offence), the Sexual Offences Act 23 of 1957 criminalises the sellers of sex, but not those who buy it. This situates the South African legislation pertaining to sex work squarely within the realm of the moralist standpoint and allows the law of the country to uphold and reinforce an allegiance to the double standard.

Thus the prohibition on prostitution in this country is not due to any concern that the profession may serve to permit and perpetuate the sexual objectification or subjugation of women (Posel 1993: 27) - an argument levelled against it which will be examined in full in the section on radical feminism later in this chapter. Rather, the laws arose from the white, male, Christian Nationalist Government which chose to construct the statute in a way that reinforced the stereotypes that sustain the commercial sex industry. According to their moralist ideology, the source of prostitution is seen to be the evil prostitute who preys on men's 'natural' and inevitably hungry sexual appetites, and it is therefore the duty of the government to pass and uphold laws that eradicate what they see as the root of the problem. They would rather penalise the sex worker who places temptation in the way of men than criminalise the activities of the buyers who raise the demand for commercial sex in the first place.

The traditional moral standpoint has indirectly supported the position of buyers of sex to the detriment of those who sell it. Its proponents seem to want to rid society of prostitution, but at the same time its laws do not realistically support this view. By precluding the buyers of any responsibility, the laws have allowed the demand for commercial sex to continue, with the sex workers bearing the brunt of this moral hypocrisy.

Tired of accepting the world vision as portrayed by the traditional moralists, feminists began constructing their own understanding of prostitution and sex work ...

## **B: THE FEMINIST APPROACHES**

Prostitution is a difficult issue for feminists. Unlike some of the other socio-sexual issues in which the response of women represents a united front - such as the growing outcry against spousal abuse - commercial sex work is an issue which divides and polarises feminists. They disagree about its social origins, effects, meaning and moral status. Hence there is a substantial body of feminist thought which has contributed a varied and contrasting set of theories to the discursive literature on prostitution. Of these views, the following major trends in feminist thinking will be discussed: contractarian feminism, liberal feminism, Marxist feminism and radical feminism. Though the listed theories differ in their outlook, what they all have in common is a commitment to an approach which takes into account a woman's perspective. Additionally, the theories are all to some extent liberatory as they seek to eradicate the subordination, injustice and oppression which women suffer as a result of gender discrimination.

### **1. Contractarian Feminism**

The basic premise upon which contractarian feminists build their analysis is the idea that each person should have freedom of choice in an environment which boasts an unfettered and competitive market. Their definition of prostitution is the contracting out of sexual services for a particular time period in exchange for money, the sale of sexual services being no different to that of workers who supply other services or labour in the marketplace (Posel 1991: 4). The contract is entered into between two consenting individuals, the supply following the demand in a manner no different to any economically and politically neutral commodity. That there is any marketable product which slots into a totally neutral environment is questionable. And without an absolutely free market which enables prices to be fixed in line with what both sellers and buyers want, there is a lack of autonomy and the individual's right to engage in commercial sex may be hampered.

The ideological stance of the contractarians is therefore not neutral, but firmly grounded in capitalism. In accordance with this, any interference with the operation of the free market system is treated with hostility. Thus any governmental laws which prohibit or regulate

prostitution exclude the right of individuals to decide conditions of contracts for themselves and are seen as an intrusion into the natural workings of the marketplace (5).

Contractarians perceive prostitution as what is known as a "victimless crime". A definition of this contains the following criteria: the element of an exchange transaction, consent between the contracting parties, the lack of apparent harm to others and the absence of a complainant. Notably, the requisite of consent precludes there being a victim. Accordingly, statutes regulating or criminalising prostitution are seen as trying to protect perpetrators from their own behaviour and attempting to legislate morality for its own sake or that of the political party in power (Jenness 1993: 17).

As feminists, contractarians regard laws which regulate prostitution as an extreme example of the laws which regulate all women and entrench male domination. They are suspicious that governments will do what is in the interests of men and this will prejudice sex workers who are mainly female. The contractarian feminist critique is therefore characterised by its concern with the male monopoly of the law, and its proponents aim to have women placed firmly on the legal agenda to ensure that all legal rights are extended to women.

These theorists, however, view the law as a largely rational, fair institution in concept; its downfall lying in the failure to adhere to its own professed standards. This occurs when laws constrain only one of the sexes and seem to work for the benefit of the other (Naffine 4<sup>1</sup>). A good example of this is the criminalisation of selling sex, which is usually the work of women, whilst ignoring the buyers of the same, who are generally men.

Thus the focus of the contractarian feminists is to achieve equality within the existing system of the law, one which would enable female sex workers 'to pursue their own, uncoercive lifestyles' (Naffine 6).

Posel criticises contractarian theory for concluding that prostitution is a contract between two consenting adults. If this is the case and hypothetically prostitutes can be of either sex, why do men 'demand' sex and women 'supply' it? As the contractarian feminist theorists see this as a contingent fact about prostitution and therefore do not investigate it, according to Posel their theory is superficial and vacuous (1991: 7).



## 2. Liberal Feminism

The liberal feminist position is similar to that of the contractarians in that it also centres its focus on the political discrimination of women. It does however differ in the way it expects the existing state institutions to respond to its call for decriminalisation (Posel 1991: 8).

The core liberal line of argument accentuates the need for decriminalisation by appealing to classical liberal ideals. The focus is upon individual rights and the value of equality before the law. Prostitution is seen as falling within the private sphere of human existence, and any state interference into the private lives of individuals should accordingly be kept to a minimum. Prostitution is viewed as a contract between two individuals exactly like any business transaction or sale of service. Just as the government has an interest in other contracts and regulates certain aspects of them, such as minimum standards for working conditions, health or hygiene, tax and social security, so should the state minimally regulate the sex industry (Jaggar 1994: 103).

According to the liberal feminists, by labelling women as a group rather than evaluating their individual interests and capacities, women have been prevented from pursuing self interests to their full capacity. A woman's choice of prostitution as a career may be directly related to the fact that sex discrimination has curtailed her opportunities of acquiring equal education, skills and (ultimately) equal job opportunities (Posel 1991: 9).

Additionally, society has been socialised to perceive women's sexuality as objectified and this has taught women to express their sexuality in a way that is pleasing to men. Moreover, because women have been expected to be care-givers, rather than given the opportunity to develop their rational faculties, they have come to accept that they are best suited to child-care and menial domestic labour. And this work does not require the exercise of human reason; choosing commercial sex work as a profession is another example of women choosing unskilled work which gives them little opportunity to exercise their autonomy and rationality (Jaggar in Posel 1991: 9).

The assertion that sex work is unskilled is not accepted by all liberal feminists, especially and significantly by those that actually work in the field. For example, Linda Day, a Johannesburg sex worker, believes prostitution is a profession that ranks with nursing and teaching 'for the healing effects it has on its recipients' (McNeill 1996: 26). She considers

herself to be a sex therapist, and her ability to play any role requested by a client and to satisfy his needs - a skill (28).

According to Posel, liberal feminists express their evaluation of prostitution in terms of political rather than moral values, and they are able to distinguish between a contemporary political scenario in which there is institutional discrimination against women and a future non-sexist society in which prostitution could operate according to their liberal ideals. Their plan to reform the current state of prostitution therefore involves facilitating the removal of gender based discrimination and providing equal opportunities to both men and women. Where they differ from the contractarians is in their recognition that *de jure* formal equality may not be adequate to achieve their reforms.<sup>2</sup> Liberal feminists therefore demand not only that any gender discrepancies be removed from legislation, but that sexual inequality is actively prevented (Posel 1991: 10-11).

Suggestions for implementing this include 'affirmative action projects, state-funding of special job-training programmes for women and the provision of public childcare facilities' (Posel: 11). Liberal feminists advocate that positive steps taken, such as these, will provide women with the opportunity to choose sex work or any other occupation out of self interest. The only laws which would govern the industry's practices then would be those that protect sex workers from any form of coercion (11).

The North American prostitute's rights movement, "COYOTE" (Call Off Your Old Tired Ethics), an example of an active liberal feminist group, affirms sex workers' behaviour as moral and sensible (Jenness 1993: 4). Significantly, here is an instance of prostitutes who define themselves in their own terms. They profess their lives to be as valuable and worthy as any others and discard the label of 'deviant'. To this end, they have undertaken campaigns which address the issues of discriminatory law enforcement and the unconstitutionality of laws prohibiting prostitution. They have also set themselves up as ardent equal rights lobbyists. The claims which shape their work include maintaining prostitution as legitimate service work, proclaiming that to deny a person the choice to engage in sex work as a profession is a denial of that individual's civil rights and the assertion that much of prostitution is voluntary and not forced<sup>3</sup>, the latter being a common misconception (Jenness 1993: 4). To achieve this, there needs to be a repeal of all existing prostitution laws and the reconstitution and protection of sex work as a viable service occupation (5).

By striving to create a neutral climate in which gender equality can prevail in all sex work contracts, liberal feminists do not consider that their goal itself may be flawed. The 'structuralist' feminist theories (which will be discussed next) question the very assumption that prostitution is a social phenomenon or institution which should be maintained. Liberal feminist theory, however, is an example of a 'subjectivist' theory which as its starting point examines the experiences of the particular subject - in this case female sex workers - involved in the activity (Boutellier 1991: 207). COYOTE is a good example of subjectivist theory in practice: sex workers converging, sharing their common experiences and ideals, and in so doing, actively living the philosophy to which they ascribe.

Structuralist theories, on the other hand, conceive of prostitution as a mirror of the patriarchal and classist society in which we live, duplicating the power relations and structures that exist (Boutellier 1991: 206-7). The two structuralist theories that will be discussed are Marxism and radical feminism.

### **3. Marxist or Socialist Feminism**

The Marxist or socialist approach to prostitution departs from the contractarian and liberal analyses of sex work because it attempts to understand the phenomenon in its social context. It also broadens the scope of what is traditionally defined as prostitution, opening interpretation of the phenomenon to a greater range of possibilities.

The point of departure of the Marxist feminist analysis is a parallel drawn between prostitution, capitalist wage labour and the nature of the bourgeois marriage. Marx wrote: 'Prostitution (in the ordinary sense) is only a specific expression of the general prostitution of the labourer' (in Jaggar 1994: 105).

To this end, both the wage labourer and the bourgeois wife are seen as instruments of production - of commodities and offspring respectively. Although prostitution produces neither of these things, but is a social institution that supplies services, it nevertheless represents a paradigmatic case of the kind of degenerate ideals found in the alienated relationships which capitalism creates. Such relationships substitute money for concrete human characteristics and in so doing, dehumanise people by evaluating them in terms of their market-value (Jaggar 1994: 106).

For example, feminist Marxists include the tangible and intangible services that a wife provides to her husband in exchange for his economic support as within the realm of prostitution (Jaggar 1994: 104). [Similarly this could cover the services provided by a poor man who marries a wealthy woman (105)]. But it is only where one of the parties to the marriage is propertied that the institution 'degenerates' into prostitution. Conversely, in instances where no property is involved, marriage is seen to be based purely on mutual attraction or inclination (105). Thus according to feminist Marxism the difference between a prostitute and a bourgeois wife is really just a matter of degree: both sell their sexual services for economic sustenance - prostitutes more explicitly than wives - but both are compelled to do so because of the social conditions created by capitalism (Posel 1991: 13-14).

The aim of socialist feminism is to fundamentally change society's structure: It is not enough to follow the contractarian or liberal example of ensuring that the current structure applies evenly to both sexes. Within the contemporary social and economic structure, class plays a role in the way that women are treated, with women of working class backgrounds suffering most harshly from gender oppression (Rakgoadi 1992: 35). Thus treating men and women alike would only address a part of the problem and not account for the class striations dividing women.

A manifestation of this is evidenced in the South African sex work scenario. Women working the streets are fined regularly and in some parts of Cape Town are still being severely harassed by the authorities. State action against prostitution is especially directed towards street walkers, the majority of whom are in a lesser financial position compared to their escort counterparts. An official explanation for this would probably pivot around the visibility of street walkers being offensive to the general public, whilst escort agencies, considered to be more contained, would be seen as less obviously objectionable.

It is not however only the disparate way in which the profession has been managed by authorities that constitutes the class striations within the industry. The manager of Cachet, a Cape Town escort agency, had this to say:

'we don't consider ourselves as being in prostitution. Our ladies go out for company. We are upmarket and our agency is not a brothel. We don't operate that way' (Weekend Argus 1993: 3).

An escort at the same agency said in an interview that she always has a choice as to whether or not she will go out with a customer, and that she chooses whether or not to sleep with him thereafter (3).

It seems that escort agencies in South Africa support this kind of classist hierarchy as it enables them to operate with little or no interference from the authorities who employ most of their efforts in policing the more visible street prostitution, a sector of the industry supposedly appealing to and originating from a lower income bracket. But the ever-present threat of danger is an unfortunate leveller: although it appears that all of the prostitutes murdered by the rampant serial killer in the Cape were probably streetwalkers, the murder of a housewife and part-time masseuse which occurred last year in the Kraaifontein (Western.Cape) home from which she worked, indicates that no form of sex work is safe from violence (Van Breda, 1995: 3).

The question then that needs to be asked is whether there is any difference between the sex worker who chooses to solicit on a public pavement and the sex worker whose entreatment to do business is only advertised publicly? Should the class differences be reflected in legislation? I would suggest that the difference is negligible and does not warrant the uneven application of laws; it is likely that beneath such a move lies a deeper class-oriented agenda. Consequently, the view of the escort agency spokespersons depicted above is not supported here. Whether the sex act is performed in the backseat of a car or on the balcony of a luxury apartment, as long as there is payment for such act by the customer, it constitutes sex work for the purposes of this paper.

Therefore, class issues prevail in the commercial sex industry in South Africa. According to the socialist feminists, because of this it is not enough to eliminate sexist legislation; instead there needs to be social revolution which eradicates the roots of class and gender oppression (Rakgoadi 1992). This entails creating a society where the economic necessity for entering prostitution is removed. Such a vision ultimately supports the policy objective usually associated with the wage labourer: to create an economy free from alienation and exploitation. But socialist theorists are realistic in their short term goals. They recognise that as long as capitalism exists, workers need to sell their labour power to survive and consequently need to protect their interests from capitalist domination. In light of this, Marxist feminists advocate the continued practice of prostitution, but with the proviso that unionisation of the industry be a priority. They recommend that unionisation will go some

of the way in eliminating the immediate problems and work-related hazards that prostitutes face on a daily basis (Posel 1991: 15).

#### 4. Radical Feminism

*"The law sees and treats women the way men see and treat women."*

Catharine MacKinnon

Kathleen Barry, a United States feminist who initiated a powerful anti-prostitution lobby with her investigation of *Female Sexual Slavery*, suggests that all women are potential victims of male sexual domination and oppression. The assumption that only women of a particular socio-economic background, age, race or class fall into this category fails to recognise the sexual suppression of women that underpins all aspects of our society:

'As most women know, being sexually harassed while walking alone down a street, or sitting at a bar or restaurant without a man, is a poignant reminder of our definition as sexual objects. Spurning those advances and reacting against them are likely to draw indignant wrath from the perpetrator, suggesting the extent to which many men assume the sexual objectification of *any* woman as their right. Under such conditions, sexual slavery lurks at the corners of every woman's life.' (Barry 1979:121).

To this end, Barry describes the similarity between the institutions of prostitution and marriage. Whilst feminist Marxism blames capitalism for the merging of these two establishments, Barry asserts that it is patriarchy<sup>4</sup> that has colonised women and forced them into sexual slavery (1979: 270): 'by channelling women into marriage or prostitution, they are kept economically marginal thereby not disrupting male economic and political power' (271). It is therefore not only in capitalist societies (as claimed by socialist feminists) that women are enslaved; any society that objectifies women is a party to patriarchal domination.

Additionally, sex colonisation assumes the automatic right of men to demand and receive sexual satisfaction whenever they feel they need it. This is achieved by sex being purchased through prostitution and legally acquired through marriage. If not supplied, it may be seized in or outside of both institutions. She explains further that the sanctioning of prostitution encourages the cultural belief that men should have sexual services

provided to them under any conditions or terms that they choose - all they need do is pay for it. In marriage, sex is presumed to be a wife's responsibility in fulfilling her duty to her husband<sup>5</sup> (269).

Barry contends that in order to break the socialisation pattern which allows women to be abused and enslaved, women need to stop identifying with society's male standards, standards which deny women their full existence in their own right and ultimately lead to their vulnerability and abuse. It is through feminism that women can become more self-assured and 'female (self)-identified' and consequently interrupt the usual socialisation process which cultivates dependency and male-identification (1984: 269). The current pervasive ideology that dominates the socialisation of society produces a situation in which, according to Evelina Giobbe, an ex-prostitute and founder of WHISPER (Women Hurt In Systems of prostitution Engaged in revolt)<sup>6</sup>:

'Prostitution isn't like anything else. Rather, everything else is like prostitution because it is the model for women's condition' (1990: 70)

Supporting the message of Giobbe's statement about the general status and nature of women's lives in patriarchal society, Mackinnon, a leading activist and writer of radical feminist legal theory, states that:

" the law reproduces sexual experience from the perspective of the male, not the female, and thereby ensures male control over the bodies of women" ( in Naffine: 9)

According to MacKinnon, the condition of women in relation to men is translated into legal terms. The reach of the 'maleness' of the law is not however restricted to preserving male sexual interests in women. Its patriarchal style, "hierarchical organisation; its combative adversarial format; and its undeviating bias in favour of rationality over all other values" constitutes it as a fundamentally patriarchal institution (7-9).

For Mackinnon, gender is not a question of difference, but a question of dominance which manifests itself in the control and oppression of women's culture, language and most importantly, their bodies. The law entrenches women's submissive position rather than providing solutions to lessen their oppression (in Naffine: 9-10). Thus radical feminists are dissatisfied with the entire structure of the law. Being equal within it does not achieve enough for the cause of women's rights. Here the view is that trying to better a women's

position within this masculine framework is futile and consequently what is needed is a fundamental reordering of societal institutions.

In order to alter the situation and provide women with the legal tools to take command of their own lives, radical feminists suggest that a female style of justice with conciliation rather than objectivity (which is the focus of the combative male legal style) as its central principle may in fact be a better way of solving social disputes which arise. Thus the radical feminists criticise strategies which accord "like" or "special" treatment to women so as to try and fit them into an existing system. The only way to really address the problem is to construct an entirely different kind of justice which translates into a fundamental change in the law's style, its form, and its view of the world (9-10).

Relating the general reforms that need to take place in the legal arena to prostitution, Barry asserts that for such structural change to take place, traditional attitudes need to change: 'As long as women who are prostitutes are socially labelled as deviants, they will be expendable as throwaway women, and legally defined as criminals' (1979:272). Legal change means directly confronting the laws which enshrine the masculine double standard by having prostitution removed from the statute books. Decriminalisation is an essential step in liberating women involved in prostitution and must be implemented even if the sight of prostitutes is unwelcome to many who would prefer to keep the double standard of morality hidden.

Practical measures which will challenge the status quo include the penalisation of pimps and violent customers and the provision of resources for prostitution outreach programmes, emergency and long-term shelters, and crisis hot lines. But Barry warns that it is only if these pro-active measures are fought for in the context of a new, feminist, sexual order that there will be a tolerance of prostitution at all (1979:278); prostitution in itself is outrightly condemned although radical feminists may express sympathy for the prostitutes themselves (Posel 1991: 18).

In view of this, Barry feels that contractarian and liberal feminists miss the point concerning power relations which exist in the world of prostitution. Without re-evaluating, revolutionising and transforming our society, prostitutes will continue to be 'exploited in a degrading manner by villainous criminals who kidnap them, trade in their bodies (and) rape them ...' (Van der Poel 1995: 48). Hence providing equality through the letter of the law is insufficient to eradicate the subjugation of women.



Similarly, radical feminists object to the contractarian claim that prostitution is a victimless crime. Instead they allege that prostitutes are degraded and exploited by men who directly or indirectly enjoy the benefits of prostitution (Jaggar 1994: 107). Thus prostitutes are the victims, and customers and pimps the beneficiaries of the system of prostitution. The liberal denial of this reality entrenches women in the subjugated position they currently occupy in society.

In essence then, the aim of radical feminism is to demystify as well as create an awareness around the detrimental effect of patriarchal ideology upon women, and ultimately to completely eliminate male domination of women. To rid society of prostitution there needs to be the eradication of the male monopoly of the economy together with the abandonment of the perception that women and sexual objectification are synonymous (Jaggar 1994: 108). The achievement of this will be linked to the establishment of the long term goal of creating a superior, self-sufficient female culture which values wholeness, trust, nurturance, sensuality and joy (Posel 1991: 17).

Thus it is not enough for the radical feminists' goal to be construed as granting rights to women. There is a broader vision which stresses felicity and harmony above the orientation which values power over all else. When power is revered as the most valued goal, discrimination, stereotypes, and oppression will be used to support the groups in positions of power making it impossible to realise the humane goals of caring, sharing, nurturing and loving in society (Harris 19 : 88).

## **C: LESSONS FOR FEMINISM FROM THE THEORY OF FOUCAULT**

*" The beginning of wisdom is in the discovery that there exist contradictions of permanent tension within which it is necessary to live and that it is above all not necessary to seek to resolve."*

*- Andre Gorz, Farewell to the Proletariat*

All four of the feminist theories presented above seek a common goal: the decriminalisation of prostitution. Yet each theory has a different rationale for reaching this conclusion, and the proposed decriminalisation to which each subscribes is intended to result in entirely different and distinct future outcomes for the industry.

Contractarian and liberal feminists would like to see prostitution decriminalised so that sellers and buyers of commercial sex can operate without the restriction of the criminal law and without the statutory gender inequalities which prevail in the current environment. Some liberals are prepared to go one step further by requiring that not only are the restrictive laws removed, but that there is a further mechanism for ensuring that *de facto* gender equality is prescribed in the new legal domain. Marxist feminists concede that in order to realise their ideals for a new, socialist world order - with prostitution completely eradicated from our society - there needs to be a suitable environment that enables those involved in the trade to protect themselves and their interests in the interim. Such an environment requires decriminalising the profession so as to allow prostitutes to have access to the law as well as enable them to use their bargaining power. Similarly, under pressure, the radical feminists will probably also accede to the idea that decriminalisation of prostitution is the better short term option for realising their long term goal of the total dissolution of patriarchy with its demand for a commercial sex market.

But despite this seemingly hopeful breakthrough in the different camps, the ideological disparities amongst feminists seem to have prevented them from coming together and using a common voice to change the law. It would seem then that a united front is not possible and that one or other of the standpoints will need to trump the rest in order to achieve its goal of decriminalisation. But is this really the case?

Some ideas for answering this question can be found in the theory of Michel Foucault. His writings display an unusual ability to establish a theoretical and political position within

which there are contradictions and tensions, (these would generally leave a theorist plagued by these differences unable to move forward) but which he accepts without feeling compelled to resolve. Thus Foucault's philosophy embraces the ability to acknowledge the theoretical tensions which arise when there is recognition that one can be both the victim and the agent in the same system of domination (Sawicki 1991:10). His theory is not however emancipatory in the way that Marxism or radical feminism strives to be; instead it provides an alternative way of looking at theories of self and society as well as offering methodology for re-evaluating them. Additionally, Foucault recognises that simply lifting restrictions on sexual behaviour does not address the deeper power relations that govern sexuality. At the same time, he does not subscribe to the view that there is a fixed sexual identity - an idea which each of the feminist theories invariably believe in. (11).

In the past, feminist theory has widely discussed how women differ from men, that is, their biological, psychological and cultural differences. These analyses, sometimes referred to as theories of sexual difference, have been able to overcome the divisions of race, class, age or sexual orientation that separate women from each other. In the same instance however, the diverse experiences of women have often been lumped together into one category: "women's experience", in an effort to provide the basis for a collective feminist viewpoint (Sawicki 1991: 17).

But the reality of theory at the level of practice has resulted in conflict between opposing feminist groups (17) who want recognition of their own particular standpoint rather than having their struggle defined in broad feminist terms. An example of this is the battle between two women's groups in the United States discussed earlier in this chapter, COYOTE and WHISPER, who both claim to speak for women in prostitution. In the 1980's a schism developed between COYOTE and WHISPER. Whilst COYOTE, whose members consisted mainly of women who were working in the industry, had as its aim the empowerment and legitimisation of sex workers, WHISPER, whose membership comprised mainly of 'women who have survived the sex industry' [Giobbe in Jaggar 1994:120] and feminist scholars, was attempting to rescue prostitutes from an inherently powerless position (Jenness 1993: 76).

At the heart of the acrimony between the two organisations, are completely different and opposing understandings of what the sex industry means in our society: 'depending on one's point of view, selling female sex is either pandering to male supremacy or a process

of self-actualisation whose coordinates are economic independence' (Jenness 1993: 79). No matter which explanation one prefers or believes, there should be recognition that the voices within the two movements belong to those who are or have been part of the commercial sex industry and constitute a genuine account of their experiences as told from their own points of view.

The question therefore arises again: 'do the differences and potential separations between women pose a serious threat to effective political action and to the possibility of theory?' (Sawicki 1991: 17) According to Foucault, resistance can and should be carried out in local struggles against the many forms of power exercised at the everyday level of social relations. The way in which this can be done is linked to the understanding of how power works in society. The traditional model of power which Foucault calls the juridico-discursive model of power presupposes the following three assumptions: Firstly, power is possessed. The Marxist and radical feminists, for example, would contend that power is possessed respectively by a bourgeois class of people or by the males in our society. Secondly, power flows from top to bottom from a centralised source. For example the law, the state or the economy and whoever has authority over these, indicates the source of power. Thirdly, power is primarily repressive; it has sanctions to uphold its prohibitions (Sawicki 1991: 20).

For Foucault, the juridico-discursive model of power describes only **one** form of power. His own theory of power suggests an alternative way of portraying power relations: Firstly, power is exercised rather than possessed. Secondly, power is primarily productive rather than repressive. Thirdly, power is analysed as coming from the bottom up rather than the other way round. By conducting an ascending analysis of power, Foucault shows how the mechanisms of power work at the microlevel of society and that it is this power which is 'invested, colonized, utilized, involuted, transformed, displaced, extended, etc.,' (23) and become part of the dominant networks of power relations. Furthermore, he writes that we are never trapped by power because with power comes resistance which enables the possibility of modification from the dominant hold. In this way his theoretical methodology is designed to facilitate the insurrection of subjugated knowledges (Sawicki 1991: 21-26).

Foucault supports division in a struggle. He does not feel that one theory or subjugated knowledge need eclipse the others. The historical, contextual and social conditions of the field of struggle will determine which forms of resistance are the most successful (26). For

feminism then the message is that individuals from diverse sites in the social field should be mobilised and their differences used as a resource to achieve the common goal.

In the United States, the voices within both COYOTE and WHISPER represent subjugated knowledges which challenge the criminalised status of sex work. In South Africa, the dominant knowledge is that of traditional moral theory which has used the law and the police to retain its position of authority. In both these countries there are radical and liberal feminist voices and a dominant traditional moral code of sexuality. There are however similarities between the two camps and it is not only their common aim of decriminalisation that they share. Both conceive of power as centralised in key institutions that dictate the acceptable boundaries of sexual expression. And both see women's sexuality as having been repressed and consequently understand the importance of the truth of sexuality as central to liberation (30).

What I understand from this is that differences should not dominate the theoretical arena during a struggle. Subjugated voices should hear each other and strive towards a common goal: challenging the dominant knowledge. The question of whose theory will succeed - liberal or radical - will depend upon the social context and it will evolve naturally. The important thing to extract from Foucaultian wisdom is that there is power in the differences between groups fighting for a common goal and these should be utilised. Grand visions of radical or socialist feminism eradicating the current social order are unrealistic. Instead subjugated knowledges should ebb away at whatever dominant manifestation of power is closest to it and in this way, many small changes will be made which will ultimately affect the larger picture.

To show that this is a realistic and practical way of thinking about women and the law, there is evidence that there are feminists who have already begun to think in this way. They contend that whilst the law professes to be "rational, dispassionate, value-neutral, consistent and objective", it is in fact none of these things (Naffine :2). Although it is argued that the concepts invoked to demonstrate the law's justice are themselves gender-biased in their construction, they reject the idea that the law is homogeneous in its subjugation of women. Instead it is contended that the law contains its own contradictions and has insufficient method and system within it to invariably be unfair to women.

These feminists contend that the law is profoundly sexist and the fact that there is much in the law that is detrimental to women is tempered by the achievements of feminists who

have already fought for and managed to change certain disparities within it (Naffine :17-19). In this way, the law is a reflection of the type of society in which we live. Although it is male-dominated, there have been inroads into its powerful patriarchal base which have consequently heralded change in the form of positive benefits to women.<sup>7</sup>

Thus the quotation of Gorz at the beginning of this section is apt: if there is to be progress in the feminist struggle against male domination, feminists must accept the contradictions and tensions that exist amongst them, learn to work with these differences and explore and utilise any opportunities in the legal system which allow them to endeavour to get closer to their goals.

## ENDNOTES

1 See the bibliography for a more complete reference.

2 *De jure* formal equality requires that the law is formulated and applied neutrally. This would involve, for example, the removal of all sexist terminology from a statute. *De facto* equality, on the other hand, recognises that because of former institutional and societal disadvantages, it is more than just the letter of the law that needs to be altered; some pro-active strategy needs to be taken in order to rectify the situation. A classic example of *de facto* equality is affirmative action.

3 This topic is given attention the following chapter under the section dealing with the Draft Bill

4 Patriarchy is defined as the systemic mode of male domination and female subjugation in any society (Posel 1991: 16).

5 The statutory introduction of marital rape as an offence has improved this situation legally in South Africa

6 WHISPER is an American (USA) national organisation of 'women who have survived the sex industry' (Giobbe in Jaggar 1994: 120). They chose the acronym WHISPER because women trapped in systems of prostitution WHISPER amongst themselves about the coercion, sexual abuse and battery that they experience, whilst myths about the sex industry are shouted out in pornography, the media and by "experts" (121). 'WHISPER believes that all prostitutes are victims, that no woman ever chooses to work as a prostitute, and that prostitution can only be understood as an institution created by patriarchy to control and abuse women' (Alexander 1987: 18).

7 For example, in the past, the law has supported and entrenched a position that divides the world into public and private, the private indicating the realm of the home, an area not always identified as needing the support of the law. The policy of police not "interfering" in private matters of the home when a woman seeks recourse from the law from her abusive husband, is an example of this type of policy. It was only through extensive campaigning that women in South Africa recently managed to have this inequity changed by law. In this way and in ways similar to it, the cracks in the uniformity of the law's patriarchal armour have allowed women to get a legal foot in the door.

## LEGISLATION

Apart from the fiery theoretical and moral debate, and the different viewpoints that individuals or groups may hold about prostitution, in practice, the industry is guided and limited by the law of its country. To a large extent the conditions that prevail in the industry are determined by the kinds of sanctions, regulations, or prohibitions that are written into a jurisdiction's legislation. Governments have long wrestled with the problem of how to manage the sex work industry and as a result there is considerable diversity in the approaches that have been adopted. It is useful to consider the various policy options that exist, and to examine whether any of them is suitable for the situation that prevails in South Africa. This chapter has three main objectives. The first is to look at the basic sex work policy options or regimes that exist. The second is to examine the implementation of these regimes in foreign jurisdictions and the third is to analyse the current legislation pertaining to prostitution in South Africa, as well as any other formulated local suggestions that propose policy change.



## **A : POLICY OPTIONS**

### **1. Criminalisation**

Criminalisation is the policy regime that uses restrictive laws to prohibit behaviour that is disapproved of in a society. The criminal law renders the forbidden activity punishable by law, and retribution is usually in the form of a fine or prison sentence. This approach is favoured by those who believe that sex work is morally wrong and who would not like to see a public manifestation of the practice. The rationale is that the restrictive laws will deter individuals from taking part in the activity or failing that, that they will be punished for their actions (Pinto, Scandia and Wilson 1990: 6).

The desired effect of criminalisation is therefore to halt or punish the activity, but in a situation where there is substantial demand for the outlawed activity and the concomitant potential for economic profitability, which is the case with prostitution, criminalisation only serves to drive the industry underground and encourages the involvement of organised crime. Once the activity is outside of the parameters of the law, it becomes increasingly difficult for a government to have any control over it or its related activities, save to punish offenders if caught (Pinto et al 1990: 6). Yet the imposition of fines in no way serves as the deterrent to offenders which it is meant to be. In fact, it often has the opposite effect, as one call girl remarked: 'when a girl gets bust she just works twice as hard to pay the fine' (Lotter 1991: 6). Posel suggests that the primary reason for the failure of criminalisation as a policy option to eliminate the sex market, is because it does not address the factors that support and sustain it (1993:19).

Criminalisation generally leads to the legal harassment of prostitutes whilst syndicates and pimps who control the trade are left untouched. In effect, this leads to a juridical vacuum and allows a situation to develop in which "anything goes" and the prostitutes are 'abandoned to the good-will of the (brothel) operators, including those who are nothing other than complete exploiters' (Van der Poel 1995: 45). Police corruption is also a common occurrence in the industry - this is given further attention below in the discussion on the South African Sexual Offences Act - and the weak legal position of sex workers does not allow for a public outcry against this. Criminalisation in no way ensures that corruption and the dangers which are notoriously associated with the profession are abated. The safety of sex workers is of no concern to governments subscribing to this legislative regime and its framework disallows complaints of other citizens to be dealt with in a practical and systematic fashion (Pinto et al : 6).

## 2. Legalisation or Regulation

Legalisation or regulation, as it is sometimes known, is the policy option which involves formal recognition and state sanctioning of the activity or trade in question. With regard to sex work, this regime has generated more problems than it has managed to solve. In most cases, the regulations are so restrictive that the sex workers are deprived of their private and economic autonomy. Working conditions are tightly controlled and direct state authority over the sex workers effectively sees the state assume the role of pimp (Pinto et al: 6). In effect, regulation institutionalises inequality by limiting the prostitutes rights. Furthermore, the underlying motivation for introducing such a system is to minimise potential public disturbances created by prostitution rather than to address, or at least balance, the needs and concerns of the people working in the industry (Shrage 1994: 83).

But then there is the view of a sex worker who wants the profession legalised:

'I want it legalised. When I was working fulltime I could earn between R2000 and R4000 a month and I was quite happy to pay taxes. I want there to be more control, primarily because the lack of control leads to serious health hazards ... I don't want to be accused because some little girl working down dock road passed on a disease. And I certainly don't want to catch it. I want more control to prevent blackmail and extortion. As things are at present the whole system is open to corruption: the client, the prostitute and even the police can use blackmail. If prostitution is legalised, then blackmail becomes a legal offence - one the police do not view lightly' (Paice, Cosmopolitan December 1985: 78).

She therefore sees legalisation as a safer option and one that will benefit women like herself. She considers legalisation the answer to the current lack of recourse to the law and she believes that it will also help to control the spread of venereal diseases.

The manager of the Community Health Department's community-based Outreach programme in Johannesburg, points out that legalising prostitution would require a register. This, he recognises, would pose a logistic impracticability: 'How on earth are you going to get all people in this industry to register when many don't even recognise what they do as sex work?'. He adds: 'Why not register their clients as well? Sex work operates on demand and supply' (Femina June 1994: 47). His statements are a reminder that the law needs to be realistic, practical and fair.

### **3. Decriminalisation**

Decriminalisation recommends the removal of all legislative measures which prohibit, monitor or control sex work. This regime ensures that sex work activities are no longer relegated to the category of crime, and participants in the industry are not subject to criminal penalties.

Supporting this type of policy option is SWEAT (Sex Worker Education and Advocacy Taskforce)<sup>1</sup>, a community service organisation based in Cape Town which envisages total decriminalisation of the sex industry as the only realistic policy regime for South Africa. SWEAT's understanding of a decriminalised status for the profession sees sex work as being subject to the same regulations that govern any business or trade, and that once this is in place, it is unlikely that any other special legislation will be needed. Standard business practices, for example, the Basic Conditions of Employment Act, would provide sufficient regulation to guide the commercial sex industry (Petzer 1995:1).

As a feminist, Shrage anticipates some significant drawbacks with the policy of decriminalisation. She cites the example of the experience of numerous other industries which have been decriminalised and have subsequently turned into 'large-scale, non-governmental, profit-oriented enterprises that have a power of their own to inflict harm on and manipulate human beings' (1994: 83).

This view is supported by Roger Matthews who acknowledges the ineffectiveness of criminalisation yet nevertheless contends that decriminalisation is unlikely to reduce the overall level of exploitation of sex workers either. In fact, he suggests that decriminalisation will increase it. He feels that this type of policy will create a laissez-faire climate for capitalists to prey upon, and the lack of legal guidelines would exacerbate the vulnerability of sex workers who would have little room to manoeuvre within such an environment of capitalist exploitation (Shrage 1994: 84).

Another concern which has been raised in relation to decriminalising prostitution is the fear that many more people might choose to take part in what is seen as a potentially harmful activity (Pinto et al 1990: 7). This situation cannot be avoided, but if it really is seen to be a problem, the government should be obligated to make other, more attractive career options available to those who are most at risk. Better education and changes in societal attitudes would go some of the way towards attaining this goal.

#### **4. Decriminalisation with Controls**

Decriminalisation with controls removes prostitution from the ambit of the criminal law and treats it as a city planning matter. Identifying this policy regime as viable, Pinto, Scandia and Wilson of the Australian Institute of Criminology, The De Graaf Foundation in the Netherlands and Laurie Shrage, a United States feminist writer have all made a number of policy proposals to this effect (Pinto et al 1990; Van der Poel 1995; Shrage 1994).

Pinto et al suggest that the commercial sex industry should be determined by the municipality of a district, but that any regulatory measures must be kept to a minimum. This policy option is seen as a compromise between sex workers, clients, residents and the community, and the general objectives include the following: removing prostitution from the ambit of the criminal law, whilst retaining provisions that prohibit: the sexual exploitation of minors, intimidation, procuring, blackmail and the assault of sex workers. According to their model of decriminalisation with controls, advertising sex work services or recruitment of sex workers should also be prohibited. There is also the stipulation that the demand for prostitution be reduced through social welfare reform and that street solicitation be permitted in certain areas only, but without creating red-light districts (Pinto et al 1990: 7). This is perhaps one of the crucial differences between the policy regimes of legalisation or regulation and decriminalisation with controls. Regulation involves the creation of red light districts, and state-controlled brothels, which often severely restrict the movement of women to the brothel at which she is registered, for example in the case of the legalised brothels of Nevada, or the denial of citizenship rights, for example in France, whereas decriminalisation with controls restricts sex workers' freedom of movement nominally but it does not deny them citizenship or create curfews. It is debatable constitutionally whether any restriction of freedom of movement is acceptable, but this will be discussed more fully in the last chapter dealing with zoning and human rights.

Pinto et al argue that an environment of decriminalisation would be instrumental in abating some of the health problems that arise from the profession. To this end, sex workers would be able to undergo health checks without fear of prosecution, and a system promoting safe sex practices would be implemented. For example, brothels or escort agencies could be required by law to disperse literature on the risk of unsafe sex and the problem of sexually transmitted diseases (1990: 7).

Although this may be a useful suggestion for Australia, and could work to some extent in South Africa, its effectiveness would be limited by local conditions. Firstly, many sex

workers in South Africa are not associated with an agency and secondly, the high illiteracy rate in this country excludes the assumption that all those approached would be literate. Nevertheless, this difficulty could be overcome by capitalising on the long and successful history of workshopping around topics, a method which conveys the necessary information in a dynamic and practical way. The workshops could be funded by government and organised by workers who are trusted and known to the sex worker community.<sup>2</sup>

There is also the concern that not enough is currently being done to ensure that occupational choices and employment opportunities for women are increased. The contention is that this situation must be changed so that the incidence of women entering the industry motivated by economic reasons alone, is reduced. Planning that is designed to reduce this phenomenon by providing viable and sustainable alternatives is needed. (Pinto et al 1990: 7). This is a huge task, but there are ways of propelling the process forward, possibly through the Gender Commission, a statutory human rights body which is currently being constituted and should be operating by the end of 1996.

The problem of exploitation would best be prevented by retaining or instituting laws that prohibit coercion of individuals entering and remaining in the profession. The danger of this type of legislation, however, is evidenced in the assumption that every person who benefits financially from sex worker's profits must be at fault. In reality, this is not always the case and any laws which do address this need to be constructed in a way that does not prevent sex workers from having the right to enter into voluntary relationships and subsequently supporting their partners if they choose to do so. (Pinto et al 1990: 7).

Shrage supports a slightly different model of decriminalisation with controls. Her proposals are in many ways similar to those of Pinto et al, but are perhaps more sex worker-oriented. Her version of controlled decriminalisation is not concerned with making prostitution safe for men and society at the expense of sex workers. Instead she maintains that decriminalising sex work without providing any positive social policy regulations or controls neither reduces prostitution nor subverts the myths that surround the industry. If these are desired goals, then certain regulations need to be put in place. Thus she argues that any future policy should be guided by following fundamental principles (Shrage 1994: 84, 5; 159):

- a critical understanding of why prostitution exists - an awareness of the values that generate the demand for prostitution and the widely held expectation that women ought to be available for the fulfillment of male sexual desires and fantasies

- the reduction of annoyance, harassment and disturbance emanating from the sex work industry - with the inherent approach that any public nuisance laws should be directed at the offence perpetrated, rather than aimed at an offender's character. Cognizance must be taken of the positions of all stakeholders concerned
- regulations which protect sex workers from coercion and exploitation should not assume that sex workers are passive: there needs to be a realism which recognises the potential exploitation a sex worker might find inherent in her or his relationships
- diminishing commercialisation of the industry by having sex workers themselves acquire licences [like other (semi) professionals], so as to give them greater freedom and empowerment than they would have if they were attached to a brothel or similar establishment.

Licensing standards should be established by a representative commission comprising of sex workers, community leaders, educators, and health and legal experts. In order to obtain a licence, certain professional standards must be met, for example the candidate's knowledge of health issues that are associated with the industry. If necessary, the relevant educative training to help fulfil this stipulation will be ensured by the licensing board and it is imperative that the personal and material costs of obtaining this knowledge, and consequently the licence, do not outweigh the risks of operating without it. They must therefore be both available and affordable on a non-discriminatory basis to those who wish to enter the industry (Shrage 1994: 159-60).

Shrage cites this system of licensing as advantageous for a number of reasons. Primarily, it allows sex workers to work for themselves rather than having to attach themselves to large-scale capitalist institutions which have a history of exploiting their workers. This in turn would encourage those who do not wish to practice on their own to form workers' collectives or professional partnerships. Additionally, the system gives a voice to sex workers who have long been ignored or silenced. In having more control over how their services are offered, sex workers will be less vulnerable to the whims of clients, pimps and public officials. And by instituting that sex workers have a strong influence in designing the licensing procedure as well as setting standards for the industry, they will be empowered to ensure that their rights are protected. Clients too would be ensured that certain professional standards have been met and the consumer would find in this system a vehicle for addressing, or a safeguard against, possible hazards that may arise from the industry (Shrage 1994: 160).

A third proponent of decriminalisation with controls is the De Graaf Foundation, an organisation created in 1961 in the Netherlands, which has as its goal the social integration of the commercial sex work industry. It aims to achieve this objective by

removing all criminal restrictions and special regulations relating to prostitution. Furthermore the Foundation submits that decriminalisation may well make a contribution to the removal of many of the problems which are commonly associated with the profession. The assumption is that:

'... the improvement of the juridical and social position of prostitutes, combined, as far as is possible, with the integration of prostitution into our society, will restrict the negative side-effects and combat undesired developments' (Van der Poel 1995: 46).

This requires firstly that the government adopts a neutral position towards the profession, neither encouraging nor condemning it. Secondly, state interference in the industry would be restricted to local government participation in the provision of licences, which would be granted if the working conditions, establishments and facilities fulfilled certain basic labour requirements (Van der Poel: 46). Thus contrary to Shrage, who envisages the licensing system as being directed at sex workers themselves, The Foundation proposes that it is the establishments that need to acquire licences. In South Africa, it is a viable option for local authorities to target escort agencies, brothels and massage parlours, but this system would not account for the many sex workers that practice their trade independently and in no one fixed abode. It is however likely that in South Africa, the licensing objective of The Foundation could be fulfilled whereas Shrage's proposal, although more inclusive and built upon a commendable rationale, is far less practical.

The De Graaf Foundation does however temper its call for governmental neutrality by adding a third requirement to its decriminalisation vision. The organisation envisages a complementary programme aimed at providing better sex education; improved employment opportunities for groups most at risk, such as single parents and juveniles; preventative supervision and advice services provided by trained social workers; and possibly the creation of an employment inspectorate which would combat press-gang recruitment (Van der Poel 1995: 46). These are valuable suggestions and are certainly considerations for a new system in South Africa.

It is acknowledged that the retention of certain controls in an environment of decriminalisation would still place limitations upon people in the industry. In light of this, decriminalisation with controls should be seen as an interim policy solution. If however educational programmes are implemented which aim to change ideas and misconceptions which the general public has about the profession, coupled with limited legislation, this will go some of the way towards reforming the commercial sex trade and will lead to a situation in which no special controls will be needed and a person's choice to enter the profession will not be questioned (Pinto et al 1990: 7).

- A similarity exists between regulation and decriminalisation with controls, but they are two separate regimes. The differences will become clearer when the various types of policy regimes are incorporated into practice in the next section, which describes how governments have formulated their policy in foreign jurisdictions. Fundamentally, regulation is far more restrictive than decriminalisation with controls and is overly concerned with the rights of the public and those that engage the services of prostitutes than a regime which decriminalises the profession and implements laws which strike a compromise position between the owners of the competing rights.



## **B : FOREIGN JURISDICTIONS**

### **1. Germany**

In Germany, the approach to prostitution is termed 'pragmatic prostitution politics'. It signifies a certain measure of toleration for the profession whilst at the same time seeking to suppress other aspects of it. The law has taken into account the futility of outlawing sex work completely whilst at the same time acknowledging that some facets of the profession remain socially problematic (Schulman 1992: 9). Thus Germany has chosen to legalise sex work so that it exists in a limited and contained legal framework.

Under "Crimes Against Sexual Self-determination" in the German Penal Code, there are a number of sections which address the issue of prostitution. Paragraph 180 criminalises the promotion of prostitution. For instance, this clause would cover owning or managing an income-producing brothel. Institutionalised sex work in the form of brothels are believed to limit a sex worker's autonomy. The rationale behind this prohibition of privately owned brothels is supposedly to protect prostitutes from becoming sexually exploited. The penalty for contravening this prohibition is up to three years imprisonment and/or a fine. Trafficking of women is penalised and a guilty party can receive between five months and ten years imprisonment for this crime. The financial exploitation of a prostitute as well as the control of her working conditions is punishable by six months to five years in prison (Schulman 1992: 10).

The German Penal code displays a concern for small communities that wish to retain their area as a prostitution-free zone. The law makes an allowance for local community councils to completely prohibit prostitution if the district numbers less than twenty thousand people whilst communities of over fifty thousand people may only prohibit prostitution in certain parts of their district (Schulman 1992:10). Prostitution is permitted then in specially demarcated locations which must be outside of residential areas, public parks, schools or children's centres and even some city centres. The bulk of the "Eros" zones then are concentrated in "grey zones" such as industrial areas or on the cities' peripheries (Argus 8 April 1993: 13).

Sex workers are taxed on their earnings, compelled to register with health agencies and must submit themselves to regular health checks - usually once a month. These may include AIDS tests. Evidence has shown that there has been a significant decrease in the incidence of HIV positive amongst licensed prostitutes in Munich (Argus 8 April: 13). It

can be argued that this signifies a success rate for the laws that compel prostitutes to take AIDS tests, but the decrease may also be no more due to safe sex practices than to testing.

An assessment of German policy presents a system reflecting a compromise position, but in effect it gives many communities the deciding vote in declaring the permissibility of prostitution in their neighbourhoods. Furthermore, the health stipulations support the sexual double standard by focusing only on the workers and not their clients. Lopez-Jones points out that legalised brothels in Germany institutionalise pimping by the state, leaving the women who work them in an inferior bargaining position which has the twofold effect of making it more difficult for them to retain their earnings as well as to determine their working conditions. She also levels criticism at the state-run brothels for charging high rental which translates into women working longer shifts to keep their rooms and pay the management that runs them (1992: 594).

## **2. England**

In England, the Street Offences Act of 1959 controls prostitution. Although prostitution itself is not prohibited, it is an offence to loiter with the intention of soliciting in a street or public place. Thus in terms of the Act, prohibition is directed primarily at street walkers in an attempt to keep them out of the public eye. On the other hand, individual sex workers who rent separate premises are almost ensured of remaining outside of the ambit of the legislation which criminalises solicitation. For example, if a landlord or landlady lets separate apartments in his/her building to individual prostitutes genuinely without knowing what their profession is, no offence is committed. It is an undoubtedly tough task to prove that a property owner really did have the requisite knowledge at the time of letting the premises to the sex worker. In this situation civil law provides the only legal recourse to disgruntled neighbours who are disturbed by the trade: they can invoke an interdict and claim damages for the disturbance. In deciding such a matter, how select the area in which the sex worker is operating will be taken into account in the assessment of damages.

One of the criticisms that has been levelled at the Act is that it is 'classist'. The prohibitions that exist are constructed in such a way that they effectively penalise lower class prostitutes who cannot afford to rent an apartment from which to operate. Upper class prostitutes who can however afford the luxury of their own private premises escape the sanction of the law (Schulman 1992: 12).

The Act also contains laws that are aimed at those who help or profit from prostitution. Only a man can be charged with this crime if the prostitute is a woman. This is considered to be a serious offence and a sentence of up to seven years can be imposed. There are also laws against those who encourage others to become or remain prostitutes, those who manage prostitutes or the business of prostitution or those who consciously provide other kinds of help, for example the provision of premises or publicity. It is an offence to make a profit from living off the earnings of prostitution. There are also laws that pay particular attention to females who fall below the adult age limit/ stipulation. To cause or encourage prostitution of a girl under the age of sixteen years, for whom one is responsible, is an offence, as is procuring<sup>3</sup> a girl under twenty one years to have unlawful sexual intercourse with a third party. Both carry a maximum penalty of two years imprisonment (Sex for a Living 121-2; Schulman 1992:11).

Furthermore it is an offence to detain a woman against her will in any place with the intention that she will have unlawful sexual intercourse with a man. Anyone who keeps a brothel or exercises control over a prostitute's movements for gain is criminally liable.

Oddly enough, however, there is a quirky law which deems it to be an offence to overcharge a sex worker for medical care, rent, clothes or food, simply because she is a prostitute (Schulman 1992:12). This law directly contradicts the prohibition against renting premises to a prostitute. If the law forbids its citizens from knowingly renting any place to a sex worker, the reasoning behind this reveals a clear attempt to ensure that s/he will struggle to find premises from which s/he can operate. To then come to the rescue of sex workers who nevertheless secure such accommodation despite the law's attempt to prevent them doing so, sends out a peculiarly ambivalent message. This paradox is perhaps not so strange at second glance - it mirrors the attitude which both chastises the promiscuous and amoral woman whilst at the same time pities her and resolves that she needs protection against the potential exploitation encouraged by her illegal status. In this way the English law consolidates the precarious tightrope that a prostitute treads in society and then has the audacity to offer provisions that create a safety valve from its morality-clad wrath.

English law also has prohibitions against "kerb-crawling". These are directed against the customers seeking the services of sex workers who create a nuisance by their slow pace either on the pavement or in their cars. Although there is a prostitute and client to every transaction, reports of convictions show very few examples of this crime (Argus 1993: 13). In 1986, compared to the 9404 women convicted on prostitution charges, 189 men were convicted of kerb-crawling (Fairweather: 1989: 112)

Assessing the English policy, it is clear that it is based upon political decisions which appease public sentiment rather than being based upon any rights-based policy. Some of the laws clearly contradict the rationale behind others and I would strongly recommend that any South African legislation addressing the situation is founded upon a more integrated philosophy which does not rely upon political decisions, and instead rests upon the due consideration of the rights of all parties involved. I would also emphasise caution against formulating policy which discriminates on the basis of class, given the fact that there are already indications of class-based divisions within the industry<sup>4</sup>. There is a necessity for further research to be done into this phenomenon, so that South African policy does not follow the example of England, and instead fosters solutions which understand and try to alleviate the class tensions that exist within the sex work industry.

### 3. France

Although prostitution is legal in France, soliciting is not. According to Jaget, this means that the usual way in which a prostitute meets her clients is forbidden (Jaget 1980: 206). In Paris, there are "red street" areas which permit street solicitation with the prostitutes working eight hour shifts, three to a room in surrounding premises. The sex workers are required to register annually with the police who arrange medical check-ups at six monthly periods. Registered sex workers are exempt from paying taxes, but they are disenfranchised (Argus 1993: 13). Additionally, French law allows for local governments to determine an area as forbidden to prostitutes, who can be fined if found in the area whether or not they are soliciting at the time or not (Jaget 1980: 07). They thus remain social outcasts and are denied one of the most basic political rights - the right to vote. The possibility of opening brothels modelled on the 'Eros' centres in Germany has long been mooted in France, but public opinion and especially the voice of the Catholic church has prevented this move (Argus 1993: 13).

The system in France is one of legalisation, and displays characteristics of the typical restrictive approach that usually accompanies this type of policy option. Whilst the sex workers are permitted by law to ply their trade, restrictions on their lifestyle and their diminished roles as citizens in their country leaves them marginalised and on the fringe of society.

#### 4. The United States of America

Of the fifty states that constitute the United States, only one, Nevada, does not prohibit sex work. And even within the state of Nevada, there are certain large cities that have banned the activity, notably Las Vegas and Reno, generally infamous for their permissive values and propensity for providing entertainment of the "iniquitous" or "vice-filled" variety. They are able to do so because the state of Nevada has legislation which permits individual county governments - counties are the United States' equivalent to municipalities - to apply their own laws. Thus it is only the counties that have chosen to retain the right to legalised prostitution in their area that have official bordellos, the bulk of which are situated in small rural towns. The counties that opt for the right to operate legalised prostitution centres, are compelled to enforce strict state laws. These include official registration of all participating prostitutes, compulsory weekly medical check-ups and payment of state and federal taxes (Argus 8 April 1993).

According to Baldwin, in practice, women working in the legalised prostitution centres in Nevada have no control over their working conditions. They cannot, for example, make decisions regarding how many clients they see and what percentage of their tips they keep. Nor do they have freedom of movement outside of the brothels. The registration of prostitutes with the police serves to stigmatise them, making it more difficult for them to leave the profession if they so choose. Baldwin assesses their position as one of vulnerability as this policy regime socially isolates them and allows the pimps and brothel owners, the state's intermediaries or buffers, to emerge as 'capitalist exploiters' who thrive upon the prostitute's economic disempowerment (Baldwin 1992: 108-9).

Elsewhere in the United States, sex work is forbidden yet prolific. It takes the form of call girl systems and escort services both of which advertise openly in magazines and telephone directories. Strangely, although the status of these services is one of illegality, the commercial sex trade has managed to flourish in the wake of several landmark legal actions in which the superior courts found that the denial of the right of men 'to telephone women for "private entertainment" was a violation of their constitutional rights' (Argus 8 April 1993: 13). The law is less tolerant of solicitation that takes place on city sidewalks and the police are quick to act against sex workers who are found plying their trade as streetwalkers (Argus 8 April 1993:13).

It is noteworthy that according to American law, the rights of men are constitutionally protected when they choose to engage the services of prostitutes whilst their counterparts have no similar right to complete the bargain. The issue of not being able to telephonically contact women for entertainment is a right situated within the private realm of a citizen's

life. The right to choose one's profession, the right of two consenting adults to enter into a contract or use one's body in whatever way one sees fit, also raises the question of personal choice which seems to fit squarely within the scope of individual human rights and freedom of choice and association. The law clearly adopts the sexual double standard in its approach to the law on prostitution giving men rights and freedoms where it does not grant women the same dominion (Carmen and Moody 1985:10).

A simple assessment of the policy regimes adopted in the United States sees that prostitutes are given a choice between a severely restrictive system of regulated legal prostitution or a system which penalises prostitutes who are compelled to sell their services on the street. The only other route to take is that of putting oneself in a position of practising a less visible form of the industry, to which the law turns a blind eye.

I reject both policy options as flawed and unsuitable for the South African situation. I would recommend more honest, rights-based law to solve the dilemma of managing the sex work industry, an approach that would see that an activity deemed legal, is not accompanied by a series of laws that curb other rights of the people acting within that law.

## **5. The Netherlands**

Prostitution in Holland is legal, and there are no criminal sanctions surrounding the industry save that of living off the earnings of sex workers and the usual constraints of the law which apply to all private citizens. The breakdown of sex work activities in Holland is as follows: about eighty percent of the sex worker population works in sex clubs, private houses and in escort agencies; about fifteen percent hire a "window" in certain streets in Dutch cities and the final five percent, in part comprising drug addicts who are known to offer sex without condoms for the means to buy drugs, work the streets (The Argus 8/4/93: 13, Van der Poel: 1995: 44).

On application, brothels can get municipal permission to operate. Interestingly, it has not been the case in Dutch practice that women working in the brothels are subject to regular health checks and enjoy fuller protection of the law, as is the expectant presumption that this type of policy attracts. A spokesperson for the De Rode Draad, an association for prostitutes in the Netherlands, has stated that much of the sex work industry is still run by semi-criminals, with the exception of a few business owners who treat their employees decently (The Argus 8/4/93: 13).

In the Netherlands, a prostitutes' rights movement emerged in the 1980's calling for the improvement of the juridical and social position of prostitutes. The movement consisted of

a coalition of influential feminists and policy-makers who sought to connect with the Dutch government's emancipation policy. They succeeded in as far as they placed the issue of sex workers' rights on the political agenda. According to a Dutch academic, Sari van der Poel, who analysed the successes and failures of the group's efforts, the process failed when there was an attempt to incorporate all categories of sex workers, including the most problematic, presumably visible drug addicts. Van der Poel concluded that the movement succeeded only as long as professional prostitutes monopolised the image of the campaign. When there was an attempt to integrate all categories of sex workers, the stigma attached to prostitution was strengthened and this hampered the liberation of the profession (1995: 41).

The point raised by Van der Poel in her research raises serious questions for the progress of a prostitutes rights movement in South Africa. There always needs to be lobbying around proposed changes to law and I am presuming that this will be spearheaded by the prostitutes rights movement of some description in South Africa.

There is opportunity for South African sex workers to capitalise on the human rights culture which is being developed at present, but there may be valuable lessons to be learned from the Dutch example. The problem that could arise in the local context - as with the Dutch experience - is there may be a tendency or at least the temptation to situate the debate in terms defined by professional sex workers (and possibly academics and politicians), who may not address the needs of the most marginalised within the profession. However, it is difficult to know at this point whether the most useful strategy might be to allow the more organised professional prostitutes to take up the challenge, hoping that advances made by that group will benefit all sectors of the sex worker community over time. On the other hand, it may be more prudent to incorporate the aspirations of all sex workers at the start of the campaign rather than risk leaving the most marginalised workers in a voiceless and vulnerable position.

If law reformers fail to address the needs of the categories of sex workers most despised by our society, not only will we fail the ideals of our new open and free society, the problems that are associated with their presence in our cities will be exacerbated.

## 6. Australia

There is no uniform policy regime for managing prostitution in Australia. Different states within the territory have adopted a variety of legal solutions to cope with the profession. Attention is being given to the law in this regard, and in Canberra and Victoria where brothels are legal, the process of decriminalisation is in a state of flux. In Victoria, it is

legal to exchange sex for money, but it is illegal to do so in a bar or on a street corner (Argus 8/4/93). The law here shows a concern with prostitution being plied in public places rather than the act itself, and the restrictions placed on the profession make conditions for business very difficult for those providing the service.

In Canberra, the legal concerns are different: it is against the law not to use a condom in the sexual exchange between sex worker and client, and it is illegal to provide or receive sex if one is HIV positive. Here there is more of an acceptance that the industry will thrive in any environment and legislation is directed at critical health issues. The laws try to ensure that responsible steps are taken to avoid unsafe sex, and to stop the spread of Aids (Argus 8/4/93). Unusually, the laws are directed both at sex workers and their clients. The attitude of the Canberra lawmakers is to be commended for squarely addressing practical issues affecting sex work rather than merely entertaining the moral and political debate. It is also fairly refreshing to come across policy which recognises that the responsibility for safe sex involves both parties involved in the act. The problem with the legislation, however, is the practicability of implementing the provisions. How, for example, is it possible to police the use of condoms? And is it constitutional to administer Aids tests to those engaging in paid sex? And then how does one label those who are HIV positive to prevent them engaging in commercial sex? Or is the legislation meant to act more as a directive than a serious legal threat because of the knowledge that it is impossible to realistically implement the provisions? These are questions that would need to be addressed before any practical provisions could be utilised in the South African debate.

In New South Wales, brothels are not legally entitled to operate, but if they do not advertise their services, there is an unspoken agreement that they will not be disturbed by law enforcement authorities. And it is here that a strange compromise that has been struck between the profession and the state: street walkers can trade provided they observe the custom of not touting for business in view of a church, school, hospital or private residence (Argus 8/4/93). Thus the attitude here is one of compromise, and a semi-respect of rights on both sides.

A policy of "toleration and containment" is observed in Western Australia: as long as sex workers register their profession, they are not harassed by police. South Australia allows the exchange of sexual acts for money, as long as the transaction is done privately and not in a brothel. Tasmania's sex industry functions quietly and efficiently, but Queensland is the Australian exception which has banned the industry in its entirety by fining or imposing prison sentences of up to seven years for repeat offenders. Queensland has targeted both prostitutes and clients in a bid to stamp out the profession from its region (Argus 8/4/93).



## 7. Finland

Up until the end of 1986, prostitution was governed by the 1936 Vagrancy Act which, from a policy perspective, subjected prostitutes to the same state measures as those designed to control 'beggars', 'ramblers' and 'work-resistant' individuals. In effect, this approach controlled the sector of the industry that was most marginalised whilst more private forms remained beyond the realm of official intervention, and customers and procurers were largely ignored. The Vagrancy Act mandated unsuccessful disciplinary measures - warnings, supervision and institutionalisation - as ways to address prostitution. According to feminist commentators, Finnish policy after 1986, a policy of total decriminalisation, and the repeal of the Vagrancy Act does not imply a sanctioning or toleration of the profession; instead there is more of an emphasis upon researching and understanding the industry, increasing equality between the sexes and dismantling obsolete gender roles in Finnish society (Jarvinen 1993: 66).

The shift to an educative approach and the empowerment of women as ways to address prostitution in Finnish society is seemingly unique in this era of control and restriction in many parts of the world. The ideals set up as alternatives to criminalising the profession are laudable, and undoubtedly will go some of the way in ensuring that women have greater opportunity to participate in all facets of the employment sector thus minimising the resort to prostitution as a means of subsistence. According to Jarvinen, who did a study after 1986 of the period in which the Vagrancy Act controlled prostitution in Finland, there has been no significant change in the level of social problems usually associated with the industry since the repeal of the Act (1993: 14-5). It does seem however, that of the Nordic countries and certainly compared to South Africa, the Finnish sex industry is relatively small and unproblematic, thus ruling out using its successful policy model alone as an option for South Africa.

## **C: SOUTH AFRICAN LEGISLATION**

In this section, I examine both the relevant sections of the Sexual Offences Act and the Draft Bill on Prostitution produced by the Centre for Applied Legal Studies (CALs).

### **1. The Sexual Offences Act 23 of 1957**

The laws which govern prostitution are contained in the Sexual Offences Act 23 of 1957 (the Act). A fairly wide spectrum of offences are covered in the Act. It includes sections on homosexuality, some of which are specifically linked to male prostitution, as well as numerous clauses dealing with child prostitution. The provisions which will be addressed here relate to adult female prostitution and brothel-keeping.

Before discussing the relevant provisions in the Act, it is necessary to understand how the policy regime of criminalisation has served to drive the industry underground and has given related criminal activities the room to flourish. Although sex workers may use the illegality of prostitution to their advantage - they do not have to pay taxes<sup>5</sup> - generally criminalisation locks sex workers into a framework of vulnerability and weak legal rights. It is not only the potential danger they face daily, but the added helplessness of not having recourse to the law in the event of a violent or abusive incident, which compounds their precarious position.

The worst case scenario facing female sex workers in the Western Cape seems to have become a reality. That a serial killer with a fetish for prostitutes has preyed upon at least sixteen victims to date, indicates that the position of women within the sex work industry has reached a nadir to which the state can no longer turn a blind eye. The most basic right, the right to life, is being denied some women who have chosen prostitution as their occupation. And this revelation is only part of a greater picture of abuse which the majority of women within the industry face. An example of forced prostitution in the Western Cape is cited below where the Draft Bill on Prostitution proposes legislative safeguards against coercion into the industry.

In the fight for human and civil rights for prostitutes and in particular equating sex work with other service industries, it is sometimes tempting to overlook the huge abuses that occur in the profession. Recognising the suffering of those especially marginalised and

subjected to the dishonesty and exploitation pervading the industry, complicates the battle for regarding the industry as legitimate. And according to Van der Poel, this was exactly the reason why the prostitutes' rights campaign failed to strengthen the position of sex workers in the Netherlands: the campaign collapsed the moment the category of drug-addicted prostitutes replaced the situation of the more professional prostitutes as the starting point for policy measures (1995: 62).

Without disregarding the valuable lesson the Dutch campaigners learned - that it would have been wiser to allow the more influential sector of the profession to monopolise the emancipation process and thereby establish the rights from which all sectors of the profession would ultimately benefit - the plight of the most marginalised within the industry cannot be ignored. Information contained in the next paragraph gives a brief indication of the type and extent of abuse women in the industry suffer.

In a study of two hundred sex workers in San Francisco, 70% were found to have been victimised by customer rape and clients going beyond the agreed contract. Of these, 75% stated there was nothing they could do about the abuse, and 1% mentioned reporting incidences to the police (Van der Poel 1995: 50). In South Africa, a woman interviewed for a local magazine said that she had been raped and being a "hooker" had not made it any easier. She added that she had debated going to the police, but knew that "she wouldn't have (had) a leg to stand on when they discovered what (she) did for a living" (Cosmopolitan 1985: 78).

The kind of abuse experienced by prostitutes is summed up in this quotation from WHISPER:

"Prostitution is violence against women ... it's the worst form of violence against women because you get abused by the johns (customers), you get abused by the pimps, you get abused by the police. Society in general turns its back on you" (Jaggar 1994:123).

It is against this background that the provisions of the Act should be considered.

Returning to the provisions of the Act, section 19 states:

**"Enticing to commission of immoral acts**

Any person who --

- (a) entices, solicits, or opurtunes in any public place for immoral purposes; or
  - (b) wilfully and openly exhibits himself or herself in an indecent dress or manner
- any door or window or within view of any public street or place or in any place to which the public has access,

shall be guilty of an offence."

Section 19 criminalises any intentional entreatment by a prostitute to attract customers in a public place. Provided a system which incorporates the recommendations (or similar workable policy considerations) suggested in response to the Draft Bill below on zoning is implemented, there should be no need for this provision.

Section 20 states:

**"Persons living off the earnings of prostitution or committing or assisting in commission of indecent acts**

(1) Any person who --

(a) knowingly lives wholly or in part on the earnings of prostitution; or

(aA) has unlawful carnal intercourse, or commits an act of indecency, with any other person for reward; or

(b) in public commits any act of indecency with another person; or

(c) in public or in private in any way assists in bringing about, or receives any consideration for, the commission by any person of any act of indecency with another person,

shall be guilty of an offence."

The restriction in Section 20(1)(a) criminalises a sex workers' right to support herself, her children, parents, spouse or boyfriend (or any other party she may wish to support). It also criminalises the recipients of her support if any of those parties know how she earns the money. This provision would be found to be unconstitutional in terms of section 26(1) and (2) of the interim Constitution.

Section 26 states:

'(1) Every person shall have the right freely to engage in economic activity and to pursue a livelihood anywhere in the national territory.

(2) Subsection (1) shall not preclude measures designed to promote the protection or the improvement of the quality of life, economic growth, human development, social justice, basis conditions of employment, fair labour practices or equal opportunity for all, provided such measures are justifiable in an open and democratic society based on freedom and equality.'

Section 20(1)(aA) is the provision which actually criminalises the sexual transaction, and is notoriously badly policed. Few countries actually ban the transaction itself because of the obviously near impossible task of gathering conclusive evidence for a criminal prosecution. Section 20 permits police officers to set traps in order to charge sex workers with an offence. This system of entrapment has brought with it much abuse<sup>6</sup>. In Johannesburg, a member of the police vice unit explained that each arrest is enumerated

in a point system; when the officer has reached his quota of 20 points, he can "spend the rest of the month at the Ellis Park swimming pool (Lotter 1991:2). During her research, the journalist who extracted this information (and who had posed as an escort for the night in order to do so) revealed far more horrifying abuses of the system. She described the treatment she and others caught in the same raid were subject to by the arresting officers.<sup>7</sup>

The men displayed a flagrant disregard for human rights, in the following ways: they used foul, defamatory language: the arresting officers referred to them as "jou hoere", "goeters". One of the men shouted at an escort whose stockings and panties had been forcefully removed: "Hou op huil jou fokken hoer"(2). Another, holding an inflated condom to his groin, asked the journalist whether she wouldn't like something like that in her (6).

One of the escorts claimed her arresting officer had ejaculated in her mouth, and was told that "it won't help if you talk about this as you are a whore and I'm a cop and they'll believe me not you". Another police officer forced one of the women to pose nude for a photograph, stuffing money into her hand before the picture was taken. It is also apparent that the photographs taken as "evidence" have been seen to be displayed at the police offices at John Vorster Square (2).

In Cape Town, since the first half of 1994, according to a detective from the former vice squad, the police have adopted a different attitude towards arresting women for soliciting: "A magistrate recently criticised us for trapping people, so now we investigate only when someone complains". This is of course a far better situation than before, but is nevertheless an inadequate course of action. It is the laws that need changing - soliciting should not be a crime - in conjunction with the change of attitude amongst police officers.

One the biggest problems with this provision in recent years is the effect the traps have had upon the concerted health programmes around Aids and using condoms. Wanting to verify allegations made by workers of the City Health Department's Outreach programme<sup>8</sup>, that police confiscate condoms as "evidence" of solicitation, the journalist posing as an escort found that these allegations were true, and that condoms were seized upon as "evidence".

What is noteworthy about the general wording of the section is that the South African law has taken into account the rise of male prostitution in the country and has amended the law to include the penalisation of men in this regard too.

Section 20(1)(b) and (c) also excludes a sex worker's right to choose whether she wants to work for herself or for a pimp or brothel. The problem of exploitation would best be prevented by retaining or instituting laws that prohibit **coercion** of individuals entering and remaining in the profession. The danger of this is creating a scenario which penalises all pimps and assumes that every person who benefits financially from sex workers' profits must be at fault. In reality, this is not always the case and any laws which do address this concern need to be constructed in a way that does not prevent sex workers from having the right to enter into voluntary relationships and subsequently supporting their partners if they choose to do so. (Pinto et al 1990: 7).

Sections 2-8 respectively are entitled:

- Keeping a brothel
- Certain persons deemed to keep a brothel
- Onus of proof
- Contract to let house or place for a brothel void
- Use of house or place as a brothel voids contracts of letting
- Summary ejection when a house or place is used as a brothel
- Proceedings upon complaint by householders or police that a house or place is used as a brothel

All of these should be repealed in full, leaving the danger of abuse, forced prostitution, zoning difficulties or any other problematic issues associated with brothel-keeping to provisions which specifically address those concerns. Continued criminalising of the business will only ensure that any abuses which do occur, will be shrouded in secrecy, and never addressed responsibly.

## **2. Draft Bill on Prostitution**

Alternative legislation to the Sexual Offences Act was drafted by the Centre for Applied Legal Studies (CALS) in Johannesburg<sup>9</sup>. The Draft Bill on Prostitution (hereafter referred to as the Bill) aims at decriminalising most aspects of the current Act, although along with the retention of six of its provisions, the Bill proposes several new categories for criminal sanction. These are consolidated in a single statute together with regulations which reflect the other aims of the Bill - recognising prostitution as a trade or profession and addressing issues of public interest.

Of the six sections of the Act retained, four of them relate to child prostitution and will therefore not be discussed here. The other two concern soliciting in a public place and the

detention of women against their will for the purposes of prostitution. As I have commented on these sections above when assessing the Act, I shall turn my attention to the new proposals advanced by CALS.

## 2.1 Contract To Let

(a) "Contacts to let a house or place for use as a brothel will be recognised by law and will be subject to the general principles that govern the law of contract/lease" (Draft Bill, section 2).

Petzer, the co-ordinator of SWEAT, who advocates a policy of complete decriminalisation of the industry, sees no reason for this provision. Whilst he agrees with the policy statement, he believes that the standard business codes relating to lease and hire will suffice and that no special provision is needed (Petzer 1995: 2). I tend to agree with Petzer in this instance and the only provisions I would consider in relation to letting property for use as a brothel should relate to zoning which is discussed below.

## 2.2 Health

The Draft Bill states:

"Criminal sanctions will be imposed for unsafe practices:

- (a) For any person failing to use a prophylactic in sex services involving anal, vaginal and oral penetration.
- (b) For owners/managers of brothels/escort agencies failing to take reasonable steps to ensure that persons working for them and their clients use prophylactics as above.

Criminal sanctions will be imposed relating to sexually transmitted Diseases (STD's)

- (c) For any person in connection with prostitution who uses a medical certificate or other representation, proving attendance for medical tests, to induce another person to believe that the person is free from STD infection.
- (d) For an owner/manager not taking reasonable steps to ensure that the above does not occur.
- (e) For an owner/manager who knowingly permits an STD-infected person to work for them.
- (f) For an owner/manager not taking reasonable steps to ensure that persons working for them are STD-free; reasonable steps including being satisfied on reasonable grounds that workers are undergoing medical tests at regular

intervals. The cost for such tests will be borne by the owner/managers and in the case of independent prostitutes, by themselves.

(g) An owner/manager who takes such steps and a prostitute who complies with such requirements will not be liable for misusing a medical certificate.

(h) HIV is included as an STD for the purposes of the above offences. STD testing should be carried out by qualified personnel designated by the department of health.

(i) It may be necessary to require information of medical test results in order to enforce the above provisions, and such information should be made available for the purposes of enforcement" (Draft Bill, section 3).

Petzer raises several objections to the above provisions. Regarding (a) and (b), he questions the underlying premise that sex workers spread STDs and therefore need to be policed into practising safe sex. He contends that sex workers practice safe sex because it is in their interest to do so, and that more unsafe sex happens amongst non-paying sexual partners than paying partners. For these two reasons, he feels it is unjust and punitive to impose criminal sanctions on sex workers and brothel owners. He does state however that it is the duty of the brothel owner to provide condoms, along with other "tools" of the trade, namely clean towels, lubricants, massage oil and sado-masochism gear. This is coupled with the expectancy that brothel owners provide training, supervision and education around the trade (Petzer 1995: 2-3).

There is also a practical dimension to policing safe sex - how does the brothel owner know when safe sex has been practiced? And then who would ensure that brothel owners or managers are not failing to take the reasonable steps to see that sex workers are using condoms? These problems are not insurmountable: brothel managers could check for used condoms as a client leaves, and local police or health inspectors could routinely check on brothels, noting the availability of condoms at the brothel, and whether there is any training or education programme instituted at there. I submit that these or similar methods would prove to be problematic and that the energy and resources spent policing in this manner could far better be used on education and support programmes aimed at sex workers.

Petzer also denounces clauses (c) to (i) as being both contrary to human rights and counter-productive. In relation to (i) in particular, he raises the issue of medical and professional ethics, contending that the clause interferes with the doctor-patient code of confidentiality, impinging directly upon the sex worker's constitutional right to privacy. He also reasons that legislating testing will drive the rates of STD infection underground. Especially in the case of Aids testing, there is a "window period" which can mask any sign



of the disease and thus encourage unsafe sex practices in the interim. Compulsory screening for diseases amongst prostitutes has also been criticised by the World Health Organisation. It was argued that the distribution of medical cards which indicate a non-infected status may encourage male clients to refuse condoms on the grounds that they are not at risk from prostitutes with clean bills of health (Posel 1993: 38).

The solution recommended by Petzer is rather to "educate and enable voluntary testing" (1995:2). I would strengthen his suggestion to advocate the active education, encouragement and support of (voluntary) testing amongst sex workers.

In South Africa it is currently unconstitutional to conduct AIDS tests in the workplace, but this is apparently due more to an invasion of bodily integrity through the method of taking blood samples than the right to privacy, and this could change substantially if the new urine and saliva tests which are being developed in the United States, are approved for use here.

The proposed legislation also falls into the trap of supporting the sexual double standard. It advocates measures which apply only to sex workers and illogically not their clients who are also potential carriers of the virus

### 2.3 Welfare of Sex Workers

"(a) A consultative group consisting of members of the industry, the community and local government, shall be established, to be a source of advice to the government on matters affecting the industry and the sex workers, as well as matters affecting the community at large.

(b) It will be an offence to supply drugs or use violent/fraudulent means, or make false representation to induce a person to be a prostitute, or continue to be so, or to give up money or other benefits derived from prostitution" (Draft Bill, section 4).

I would strongly recommend the establishment of a consultative group as outlined in (a) and it would be incumbent upon the state to provide the infrastructure and funding for the group. I submit that if there is to be any lasting solution to the problems which feed the fracas between the public and the industry, this can only happen if there is an appropriate forum for discussion and a properly constituted body of representatives.

In relation to (b), Petzer states that it should be an offence in any occupation to supply drugs to workers or threaten them with violence or force them to join the industry against

their will. He adds that it is "a huge social myth that people are forced into prostitution" (1995: 3). I would tend to disagree with this latter statement, notwithstanding the fact that signs of direct physical force are infrequent (and this may well be due to the silence that shrouds the industry because of its illegality). They do nevertheless exist. Bringing the debate to a local level, it has recently come to light that there are gangs originating from the Cape Flats who have used the vulnerability of certain marginalised women to achieve economic gain. The following example expounds the point:

A situation exists in which attractive, single mothers who are in financial difficulty with little prospect of improving their position are being sought by an influential Cape Flats gang. Once earmarked as being in this predicament, the woman is approached by a gang member. She is befriended and invited to a party, with the promise that she will be provided with the appropriate party gear, such as new clothes and make-up. The prospect of meeting new people at a party and having a new outfit to wear lures the unsuspecting women into accepting the 'generous' invitation. At the party, one of the more senior gang members rapes her. After this ordeal, she is warned by the gang that if she does not oblige their wishes, they will contact Welfare, (with whom they claim to have close ties), so as to arrange that her child be taken away from her. Invariably this threat together with her immediate personal knowledge of their violence and brutality serves to secure the woman's allegiance to the gang. She is then forced to prostitute herself and in many cases, is expected to push drugs whilst on the job. If the woman stays in a council house with her child, the premises are sometimes turned into drug and weapon holding premises, the gangsters safe in the knowledge that the police are unlikely to suspect an indigent, single woman of hoarding drugs at her home. In the event that there is a raid on the house by police, the woman is arrested and jailed and gang escapes the law. Sometimes the gang members look after and provide for the child whose mother is in prison; when she returns to society, her debt is to the gang who tended her child, and she consequently remains within their domain (personal communication, researcher, Criminology Institute, April 1996)

This example illustrates that it is not a myth that women are forced into prostitution and it is not an exaggeration that there are woman who are vulnerable to this type of abuse, often through no fault of their own or certainly through the lack of opportunities that life offers them.

Thus the brief that an enlightened legislator could be tasked with, that is, how to devise laws that account for a situation such as the one above whilst simultaneously ensuring that the path to practising the profession is not blocked for those who enter the industry freely, is an exceedingly difficult one. Ideologically, the feminists who advocate that

women have a right to choose their work and must have control over their bodies, disapprove of any laws which may restrict either of these ideals. But in order to see that there is legal recourse to the law for those that may desperately need it, an omission in the legislation would fail them, and again leave a sector of the most marginalised sex workers, those that are in the profession against their will, in a tenuous position.

The view of the liberal feminists recognises that there are some women who do not enter the profession of their own free will, but they contend that it is only through decriminalising the profession and thus opening it to scrutiny that the authorities will be able to tackle the problem of forced prostitution (Jennes 1993: 4).

According to radical feminists, there is also tacit coercion into prostitution: simply living within a patriarchal system often leads women who do not go the expected route of marriage, to prostitution, practically the only other financial door open to them (Jaggar 1994: 131). Thus according to this view, women are forced into the profession by a system that does not cater for their needs, leaving them no other option, but to become prostitutes. I submit that the radical viewpoint overstates the reality. But it is evident from research conducted with prostitutes in Cape Town that many women who enter the profession are pushed towards it, the occupation representing the only viable source of income available to them (Pauw, March 1996).

In most countries, prostitution is the only occupation in which women can, on average, earn more than their male counterparts (Pinto et al 1990: 7). Research conducted in South Africa identified economic need as the driving factor behind prostitution. The sale of sex creates economic opportunities for unskilled women, as well as providing a more lucrative form of employment than can be found in the formal business sector (Posel, D 1993: 19). Thus for a single Captonian mother of three, who needed to support herself and her children (and was still not able to secure enough money for her children's needs after approaching welfare organisations), prostitution seemed the only viable answer: "Its dangerous work, but what can you do?" (Posel 1993: 20).

A Durban escort described her resolve to become a sex worker as a purely financial decision. Having done a typing course, the most she could earn monthly was a net R1450, whereas it is possible for her to earn on average R8000 a month tax-free as an escort. Other attractive aspects of the profession include flexible hours and the opportunity to work only part-time (Posel 1993: 20).

In Sweden, policy devised by the government supports the notion that given an economically sound alternative, many women will leave the profession. The programme

aimed at reducing prostitution through socio-economic measures rather than imposing legal sanctions. Women were provided with sufficient economic and social security for them to leave their occupation if they desired. This included accommodation, money, emotional support and alternative employment. The result of the programme is that there has been a significant reduction in the number of women entering the industry in Sweden (Pinto et al).

#### 2.4 Employment Law

"(a) Prostitutes and their employers will be subject to the application of the Basic Conditions of Employment Act, the Labour Relations Act, the Occupational Health and Safety laws and the Workman's Compensation Act, in the same way as other employees and employers, and will thus be entitled to the same benefits and protection afforded by these laws" (Draft Bill, section 5).

In order to try and bring the sex work industry in line with other work, it is essential that these Acts apply to the profession. They can provide guidelines for a more professional workforce and build safeguards into the industry which do not feature at present.

#### 2.5 Zoning

"(a) Brothels/escort agencies will not be confined to industrial areas, the central business district, a 'red light' district nor any other area and thus, shall not be subject to any restrictions as to location. The only exception is premises next door, opposite to or in a 200 metre radius of schools and religious places of worship.

(b) Interested parties in any area may approach the court and show good reason why the brothel/escort agency should not be allowed to operate from that specific area/location.

(c) The onus shall rest on the owner/manger of the brothel to prove that the operation of the brothel in that area is bona fide and does not infringe the rights of those residents/interested parties, nor interfere with their activities" (Draft Bill, section 6).

Petzer considers (a) to be a ludicrous provision, and backs up his view with the fact that two of the agencies which his organisation services with condoms and safe sex workshops are situated alongside places of worship in Cape Town; the agencies have reported that some of their patrons are members of those religious institutions (1995: 3).

This may be so, but I would submit that it is the prerogative of the leadership of those institutions to object nevertheless.

In 1993, a Cape city councillor recommended the legalisation of the industry and the demarcation of red light districts. The districts would be located in areas decided upon by regional authorities in consultation with the public (Argus 2/4/93: 15). As the creation of red light districts is not a necessary consequence of the decriminalisation process, the question that needs to be asked is whether it is the most desirable option.

The World Charter for Prostitutes Rights<sup>10</sup> states that

"There should be no law which implies the systematic zoning of prostitution. Prostitutes should have the freedom to choose their place of work and residence. It is essential that prostitutes can provide their services under the conditions that are absolutely determined by themselves and no one else" (Charter 1985).

After centuries of authorities determining conditions and geographical parameters of prostitutes' work, the International Committee on Prostitutes Rights (ICPR) drew up a set of values in the form of a charter which declared the rights which prostitutes would like to see incorporated in any prospective legislator's deliberations. Although there is no national sex worker union or collective in South Africa, Sweat, the only organised body representing sex workers in the Western Cape, and whose coordinator is the Southern African representative for the International Network of Sex Worker Projects, recommends the Charter as the essential guideline to any authority making decisions which affect the rights of prostitutes (Petzer 1995: 4). Sweat would therefore advocate that there be no restrictions whatsoever on the choice of prostitutes to work where they wish.

A spokesperson for Rape Crisis, has said that although the organisation supports decriminalisation of prostitution, red light districts are undesirable. She claims that forcing all prostitutes to work in red light districts would serve to ensure that the women remain social outcasts and it would dilute their legal status by pretending they are not part of the community (Argus 3/4 April 1993). In general, there does seem to be a movement away from the red light district concept in places where the law is under review (Pinto et al 1990: 7). CALS has rejected red light districts because they argue that clients come from all walks of life and therefore should be able to find brothels situated in areas where it is convenient to visit them (Mail and Guardian 1-7 September 1995: 11). I would agree with this view, but balance it with the rights of sex workers to work where it is convenient for *them* to do so. If red light districts were created in Cape Town, a situation would arise in

which women who have built up clientele in particular areas over a number of years would suddenly have to move their business elsewhere.

The call for prostitutes to have their work conditions and location "absolutely determined by themselves" does not balance the rights of other citizens who may object to their presence. The value of private property has been seen to suffer from the presence of prostitutes in the area (McLeod 1981: 68). A resident in the Cape's Southern Suburb of Kenilworth, has found used condoms and tissues strewn at the entrance to her home, and to get to her gate she often has to walk past parked cars containing prostitutes and clients conducting their sexual activities in broad daylight (Southern Suburbs Tatler 7 December 1995: 1). On the Atlantic seaboard, a resident has complained of prostitutes (and possibly their clients) defecating and urinating at his front gate (letter to the City Council, August 1996). There are no public ablutions in the area as street walkers are conducting their business in a residential area and thus there has been no town planning around their needs. These complaints and the distress of religious and educational authorities when sex work businesses open up alongside their respective institutions, may well be genuine and worthy of consideration<sup>11</sup>.

Because there are rights to be considered on both sides, I would recommend a compromise position for South Africa. There should be no red light districts, and sex workers should be able to choose where they want to work. The usual standards which govern town planning and zoning of residential and business areas should apply to sex work businesses. However, where there are strong objections from residents, religious communities or schools to sex workers working in close proximity to them, these should be taken for decision to court. The court must be compelled to refer to any recommendations made by a local government forum, which should act in each case of this kind. The forum should consist of representatives of all relevant stakeholders - and should be constituted by the consultative group<sup>12</sup>.

In all of this, it should be remembered that there are other ways of eradicating the manifestation of a problem. For example, in the instance of the circumstances described by the Atlantic resident, creative problem solving within the forum could recommend that an ablution block be built rather than proclaiming the area a prostitution-free zone. If the usual route of banning sex workers from an area is recommended instead, it is unlikely that the problems described will be solved. Women have been defying prohibitions to service the area for years and it is unlikely they will change: where there is a demand for sexual services, there will be a supply. Particularly during this period of rampant violent crime in South Africa, it is simply not practical to expect government to focus energy and

resources into policing the sex work industry, unless there is a specific complaint of violence or abuse.

## 2.6 Registration

(a) There should be a public register, maintained by a court Registrar containing the names and addresses of the owners and managers of brothels and escort agencies (including the directors and principal shareholders or corporate owners who shall be jointly and severally liable as if they were owners for the purposes of the law), the location of their business premises, operating hours and other necessary information.

(b) Owners shall be required to notify the Registrar of this information, (and of changes to previously notified information) within seven days of establishing a business (or of any change)

(c) Failure to notify, or giving false information, is a criminal offence.

(d) Non-registration will not render the business illegal but will result in substantial penalties being imposed (Draft Bill, section 7).

Petzer objects to clauses (a) to (d) on the grounds that a system such as this will replace the current criminalisation with a regime of "social penalisation and marginalisation of shareholders and owners of sex worker businesses" (1985:4). There are aspects of this proposed legislation that makes it more onerous on the managers, owners, directors and principal shareholders, than certain other businesses, for example the phrase binding the principal shareholders and directors to be jointly and severally liable. It is not unique that certain kinds of professions or businesses have a special register - lawyers and pharmacists are just two examples. Second-guessing the reasoning for this clause, it is probably for easy access of information concerning stakeholders in a potentially problematic industry. There is nothing terribly objectionable about this: it has proved to be a hazardous industry where abuses do take place, and perhaps it is necessary for the state and public to have access to this information.

Another suggestion is that sex workers themselves should be licensed, rather like other (semi) professionals, with sex workers participating in the process of setting up the licensing system in order to safeguard their interests. Licences would be granted to applicants who meet the particular professional standards set (Shrage 1994: 159). It is a sad twist of fate that a registration system of sorts has been implemented in the Cape in an attempt to assist the police in their investigations into the serial killings of prostitutes on the outskirts of Cape Town. In unprecedented co-operation between police and prostitutes, two hundred frightened prostitutes responded to an invitation to visit police

stations, have their fingerprints and photos taken and their personal details recorded on a database. According to police, the information will be used to "keep track of women and, if the killer is not caught, help to identify his victims" (*Mail and Guardian* 26 January -1 February 1996: 4). Thus by default, rather than an action built upon positive policy goals, there is a Cape register, detailing many of the women working in the area.

## 2.7 Advertising

"(a) It will not be an offence to advertise prostitution services or employment in the industry, provided that such adverts are reasonable and not patently offensive.

(b) Notwithstanding the above, advertising shall be restricted to the print media and in particular to 'contact' magazines/literature, in which one would ordinarily expect to find advertisements of this nature".

(c) Advertising in a public place, on billboards, public walls, bus shelters and anything of a like nature, is prohibited" (Draft Bill, section 8).

According to Petzer, there should be no restrictions on advertising the services of the sex industry (1995:4). Over the last couple of months, a parked combi emblazoned with an advertisement offering escort and hostess services has been permitted to flaunt its message at the intersection of a main highway in Cape Town. In Adderley Street, a person stands with a large sign indicating the services of a sex shop and brothel in a side street nearby. There has been no official reaction to this advertising.

I would argue that provided the advertising is not graphic and "patently offensive" it should be allowed to be displayed in public places such as those described in (c).

It is clear from the commentary above that neither the current law as it stands nor the Draft Bill, have gone far enough in recognising the rights of sex workers. The vision of Sweat, (decriminalisation with no controls), however, does not balance competing rights of the public, and dismisses the fact that the industry does have difficult issues to negotiate which will not simply disappear if it is decriminalised. It should be recognised that some state intervention is needed.



## ENDNOTES

- 1 SWEAT assists sex workers in the following three areas: health education (including HIV/AIDS education), psycho-social care, and legal and advocacy support.
- 2 SWEAT conducts this type of work in Cape Town.
- 3 'Procuring' involves an element of persuasion and implies that had there not been this encouragement, the individual would not have done what she did (Sex for a Living 122).
- 4 See the information contained in chapter three with regards to Marxist Feminism
- 5 The flip side to this is that prostitutes are not considered by the state to be working citizens and therefore have no contingent right to social welfare, state pension, housing allowance or unemployment pay (Posel 1993: 31).
- 6 A Criminal Procedure Amendment Bill came before Parliament in the second week of September of 1996 which recommended the formalisation of entrapment or trapping procedures. In the past, this area of investigation has formerly been practiced on an ad hoc basis with no specific guidelines. The Human Rights Committee of South Africa (HRC) has objected to blanket permissibility of entrapment and feels it should be restricted to instances of serious economic offences. If this suggestion is accepted, prostitution would be excluded from the Bill's ambit. The HRC has objected to the entrapment clause on the grounds that it is open to abuse and conflicts with the due process of law.
- 7 The journalist writes for a weekly newspaper, and gives a voice to many women who do not usually have the opportunity to have their stories of abuse heard. As women usually caught in police traps genuinely work as prostitutes, they are legally vulnerable and on the whole unable to lay charges against abusive officers. In an interview with a member of Sweat in March, it was disclosed that earlier that month a prostitute had approached the organisation with an account of a police officer picking her up for soliciting in Salt River. He had received complaints of women posing as prostitutes in order to rob their "clients" of their cash. In this instance, the police officer had arrested a genuine sex worker. He told her that no charge would be laid against her if she agreed to have sexual intercourse with him (personal communication, March 1996).
- 8 Programme educators were disturbed by the alleged practice of police confiscating condoms as evidence of contravening the Sexual Offences Act, as this has had the counterproductive effect of discouraging sex workers from carrying and using them.
- 9 According to CALS, the bill is meant only as a first draft which is open to discussion and is by no means the final offering that the Centre may have on the topic.
- 10 This Charter was compiled by the International Committee on Prostitutes Rights, which was formed in 1985 by Margot St James of COYOTE and other prominent prostitute activists ( in Jaggar 1994: 135)
- 11 In my personal experience, having caught a bus home from opposite my high school for five years, and waiting at a bus stop alongside sex workers who plied their trade from that particular bus shelter, I never experienced any animosity between pupils and the women. Nor was there any evidence of their presence serving as encouragement for pupils to drop out of school and join the profession. The effect of their presence upon scholars was negligible, and the women were merely seen as being a part of the fabric of the Rondebosch community.
- 12 This group, recommended in the previous chapter, would consist of members of the industry, the community and local government. It would serve as a source of advice to the government on matters affecting the industry, the issue of town planning and the rights of sex workers falling within their domain. At all times, any decision taken by a court on recommendation by this group or any forum constituted by it, will be directed in its decision-making by the Bill of Rights contained in the final Constitution.

## CONCLUSION

That prostitution is a difficult issue for feminists and legislators to negotiate is clear: there is very little agreement on how it should be understood and even less as to the ways it should be managed. In this paper, I have tried to show that a blanket approach to the phenomenon enlisting only one feminist, moralist or liberal view will do little to pragmatically influence a phenomenon which poses a prickly challenge to our emerging democracy. It seems that neither of the extremes - full criminalisation and total decriminalisation - are adequate responses to the profession. In fact, they are both substantially flawed and are not independently useful in practice.

The value of the Foucaultian approach to the issue is that it permits analysts to extract useful segments of various theorists' critiques, freeing them from the constraints of a single approach which may be helpful in certain respects and not in others. Thus a multi-dimensional understanding of the commercial sex trade, when translated into practical measures, provides more scope for addressing the different forms of sex work and the varying public responses. Of the existing policy regimes, decriminalisation with minor controls presents the best solution for dealing with a category of crime which is in flux.

Furthermore, with all the competing theories offering different solutions, it is easy to confuse the real issue: managing the industry in a fair and humane way. I submit that our new Constitution is only as valuable as the protection it affords the most marginalised in our community, and the principles enshrined within the bill of rights should thus be the starting point of any formulated sex work policy.

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