

THE “WHOREARCHY”: WEBCAMMING AND PROSTITUTION, SOCIETY AND POLITICS

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There is a hierarchy, or “whorearchy,” in sex work that informs why only certain types of sex work are legalized. “Authorities’ in criminalization and legalization regimes devote great effort to erecting arbitrary barriers between ‘tolerable’ and ‘intolerable’ varieties of harlotry, and sometimes to cementing the strata in place; . . . sex worker advocates expend considerable efforts in hand-wringing and lamentation over ‘classism.’”¹ “Authorities” manipulate their semantics to “bless some harlots while damning others” to shrink the size of their opposition and gain supporters from those they have legitimized through their speech.² Therefore, some sex workers see themselves as less “abhorrent,” or more valuable to society, than other sex workers depending on the type of sexual labor they perform.³ This is also supported by the legal system as pornography stars, phone sex operators, and webcam models are all able to file taxes for the income they earned through sex work, while prostitutes may choose not to.⁴ This “whorearchy” mindset explains why certain types of sex work are legal while other types are not.

I. CAMMING

Prostitution has existed since, quite literally, the dawn of time, hence the moniker of “the world’s oldest profession.”⁵ Prostitution

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¹ Maggie McNeill, *Whorearchy*, THE HONEST COURTESAN: FRANK COMMENTARY FROM A SEMI-RETIRED CALL GIRL (May 10, 2012), <https://maggiemcneill.wordpress.com/2012/05/10/whorearchy/> [<https://perma.cc/D8PB-77Q7>].

² *See id.*

³ *See id.* (referring to different types of sex workers, like those who practice “sensual therapy,” maintaining that they are not sex workers).

⁴ *See* Peter Szekely, *Sex and Taxes: A Seattle Tax Preparer is Intimate with Both*, REUTERS (Feb. 18, 2020, 6:13 AM), <https://www.reuters.com/article/us-usa-tax-sexwork/sex-and-taxes-a-seattle-tax-preparer-is-intimate-with-both-idUSKBN20C1CH> [<https://perma.cc/2Z65-5WPN>].

⁵ *See* Forrest Wickman, *Is Prostitution Really the World’s Oldest Profession?*, SLATE (Mar. 6, 2012, 5:57 PM), <https://slate.com/news-and-politics/2012/03/rush-limbaugh-calls-sandra-fluke->

has long faced strong religious and moral opposition.⁶ While prostitution has been deemed immoral and illegal in most jurisdictions,⁷ pornography has continued to survive and often thrive. Pornography has also been in existence for an unfathomable amount of time as cavemen would draw explicit, sexual images on cave walls, creating the *Playboy* of the Stone Age.⁸ As society and technology have advanced, sex work has as well. Technology has evolved so far that now there is sex work that sits squarely between both prostitution and pornography and is perfectly legal, given certain statutes are followed: webcamming.

Webcamming is when “young women . . . operate their own webcams to communicate with a broad audience online, often engaging with sexually explicit behaviour in real-time in return for financial compensation.”⁹ “The camgirl industry began in the mid-1990’s [once access] to the internet became widespread and the increased capacity of bandwidth allowed [for] . . . engage[ment] with live video streaming.”¹⁰ Webcamming as a genre began as simply “homecamming,” where someone, typically a woman, would place webcams throughout her domestic sphere with the goal of broadcasting her life to the general public while typically keeping a sort of online journal.¹¹ The first woman to do this, Jennifer Dingley, created the website JenniCam on which she broadcasted every aspect of her life in her small Dickinson College dorm room, including sexual encounters.¹²

As webcamming and the camgirl industry began gaining widespread popularity, the commercial possibilities presented by webcam technology became evident to traditional pay-for-use porn companies.¹³ A camgirl is able to create customized pornographic

a-prostitute-is-prostitution-really-the-worlds-oldest-profession.html [https://perma.cc/TH3C-57KD].

⁶ See Univ. of Minnesota Libraries Publ’g, *Prostitution*, SOCIAL PROBLEMS: CONTINUITY AND CHANGE, <https://open.lib.umn.edu/socialproblems/chapter/9-4-prostitution> [https://perma.cc/DC9C-ERXX].

⁷ See *id.* (supporting the proposition that prostitution is generally looked down upon in the United States); *Prostitution in Nevada is a Legal Business*, HG, <https://www.hg.org/legal-articles/prostitution-in-nevada-is-a-legal-business-50031> [https://perma.cc/32BM-D28C] (describing prostitution being illegal across the United States except for in Nevada).

⁸ See Jennifer Viegas, *Female Sex Organs the Focus of Oldest Known Cave Art*, NBC NEWS (May 14, 2012), <https://www.nbcnews.com/id/wbna47418532> [https://perma.cc/2ART-MTA7].

⁹ Paul Bleakley, “500 Tokens to Go Private”: *Camgirls, Cybersex and Feminist Entrepreneurship*, 18 SEXUALITY & CULTURE 892, 893 (2014).

¹⁰ *Id.* at 895.

¹¹ THERESA M. SENFT, CAMGIRLS: CELEBRITY & COMMUNITY IN THE AGE OF SOCIAL NETWORKS 15–18 (2008).

¹² *Id.* at 15–16.

¹³ Bleakley, *supra* note 9, at 895.

material by responding to requests in the chat box, which allows the consumer to feel that they have control over the show, as though they are the director of their own porn experience.¹⁴ The interactivity of camming has lent itself to the creation of a unique relationship that has a “transactional nature” between performer and audience that is unlike anything that exists within the sex work industry.¹⁵ While camming is similar to traditional pornography in the sense that it is not in-person sexual contact, it is also similar to prostitution because a camgirl is able to use direct communication, lacking in traditional pornography, to create relationships with clients that “encourag[es] repeat business and cultivat[es] a dedicated client base.”¹⁶ The interactive nature of the industry allows “camgirl performers [to] encourage patrons to articulate their physical responses and show tangible appreciation via tokens or alternative means of payment.”¹⁷

Like prostitution, and unlike pornography, camgirls are able to create boundaries with their customers.¹⁸ With traditional pornography, the consumer is unaware of a performer’s boundaries, whereas with camming a client is often made aware via disclaimer of a performer’s boundaries and preferences prior to entering a site.¹⁹ This is similar to how a client is made aware of a prostitute’s limits before engaging in sexual activity.²⁰ The relationship between the camgirl and her audience is unique and unlike that of a traditional porn performer and her audience because,

[t]he transactional nature of the camgirl business allows performers to establish firm boundaries in regards to their work: audiences are typically provided with information detailing the specific type of sexual behaviour that performers are comfortable with and at what price. Negotiation between camgirl performers and their audience is an essential aspect of the genre, with the sense that consumers have directed the

¹⁴ *Id.* at 898–99.

¹⁵ *Id.* at 899.

¹⁶ *Id.* at 899–900.

¹⁷ *Id.* at 899.

¹⁸ *Id.*

¹⁹ See *id.* at 899, 902; Rachel Stuart, *Webcamming: The Sex Work Revolution That No One is Willing to Talk About*, THE CONVERSATION (Dec. 19, 2016, 5:35 AM), <https://theconversation.com/webcamming-the-sex-work-revolution-that-no-one-is-willing-to-talk-about-69834> [<https://perma.cc/9MXJ-VKAF>].

²⁰ Jessie Patella-Rey, *Want to Figure Out the Rules of Sexual Consent? Ask Sex Workers.*, WASH. POST (May 21, 2018, 6:00 AM), <https://www.washingtonpost.com/news/posteverything/wp/2018/05/21/want-to-figure-out-the-rules-of-sexual-consent-ask-sex-workers/> [<https://perma.cc/JY44-PNKK>].

actions of performers serving to increase investment in the sexual material that is ultimately produced.²¹

A. Payment

Camming can also be a highly lucrative career choice for performers. Camming is best equated to the gigging economy in which you get back what you put in.²² To be successful, a camgirl must devote time and effort to building her fan base of consumers through social media and other platforms.²³ To find performers, consumers use “camgirl databases” to select shows of individual performers to watch and then, “using payment methods such as credit cards or PayPal[,] . . . purchase ‘tokens’ from the website.”²⁴ The use of tokens is a generally accepted industry standard.²⁵ “These tokens can . . . be used to ‘tip’ performers for their [performance]” or can also be used to buy “private access to a camgirl.”²⁶ With private access, an audience member is able to request a camgirl perform sexual acts and a customer is charged 60 tokens per minute, according to one hosting website.²⁷ However, in a non-private medium, like the open “room,” camgirls are allowed to set their own token benchmarks for sexual acts.²⁸ Ultimately, it is at the performer’s discretion “to decide how far they [wish] to push their professional sexual exhibitionism.”²⁹

Being able to set token benchmarks allows a performer to “maintain control of their image and dictate the terms and conditions on which they are viewed.”³⁰ This ability has given many impoverished people the ability to raise themselves out of poverty in a relatively safe and controlled environment.³¹

²¹ Bleakley, *supra* note 9, at 899.

²² Susannah Breslin, *Meet the Vince Lombardi of Cam Girls*, FORBES (Aug. 18, 2015, 3:19 PM), <https://www.forbes.com/sites/susannahbreslin/2015/08/18/cam-girl-money/#7da5f0b76827> [<https://perma.cc/7YYU-58RX>].

²³ *Social Media for Cam Models: How to Grow & Monetize Your Online Community*, SKYPRIVATE, (Oct. 25, 2018), <http://blog.skyprivate.com/social-media-for-cam-models-how-to-grow-monetize-your-online-community/> [<https://perma.cc/9B8C-PYAV>].

²⁴ Bleakley, *supra* note 9, at 899.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *See id.*

²⁸ *Id.*

²⁹ Breslin, *supra* note 22.

³⁰ *See* Stuart, *supra* note 19.

³¹ *See id.*

[T]he webcamming industry is driven by a very different force: the mainstream corporation. With no easily identifiable victim and an above-board financial operation, the world of webcamming has confounded law-makers and anti-sex work campaigners alike. . . . [E]ntrepreneurial women are free to participate in a legal form of sex work, which they have the power to define.³²

While camming can be lucrative, hosting websites take a large portion of camgirl revenue. Hosting sites retain forty to sixty-five percent of performers’ earnings for the service of “providing chatroom and payment services . . . [in addition to a] [pre]existing customer base.”³³ The remainder is then transferred to the individual performers through standard electronic banking transfer at regular intervals, typically weekly or biweekly.³⁴ To supplement their income many camgirls post “wish lists” on their various social media platforms and/or sell access to their personal contact information, like Facebook, Snapchat and phone numbers.³⁵ The banking system also profits from the camming industry as companies charge a seven to fifteen percent transaction fee, far more than the typical two to three percent transaction fee, which is justified by the supposedly “greater risk of fraud” associated with the payment for webcam sessions.³⁶ Often, “payment processors and credit card companies have more control over the content [of models] than the governments. . . . [C]ompanies [maintain] . . . their own standards as far as what they will and won’t provide services for, including prohibited content.”³⁷ So, anything prohibited by the payment processor will be against the content policy and terms of service of the various camming and clip sites serviced by the payment processor.³⁸ Camming and clip sites will therefore ban non-compliant models because keeping one model is not worth compromising a whole business.³⁹ However, the advent of cryptocurrency is

³² *Id.*

³³ *Id.*

³⁴ See Bleakley, *supra* note 9, at 900.

³⁵ See Bleakley, *supra* note 9, at 900; Graham Isador, *Cam Models Tell Us How Much Money They Are Really Making*, VICE (Mar. 8, 2019, 8:46 AM), https://www.vice.com/en_ca/article/wjmbwn/cam-models-tell-us-how-much-money-they-are-really-making [<https://perma.cc/7THA-QKLL>].

³⁶ See Stuart, *supra* note 19.

³⁷ See *Camgirl Laws and Legal Issues to Know About*, WEBCAM STARTUP, <https://webcamstartup.com/camgirl-law/> [<https://perma.cc/3MTE-D637>].

³⁸ *See id.*

³⁹ *See id.*

disrupting the payment processor control. Cryptocurrency has no content policies, so camming and clip sites need only stay compliant with the laws of the country their company is based out of, and models need only be compliant with their jurisdiction's laws and the laws governing the company.⁴⁰

B. Camming Legality

In the United States, “webcam modelling’ is not illegal . . . [as the law] differentiates between in-person solicitation and its digital equivalent [(camming)].”⁴¹ “[W]hile soliciting a woman for sexual services can lead to imprisonment in most American states, the presence of a computer screen as buffer removes most legal restrictions in terms of providing payment for sexual activity.”⁴² Also, while there are many restrictions on recordings (traditional pornography), there are not so many on live streaming (camming).⁴³ However, Filipino lawmakers in 2012 addressed this legal quandary when they made camming illegal and punishable by a \$6,000 fine and six months imprisonment.⁴⁴ The lawmakers defined “cybersex’ as ‘any lascivious exhibition of sexual organs or sexual activity, with the aid of a computer system, for favour or consideration.’”⁴⁵ This definition can be problematic as camming may also be known as “webcam modelling,” which is equated more to stripping.⁴⁶ Camgirls, like strippers, are “paid by customers to display their body without the expectation of ‘actual sexual intercourse.’”⁴⁷

C. The Legal Nitty Gritty

In order for camming to continue within the United States, websites, companies, and performers must adhere to strict record keeping requirements per 18 U.S.C. § 2257.⁴⁸ The record keeping compliance necessitated by 18 U.S.C. § 2257 is a requirement of both the pornography and webcamming industries.⁴⁹ The statute requires that producers of “any . . . film, videotape, digital image, digitally- or

⁴⁰ *See id.*

⁴¹ Bleakley, *supra* note 9 at 901.

⁴² Bleakley, *supra* note 9, at 901.

⁴³ *See* Stuart, *supra* note 19.

⁴⁴ Bleakley, *supra* note 9, at 903.

⁴⁵ *Id.*

⁴⁶ *See id.*

⁴⁷ *Id.*

⁴⁸ *See Camgirl Laws and Legal Issues to Know About*, *supra* note 37.

⁴⁹ *See id.*

computer-manipulated image of an actual human being, picture, or other matter which— (1) contains one or more visual depictions . . . of actual sexually explicit conduct” keep records showing performers’ ages.⁵⁰ For webcam models, this process is taken care of by their streaming platform, as all companies require you to submit a form of government issued identification when signing up for the site.⁵¹ However, models should be aware of such requirements if they wish to market and sell scenes on their personal websites because social media sites are not required to maintain such documents, but the models may be.⁵²

Furthermore, in 2005 the Department of Justice released new federal regulations expanding the definition of a “secondary producer,” which makes the record keeping requirements even more strict.⁵³ A “secondary producer” is anyone “who inserts on a computer site or service a digital image of, or otherwise manages the sexually explicit content of a computer site or service that contains a visual depiction of . . . sexually explicit conduct.”⁵⁴ While this sort of content production may seem similar to that of major porn sites like Pornhub.com, it is not; those sites are not considered producers of sexually explicit content. Individuals or entities are not covered producers if their role with respect to covered materials is “limited to . . . [d]istribution; . . . [or] [t]he transmission, storage, retrieval, hosting, formatting, or translation . . . of a communication, without selection or alteration of the content of the communication.”⁵⁵ Sites like Pornhub.com merely distribute and transmit sexually explicit material and are, therefore, not required to maintain records in compliance with 18 U.S.C. § 2257.⁵⁶ While such sites do often make sure that the scenes and models are legal as best they can, they do not require producers to provide documentation in order to post content.⁵⁷

⁵⁰ 18 U.S.C. § 2257(a) (2018).

⁵¹ See *Camgirl Laws and Legal Issues to Know About*, *supra* note 37.

⁵² See Dep’t of Justice, 28 C.F.R. Part 75 *Small Business Compliance Guide: Recordkeeping for Visual Depictions of Actual and Simulated Sexually Explicit Conduct* (Mar. 19, 2012), <https://www.justice.gov/sites/default/files/criminal-ceos/legacy/2012/03/19/2257compliance.pdf> [<https://perma.cc/WF2H-TXRD>].

⁵³ See *id.*; Inspection of Records Relating to Depiction of Sexually Explicit Performances, 70 Fed. Reg. 29607, 29609 (May 24, 2005) (to be codified at 28 C.F.R. 75).

⁵⁴ Child Protection Restoration and Penalties Enhancement Act of 1990, 28 C.F.R. § 75.1(c)(2) (2020).

⁵⁵ *Id.* § 75.1(c)(4).

⁵⁶ See *Terms of Service*, PORNHUB (Dec. 8, 2020), <https://www.pornhub.com/information#btn-2257> [<https://perma.cc/JG35-FR2A>].

⁵⁷ See *id.*

The new regulations set forth by the Department of Justice also further burden producers of sexually explicit material. Previously, producers need only “maintain records of the legal name and date of birth of each performer, [including] any name, other than each performer’s legal name, ever used by the performer, including the performer’s maiden name, alias, nickname, stage name, or professional name.”⁵⁸ However, the new regulations set forth by the Department of Justice now require that “the records include a copy of each image as well as the URL on which the depiction was published.”⁵⁹ The new regulations also include burdensome requirements on how long records must be kept, including maintaining the records for up to five years after the “producer” is out of business.⁶⁰ Even amateur performers who film and post their scenes on file sharing websites must maintain such records,⁶¹ however, it is highly unlikely that law enforcement would prosecute mere amateurs with very few scenes. Failure to maintain these records “is a criminal offense punishable by imprisonment of not more than five years for a first offense and not more than ten years for subsequent offenses.”⁶² This type of regulation is used to ensure that large companies and producers of sexually explicit content maintain safe practices within the industry.⁶³

The new regulation applies to “visual depictions of actual human beings engaged in actual or simulated sexually explicit conduct.”⁶⁴ However, the regulation does differentiate between types of content and how far back records must go on that genre. “The requirements apply in full to any visual depiction of actual sexually explicit conduct produced after July 3, 1995, . . . with the exception of visual depictions of lascivious exhibition of the genitals or pubic area of a person (‘lascivious exhibition’).”⁶⁵ “The requirements for depictions of lascivious exhibition [and simulated sexually explicit conduct] apply only to depictions produced after March 18, 2009.”⁶⁶

⁵⁸ *Legal Guide for Bloggers: Adult Material*, ELECTRONIC FRONTIER FOUND., <https://www EFF.org/issues/bloggers/legal/adult> [<https://perma.cc/3X89-UGBT>].

⁵⁹ *See id.*; 28 C.F.R. § 75.2 (2020).

⁶⁰ *See* 28 C.F.R. § 75.4 (2020).

⁶¹ *See* 28 C.F.R. § 75.1 (2020); 28 C.F.R. § 75.2 (2020).

⁶² Dep’t of Justice, *supra* note 52.

⁶³ M. Eric Christensen, Note, *Ensuring that Only Adults “Go Wild” on the Web: The Internet and Section 2257’s Age-Verification and Record-Keeping Requirements*, 23 BYU J. PUB. L. 143, 144 (2008).

⁶⁴ Dep’t of Justice, *supra* note 52.

⁶⁵ *Id.*

⁶⁶ *Id.*

“Lascivious exhibition of the genitals or pubic area” is not defined by the regulation.⁶⁷ However, judicial precedent from child pornography prosecutions has set forth a six-factor test to help determine if a given image is to be considered “lascivious”:

- (1) Whether the genitals or pubic area are the focal point of the image;
- (2) Whether the setting of an image is sexually suggestive (i.e., in a place generally associated with sexual activity . . .);
- (3) Whether the subject is depicted in an unnatural pose or inappropriate attire considering [the subject’s] age;
- (4) Whether the subject is fully or partially clothed or nude;
- (5) Whether the [visual depiction] suggests sexual coyness or willingness to engage in sexual activity; and
- (6) Whether the [visual depiction] is intended or designed to elicit a sexual response in the viewer.⁶⁸

The Department of Justice defines simulated sexually explicit conduct as “conduct engaged in by performers that is depicted in a manner that would cause a reasonable viewer to believe that the performers engaged in actual sexually explicit conduct, even if they did not in fact do so.”⁶⁹ Considering the variety of sexually explicit behavior, ranging from simulated to lascivious exhibition, that webcam models may engage in, it is clearly important that webcamming sites remain in compliance with federal regulations. However, models must also make sure that their shows are in compliance. Therefore, they must remain conscious of the location in which they are performing or filming to make sure that people who are not in compliance with 18 U.S.C. § 2257 are not included in the scene.⁷⁰

⁶⁷ *Id.*

⁶⁸ *Legal Guide for Bloggers: Adult Material*, *supra* note 58; *see also* United States v. Dost, 636 F. Supp. 828, 832 (S.D. Cal. 1986) *aff’d sub nom.*, United States v. Wiegand, 812 F.2d 1239 (9th Cir. 1987). The *Dost* test is applied by many courts to determine if a given image is considered to be “lascivious” under the law. *See, e.g.*, United States v. Amirault, 173 F.3d 28, 31 (1st Cir. 1999) (citing *Dost*, 636 F. Supp. at 832).

⁶⁹ Dep’t of Justice, *supra* note 52.

⁷⁰ *See Camgirl Laws and Legal Issues to Know About*, *supra* note 37.

D. Socio-Political Discourse

The statutes governing the webcamming industry clearly are not as voluminous as those which generally govern prostitution. This is likely because many do not have such strong moral opposition to sexual solicitation when there is a computer screen as a buffer. Rather than pure political discourse, “the public discussion on prostitution has become an ideological brawl in which both sides bend research to promote political agendas and to slander opponents.”⁷¹

Rather than treating those who choose to pursue sex work as free-thinking individuals with agency, politicians and society as a whole choose to view such people as victims in need of rescuing.⁷² Many “fail to distinguish between woman-as-laborer and sex as ‘the particular product of individual labor.’ Instead, [many] tend to conflate the two, everywhere seeing prostitutes as victims who always happen to be women (or girls) but never workers.”⁷³ This is because the concept of work is skewed towards mainstream industry, in which sex work is not considered work. “[C]alling something ‘work’ euphemistically erases its connections to violence and exploitation.”⁷⁴ In order for sociopolitical discourse surrounding sex work to change in a positive direction, we, as a society, must part with the classist, elitist mindset that only certain work is valuable.

II. PROSTITUTION

In the United States, the prevailing attitude towards prostitution policy is criminalization. This is in part due to the shame that enshrouds American society’s view of sex and sexual pleasure in general; “[w]hen sexual pleasure is seen as a positive and honorable goal, much of the negative fruit of the sex industry is deprived of the soil in which to grow.”⁷⁵ The idea that a woman could and should never willfully enter sex work as a bona fide profession will continue to influence societal perceptions unless society consciously decides to see a woman as a true worker who offers a service and not as a victim. The public policy governing prostitution “emerged haphazardly as police and local officials respond[ed] to public concerns,” which has

⁷¹ Brooke Meredith Beloso, *Sex, Work, and the Feminist Erasure of Class*, 38 SIGNS: J. WOMEN CULTURE & SOC’Y 47, 49 (2012).

⁷² See *id.* at 49–50, 62.

⁷³ *Id.* at 50.

⁷⁴ Heather Berg, *Labouring Porn Studies*, 1 PORN STUD. 75, 77 (2014).

⁷⁵ Heather Berg, *An Honest Day’s Wage for a Dishonest Day’s Work: (Re)Productivism and Refusal*, 42 WOMEN’S STUDY Q., 161, 173 (2014).

helped the effort to awfulize the life situation of the sex worker.⁷⁶ Rather than working towards sustainable models of decriminalization or legalization, both sides of the political and public discussion have become devoid of any substantive discussion of change; instead, both sides bend research to promote their political agendas. This pervasive viewpoint of sex workers as victims contrasts greatly with Nevada’s legal brothel model, where ten counties throughout the state have licensed brothels.⁷⁷

A. Nevada’s Model

Over the past fifty years, the state of Nevada has managed to build and expand a sustainable, regulatable system of legal brothels. Nevada’s Wild West mining town history culture allowed for, and even welcomed, the rise of brothels. “[T]he culture and political economy of the West had several features that help explain the rise of the brothels: an economically unstable, migrant economy; libertarian sexual values; a particular political culture, and the beginnings of a tourist economy.”⁷⁸

Nevada’s brothels find their roots in patriarchal gender roles. A woman’s job was to please migrant male workers, which only reinforced the misplaced idea that it is a biological necessity for the male libido to be perpetually satisfied.⁷⁹ These gender roles still continue to inform Nevadan prostitution as it is “limit[ed] on the kind of sex for sale permitted, the parties involved, and the circumstances under which the exchange may occur.”⁸⁰ The vast majority of brothels in Nevada are, therefore, cisgendered and heteronormative, as women are the only people recognized as “legitimate prostitutes.”⁸¹ This framework allowed towns to develop where prostitution became institutionalized in brothels that were “regulated in accordance with

⁷⁶ Martin A. Monto, *Prostitutes’ Customers: Motives and Misconceptions*, in *SEX FOR SALE: PROSTITUTION, PORNOGRAPHY, AND THE SEX INDUSTRY* 233, 237 (Ronald Weitzer ed., 2d ed. 2010); see Martin A. Monto, *Focusing on the Clients of Street Prostitution: A Creative Approach to Reducing Violence Against Women* (1999), <https://www.ncjrs.gov/pdffiles1/nij/grants/182859.pdf> [<https://perma.cc/3WBY-UFLZ>]; Ronald Weitzer, *Prostitution Control in America: Rethinking Public Policy*, 32 *CRIME L. & SOC. CHANGE* 83, 83–85 (1999).

⁷⁷ Kathryn Hausbeck & Barbara G. Brents, *Nevada’s Legal Brothels*, in *SEX FOR SALE: PROSTITUTION, PORNOGRAPHY, AND THE SEX INDUSTRY* 255, 255 (Ronald Weitzer ed., 2d ed. 2010).

⁷⁸ *Id.* at 256.

⁷⁹ *Id.* at 256–57.

⁸⁰ *Id.* at 259.

⁸¹ *Id.*

local sex and gender norms.”⁸² While the women of the Wild West saloons were stroking more than just male egos, they were cementing their place as normal fixtures of Nevadan culture.

In 1971, Nevada became the first state to create and sign into law legislation that provided for official brothel licensing.⁸³ The original legislation made prostitution illegal in counties with populations of more than 200,000, which, at the time of creation, meant only Clark County (Las Vegas).⁸⁴ The population cap was in response to efforts by Nevadan brothel owner, Joe Conforte, to open a brothel in Las Vegas.⁸⁵ State legislatures representing local counties lobbied against the legislation because the industry was still trying to legitimate gambling as a viable touristic and economic resource.⁸⁶ However, in 1978 the Nevada Supreme Court ruled that the “prohibition of brothel prostitution in one county tacitly allowed the other [sixteen] counties to license brothels.”⁸⁷ While the state legalized brothels, it was left to the discretion of local governments to create brothel-licensing mechanisms.⁸⁸ In the subsequent years, “brothel owners in a majority of counties successfully lobbied county commissioners to pass brothel-licensing ordinances.”⁸⁹

Nevadan culture recognizes that humans are sexual beings, making it “inevitable that some women will resist traditional feminine roles and sell sex and that men will want to have sex available on demand.”⁹⁰ This perspective is shared by the majority of the Nevadan population, and it is understood that

[l]egal brothel prostitution is justified by a discourse that maintains that (1) the sale of sex is one of the world’s oldest professions and is unlikely to disappear; (2) state and local government-regulated prostitution is superior to illegal prostitution insofar as it allows for limitations on what is sold, on the terms and conditions of sales, and on brothel ownership and employment practices; (3) such businesses are revenue generating; (4) legal prostitution provides a valuable service to certain individuals who have desires that cannot be easily

⁸² *Id.* at 257.

⁸³ *Id.* at 258.

⁸⁴ *Id.*

⁸⁵ *See id.*

⁸⁶ *See id.*

⁸⁷ *Id.*; *see also* *Nye Cnty. v. Plankinton*, 587 P.2d 421, 423 (Nev. 1978).

⁸⁸ *Hausbeck & Brents*, *supra* note 77, at 258.

⁸⁹ *Id.*

⁹⁰ *Id.* at 259.

fulfilled otherwise; and (5) limiting such activities to particular licensed venues curtails related criminal activities (drugs, pimping, violence) and helps control the spread of disease.⁹¹

Nevada’s emphasis on regulatory oversight and public scrutiny allows prostitutes to feel empowered, in addition to creating a safer environment for all parties (community, workers, and clients), minimizing rape, sexual assault, extramarital affairs, and the spread of disease.⁹²

“Nevada is [now] home to [twenty-eight] licensed brothels in [ten] counties.”⁹³ Larger, urban/suburban brothels employ eighty women at a time, whereas smaller, rural brothels employ two to ten women at a time.⁹⁴ In 2008, these twenty-eight licensed brothels grossed \$45 million.⁹⁵ This is in large part due to the rise of sex tourism in Nevada because of events like the Burning Man festival and the National Cowboy Poetry Gathering.⁹⁶ While this influx of tourists is beneficial to the economy, it has also subjected Nevadan brothel and sex culture to gentrification. Tourists bring with them “cosmopolitan expectations about the emotional, sexual, and commercial experience of prostitution.”⁹⁷ Larger brothels are deviating from the Wild West experience to cater to tourists’ desire for “more familiar and luxurious, modern sexualized atmosphere[s].”⁹⁸

This commercialization of brothels has made it difficult for owners to retain workers, so owners are always trying to attract new employees. Owners would place billboards in counties where prostitution was illegal in hopes of attracting new women.⁹⁹ However, in 2007, that tactic was challenged in *Coyote Publishing, Inc. v. Heller*.¹⁰⁰ The District Court for the District of Nevada held that the ordinances forbidding brothel advertisement in counties where prostitution is illegal were overly broad and therefore violated

⁹¹ *Id.*

⁹² *Id.* at 259–60.

⁹³ *Id.* at 260.

⁹⁴ *See id.* at 263.

⁹⁵ *Id.* at 260.

⁹⁶ *Id.* at 263.

⁹⁷ *Id.*

⁹⁸ *Id.* at 264; see Barbara G. Brents & Kathryn Hausbeck, *Marketing Sex: U.S. Legal Brothels and Late Capitalist Consumption*, 10 *SEXUALITIES* 425, 432 (2007).

⁹⁹ *See* Hausbeck & Brents, *supra* note 77, at 265.

¹⁰⁰ *Coyote Publ’g, Inc. v. Heller*, No. CV-06-329-JCM-PAL, 2007 U.S. Dist. LEXIS 57453, at *7 (D. Nev. Aug. 1, 2007), *rev’d*, 598 F.3d 592 (9th Cir. 2010).

the First Amendment rights of brothel owners.¹⁰¹ However, upon appeal to the Ninth Circuit, this decision was reversed.¹⁰² his reversal is likely to have made recruiting workers for legal prostitution even more difficult than it already had been prior to the Ninth Circuit's decision.¹⁰³

The Nevadan state government plays a very small role in regulating brothels. Statewide legislation merely "restricts prostitution to counties of a certain size, and prohibits brothels from being closer than 400 yards from a school, a religious building, or being on a principal business street."¹⁰⁴ However, since 1985, the State Health Department has maintained stringent worker health testing to ensure the health and safety of both workers and clients.¹⁰⁵ In order to work, women "must have a state health card certifying [she] . . . [is sexually] safe and healthy prior to applying for work in a brothel," meaning that she must "test[] negative for all [sexually transmitted diseases (STDs)], including syphilis, gonorrhea, and HIV."¹⁰⁶ "Once hired, [women] . . . [are] required to have *weekly* health exams by a registered doctor to certify that she is not carrying any STDs," in addition to monthly blood tests by a doctor to check for HIV and syphilis.¹⁰⁷ The State Health Department has been successful with combatting STDs by requiring brothels to post notices at the entrance and throughout the building "informing customers that condom use is mandated by the state."¹⁰⁸ Women support this regulation not only for their sexual health but also for their financial health, as it can be fiscally detrimental for a worker to have to take time off to recuperate from an STD.¹⁰⁹ Brothels are very strict about enforcing these Health Department regulations to avoid having their privileged licenses revoked by local officials who "have the power to revoke licenses . . . and . . . impose all kinds of regulations."¹¹⁰

"Brothels [often] impose their own house rules."¹¹¹ However, women are independent contractors and are able to negotiate and sign individual contracts with the house, so they are able to set out

¹⁰¹ *Id.* at *7–8.

¹⁰² *Coyote Publ'g, Inc. v. Miller*, 598 F.3d 592, 611 (9th Cir. 2010).

¹⁰³ *See Hausbeck & Brents, supra* note 77, at 265.

¹⁰⁴ *Id.* at 266.

¹⁰⁵ *Id.* Since the implementation of the regime there has been no reported cases of HIV. *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* (emphasis added). If a woman "tests positive [for an STD], she is unable to work until the treatment cures her and the physician reinstates her health card." *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 268.

¹¹¹ *Id.*

their own terms.¹¹² Typically, they work three weeks at a time and usually split half their earnings with the house and must tip house staff.¹¹³ The house rules often restrict women’s mobility; while they are allowed to leave for errands, women may not leave the brothel for extended periods of time without being health tested again.¹¹⁴ This is in an effort to ensure financial return on an employee and also to keep all parties safe.¹¹⁵ Overall, safety is very important to and in the brothel industry, and “Nevada’s legal brothels offer the safest environment available for women to sell consensual sex.”¹¹⁶ Brothels are equipped with panic buttons, brothel staff listen to all negotiations between a woman and client, and women are allowed to turn away customers.¹¹⁷ These measures allow women to feel safe and that there is a sense of camaraderie and family, to feel respected and supported.

B. Decriminalization versus Legalization

Criminalization of prostitution has been the prevailing policy throughout the United States, aside from Nevada. Approximately 80,000 arrests for violation of prostitution laws are made annually in the United States, not including an innumerable amount of arrests of street prostitutes for disorderly conduct or loitering statutes.¹¹⁸ These arrests rarely have the effect desired by law enforcement: “arrests have the effect of either (1) *containment* within a particular area, where prostitutes are occasionally subjected to the revolving door of arrest, fines, brief jail time, and release, or (2) *displacement* to another locale where the same revolving-door dynamic recurs.”¹¹⁹

This seemingly never-ending revolving-door interaction between prostitutes and law enforcement happens because “prostitutes have failed to pay the social necessity debt; not only does this render them abject victims, it also negates any possibility of organizing for improved working conditions, better policies, or access to vital services.”¹²⁰ For this pattern to end, mechanisms must be in place to

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.* The mobility limits set by the brothels are often criticized for violating women’s human rights. *Id.* at 269.

¹¹⁵ *See id.* at 268–69.

¹¹⁶ *Id.* at 272.

¹¹⁷ *Id.*

¹¹⁸ Ronald Weitzer, *Sex Work: Paradigms and Policies*, in *SEX FOR SALE: PROSTITUTION, PORNOGRAPHY, AND THE SEX INDUSTRY* 1, 21 (Ronald Weitzer ed., 2d ed. 2010).

¹¹⁹ *Id.* at 21.

¹²⁰ Berg, *supra* note 75, at 171–72.

allow sex workers opportunities for other career choices or society must learn to accept sex work as a valid form of employment. To accept sex work as a valid form of labor in our capitalistic society, there must be a distinct uncoupling of women-as-laborers and sex as a product of their individual labor. Instead of scholars commenting on the depravity of prostitution and other sex work, efforts could better be channeled into examining the realities of the work under capitalism. Such an effort might be,

[f]or example, approaching condom use in porn production not as a special question of porn or even sex work but as part of a constellation of occupational health issues impacting on waged workers allow[ing] us to explore the issue more soberly and to connect it to the larger story of how work impacts on our bodies.¹²¹

This type of analysis would normalize prostitution and other types of sex work in society, which would grant workers greater, easier mobility between sex work and other career choices. Such mobility would allow for greater transparency in the sex work industry because workers would eventually experience less of the stigma that accompanies sex work.¹²²

There are varying levels of decriminalization: full decriminalization, partial decriminalization, and *de facto* decriminalization. Full decriminalization would “remove all criminal penalties and leave prostitution unregulated, albeit subject to conventional norms against nuisances, sex in public, or disorderly conduct.”¹²³ Essentially, full decriminalization would allow street prostitution to exist, “so long as . . . workers and customers [do] not disturb the peace or violate other ordinances.”¹²⁴ Partial decriminalization “would reduce[,] but not eliminate penalties[,] [as] the penalty might be a fine instead of incarceration or the charge may be reduced from a felony to a misdemeanor or violation.”¹²⁵ Finally,

¹²¹ Berg, *supra* note 74, at 77.

¹²² See *id.*; Kathleen Guidroz & Grant J. Rich, *Commercial Telephone Sex: Fantasy and Reality*, in *SEX FOR SALE: PROSTITUTION, PORNOGRAPHY, AND THE SEX INDUSTRY* 139, 139, 148–49 (Ronald Weitzer ed., 2d ed. 2010).

¹²³ Weitzer, *supra* note 118, at 21.

¹²⁴ *Id.* at 21–22.

¹²⁵ *Id.* at 22. It is important to note, however, that partial decriminalization might leave street prostitutes in difficult financial situations if they are unable to pay fines of which delinquency could lead to incarceration or other consequences. See SAN FRANCISCO TASK FORCE ON PROSTITUTION: FINAL REPORT 1, 8–9 (1996).

de facto decriminalization “means that the existing law is not enforced, yet the offense remains in the penal code.”¹²⁶ In contrast, legalization “implies regulation of some kind: vetting and licensing business owners, registering workers, zoning street prostitution, mandatory medical exams, special business taxes, or officials’ periodic site visits and inspection of legal establishments.”¹²⁷ The primary difference between decriminalization and legalization is government involvement in sex work. Both manners require government interference/regulation to an extent, however legalization allows the government to have an input in the day-to-day practices of sex workers and their clients.¹²⁸

Some jurisdictions, both internationally and within the United States, exercise a “two-track prostitution policy” that differentiates and evaluates indoor and outdoor prostitution.¹²⁹ The policy “(1) target[s] resources exclusively toward the control of street prostitution and simultaneously (2) relax[es] controls on indoor prostitution.”¹³⁰ This approach, however, has disparate effects on the sex workers associated with each track, but there are legitimate grounds for such differential treatment:

(1) certain other types of commercial enterprise and individual behavior (e.g., nudity, urination, being drunk and disorderly) are prohibited on the streets and (2) “this kind of policy may not be considered too inequitable if the costs inflicted on society by the street prostitutes are greater . . . than from those working in hotels” and other indoor venues.¹³¹

The state of Rhode Island is the only jurisdiction in the United States to have formally adopted such a two-track policy.¹³² In Rhode Island, loitering for the purpose of soliciting sex was criminalized; however, in order to loiter one must be outdoors, making indoor solicitation not a crime *per se*.¹³³ However, in 2009, Governor Don Carcieri closed

¹²⁶ Weitzer, *supra* note 118, at 22. *De facto* decriminalization is practiced by several jurisdictions in the United States. *Id.* at 26.

¹²⁷ *Id.* at 22. Legalization of prostitution, either in the abstract or in the form of brothels, is endorsed by majorities in several European nations. *Id.* at 23, 24.

¹²⁸ *See id.* at 22.

¹²⁹ *Id.* at 25–26.

¹³⁰ *Id.* at 25.

¹³¹ *Id.* at 27–28; HELEN REYNOLDS, *THE ECONOMICS OF PROSTITUTION* 194 (1986).

¹³² Weitzer, *supra* note 118, at 29.

¹³³ *See id.*; Scott Cunningham & Manisha Shah, *Decriminalizing Indoor Prostitution: Implications for Sexual Violence and Public Health*, 85 *REV. OF ECON. STUD.* 1683, 1686 (2018).

this “loophole,” declaring that “[p]rostitution, outdoors or indoors, is a bad thing.”¹³⁴ During the finite period that prostitution was legal in Rhode Island the benefits to public health were clearly evident.¹³⁵

The first track focuses on indoor prostitution by practicing *de facto* criminalization, meaning that law enforcement ignores the practices of escorts, brothels, and massage parlors unless a complaint is made by a member of the public.¹³⁶ By decreasing crackdowns on indoor prostitution, taxpayer funding would be diverted towards managing street prostitution, while also preventing an increase in the number of street prostitutes because of those crackdowns.¹³⁷ Jurisdictions maintaining an unwritten policy of nonenforcement where it is not the norm “would free up resources for the more pressing problems on the street, and might have the effect of pushing at least some streetwalkers indoors [k]eeping prostitutes off the streets may be aided by tolerating them off the streets.”¹³⁸ The legal principle governing this concept is that “criminal law should not interfere with the conduct of consenting adults, provided that this conduct does not threaten the legally protected interests of others.”¹³⁹ Track two speaks to the restructuring of street prostitution control. This track requires that “the central objective of [law enforcement] and social service agencies . . . be to (1) protect workers from violence and (2) assist workers to leave the streets.”¹⁴⁰ While some British cities have employed this strategy under the formal term of “multi-agency partnership” to approach street prostitution,¹⁴¹ it is not normal practice in the United States. However, in 2008, New York State adopted such a strategy in The Safe Harbour for Exploited Children Act which created such mechanisms for minors caught street soliciting.¹⁴² This made New York State “the first state in the nation to recognize that sexually exploited minors are victims[,] . . . not perpetrators[,] of crimes.”¹⁴³ The policy requires that minors (persons

¹³⁴ Elana Gordon, *Prostitution Decriminalized: Rhode Island's Experiment*, WHYY PBS NPR (Aug. 3, 2017), <https://whyy.org/articles/prostitution-decriminalized-rhode-islands-experiment/> [https://perma.cc/QJ2G-TQ85]; see also 11 R.I. GEN. LAWS § 11-34-1 (repealed 2009).

¹³⁵ See Gordon, *supra* note 134; Cunningham & Shah, *supra* note 133, at 1707.

¹³⁶ Weitzer, *supra* note 118, at 26.

¹³⁷ *Id.* at 27.

¹³⁸ *Id.*; THE SAN FRANCISCO COMMITTEE ON CRIME, A REPORT ON NON-VICTIM CRIME IN SAN FRANCISCO, PART II: SEXUAL CONDUCT, GAMBLING, PORNOGRAPHY 44 (1971).

¹³⁹ Weitzer, *supra* note 118, at 28.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² See *id.*; Safe Harbour for Exploited Children Act, N.Y. SOC. SERV. LAW § 447-b (2020).

¹⁴³ N.Y.S. Off. of Child. and Fam. Servs., *Human Trafficking and Commercial Sexual Exploitation in NYS*, DIV. OF YOUTH DEV. AND P'SHIP FOR SUCCESS, [https://ocfs.ny.gov/programs/human-trafficking/#:~:text=\[https://perma.cc/FPW4-NS3D\]](https://ocfs.ny.gov/programs/human-trafficking/#:~:text=[https://perma.cc/FPW4-NS3D]).

under the age of eighteen) “arrested for prostitution [are] channeled into services and programs . . . instead of being charged with a crime and prosecuted,” avoiding the revolving-door effect commonly seen among adult street prostitutes.¹⁴⁴ While the minors are still arrested in an effort “to compel compliance, . . . those arrested are not stigmatized by prosecution in court and formal punishment.”¹⁴⁵

It is evident by New York’s efforts with minors that such a program could be extended to adult street prostitutes. Like the *Safe Harbour for Exploited Children Act* calls upon pre-existing social services agencies to aid minors, an adult program could call upon pre-existing programming for “temporary housing, job training, drug treatment, healthcare, counseling, education, and other services.”¹⁴⁶ Such programming is not out of the realm of possibilities and would likely benefit the public in many ways.

III. CONCLUSION: IF WEBCAMMING IS LEGAL WHY ISN’T PROSTITUTION?

Within the United States, the legalization of prostitution has long been resisted despite the legalization of other forms of sex work. Online sex shows, and pre-recorded pornography, are legal so long as producers follow the strict record-keeping requirements set forth in 18 U.S.C. § 2257.¹⁴⁷ Both online sex show models and prostitutes have a transactional relationship with clients which involves payment in exchange for the performance of real-time sexual acts for a client’s pleasure, yet only webcamming is legal. Society often praises a person who posts “risqué” images of herself under the guise of self-love and body acceptance yet disowns the person who chooses to engage in sexual intercourse for income. Both acts involve an individual taking control of their body and how it is used, but only one is deemed socially acceptable. This is a clear representation of the “whorearchy” at play.

Not only do sex workers adhere to the classist “whorearchy” system, but society does too. However, what differentiates camming from prostitution is simply the means used to reach the same end: the mere presence of a computer screen. Society and politics might deem cam models as more “worthy” or “tolerable” because they are

¹⁴⁴ Weitzer, *supra* note 118, at 28; see SOC. SERV. L. § 447-b. Services provided include “safe houses, counseling, vocational training, [and] healthcare.” Weitzer, *supra* note 118, at 28.

¹⁴⁵ Weitzer, *supra* note 118, at 28.

¹⁴⁶ *Id.* at 28–29.

¹⁴⁷ See 18 U.S.C. § 2257 (2020).

able to put cam models, pornography stars, phone sex operators, and escorts into an imaginary box and on a shelf where they are not as visible to the public. However, prostitutes do not fit that mold because they are more publicly visible which also causes them to be more often victimized and demonized. “[T]he feminist who sees only victims everywhere she or he looks at prostitution misses entirely the ingenuity and agency of the human being who chooses to work in the sex industry”¹⁴⁸ To change the narrative surrounding prostitution, activists must view prostitutes like cam models: businesspeople who are taking control of their bodies, appearances, and work, not victims.¹⁴⁹ Ultimately, both cam models and prostitutes are being paid to perform sexual acts. As one sex worker aptly stated, “The way I saw it was this: in porn I was having sex with other people paid to have sex, and in prostitution I was having sex with people paying to have sex. Either way, I was being paid for sex.”¹⁵⁰ Total equality will only be achieved if “sexual pleasure is seen as a positive and honorable goal” and sex workers are no longer viewed as victims in need of rescue.¹⁵¹

The commodification of a woman’s body has long been opposed by both the government and society. However, in April 2020, Governor Andrew Cuomo signed into law the Child-Parent Security Act which legalizes paid surrogacy as of February 2021 in New York State.¹⁵² The Child-Parent Security Act legalizes gestational surrogacy and “streamline[s] the ‘second parent adoption’ process.”¹⁵³ This bill was met with intense opposition, especially during the 2018-2019 legislative session, as many prominent feminists, including Gloria Steinem, and progressive female lawmakers argued that paid

¹⁴⁸ Beloso, *supra* note 71, at 62.

¹⁴⁹ See Stuart, *supra* note 19.

¹⁵⁰ Comixchik, Comment to Maggie McNeill, *Whorearchy*, THE HONEST COURTESAN: FRANK COMMENTARY FROM A SEMI-RETIRED CALL GIRL (May 12, 2012, 3:46 PM), <https://maggiemcneill.wordpress.com/2012/05/10/whorearchy/> [<https://perma.cc/D8PB-77Q7>].

¹⁵¹ Berg, *supra* note 75, at 172–73.

¹⁵² *The Child-Parent Security Act in New York*, FAM. EQUAL., <https://www.familyequality.org/resources/child-parent-security-act-new-york/> [<https://perma.cc/W37U-TXV5>]; Elizabeth Chuck, *New York State, Long a Holdout Against Legalizing Surrogacy, Overturns Ban*, NBC NEWS (Apr. 3, 2020), <https://www.nbcnews.com/news/us-news/new-york-state-long-holdout-against-legalizing-surrogacy-overturms-ban-n1176071> [<https://perma.cc/QYU9-EMFD>]. It is important to note that New York was only one of three states that explicitly prohibited the practice of paid gestational surrogacy. Chuck, *supra*.

¹⁵³ *Governor Cuomo Unveils 16th Proposal of 2020 State of the State: Legalizing Gestational Surrogacy*, N.Y. STATE (Dec. 30, 2019), <https://www.governor.ny.gov/news/governor-cuomo-unveils-16th-proposal-2020-state-state-legalizing-gestational-surrogacy> [<https://perma.cc/6U85-927J>].

surrogacy commodifies a woman’s reproductive system.¹⁵⁴ Eventually, the governor and other supporters overcame the opposition and granted women, or anyone with a uterus, the ability to be paid for gestational surrogacy while benefiting from legal protections granted in the Surrogates’ Bill of Rights.¹⁵⁵

Like prostitution, the surrogacy industry is difficult to curtail as it is fueled by desire. The intense desire to have children at any cost is what drives the creation of children, in its myriad of forms, and the industry that has evolved from that desire.¹⁵⁶ Governor Cuomo stated, “New York’s surrogacy ban is based in fear not love, and it’s past time we updated our antiquated laws to help LGBTQ couples and people struggling with fertility use commonplace reproductive technology to start families.”¹⁵⁷ While this statement is valid, it is important to realize that it is not a totally altruistic human favor to be a surrogate, it’s also a market. Babies are a commodity created by the same things utilized for sex work (desire and a woman’s body) and paid for handsomely.¹⁵⁸

This desire for children and the ensuing surrogacy market is best depicted by the commercial surrogacy clinics previously located in India.¹⁵⁹ The surrogates at these clinics must endure a difficult nine

¹⁵⁴ Vivian Wang, *Surrogate Pregnancy Battle Pits Progressives Against Feminists*, N.Y. TIMES (June 12, 2019), <https://www.nytimes.com/2019/06/12/nyregion/surrogate-pregnancy-law-ny.html> [https://perma.cc/9GS8-SZ4F].

¹⁵⁵ See N.Y. FAM. CT. ACT, §§ 581-601–581-607 (2021). Article 5-C Part Six of the Family Court Act establishes the Surrogates’ Bill of Rights which enumerates rights that apply to any person acting as a surrogate in New York. *Id.* The limiting or waiving of any of these rights via verbal or written agreement “is void as against public policy.” *Id.* at § 581-601. The rights include: health and welfare decisions; independent legal counsel; health insurance and medical costs; counseling; life insurance; and termination of surrogacy agreements. *Id.* at § 581-602–581-607.

¹⁵⁶ See DEBORAH L. SPAR, *THE BABY BUSINESS: HOW MONEY, SCIENCE, AND POLITICS DRIVE THE COMMERCE OF CONCEPTION* xi, xv (2006); Rebecca Mead, *Annals of Reproduction: Eggs for Sale*, NEW YORKER 56, Aug. 9, 1999 <https://www.1150spring2012.files.wordpress.com/2012/01/eggs-for-sale.pdf> [https://perma.cc/H9UL-H4GC].

¹⁵⁷ N.Y. STATE, *supra* note 153.

¹⁵⁸ See Astrid Rodrigues & Jon Myersohn, *Military Wives Turn to Surrogacy: Labor of Love or Financial Boost?*, ABC NEWS GOOD MORNING AM. (Oct. 14, 2010, 2:39 PM), <http://abcnews.go.com/GMA/Parenting/military-wives-surrogates-carrying-babies-love-money/story?id=11882687&page=2> [https://perma.cc/GQ4Y-Y8UF]; Stephanie Saul, *Building a Baby, With Few Ground Rules*, N.Y. TIMES (Dec. 12, 2009), <https://www.nytimes.com/2009/12/13/us/13surrogacy.html?pagewanted=all> [https://perma.cc/KL7Z-U4DL].

¹⁵⁹ See GOOGLE BABY (HBO 2009). Commercial paid surrogacy in India was made illegal in 2018 by the passage of a surrogacy law that only allows “altruistic surrogacy for needy, infertile Indian couples.” *Intended Parents: All You Need to Know About Completing a Surrogacy in India*, SURROGATE, <https://surrogate.com/intended-parents/international-surrogacy/surrogacy-in-india/#:~:text=Today%2C%20Indian%20surrogacy%20laws%20make,complete%20a%20surro>

months in subpar living conditions and away from their families, which illustrates how people (future parents) are less concerned with *how* they get their children as they are with the end product.¹⁶⁰ This leads to a lucrative system that relies on women's bodies to create the product—and look at how they are treated. The women at these surrogacy clinics are locked away in a hospital for nine months, far from society and their families, on beds with no blankets, there solely to create a product for foreign couples that can pay.¹⁶¹ Their bodies are used and discarded; it is not much different than paying a woman for a night of pleasure. At least sex workers, unlike surrogates, are more easily able to escape an unsafe situation and have greater bodily autonomy.

The recent legalization of paid gestational surrogacy in New York calls for the decriminalization or legalization of sex work. Both industries require a person to sell the use of their body, except sex work, in ways, is less burdensome. However, only surrogacy as a form of bodily commodification has been deemed socially acceptable, and the women who carry out that work have paid their “social necessity debt.”¹⁶² This presents an uncanny irony: women who deliver the products of sex are accepted and financially compensated, but women who simply offer sex are disowned and cast out. The respect afforded a surrogate is similar to that enjoyed by the webcam model in certain societal circles: the surrogate is seen as performing a selfless act¹⁶³ and the webcam model is seen as a strong,

gacy%20in%20India.&text=In%20December%202018%2C%20after%20almost,for%20needy%2C%20infertile%20Indian%20couples [https://perma.cc/7ST8-YWPN].

¹⁶⁰ See GOOGLE BABY, *supra* note 159. An Australian couple hired a Thai gestational surrogate who became pregnant with twins. Lindsay Murdoch, *Wendy Farnell Did Not Supply the Egg, Gammy's Thai Mother Says*, SYDNEY MORNING HERALD (Aug. 10, 2014, 7:22 PM), <http://www.smh.com.au/world/wendy-farnell-did-not-supply-the-egg-gammys-thai-mother-says-20140810-102joz.html> [https://perma.cc/4ZPD-LVUC]. Upon learning that one of the twins had Down's Syndrome the couple requested that the surrogate abort the fetus with Down's Syndrome, but she refused stating that abortion was sin. *Id.* Upon the twins' delivery, the couple left the child with Down's Syndrome in the surrogate's care, thus proving that people want the perfect commodity, and that the surrogacy market is not at all humanitarian. *See id.*

¹⁶¹ See GOOGLE BABY, *supra* note 159; Julie McCarthy, *Why Some of India's Surrogate Moms Are Full of Regret*, NPR (Sept. 18, 2016, 7:49 AM), <https://www.npr.org/sections/goatsandsoda/2016/09/18/494451674/why-some-of-indias-surrogate-moms-are-full-of-regret> [https://perma.cc/2Z3X-M3WU].

¹⁶² See Berg, *supra* note 75, at 161. Society deems children far more important than sexual pleasure, which has allowed the surrogacy industry to thrive while the sex work industry has been relegated to the shadows where workers are not afforded the protection and rights they deserve. *See id.* at 173.

¹⁶³ *Surrogacy – Giving the Ultimate Gift of Life*, FAM. INCEPTIONS (Apr. 9, 2014), <https://familyinceptions.com/surrogacy-giving-the-ultimate-gift-of-life/#:~:text=Surrogacy%20is%20truly%20a%20selfless,another%20child%20to%20the%20family> [https://perma.cc/24KC-JTKB].

entrepreneurial woman.¹⁶⁴ Both women are considered productive members of society, while prostitutes, in most areas of the United States, are deemed less than others and often experience legal consequences for their chosen work.¹⁶⁵

Sex workers provide a service that is far more than “just sex.” Sex workers perform “emotional labor”¹⁶⁶ that is unlike labor in any other field through the commercialization of intimacy.¹⁶⁷ This effort deserves respect from society as it likely helps protect society from heinous acts of violence and other tragic acts: “[t]here is the belief that women in [the] sex industry are providing some positive, educational service to men, including preventing men from committing violent sexual acts against other women and children.”¹⁶⁸ This service is incredibly valuable and should be rewarded by legalizing or decriminalizing sex work so that all members of the sex work industry, no matter their level in the “whorearchy,” are able to enjoy the same benefits and protections as mainstream workers.

¹⁶⁴ See Breslin, *supra* note 22.

¹⁶⁵ See Gary Deel, *How Do We Justify the Many Laws Against Prostitution?*, AM. MIL. UNIV. EDGE (Dec. 20, 2019), <https://amuedge.com/how-do-we-justify-the-many-laws-against-prostitution/> [https://perma.cc/V7AF-SRGM].

¹⁶⁶ Janet Lever & Deanne Dolnick, *Call Girls and Street Prostitutes: Selling Sex and Intimacy*, in *SEX FOR SALE: PROSTITUTION, PORNOGRAPHY, AND THE SEX INDUSTRY* 187, 187 (Ronald Weitzer ed., 2d ed. 2010). Emotional labor is “the management of feeling to create a publicly observable facial and bodily display.” *Id.* “[W]hen sex workers display or feign sexual arousal or sexual pleasure for their clients’ gratification, they are engaging in emotional labor.” *Id.*

¹⁶⁷ See *id.* at 188. “[O]pportunities for personal disclosure or intimate touch are part of what a patron pays for, at least implicitly,” so a sex worker must also serve as a psychotherapist and/or massage therapist, while also performing sexually. See *id.*

¹⁶⁸ Guidroz & Grant, *supra* note 122 at 153.