Race, Class, Gender, and Deviancy:
The Criminalization of Prostitution

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I. INTRODUCTION

The criminalization of prostitution occurred during the Progressive Era, as American society responded to vast changes in social life. Some changes involved impersonal forces such as capitalism and industrialization, while others affected or involved specific sectors of the American polity—namely women, the poor, and immigrants. Prostitution was often at the intersection of these larger forces, and in prostitution reformers saw crystallized the problems besetting modern life. Prostitution policy was part of a larger effort to defuse the threat to dominant values posed by working-class and immigrant communities, waged work, industrialization, urbanization, and anonymity. Laws against prostitution were meant to reinforce those decaying values among the new generation, and to force poor people and immigrants—especially women—to assimilate to middle-class norms of chastity, monogamy, hard work, and propriety.

Progressive Era social views and policies have strongly influenced the various forms of present-day prostitution. Therefore, before examining the nineteenth-century campaign to criminalize prostitution, I would like to make some preliminary observations regarding the contemporary situation.

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A. Prostitution as "Sex" versus Prostitution as "Work"

From the point of view of the prostitute, prostitution might be analyzed more usefully under the rubric of work rather than sex. That is, the exchange of money makes what she[1] does illegal, and the exchange of money is why she does it. However, from the point of view of her customers, prostitution is usually about sex. More importantly, the public and the legislatures view prostitution as being primarily about sex—sex outside the confines of marriage, deviant sex, sex without the intent to reproduce, paid sex. This point of view has been dominant in shaping the legal response to prostitution—that is, its criminalization—and so I focus on this viewpoint here.[2]

B. Modern Demographics of Prostitution

The stereotypical image of the streetwalker does not adequately represent the business of prostitution or its practitioners. While the most familiar and attention-getting form of prostitution is street prostitution, best estimates indicate that only ten to twenty percent of prostitutes solicit on the streets.[3] The remaining eighty to ninety percent work off the streets, in

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[1] I am aware that prostitution is not an enterprise reserved solely to women, and that there are significant numbers of male prostitutes. However, in this paper I focus exclusively on female prostitution, because I believe the social significance of male prostitution may be completely separate and independent from that of female prostitution, despite material and commercial similarities between both practices.

[2] This is not to say that there has been no concern about prostitution as a financial enterprise, that is, about prostitution as "work." Indeed, as I discuss below, some part of the public outcry over prostitution in the nineteenth century was motivated by broader concerns about women's activity in the public sphere. Moreover, it is often hard to separate objections to prostitution into those focusing on sexual aspects and those focusing on commercial aspects, since prostitution is, by definition, sex for a fee. Nonetheless, to the extent that such a distinction can be made, I believe that preoccupations with sexuality have predominated in shaping American social and legal policy toward prostitution.

[3] Priscilla Alexander, *Prostitution: A Difficult Issue for Feminists, in* SEX WORK: WRITINGS BY WOMEN IN THE SEX INDUSTRY 184, 189 (Frédérique Delacoste & Priscilla Alexander eds., 1987) [hereinafter SEX WORK]. About 40% of street prostitutes work independently; the remainder work with pimps. *Id. See also* RONALD B. FLOWERS, WOMEN AND CRIMINALITY: THE WOMAN AS VICTIM, OFFENDER, AND PRACTITIONER 126 (1987) (suggesting that call girls comprise the largest percentage of prostitutes); DOLORES FRENCH, WORKING: MY LIFE AS A PROSTITUTE 149 (1988); Lynn Hampton, *Hookers with AIDS—The Search, in* AIDS: THE WOMEN 157, 162 (Ines Rieder & Patricia Ruppelt eds., 1988); DEBORAH L. RHODE, JUSTICE AND GENDER: SEX DISCRIMINATION AND THE LAW 261 (1989); *Human Rights: "Simple Human Respect," in* A VINDICATION OF THE RIGHTS OF WHORES 52, 59 (Gail Pheterson ed., 1989) (noting Roberta Perkins' estimate that about 10% of prostitutes in Sydney, Australia work on the street); Beth Bergman, *AIDS, Prostitution, and the Use of Historical Stereotypes to Legislate Sexuality,* 21 J. MARSHALL L. REV. 777, 783 n.29 (1988) (citing NATIONAL TASK FORCE ON PROSTITUTION, SUMMARY OF DATA ON PROSTITUTES AND AIDS (Aug. 1987)); Belinda Cooper, *Prostitution: A Feminist Analysis,* 11 WOMEN'S RTS. L. REP. 99, 100 n.4 (1989) (citing Alexander, *supra,* at 189, and J. DECKER, PROSTITUTION: REGULATION AND CONTROL 106-07 (1979)).

Estimates of the number of prostitutes in the United States range from 250,000 to 1,300,000. *See* RHODE, *supra,* at 257 (250,000); FRENCH, *supra,* at 149 (1,300,000).

Given the pervasiveness of the streetwalker stereotype, it is not surprising that even some accomplished feminist scholars mistake the dominant characterization for reality. *See, e.g.,* ROSEMARIE TONG, WOMEN, SEX, AND THE LAW 44 (1984) (claiming without evidence that most prostitutes solicit in the street); RUTH ROSEN, THE LOST SISTERHOOD: PROSTITUTION IN AMERICA, 1900-

brothels, massage parlors, escort services, and similar establishments, or as independent "call girls."[4]

This demographic picture has multiple significance. First, it demonstrates that all prostitutes are stereotyped based on the characteristics or circumstances of a small minority of their members—much like stereotyping applied to other disfavored groups. Second, it suggests that politicians and police, preoccupied with "cleaning up the streets," develop and implement policies intended to deal with all forms of prostitution, but poorly matched to the primary arenas of prostitution. This, in turn, means that street prostitutes—predominantly poor women and women of color—disproportionately suffer police harassment and arrest, while their sisters who are often white, more financially stable, less publicly visible, and less "offensive" to the public, are treated more leniently. Thus, although women working on the streets comprise a small minority of all prostitutes, they account for ninety percent of those arrested for prostitution.[5] Women of color are also disproportionately arrested and given jail sentences. Although women of color represent forty percent of street prostitutes, they account for fifty-five percent of those arrested for prostitution, and eighty-five percent of those sentenced to jail.[6]

In reporting these facts, I do not mean to set one group of prostitutes against another, or to suggest that any one group is exempt from the risks inherent in criminalization. All prostitutes risk physical abuse from customers and police, just as all prostitutes are stigmatized and denied basic social services. Nonetheless, it is important to observe which women bear the brunt of anti-prostitution policy. As in all other areas of life, the racial and economic cleavages present in the larger society also apply to women engaged in criminal behavior.

II. The Criminalization of Prostitution in the United States During the Progressive Era

A primary goal of prostitution policy is to deter women from becoming prostitutes. This rather obvious fact is sometimes overlooked: we often think about criminalization just as an attempt to punish prostitutes. While punishment is one goal, history demonstrates that criminalization is also an attempt to keep otherwise law-abiding women from *becoming* prostitutes.

1918, at 171-72 (1982) (same). Whether this misconception informs the positions they take on prostitution is unclear, but it may be one source of my disagreement with those who take a rigid stance against prostitution on feminist moral grounds.

4 Alexander, *supra* note 3, at 189-91.

5 French, *supra* note 3, at 149; Rhode, *supra* note 3, at 261; Alexander, *supra* note 3, at 196.

6 Rhode, *supra* note 3, at 261; Alexander, *supra* note 3, at 197. *See also* Carole, *Interview with Barbara, in* Sex Work, *supra* note 3, at 166, 171; Rachel West, *U.S. PROStitutes Collective, in* Sex Work, *supra* note 3, at 279, 282-83.

Moreover, 70% of *all* female prison inmates were first arrested for acts of prostitution. Rhode, *supra*, at 261. *See also* Tong, *supra* note 3, at 56.

As I will explain, the nineteenth-century campaign to criminalize prostitution was part of a sometimes desperate attempt to enforce norms of marriage, chastity, and propriety on women—to keep women in the private sphere of home and family, to prevent them from supporting themselves independently of men, to encourage them to marry. This was partly an effort to protect women, who were seen as innocent, vulnerable, and pure. But a contradictory set of beliefs and impulses was also at work, portraying women—particularly working-class women, women of color, and immigrant women, but potentially *all* women—as capable of destroying the social order.

A. Factors Contributing to Heightened Concern about "Deviant" Sexuality

From colonial times through most of the nineteenth century, prostitution was not a distinct criminal offense in the United States. While police arrested prostitutes (and others considered to be disrupting the peace) for nightwalking, vagrancy, disorderly conduct, indecent exposure, or lewdness, neither prostitution nor solicitation for prostitution was considered a distinct crime.[7] Brothels were regulated primarily through public nuisance laws, which allowed private citizens to complain when offended by neighborhood bawdy houses.[8] In general, legal toleration was the rule, and these laws were enforced against prostitutes only sporadically.[9] Thus, although prostitution could lead to criminal penalties during this period, it was neither specifically prohibited by law nor consistently suppressed in practice.

This is not to suggest that prostitution was affirmatively valued in American society. Rather, it was viewed as a "necessary evil"—"necessary" in that it protected virtuous women by providing an alternative outlet

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[7] *See* BARBARA MEIL HOBSON, UNEASY VIRTUE: THE POLITICS OF PROSTITUTION AND THE AMERICAN REFORM TRADITION 32-34 (rev. ed. 1990) (mentioning fiddlers and peddlers as others arrested for nightwalking or vagrancy, and citing British common law dating from the fifteenth century as the origin of the treatment of prostitution as vagrancy). Prohibitions against lewdness and nightwalking were not gender-specific. Hobson notes that men represented approximately one-fourth of such defendants in early nineteenth-century Boston, but that by 1850, no men were prosecuted for these offenses. *Id.* at 34. *See also* JOHN D'EMILIO & ESTELLE B. FREEDMAN, INTIMATE MATTERS: A HISTORY OF SEXUALITY IN AMERICA 140 (1988); THOMAS C. MACKEY, RED LIGHTS OUT: A LEGAL HISTORY OF PROSTITUTION, DISORDERLY HOUSES, AND VICE DISTRICTS, 1870-1917, at 28-92 (1987) (discussing the application of vagrancy statutes to prostitutes in Britain and America); CAROLE PATEMAN, THE SEXUAL CONTRACT 196 (1988) (arguing that prostitutes were members of "the casual laboring poor" rather than a distinct profession); ROSEN, *supra* note 3, at 4; Kathleen Daly, *The Social Control of Sexuality: A Case Study of the Criminalization of Prostitution in the Progressive Era*, 9 RES. L. DEVIANCE & SOC. CONTROL 171, 174 (1988).

[8] *See* HOBSON, *supra* note 7, at 44-45; MACKEY, *supra* note 7, at 93-141.

[9] D'EMILIO & FREEDMAN, *supra* note 7, at 140.

for men's fierce sexual drives, but "evil" in that it involved commercial, non-marital, and sinful sex.[10]

Legal toleration of prostitution ended, however, during the Progressive Era. A variety of factors in the nineteenth century led to a concerted effort to stamp out prostitution, and to its concomitant criminalization. This anti-prostitution campaign created a legacy that remains today, and I now turn to the reasons motivating that effort.

1. The Concept of the "Fallen Woman"

By the Progressive Era, prostitution had come to be seen and treated as an independent criminal offense. This development in the criminal law reflected and promoted new views of prostitutes as irredeemably deviant women. Having "fallen from virtue," the prostitute was considered permanently degenerate, and now capable of any crime.[11] According to Barbara Meil Hobson, this perception originated in the Victorian Era, when expert and popular opinion held

> a fixed idea that sexual deviance was the source of all female criminality. According to the theory, a woman who crossed the great divide between chastity and unchastity had no way back, not only because of society's condemnation but also because she had upset the delicate mechanism that governed her nature.[12]

Thus, female criminals were considered more vile than male offenders, since one violation was sufficient to lead to a life of crime.[13] Victorian views of "fallen women" influenced prostitution policy even in the early twentieth century, when prostitution became ideologically linked to every form of corruption, crime, and vice. By this time prostitution was not simply another vice to be considered along with drunkenness, blasphemy, and others; rather, it had become *the* "Social Evil."[14]

2. Capitalist Industrialization and Urbanization

Again, I want to emphasize that the anti-prostitution movement involved more than concern about prostitution itself. The movement was

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[10] D'EMILIO & FREEDMAN, *supra* note 7, at 133, 138, 140. *See also* ROSEN, *supra* note 3, at 5; D'EMILIO & FREEDMAN, *supra*, at 95-96 (discussing similar belief in the antebellum South that white men's use of black women slaves for sexual gratification protected white women's virtue).

[11] *See* ROSEN, *supra* note 3, at 6; HOBSON, *supra* note 7, at 110.

[12] HOBSON, *supra* note 7, at 110. *See also* D'EMILIO & FREEDMAN, *supra* note 7, at 70. In this vein, Hobson notes that female juvenile offenders in the nineteenth and twentieth centuries were physically examined to ascertain whether they were virgins. Whatever their crimes, women offenders' criminal tendencies were discovered from their sexual histories. HOBSON, *supra*, at 112.

[13] *See* HOBSON, *supra* note 7, at 110. For identical views in regard to the deviance of adolescent girls, see ROSEN, *supra* note 3, at 19-20.

[14] *See* ROSEN, *supra* note 3, at 15; D'EMILIO & FREEDMAN, *supra* note 7, at 138; THOMAS LAQUEUR, MAKING SEX: BODY AND GENDER FROM THE GREEKS TO FREUD 230 (1990). *See also* Daly, *supra* note 7, at 173.

animated by a vast array of anxieties about women, the family, morality, and community, not just by the tangible and readily-ascertainable social effects of prostitution.[15] For example, capitalist industrialization caused many strains in social life. Many felt that capitalism had reduced everything to market values, and that such commercialization undermined both civic and sexual virtue.[16] Anything could be had for a price: wanton luxury, political influence, police protection, professional prestige, and women's virtue. Prostitution came to symbolize all such evils, because it "exemplified the intrusion of market values into one of the most private areas of human existence."[17]

In addition to the expansion of capitalism itself, the concomitant industrialization and urbanization of the United States during the late nineteenth century brought a marked change from the earlier rural, family-based economy. These changes led to a loss of informal and local social control. Previously, small, close-knit families, communities, and churches effectively induced compliance with behavioral norms through informal sanction. However, industrialization and urbanization produced larger cities, where many young people lived independent and relatively anonymous lives, without families or neighbors to look out for or watch over them. The opportunities to engage in prostitution increased accordingly. More importantly, this loss of informal, local social control contributed to *fears* that more young people would engage in prostitution, whether or not more people actually did.

Another significant development was the increasing employment of young women, particularly poor and immigrant women, in factories in the growing industrial cities. Although these women were by no means a majority, they were a highly visible *symbol* of the social changes affecting the country. The increased visibility of women in the public sphere—the world of work, as opposed to the world of home and family—represented the demise of an older way of life. Those lamenting this demise felt that all activity outside the home could lead women into prostitution.

With the modernization of social life came a fear of moral decay, especially in urban centers. Immigration, changes in family structure, new roles for women, increased mobility, and decreased community cohesion threatened surviving Victorian moral norms.[18] Concerns about moral decay

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[15] *See, e.g.*, MARK T. CONNELLY, THE RESPONSE TO PROSTITUTION IN THE PROGRESSIVE ERA 6 (1980):

> [A]ntiprostitution had at least as much to do with the anxieties produced by the transformation of American society occurring in the progressive era as with the actual existence of red-light districts. . . . There was . . . more to the progressive furor over prostitution than prostitution itself, just as there is often more to an obsession with communism than communism itself.

[16] *See* ROSEN, *supra* note 3, at 41; Daly, *supra* note 7, at 173.

[17] ROSEN, *supra* note 3, at 42.

[18] *See* D'EMILIO & FREEDMAN, *supra* note 7, at 40. *See also* ALLAN M. BRANDT, NO MAGIC BULLET: A SOCIAL HISTORY OF VENEREAL DISEASE IN THE UNITED STATES SINCE 1880, at 33 (1985).

were enhanced by the growth of the urban working class, which appeared to have its own (in other words, deviant) moral standards, behavioral ethics, and cultural practices.[19] Prostitution, which seemed to subvert values of family, community, domesticity, morality, sobriety, purity, and thrift, symbolized all of these threats to an older way of life.

In particular, prostitution was linked to changes in family structure and the roles of women. It was "cited as a cause, consequence, or sign of every change," such as a rising divorce rate, a falling birth rate, a great increase in single and married working women, and a rise in feminist political and social demands that challenged patriarchal orders.[20] In large part, all of these concerns about "family" were concerns about *women*:

> Women's entrance into the public arena, traditionally frequented only by prostitutes and other "bad" women, blurred the clear divisions between the "lady" and the prostitute. . . . [W]omen's activities outside the home became symbolic of whorish behavior. Women who became active in clubs and social reform . . . risked losing their sexual purity and drifting into a life of prostitution. By absenting themselves from home, they exposed their unprotected daughters to the immorality of the street. If women would just remain at home, such tragedies need not occur. Further, thought reformers, contempt for feminine domestic pursuits would inevitably lead to contempt for feminine chastity as well.[21]

Clearly, then, in entering the public arena, women were not simply blurring a previously bright line—they were challenging conventional restraints on their behavior.[22] Prostitutes simply represented the worst and most obvious transgressors, but concerns extended to all women. Nonprostitute women were beginning to adopt prostitutes' independence from husbands and families, their use of birth control, and their rejection of prescribed morality.[23] Note the alarm in the following vice commission report from 1911:

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[19] *See* ROSEN, *supra* note 3, at 43-44. *See also* BRANDT, *supra* note 18, at 34. However, Kathleen Daly emphasizes that many Progressive Era reformers had a more comprehensive view of the problem:

> It would be misleading to say that by repressing prostitution, middle class reform groups were simply reacting against the threat of working class and ethnic groups. While the urban and laboring poor were identified as the sites of immoral conditions, the New York City Committee of Fifteen aimed their first salvo at the police, city officials, and commercial interests in vice; that is, state and economic interests that protected and profited from prostitution.

Daly, *supra* note 7, at 200 (citation omitted).

[20] ROSEN, *supra* note 3, at 44-45.

[21] *Id.* at 46 (citation omitted). Similarly, Mark Connelly notes:

> An extraordinary amount of time was spent determining why women became prostitutes; very little was spent determining which men engaged them and why. Prostitution became a manifestation of female maladjustment and dislocation, even for those [reformers] who took pains to denounce the double standard and the uncontrolled male sex drive.

CONNELLY, *supra* note 15, at 29-30.

[22] *See* ROSEN, *supra* note 3, at 43.

[23] CONNELLY, *supra* note 15, at 47.

> One of the most disturbing phases of the present situation in Minneapolis, and an alarming social symptom, is the large number of young girls in the streets at night[,] . . . loitering about the fruit stores, drug stores and other popular locations, haunting hotel lobbies, crowding into dance halls, the theaters and other amusement resorts; also in the saloon restaurants and the chop suey places and parading the streets and touring about in automobiles with men. [Not all, or even a majority] of these girls are prostitutes, [but it is] perfectly plain . . . that many . . . are on the direct road [to prostitution]. . . . The situation is unmistakably sinister.[24]

Thus, concern derived less from the direct social effects of prostitution and more from the fact that prostitutes were the signal-bearers of vast changes in women's behaviors and attitudes. What prostitutes themselves did was not so alarming as what non-prostitute women were also beginning to do.[25]

3. The Spread of Venereal Disease

Progressives worried not only about increasing commercialization and declining morality, but about the spread of disease as well. Venereal disease was both a real public health concern and, like prostitution, a symbol of social contamination.[26] Syphilis and gonorrhea were known to cause birth defects, infant blindness, and general paresis (paralysis and insanity).[27] However, venereal disease was more than a physical health threat; it represented a threat to the social order as well. Thus, both physicians and the public viewed venereal diseases differently than other contagious diseases that had equally serious health consequences.[28]

In the Progressive Era, "[b]ecause there was no known treatment for venereal diseases, they were not just medical phenomena. Instead, they symbolized dirt, pollution, and ultimately were envisioned as punishment

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[24] REPORT OF THE VICE COMMISSION OF MINNEAPOLIS 76-77 (1911), *quoted in* CONNELLY, *supra* note 15, at 38.

[25] CONNELLY, *supra* note 15, at 47.

As noted earlier, movements to criminalize prostitution arose during periods of rapid social change affecting or involving women. This fact suggests that prostitutes may have been the bellwether for women in general; the evidence reviewed thus far lends support to that interpretation. Prostitutes symbolized not only sexual freedom or license for women, but also social and economic freedom—in direct challenge to norms of domesticity.

The cult of domesticity continued to hold sway in postbellum America, and its precepts led many men and women to oppose women's entry into the paid work force. Many trade unionists, for example, insisted upon a liveable family wage for male laborers as the solution to the plight of poor families. *See* Amy Dru Stanley, *Conjugal Bonds and Wage Labor: Rights of Contract in the Age of Emancipation*, 75 J. AM. HIST. 471, 486 n.33 (1988) (citing WORKINGMAN'S ADVOCATE, Aug. 8, 1868, May 7, 1870; ALICE KESSLER-HARRIS, OUT TO WORK: A HISTORY OF WAGE-EARNING WOMEN IN THE UNITED STATES 68-70, 84-86 (1982); Martha May, *Bread Before Roses: American Workingmen, Labor Unions, and the Family Wage*, *in* WOMEN, WORK AND PROTEST: A CENTURY OF U.S. WOMEN'S LABOR HISTORY 1 (Ruth Milkman ed., 1985)). While some trade unionists did support proposals mandating equal pay for women doing work equal to men's, they simultaneously endorsed norms of domesticity for women. *See* Stanley, *supra*, at 486 & n.33.

[26] *See* Bergman, *supra* note 3, at 791.

[27] CONNELLY, *supra* note 15, at 74.

[28] *Id.* at 74-75.

for the sexually irresponsible."[29] As potential carriers of these diseases, prostitutes were doubly stigmatized; they represented and spread moral corruption, and they threatened society's physical health as well.[30] The onset of World War I and the concern for a healthy fighting force led to further stigmatization. Prostitutes, as potential disease-carriers, were depicted as subversives, much like political dissenters or enemy agents.[31]

Despite a continuing sexual double standard, the spread of venereal disease made quiet toleration of prostitution no longer possible. In discussing Victorian British rhetoric about sexuality, Mary Poovey argues that, because syphilis is sexually transmitted, its threat served to modify public attitudes toward prostitution: "in transforming a natural sexual exchange into an assault upon public health, syphilis turns prostitution into a crime; . . . in defying the boundaries of class and gender, syphilis substitutes for the false equality promised by bourgeois rhetoric a true and hideous equality before an indiscriminate disease."[32] Prostitution could no longer be viewed as the protector of upright womanhood, because men who patronized prostitutes could contract disease and then infect their unknowing, undeserving wives. Moreover, the Victorian idea that the male sex drive could not be controlled was offensive to Progressives' faith in education and reform.[33] Thus, the specter of venereal disease changed the focus of the anti-prostitution movement. Before 1917, legislation targeted commercialized vice rather than prostitutes per se. (Prostitutes were still being arrested for acts of vagrancy and disturbing the peace.) However, by the end of World War I, legislation focused directly on prostitution and venereal disease, and the criminalization of prostitution was complete.[34]

4. Race and Class Concerns

At one level, concerns about morality and disease related to women in general—nineteenth-century doctors believed that even uninfected women could transmit gonorrhea, that women inherently possessed the disease, or

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[29] Bergman, *supra* note 3, at 792 (footnotes omitted).

[30] Indeed, some reformers considered prostitution the literal breeding ground of venereal disease, akin to the swamps that nurture malaria-carrying mosquitoes. *See* LAVINIA L. DOCK, HYGIENE AND MORALITY: A MANUAL FOR NURSES AND OTHERS, GIVING AN OUTLINE OF THE MEDICAL, SOCIAL, AND LEGAL ASPECTS OF THE VENEREAL DISEASES 35 (1910), *quoted in* CONNELLY, *supra* note 15, at 68.

[31] Daly, *supra* note 7, at 196. Under the "American Plan" for protection of military forces from venereal disease, women within five miles of a military base or camp could be arrested. If these women were found to be infected, they would be sent to a hospital or "farm colony" until cured. At war's end, 15,520 infected prostitutes had been kept either in "detention homes" for an average of 70 days, or in reformatories for an average of one year. Only women were targeted by the Plan; no men were arrested. ROSEN, *supra* note 3, at 35. *See also* D'EMILIO & FREEDMAN, *supra* note 7, at 212.

[32] Mary Poovey, *Speaking of the Body: Mid-Victorian Constructions of Female Desire, in* BODY/POLITICS: WOMEN AND THE DISCOURSES OF SCIENCE 29, 36 (Mary Jacobus et al. eds., 1990).

[33] *See* BRANDT, *supra* note 18, at 35-36; Daly, *supra* note 7, at 190.

[34] *See* ROSEN, *supra* note 3, at 36.

both.[35] However, a significant part of the animus toward prostitutes was a result of racial and class-based anxieties. Working-class and immigrant communities in major cities developed their own distinct subcultures, whose values at times conflicted with those of the dominant middle-class and elite. Moreover, even when there was no real conflict in values, working-class and immigrant communities were still viewed as dangerous, dirty, immoral, and deviant—including sexually deviant.

As Progressive Era America increasingly associated degeneracy with poverty, it began to focus on the sexual behavior of poor people.[36] Brothels were often run by immigrants and found in poor and immigrant neighborhoods.[37] "Unchastity" and "deviant" sexuality were identified with men and women from working-class, immigrant, and non-white communities.

However, women from these groups were especially vilified: because the Victorian sexual double standard had not been fully eradicated, "mainstream" Americans generally tolerated greater (presumed or actual) promiscuity by men of all statuses than by women.[38] Women of color and immigrant women, in particular, were assumed to be promiscuous, indiscriminate in choice of sexual partner, and likely to be prostitutes.[39] Historians John D'Emilio and Estelle Freedman persuasively argue that white, middle-class Americans used sexuality to justify and maintain racial hegemony:

> Both scientific and popular thought supported the view that whites were civilized and rational, while members of other races were savage, irrational, and sensual. . . . At a time when middle-class morality rested heavily upon a belief in the purity of women in the home, stereotypes of immoral women of other races contributed to the belief in white superiority. In addition, whites feared the specter of racial amalgamation, believing that it would debase whites to the status of other races. . . . The belief in white moral superiority surfaced in relation to all racial and ethnic groups—whether the Chinese in California, who were considered a "depraved class," or the Irish in eastern

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35 *See* Bergman, *supra* note 3, at 793. For similar views held by officials in mid-nineteenth-century Britain, see Sandra Stanley Holton, *State Pandering, Medical Policing and Prostitution*, 9 RES. L. DEVIANCE & SOC. CONTROL 149, 153-54 (1988).

36 ROSEN, *supra* note 3, at 22.

37 *See* HOBSON, *supra* note 7, at 44.

38 "Miscegenation" (mixed marriages) and sexual couplings between men of color and white women were exceptions to this general tolerance of male sexuality. On miscegenation in the American South, see D'EMILIO & FREEDMAN, *supra* note 7, at 106-07. White women who dated or married men of color were condemned and ostracized, and in the South, Black men were frequently lynched for approaching, having sex with, or (allegedly) raping white women. *See id.* at 105, 216-20. However, there appeared to be some tolerance for white-Latino couplings in the West. *See id.* at 91.

White men's "dalliances" with women of color were accepted (or at least "understood") on the basis of stereotypes depicting women of color as promiscuous, and on the basis of white men's general social prerogative. *See id.* at 186. Note that white men could have sex with women of color but could not marry them. Marriage would be more likely to produce "mixed" children, thus debasing the white race, and possibly transferring property out of white hands. *See id.* at 106.

39 *See, e.g., id.* at 93. *Cf. infra* note 50 and accompanying text (discussing overrepresentation of immigrant women and women of color in nineteenth-century prostitution arrests).

> cities, who were portrayed as an animalistic race with a "love for vicious excitement." Indians, Mexicans, and Blacks elicited the most extensive commentaries, in part because of the nature of the contact with whites. Patterns differed, but in each region the belief that white sexual customs were more civilized, along with the assumption that Indian, Mexican, and Black women were sexually available to white men, supported white supremacist attitudes and justified social control of other races.[40]

For example, the presumed promiscuity of Mexican women was linguistically encoded in California after its American conquest. Mexican women were stereotyped into two groups: "Spanish" (good, assimilable) and "Mexican" (bad, unassimilable).[41] Those stereotyped as "Mexican" were usually also considered prostitutes.[42]

The furor over involuntary prostitution, commonly known as "white slavery," also had a racial/class cast. "White slavers" were assumed to be foreign or foreign-born men linked in an international syndicate, whose victims were unfortunate young immigrant women, often lured from Ellis Island straight into brothels.[43] While these assumptions matched reality in a few cases, verified instances of white slavery were uncommon, and immigrant men and women represented neither the totality nor the majority of those involved with prostitution.[44] However, by emphasizing importation of foreign women and trafficking by foreign men, American legal and social policy pinpointed outsiders as the source of the prostitution problem. This effectively obscured the role of Americans, and of American social and economic factors, in promoting prostitution.[45]

Conflicting perceptions of prostitutes during this period also reveal class and racial biases. Those who viewed prostitutes as victims of male seduction and guile typically portrayed such women as "white, native born, and middle-class in . . . manners and attitudes if not . . . background," and also "young, rural, and innocent."[46] Those who blamed prostitutes for their depravity tended to picture working-class women, usually non-white and/or

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40 D'EMILIO & FREEDMAN, *supra* note 7, at 86-87 (citation omitted).

41 *Id.* at 91.

42 *Id.*

43 *See* HOBSON, *supra* note 7, at 142-47; ROSEN, *supra* note 3, at 112-35; Marlene D. Beckman, Note, *The White Slave Traffic Act: The Historical Impact of a Criminal Law Policy on Women*, 72 GEO. L.J. 1111, 1112-18 (1984). On a similar trend in Britain, blaming a white slavery epidemic on an international conspiracy, see JUDITH R. WALKOWITZ, PROSTITUTION AND VICTORIAN SOCIETY: WOMEN, CLASS, AND THE STATE 248, 250 (1980).

44 *See, e.g.*, CONNELLY, *supra* note 15, at 63.

45 *Id.* at 60.

46 ROSEN, *supra* note 3, at 49. That this view exempted prostitutes from blame for their fate did not mean that prostitutes were viewed as socially equal to reformers. As Carroll Smith-Rosenberg has pointed out, many women reformers described themselves as "mothers," and the seduced women as "daughters," a description which has important implications: "The category sister implies equality, an absolute identification. Daughter implies a hierarchy of power, the right of mothers to criticize and restrain, and of bourgeois women to control the sexual and nonsexual behavior of working-class women." Carroll Smith-Rosenberg, *Writing History: Language, Class, and Gender, in* FEMINIST STUDIES/CRITICAL STUDIES 43, 50 (Teresa de Lauretis ed., 1986).

immigrant, with deficient personal and cultural habits and characteristics.[47] Fears of racial degeneration, common in connection with the era's eugenics movement, magnified concerns about prostitution. Prostitutes were assumed to be barren or, at least, unlikely to have children;[48] thus, white women who became prostitutes contributed to "the extinction of the race."

B. The Effects of Criminalization During the Progressive Era

Prostitutes caught up in the justice system in the nineteenth and early twentieth centuries were subject to severe social controls aimed at reforming behavior and instilling proper feminine, middle-class values. Prostitutes sent to reformatories were taught sewing, scrubbing, and cooking, so that they could later find work as domestic servants. They were also tested for mental, hereditary, and genetic defects, and many were forcibly sterilized.[49] It is important to note who bore the brunt of such social control. As is the case today, in the late nineteenth and early twentieth centuries, certain groups of women were overrepresented in prostitution arrests: immigrant women and women of color. For example, on the East Coast, Irish prostitutes were disproportionately arrested; in St. Paul, Minnesota, it was Irish and Scandinavian prostitutes; in Austin, Texas, it was Black prostitutes; in New Orleans, it was Black madams; and in San Francisco, it was Chinese prostitutes and madams.[50]

A concomitant to the social control of prostitution was the stigmatization of deviant women. At times, Progressive Era reformers labeled any illicit sex as prostitution, even if it was not commercial. They feared that socially-accepted promiscuity would allow women "to experiment with immorality *without losing such social standing as they may have.*"[51] Clearly, these reformers wanted sexual deviancy to remain rigidly defined and stigmatized so as to maintain existing norms of feminine chastity and domesticity. This concern about sexual propriety also suggests a reason for the criminalization of prostitution. If prostitution were legalized, the stigma attaching to it might disappear as moral norms changed over time; but if

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47 *See* ROSEN, *supra* note 3, at 49, 62. For a summary of American immigration laws that excluded aliens from entry on the basis of immorality and/or the practice of prostitution, and that provided for deportation of aliens guilty of prostitution or immorality after entry (which included procuring prostitutes, managing brothels, assisting prostitutes in any way, receiving or sharing in the proceeds of prostitution, and frequenting any locale habitually frequented by prostitutes), see CONNELLY, *supra* note 15, at 48-66; E.P. HUTCHINSON, LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION POLICY 1798-1965, at 452-53 (1981).

48 LAQUEUR, *supra* note 14, at 230.

49 ROSEN, *supra* note 3, at 21.

50 HOBSON, *supra* note 7, at 35-36. *See also* D'EMILIO & FREEDMAN, *supra* note 7, at 136-37 (noting that Black prostitutes tended to be arrested more frequently than white prostitutes in the postbellum South, despite underrepresentation of Black women in the area's prostitute population).

51 EDWIN SELIGMAN, THE SOCIAL EVIL 11 (1912), *quoted in* ROSEN, *supra* note 3, at 43 (emphasis added). *See also* CONNELLY, *supra* note 15, at 40. Reformers also thought that socially-accepted promiscuity could lead to professional prostitution. ROSEN, *supra*.

prostitution were criminalized, the stigma almost necessarily would remain. That is, after an arrest or conviction for prostitution, a disreputable woman could not pass herself off as law-abiding, chaste, or otherwise fit for respectable employment or marriage.[52]

Reformers' attempts to stigmatize prostitutes may be interpreted as political as well as moral efforts. Not only did prostitutes violate norms governing sexual behavior and personal morality, but they also challenged existing familial and economic norms by threatening men's dominance in the market and the home. Prostitutes were free from economic dependence on men in marriage,[53] and many earned more money than did women in legitimate occupations.[54] Indeed, Progressive Era reformers were aware of prostitutes' earning power. As one observed, "a girl represents as a professional prostitute a capitalized value four times greater than she would represent as a hard working industrial worker."[55] Thus, if true "masculinity" required supporting a family,[56] independent women, such as prostitutes, might undermine it.[57]

Indeed, the disparate treatment of prostitutes and their male customers may support this view, in that it suggests that deviant women are especially deserving of punishment. Patrons of prostitutes have always been more likely to escape arrest than the prostitutes themselves.[58] For example, during the campaigns against venereal disease, male customers were not arrested, tested for disease, or confined to the extent that female prostitutes were,[59] even though men are a necessary and integral part of the prostitution contract and the spread of disease through commercial sex. Even those who blamed men and the sexual double standard for the spread of venereal disease still considered prostitutes to be the ultimate source of disease. No one ever claimed that licentious men were spreading disease to both prosti-

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52 HOBSON, *supra* note 7, at 26.

53 Prostitutes can be, and in fact have been, married. *See, e.g.*, ROSEN, *supra* note 3, at 143 & n.20, 144, 150. However, the standard image of the prostitute is a single, independent woman.

54 *See, e.g.*, PATEMAN, *supra* note 7, at 195; ROSEN, *supra* note 3, at 147-61.

55 ROSEN, *supra* note 3, at 72 (quoting unnamed reformer) (citation omitted).

56 For a definition of "manhood" in the Progressive Era, see Virginia Sapiro, *The Gender Basis of American Social Policy, in* WOMEN, THE STATE AND WELFARE 36, 44 (Linda Gordon ed., 1990).

57 *Cf. supra* note 25 (discussing nineteenth-century trade unionists' advocacy of the "family wage" for male laborers).

58 ROSEN, *supra* note 3, at 35, 176 (observing that unequal treatment of prostitutes and customers is an historical as well as contemporary practice in the United States). On contemporary patterns, see Alexander, *supra* note 3, at 196 (noting that 10% of those arrested for prostitution are male customers, 70% are female prostitutes, and the remaining 20% are male prostitutes); FRENCH, *supra* note 3, at 149 (same); RHODE, *supra* note 3, at 261 (noting that male customers represent less than 10% of prostitution arrests). *See also* Frances P. Bernat, *New York State's Prostitution Statute: Case Study of the Discriminatory Application of a Gender Neutral Law, in* CRIMINAL JUSTICE POLITICS AND WOMEN: THE AFTERMATH OF LEGALLY MANDATED CHANGE 103, 103-20 (Claudine SchWeber and Clarice Feinman eds., 1985) (reporting data from case study that indicates unequal treatment of prostitutes and customers); FLOWERS, *supra* note 3, at 129 (noting that one customer is arrested for every four prostitutes arrested, despite the greater number of customers than prostitutes in the population); TONG, *supra* note 3, at 55-56 (observing that female prostitutes are disproportionately arrested in comparison to male prostitutes).

59 *See supra* note 31 and accompanying text.

tutes and wives; rather, "innocent" women contracted disease from "sinful" men, who contracted it from prostitutes.[60]

III. CONCLUSION

Throughout the Progressive Era, reformers, policy-makers, and much of the public perceived members of the working class, immigrants, and people of color as being promiscuous and deviant. They also assumed that most, if not all, prostitutes came from these groups. Given the visibility of prostitutes who fit these stereotypes, perhaps the path of reform in the nineteenth century is not surprising. What appeared to be at stake in control of prostitution was the moral control of *all* women—women who, left to their own devices, might reject civilized, middle-class standards of probity. The fact that some deviant women had done so already underscored women's potential to destroy the very foundation of the existing social order. With the social order itself in jeopardy, extreme and coercive measures appeared to be warranted.

What does this analysis mean in the larger context? While it is beyond the scope of this paper to explain my theory in detail, perhaps I can summarize briefly. First, given the history and motivations behind anti-prostitution policy in the United States, the reader should be highly skeptical of politicians and scholars who insist that the criminalization of prostitution protects women, or even promotes feminist goals. A second and closely related point is that feminists may need to reconceptualize prostitution, at least in the American context. However valuable "pure" theory may be, prostitution and prostitutes cannot be analyzed in the abstract; rather, specific manifestations, motivations, and circumstances must be considered. Considered ahistorically, prostitution may be viewed as an institution that promotes women's sexual subordination to men.[61] However, considered in light of its history, I feel that prostitution is often better viewed as an instance of resistance to rigid gender norms.

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[60] BRANDT, *supra* note 18, at 31-32. *See also* Gail Pheterson, *The Social Consequences of Unchastity, in* SEX WORK, *supra* note 3, at 226.

[61] *See generally* PATEMAN, *supra* note 7; ANDREA DWORKIN, INTERCOURSE (1987).