WE’D BETTER TREAT THEM RIGHT: A PROPOSAL FOR OCCUPATIONAL COOPERATIVE BARGAINING ASSOCIATIONS OF SEX WORKERS

Oliver J. McKinstry*

In a dimly lit room at a local community center, a group of workers comes together to discuss their work. The agenda includes issues like promoting health and safety standards, standardizing wages, and obtaining health benefits. Before getting through the agenda, however, members of the group share their stories from the job. Some have positive things to say about their work, others are more critical. One thing they all agree on is the unfair amount of animosity they face in the workplace. From their bosses and their clients, to outside government regulators, these workers are constant targets of harassment and disdain. Although they are concerned about the discrimination they face for being low-wage workers, the meeting eventually returns to how the group can obtain a healthier work environment, higher wages, and health benefits of some kind. Although the workers’ goals might seem easy to accomplish through collective bargaining techniques under the National Labor Relations Act,¹ these workers face hardship in changing the conditions under which they work. People who sell sex face great amounts of social and legal alienation preventing them from effectively organizing collective bargaining units. This comment seeks to explore why prostitutes face such obstacles in organizing and to suggest ways for them to organize effectively and without hardship.²

---

* J.D. candidate, 2007, University of Pennsylvania Law School; B.A. 2002, Macalester College. I would like to thank Professor Regina Austin for her invaluable comments early in my writing process. Thanks to Bridget Crawford for her lessons in Feminist Legal Theory. Lastly, I want to thank Professor Clyde Summers for his inspiring lessons in labor law during my first year of law school.


² This work borrows from organizing attempts in other non-traditional work environments such as exotic dancers. “Exotic dancers from popular clubs experience unsafe working conditions, lack employee benefits, are misclassified as independent contractors, and have managers who extort money and decrease their wages. They deal with many of the same issues as other exploited workers, but because of the nature of their industry are
Ideas about and images of prostitution appear in almost every aspect of our society. Sometimes prostitutes are people at whom we laugh, sometimes they are people we love. "One may be for or against prostitution, one may adhere to an ideology that seeks to abolish, regulate, or normalize it (through decriminalization or legalization, for example), but one cannot deny its existence all around us." Despite the ubiquity of ideas about and images of prostitution, there is a noticeable dearth of academic work exploring the implication of selling sex.

rarely taken as seriously. Prostitutes are in an even more vulnerable position because their activities are illegal, making it nearly impossible for them to turn to the legal profession to redress their grievances. With limited but promising legal successes, sex workers reached out to the legal community and labor organizers. Minal A. Shah, Introduction, 10 HASTINGS WOMEN'S L.J. 1, 2 (1999).

3. See DAVID SEDARIS, HOLIDAYS ON ICE 84 (Little, Brown and Co. 1997) ("Two young men passed down the sidewalk carrying a mattress, and one of them turned to yell, "Get that ho off the street!" Had we been in a richer or poorer neighborhood, I might have searched the ground for a gardening tool, fearful that once again I might step on the thing and split my lip with the handle. Ho. I'd heard that word bandied about by the cooks at work, who leered and snickered much like the young men with their mattress. It took me a second to realize that they were referring either to Lisa or to her friend, who was squatting to examine a hole in her fishnet stockings. A whore. Of the two possible nominees, the friend seemed the more likely candidate. At the mention of the word, she had lifted her head and given a little wave. This woman was the real thing, and I studied her, my breath shallow and visible in the cold, dark air. Like a heroin addict or a mass murderer, as prostitute was, to me, more exotic than any celebrity could ever hope to be. You'd see them downtown after dark, sticking their hatchet faces into the windows of idling cars. 'Hey there, Flossie, what do you charge for a lube job,' my father would shout. I always wanted him to pull over so we could get a better look, but having made his little comment, he'd roll up the window and speed off, chuckling."

4. See Ismail Kadare, The Albanian Writers' Union as Mirrored by a Woman, THE NEW YORKER, Dec. 26, 2005 & Jan. 2, 2006, at 113, 123 ("On Dibra Street, there was a little coffee shop where the young reporters who worked at the Writers' Union often downed beers when the weather was hot. Next to it was a privately owned fruit stall. It was there that I saw Marguerite for the first time. I was just coming out of the coffee shop when a friend from the Union whispered, ‘Look, there's Marguerite, the woman who lives across the street.’ I'd heard about her, but so vaguely that I'd forgotten everything—I knew only that she was one of 'those women' of an earlier time, who was said to live with her aged mother in a little house in the alley. . . . More than any other symbol, it was a whore who made me feel that I was from the capital. I didn't know whether to laugh or to cry.").


6. See Shah, supra note 2, at 3 ("In What's Wrong With Prostitution? What's Right with Sex Work? Comparing Markets in Female Sexual Labor, Elizabeth Bernstein finds that among feminists, 'prostitution has been abundantly theorized, yet insufficiently studied.' Bernstein categorizes the feminist literature into three categories which she defines as 1) radical feminist critiques of prostitution, including works by Catharine MacKinnon and Carole Pateman; 2) sex-positive feminist defenses of prostitution, including works by Anne McClintock and Lynn Sharon Chancer; and 3) feminist contextualizations: situating the meaning of prostitution empirically, including works by Laurie Shrage." (citing Elizabeth Bernstein, What's Wrong with Prostitution? What's Right with Sex Work? Comparing
Analysis of the criminalization of prostitution is the largest source of scholarship on the subject.\footnote{See Bernstein, supra note 6, at 92-93 ("In response to centuries of 'social purity' movements which have regarded prostitutes as lewd and immoral women to be reformed or punished, prostitutes' rights spokeswomen and pro-sex feminists have opposed the criminalization of prostitution, advocating instead some form of decriminalization or occasionally, legalization. Radical feminists usually have argued that legalization is the state's official endorsement and the ultimate patriarchal expression of 'the traffic in women.' But they also have objected to criminalizing women for their own exploitation and victimhood, and thus often have supported decriminalization.")} Statutes criminalizing prostitution, broadly defined as exchanging sexual intercourse for a fee,\footnote{See 63C AM. JUR. 2D Prostitution § 2 (2006) ("Prostitution is sometimes defined as engaging in sexual intercourse for a fee. Thus, it has been held that in order for there to be prostitution there must not only be sexual activity, but also be payment of money, and that mere discussion or solicitation without any financial aspect does not constitute an attempt to engage in conduct prohibited by a statute governing compensated crimes against nature.")} have been deemed constitutional by the Supreme Court.\footnote{See Jack L. Littwin, Annotation, Validity and Construction of Statute or Ordinance Proscribing Solicitation for Purposes of Prostitution, Lewdness, or Assignation – Modern Cases, 77 A.L.R.3d 519 § 2[a] (2007) ("Statutes and ordinances regulating public morals, including the regulation and punishment of prostitution and related offenses, fall within the police power of the states and cities. To be valid, however, statutes and ordinances must be constitutional as well as reasonable. Statutes and ordinances may be aimed against the acts of the prostitutes themselves, against the acts of the customers with whom they consort, or against the acts of those who as agents organize and promote prostitution . . . Statutes and ordinances proscribing solicitation for purposes of prostitution, lewdness, or assignation have survived challenges based on restriction of free speech, overbreadth and vagueness, infringement of the privilege against self-incrimination, shifting of the burden of proof, denial of equal protection of the law, violation of the right of privacy, and exceeding the grant of authority to the municipality.")} The development of laws criminalizing the act of prostitution\footnote{For a discussion of the history of the criminalization of prostitution, see 63C AM. JUR. 2d Prostitution § 1 (2006) (exploring the development of Biblical disdain for prostitution, the movement toward moral condemnation without common law prohibition, and the finale of statutorily codified proscription).} has led to broad criminalization of acts that promote prostitution.\footnote{See Littwin, supra note 9, § 10, at 519 ("[C]ourts [have] held that the statutes were not limited to houses of prostitution in the traditional sense, but encompassed any place susceptible of misuse for the purpose of prostitution.")} Even recent attempts at legalization in the most liberal American communities have failed.\footnote{"On November 2nd 2004, Berkeley, the ultimate testing ground for liberal issues, voted 'no' to decriminalize prostitution by 63.9%. Measure Q, the first proposed U.S. law to decriminalize prostitution, would have made arresting prostitutes a low priority to police and required the creation of a semi-annual police report on the enforcement of prostitution.}"
has been heated, but “[d]espite their theoretical differences, most feminists have tended to agree that the current criminalized status of prostitution and the selective enforcement of prostitution laws are unsatisfactory.”13 Arguments on both sides of the criminalization debate seek to empower prostitutes, protect them from violence,14 and improve health standards in the profession.15

Despite the heated debate surrounding the criminalization of prostitution and the widespread images of and narratives about prostitution, general understanding of the realities faced by sex workers is inaccurate.6 This comment does not specifically seek to correct or inform general understandings of prostitution. It seeks to illustrate, however, ways for prostitutes to more effectively achieve their goals in a manner that will accurately illuminate the realities of sex work. “The sex industry is rapidly expanding. With newly emerging markets and on-line technologies, sex workers face even more challenging issues. There are expanding choices as well as increasing opportunities for exploitation.”17 This comment seeks to fill the void in academic work with practical application for sex workers before technological progress exacerbates the current situation any further. Part I is a practical and theoretical exploration of sex workers’ lives and a

laws and arrests. The measure also would have required the city government to support the statewide repeal of prostitution laws. This controversial measure, originally named ‘Angel's Initiative’ in honor of San Francisco prostitute Angel Lopez who was murdered in 1993, created a heat wave of debates and focused worldwide attention on the city, which is exactly what the authors of the measure, Robyn Few and Carol Leigh, wanted.” Heather Cassell, Decriminalization in California?: The Life and Death of Measure Q, SPREAD, Spring 2005, at 13.

13. Bernstein, supra note 6, at 92.
14. See Cassell, supra note 12, at 13 (“Activists on both sides of the debate about decriminalization care passionately about women and argue that they want to empower women and protect them from becoming victims of crimes. What they can’t agree on is how to empower and protect women working in the sex industry.”).

15. See David Henry Sterry, Prostitution in America, SPREAD, Spring 2005, at 21 (“Instead of condemning sex workers and customers who want to honestly exchange sex for money, we must protect the valiant men and women who work honorably in the sex business and carefully monitor the industry to eliminate violence and dease. Prostitution must be decriminalized.”).
16. See, e.g., Jo Doezema, Back in the Brothel: How My Fears About the Dangers of "Rescue" Were Confirmed, SPREAD, Spring 2005, at 40 (“Working in the brothel made clear to me once again the mismatch between the media and the feminist perceptions of migrant sex workers and my own experiences and those of my co-workers... . Talking to the other women in the brothel reinforced the commonalities between my experiences and theirs, belying a simple distinction between sex workers from the ‘West’ and the ‘rest of the world’. My experiences of sex work have also been bound up with movement, mobility, migration, and the ‘search for a better life’. Kim, Natalie, Wendy, Julia, Becky, Tracy and the others told stories of their lives that showed their courage and resourcefulness in getting to England and their skilfulness [sic] in 'working the system', even those who went into debt to work here or who had been deported from countries all over Europe.”).

discussion of the economic impact of their work. Part II explores the historical function of collective bargaining and illustrates the ways it has been recently used in non-traditional contexts. Finally, in Part III, it is argued that occupational cooperative organizing, one of the recent uses of non-traditional collective bargaining, can be used by prostitutes to potentially obtain a healthier work environment, higher wages, and some level of health benefits.

I. SEX WORKERS: WORKING HARD FOR THEIR MONEY

A. Defining the Group

Although many jobs involve using sexuality for economic gain, this work focuses solely on individuals who exchange sex acts for money and the ability of organized labor to ameliorate their struggles. I call these individuals sex workers. Although my use of this term involves some nuance, I prefer sex worker to other highly political and potentially derogatory and offensive terms, such as prostitute, streetwalker, slut, or whore. Also, although the majority of scholarship focuses on female sex workers with male clients, I do not wish to have my work read so narrowly. Male sex workers have a history all their own and face problems similar to those faced by female sex workers. Although some outstanding

18. "The term 'sex-work' is claimed to have been invented by COYOTE member Carol Leigh, who 'began working and writing as a prostitute in 1978.' Unlike the word 'prostitute,' with its connotations of shame, unworthiness or wrongdoing, the term 'sex-worker' tries to suggest an alternative framing that is ironically both a radical sexual identity (in the fashion of queer activist politics) and a normalization of prostitutes as 'service workers' and 'care-giving professionals.' In this apparent contradiction—I would argue—lies the meaning and appeal of their work." Bernstein, supra note 6, at 111 (citing Sex Work: Writings by Women in the Sex Industry (Frédérique Delacoste & Prascilla Alexander, eds., 1987)).

19. See Juliette Sadaa, A Whore's Stream of Consciousness: Journal Entry #30, 8/4/04, SPREAD, Summer 2005, at 60-61 ("I refer to myself as a 'whore.' I argue that I'm reclaiming the word, that I'm attempting to linguistically legitimize an illegal, contentious, greatly disregarded and contemptuous profession. So I say it casually, for a normative effect, as well as for shock value, which kind of goes against the desire to create a normative effect. The use of 'whore' also becomes a means for me to personally attempt to stop the reproduction of the racist and classist prostitution hierarchy. 'I'm not a whore,' meaning, 'I'm not a streetwalker,' meaning 'I'm not a poor woman of color,' meaning 'I'm not disposable filth and sub-human. I am a high-class escort, a courtesan.' The need for distinction is, in my personal opinion, an indication of insecurity (without getting into paradigms of oppression, race and class). It's a way of saying, 'There's someone dirtier than me, therefore, I'm not all that bad!'").

20. DORAIS, supra note 5, at 13 ("Male prostitution has existed since ancient times.").

21. For a discussion of contemporary male prostitutes in England, see Peter Davies & Rayah Feldman, Prostitute Men Now, in RETHINKING PROSTITUTION: PURCHASING SEX IN THE 1990s 29 (Graham Scambler & Annette Scambler eds., Routledge 1997) (discussing the
scholarship has specifically explored particularities of male sex work,\textsuperscript{22} paradigms for understanding and analyzing male and female sex work are substantively the same.\textsuperscript{23} Also, same-sex intercourse constitutes much of the work done by sex workers, particularly male sex workers,\textsuperscript{24} but I do not make gay/straight distinctions in my work. Gays and lesbians play important and unique roles in sex work communities and in contemporary society at large.\textsuperscript{25} Although the differences between homo- and heterosexual sex work may be telling,\textsuperscript{26} this comment forgoes that analysis to focus on the importance of organization for all sex workers, straight, gay, or lesbian. Although each individual sex worker's experience is different,\textsuperscript{27} occupational cooperative organizing offers a powerful means of trans-identity organization.

\subsection*{B. Experiences of Sex Workers}

Regardless of a sex worker's identity, there are struggles associated with the job. Of course, every job has its difficulties. However, the struggles faced by sex workers are not reasonable in many circumstances. Sex workers face a social stigma that few other professions can match.

\begin{footnotesize}
\begin{itemize}
\item 22. \textit{DORAI\textsuperscript{s}}, \textit{supra} note 5, at 17-18 ("Male prostitution, like other types of sex work, may be conceptualized as a mise en sc\textsuperscript{\(e\) ne} of four different groups of actors. The first group, prostitutes, share the stage with the second, their clients, the majority of them male, most coming singly but some in couples. The third group comprises all the entrepreneurs revolving around these two groups and profiting from their interaction without physically participating in it. . . . The fourth group consists of individuals such as legislators, judges and, especially, opinion leaders whose mission is to produce social norms and enforce them by means of policing, prosecution, or other approaches.").
\item 23. \textit{See DORAI\textsuperscript{s}}, \textit{supra} note 5, at 35 ("[M]ale sex work takes place on three relatively distinct levels: escorts at the top of the hierarchy; strippers, whose status varies according to their popularity at any given time; and street hustlers, looked down upon by the other two groups and by society at large.").
\item 24. \textit{See generally DORAI\textsuperscript{s}}, \textit{supra} note 5 (illustrating the breadth of same-sex intercourse amongst male sex workers).
\item 25. \textit{See} Laura Weinstock, \textit{Illegally Yours}, 10 HASTINGS WOMEN'S L.J. 447 (1999) (discussing the importance of the struggle for gay marriage). \textit{See generally} Romer v. Evans, 517 U.S. 620 (1996) (holding that animus toward gays and lesbians does not survive rational basis review); \textit{Will & Grace} (NBC television broadcast) (illustrating the growing acceptance of gays on mainstream American TV); \textit{Brokeback Mountain}, (Focus Features 2005) (illustrating poignantly a gay love affair between cowboys); and \textit{The 63rd Annual Golden Globe Awards} (NBC television broadcast Jan. 15, 2007) (acknowledging movies featuring gay and lesbian characters in nearly every award category).
\item 26. The different social and legal treatment of gay and lesbian sex workers and of heterosexual sex workers who perform same-sex sexual acts is an important point of future analysis.
\item 27. \textit{See}, Bernstein, \textit{supra} note 6, at 102 ("[P]rostitutes have a diverse range of experiences . . . even within a ten-block radius of one city.").
\end{itemize}
\end{footnotesize}
This stigma sometimes affects the psychology of sex workers and their ability to love outside of work.\(^28\) Social construction of contempt and blame for sex workers can be seen affecting the workers in the form of internal battles concerning shame.\(^29\) However, even winning the internal battle does not mean winning the war over acceptance or even the war over safe and healthy working environments.

Beyond the psychological warfare, sex workers also face on-the-job violence. This violence often comes from the individuals who arguably benefit most from the work of sex workers, their clients.\(^30\) Violence toward sex workers is such a commonly accepted risk of the trade that sex workers are taught not to wear and carry items that can be used to hurt them.\(^31\) Sex workers are often required to bring security with them to house calls and are often forced into bargaining over prices due to clients' potential for violence.\(^32\) Although violent robbery is considered the most common form

\(^{28}\) See Shane Luitjens, *I (Heart) Affection and Other Forms of Emotional Masochism*, $PREAD$, Summer 2005, at 36, 39 (“Many other working guys I have talked to have shared this dichotomy, the one that whispers in one ear that it is important to be loved, and in the other that there is so much of us to share, how could we possibly hold it all in or confine it to one person? I was a balloon, a time bomb, an unopened bag of popcorn: in the evenings after the hardest days at work I was freedom looking for a cage to open. And this isn’t just true for guys in the business, but also guys I know who work day jobs and fuck nights at group sex events - the right hand couples who don’t know what their left hand is doing. The country is populated with glory holes looking for love.”)

\(^{29}\) See Luitjens, supra note 28, at 38 (“When someone makes a commitment to becoming a sex worker, whether it is placing an ad, getting a second cell phone or screen name, or just making a regular client list, he also takes on a weighty repertoire of consciousness that is hell-bent on drowning him in the malaise of traditional morals and propaganda. It is easy to say it doesn't bother me, but I’d be lying if I said I didn't pay some attention to the rife indignation. After all, it is the right of all Americans to be indignant, even if it’s to ourselves. To live or work within Main Street, USA, means finding a way of talking to it, negotiating with it, and sliding past when no-one is looking.”). But see id. (“In my thoughts, pleasure did not equal shame: those rules were made by men seeking to control other men. I was a self-touted intellectual and activist and I could throw off that guilt on a dance floor or street side, a poetry reading or a night fucking someone of my own free will.”).

\(^{30}\) See Gregor Gall, *Sex Workers of the World Uniting and Unionizing*, $PREAD$, Summer 2005, at 22 (“Independent prostitutes often work with the fear of arrest and risk violence and harassment from clients, police, and pimps. Prostitutes working for a brothel or agency may be subject to compulsory health testing in jurisdictions that regulate the industry.”).

\(^{31}\) See L. Synn Stern, *Tricks of the Trade: Work Safe!,* $PREAD$, Spring 2005, at 19 (“Do not wear anything that will slow you down if you have to run, or anything that can be used to hurt you.”).

\(^{32}\) See Fabulous, *The Last Outcall*, $PREAD$, Summer 2005, at 56, 59 (“Anyway, on my way home I get another call, just as I’m about to walk through my front door. After much haggling I agree to a $160 massage outcall, which is outrageously low, frankly, considering the risk involved in going to his house, but right now I'm feeling like I need to work, work, work. Plus, the economy is terrible and work is harder to come by when you have an 'alternative look,' so I agree. . . . On the way home I'm nervous and skittish, obsessively
of violence toward sex workers, sex workers must also contend with sometimes merely strange, and other times bizarre, fetishes.

Sex workers also face disdain from sources often thought to protect even the weakest members of our society. Sex workers caught in the legal system are subject to the whim of an individual police officer, lawyer, or judge and his or her politics. Sex workers have a difficult time obtaining fair treatment from these legal entities. Some sex workers have experienced egregious disdain from so-called officers of the court. The legal system's treatment of sex workers has caused a proliferation of theoretical thinking on sex work in contemporary American culture.

C. Theories of Sex Work

Common to academic thinking about prostitution is the idea that prostitutes have few people, if anyone, to turn to for support in their everyday lives. Many feminist scholars focus their work on prostitution.

imagining sirens all the way to the on-ramp. I can just see the headlines: 'Call girl gets busted for not keeping dick hard,' or 'Stingy prostitute refuses to blow.' Is this what it's coming to? This is the last one, I tell myself. The very last outcall I will ever do.

33. See, DOEZEMA, supra note 16, at 41 (“Violent robbery is the most serious threat to personal safety faced by indoor sex workers in the UK, much greater than the threat of sexual violence, according to a review of studies of violence against UK sex workers by Hilary Kinnell of the UK Network of Sex Work Projects. Kinnell clearly identifies how sex workers' fear of police works to allow this violence to continue . . . .

34. Trixie Fontaine, Menstruation: Porn’s Last Taboo, $pread, Fall 2005, at 30, 33 (“Pee is more easily eroticized by men than menstrual fluid because pissing is something they can relate to and urine more closely resembles semen.”).

35. See Norma Jean Almodovar, For Their Own Good: The Results of the Prostitution Laws as Enforced by Cops, Politicians and Judges, 10 HASTINGS WOMEN'S L.J. 119, 120 (1999) (“Even those who take an oath to protect all citizens see the prostitute as undeserving of rights that are supposedly guaranteed to all people. This view is typified by Pasadena Superior Court Judge Gilbert C. Alston, a former Los Angeles Police Officer, who stated his belief that: [t]he law did not afford prostitutes protection against rape or sodomy if they had agreed to and were paid for a ‘lesser sex act’ . . . . [T]he man could force the prostitute to engage in sexual intercourse and sodomy without being criminally liable, as long as he didn't physically abuse her. A woman who goes out on the street and makes a whore out of herself opens herself up to anybody . . . . She steps outside the protection of the law. That's a basic and fundamental legal concept . . . . Who in the hell is going to believe a whore on the witness stand anyway?” (quoting Mark Arax, Judge Says Law Doesn't Protect Prostitutes, Drops Rape Count, L.A. TIMES, April 24, 1986, at A1)).

36. Id.

37. For a less theoretical and more practical or sociological discussion of sex work as a chosen profession, see BARBARA SHERMAN HEYL, THE MADAM AS ENTREPRENEUR: CAREER MANAGEMENT IN HOUSE PROSTITUTION (Transaction 1979) (exploring the psychological and economic reasons for choosing prostitution as a career under a sociological interactionist perspective).

38. See Sterry, supra note 15, at 21 (“The one thing criminalizing prostitution does is insure that people, mostly women, who do sex for money will be punished. Because it turns
Almost in step with changing social mores, writings about sex workers have changed drastically over the last several decades. Their writings suggest that oppression and liberation dominate thinking on prostitution:

Two major feminist perspectives are documented in the available literature. First, women working as prostitutes are exploited by those who manage and organize the sex industry (mostly men). Moreover, prostitution and the wider sex industry serve to underpin and reinforce prostitution as a patriarchal institution that affects all women and gendered relations. Second, in contemporary society, prostitution for many women is freely chosen as a form of work, and women working in the sex industry deserve the same rights and liberties as other workers, including freedom from fear, exploitation and violence in the course of their work. Additionally, sex work or erotic labour can actually be a "liberatory terrain for women."

The most recent academic analysis of sex work has focused on not only the liberation involved in sex work, but also the economic benefits to sex workers. Some of these works focus on the development of the study of sex work while others take a different approach by focusing on issues

---

39. For a recitation of differing feminist theories on prostitution see WENDY CHAPKIS, LIVE SEX ACTS: WOMEN PERFORMING EROTIC LABOR (Routledge 1997) (defining different historical feminist positions on prostitution and illustrating them through personal narratives of sex workers).

40. MAGGIE O'NEILL, PROSTITUTION AND FEMINISM: TOWARDS A POLITICS OF FEELING 15 (Polity Press 2001) ("Feminist approaches to prostitution have shifted over the last ten or so years - linked to later modernity/reflexive modernity/postmodernity, however you decide to label the shifts and transformations that have been taking place since the 1960s but are, of course, rooted in much earlier social and cultural changes. In any consideration of feminist responses it is important to explore the intersection with discourses on health, the law and prostitutes' rights.").

41. Id. at 16.

42. Bernstein, supra note 6, at 117 ("Under certain circumstances, prostitution may be—at least in a very immediate sense—empowering or liberatory; under other circumstances, it can be the most disempowering of exchanges, particularly for the already desperate and weak. Feminists might be wise to take this as the starting point of future theoretical and political formulations.").

43. Maggie O'Neill, Prostitute Women Now, in RETHINKING PROSTITUTION: PURCHASING SEX IN THE 1990s 3 (Graham Scambler & Annette Scambler eds., Routledge 1997) ("In contemporary society prostitution, for some women, offers a good enough standard of income for shorter working hours and some degree of autonomy and independence for those working for themselves. Sex work has always been an alternative form of work for women. But sex work also brings fear, violence, criminalization, stigmatization and reduced civil liberties and rights of human dignity, as well as the risk of disease and, for some, death.") (citations omitted).

44. For a discussion of the development of the academic study of prostitution see
of race, class, and gender in sex work. However, "[f]or those working in the area of prostitute women's rights, the most frustrating trend deals with prostitution as if it were a monolithic and uniform institution in which women are entirely free or entirely enslaved."

D. Weighing Economic Benefits in Sex Work

Many sex workers feel strongly that there is positive social value in the work they do. These workers tend to frame their sex work as service work or employment that brings about a positive result through service to a customer. Some sex workers comparatively weigh the costs and benefits of sex work against other jobs before joining the profession:

Many sex workers come to the work because they've made a cool, calm, rational decision. If your options are to make six dollars an hour flipping burgers, or $500 a day turning tricks, suddenly selling your sex doesn't seem quite so unreasonable. And that is your right in America. Many professions are high risk. But if you want to run into a burning building for a living, that is your right. And of course no one has the right to put a gun to your head and say, "Be a fireman."

Other sex workers join the profession because there are no jobs that would pay them more per hour. However, these economic benefits of sex work must be weighed against the potential harm involved in doing business with

---

Timothy J. Gilfoyle, Prostitutes in History: From Parables of Pornography to Metaphors of Modernity, 104 THE AM. HIST. REV. 117 (1999) (tracing the historical development of serious discussion and analysis of prostitution in the academy).

45. For an historical discussion of the intersection of race, class, and sex as they relate to sex work, see generally Siobhan Brooks, Sex Work and Feminism: Building Alliances Through A Dialogue Between Siobhan Brooks and Professor Angela Davis, 10 HASTING'S WOMEN'S L.J. 181 (1999).


47. JOANNA BREWIS & STEPHEN LINSTEAD, SEX, WORK AND SEX WORK: EROTICIZING ORGANIZATION 210 (Routledge 2000) ("[I]t is important . . . to note that this commodification of the body as an object for consumption — where the legitimate business activity of the client is serviced by the legitimate business activity of the prostitute — has been fully embraced by certain sectors of the sex industry itself. This has produced the 'sex worker' argument wherein prostitutes represent themselves (and are represented by others) as service workers who happen to be selling their sexuality as opposed to other dimensions of their labour power, such as their social skills or their physical strength.").


49. Bernstein, supra note 6, at 104 ("What is key for all streetwalkers (and for most female prostitutes generally) is that there is no other job at which they could make anywhere near a comparable wage. Indeed, even the most successful women professionals would be hard-pressed to match their hourly earnings, let alone women of class, race and educational backgrounds similar to their own, for which the most likely alternatives would be a minimum wage job or marriage.").
some of the least trustworthy individuals in society.\textsuperscript{50} Sex workers have a need for a method of protecting the economic value in their work that also protects them from the physical and emotional harm involved in their work. One potential solution is for sex workers to utilize the principles of labor unions to organize for positive change within their community.

II. LABOR UNIONS: WORKING HARD FOR THEIR MEMBERS

A. \textit{Rise and Fall of Unions}

New Deal legislation codified a support for and protection of collective bargaining practices in the form of the National Labor Relations Act (the NLRA).\textsuperscript{51} The National Labor Relations Board (NLRB) was created and given power through the Constitution's Commerce Clause\textsuperscript{52} to enforce the promotion of collective bargaining, the freedom of organization, and healthy interstate commerce.\textsuperscript{53} Although organized labor flourished for several decades under the NLRA, the development of legal protections for individual employee rights, such as Title VII of the Civil Rights Act of 1964,\textsuperscript{54} the Employee Retirement Income Security Act,\textsuperscript{55} the Occupational Safety and Health Act,\textsuperscript{56} and the Employment Non-Discrimination Act,\textsuperscript{57} have resulted in stagnation in the labor movement.\textsuperscript{58}

\begin{itemize}
  \item \textsuperscript{50} Sterry, supra note 15, at 21 ("Criminalizing sex work . . . puts the business into the hands of gangsters: organized and unorganized criminals. If sex work were decriminalized, perhaps sex workers wouldn't be stabbed, shot, raped, harassed, jailed and forced to give freebies to every cop with an attitude.").
  \item \textsuperscript{52} U.S. CONST. art. I., § 8, cl. 3.
  \item \textsuperscript{53} Carl M. Howard, \textit{Striking a Balance Among Illegal Aliens, the INA, and the NLRA}: Sure-Tan v. NLRB, 12 PEPP. L. REV. 679, 682-84 (1985) ("The NLRA was enacted on July 5, 1935, to promote the following policies: the practice of collective bargaining, the freedom of workers to organize, and the free flow of interstate commerce. This original congressional act created the NLRB as the supervisory body solely responsible for the administration and enforcement of the Act . . . In order for a business to be subject to the supervisory powers of the NLRB, the Board must have jurisdiction over that business. Section 141 of the Act requires that the business 'effect commerce.' Furthermore, the employee must also come under the protection of the Act. The term employee, as used in section 151, is broadly defined in section 152(3).")
  \item \textsuperscript{54} 42 U.S.C. § 1983 (1996).
  \item \textsuperscript{55} 29 U.S.C. § 1132 (2005).
  \item \textsuperscript{56} 29 U.S.C. § 659 (2005).
  \item \textsuperscript{57} 42 U.S.C. § 2000(e) (2000).
  \item \textsuperscript{58} Henry S. Farber, \textit{Trends in Worker Demand for Union Representation}, 79 AM. ECON. REV. 166, 166 (1989) ("The stagnation of labor unions in the United States moved into a new phase in the mid-1970s as the fraction of the workforce unionized began to fall rapidly.").
\end{itemize}
Although overall private sector membership in unions has decreased, membership in service worker unions has increased and minority membership in unions in general has also increased.\textsuperscript{59} The question remains: "[W]hat can the union movement do to recoup its losses? The results on the relationship between worker demand for union representation on the one hand, and job satisfaction and union instrumentality on the other, suggest that the task is to convince workers that unions can play an effective role in the workplace."\textsuperscript{60}

\textbf{B. Sex Workers and Democracy in Unionization}

Even if employees are convinced of the effectiveness of unions in the workplace, many union members and employees considering forming or joining unions recognize the difficulty of having their voices heard in a bureaucratic and sometimes unfriendly setting. Although the Act recognizes the comparative strength in collective bargaining over individual bargaining,\textsuperscript{64} collective bargaining units function on the tension created between the obligations of members and the duties conferred on members who meet those obligations.\textsuperscript{62} "[T]he crux of the problem of

\begin{itemize}
\item \textsuperscript{59} Sarah Chun, Note, \textit{An Uncommon Alliance: Finding Empowerment for Exotic Dancers Through Labor Unions}, 10 Hastings Women's L.J. 231, 249 (1999) ("[U]nion membership in the private sector has been declining since 1953. The number of unionized workers in the private sector is smaller today than when the Wagner Act was enacted in 1935. To combat their declining membership, unions need to focus on attracting untapped industries and populations such as women, minorities and the service sector. These are sizable underrepresented sectors which have been growing as the globalization of the American economy shifts workers away from manufacturing towards service industries. The Service Employees International Union (SEIU) is the fastest growing union in America. In 1981, membership was at about six hundred thousand. Now, the SEIU is one of the largest unions at 1.3 million members. The SEIU's growth can be attributed to a number of factors including its focus on social justice and equity as well as its large number of female and minority organizers. Given the SEIU's reputation for alternative methods, it is not surprising that the Lusty Lady dancers in San Francisco turned to them when they sought unionization.").
\item \textsuperscript{60} Farber, \textit{supra} note 58, at 170.
\item \textsuperscript{61} Peggie R. Smith, \textit{Organizing the Unorganizable: Private Paid Household Workers and Approaches to Employee Representation}, 79 N.C. L. Rev. 45, 62-63 (2000) ("Conceived with trade workers in mind who labor for a common employer and at a common work site, the Act recognizes that collective rather than individual action is necessary for workers to have an effective voice at the workplace.").
\item \textsuperscript{62} Frank C. Pierson, \textit{The Government of Trade Unions}, 1 Indus. & Lab. Rel. Rev. 593, 593-94 (1948) ("When a worker consents to join a union - or should we say, when he is given the opportunity to consent to join - there is an exchange of obligations and benefits. In return for his promise to abide by the rules and conditions of membership, including certain financial obligations, the individual worker receives the protection of the union in dealing with his employer, in addition to whatever other benefits, such are retirement or burial payments, the union may provide.").
\end{itemize}
democracy in trade unions is how to reconcile the need for authority over
the membership with the democratic rights of workers; for, if a union is to
fulfill its obligations to the membership, it must be given authority to make
sure that individual workers comply with its rules of organization.”

This problem is particularly poignant for minorities. In determining
whether and how members have met their obligations and in assigning
benefits for having met the obligations, prejudice rears its ugly head. Formal labor unions are largely dominated by men despite a long history
of women using collective bargaining techniques in the employment
context. This ability to effectively use organizing techniques outside
unions formally protected by the NLRA is particularly important for sex
workers not included under the Act.

C. Union Membership

The NLRA limits union membership to ‘employees.’ It also provides
that:

The term “employee” shall include any employee, and shall not
be limited to the employees of a particular employer . . . and shall
include any individual whose work has ceased as a consequence
of, or in connection with, any current labor dispute or because of
any unfair labor practice, and who has not obtained any other
regular and substantially equivalent employment . . . .

In some ways, the definition of employee has been interpreted so broadly
by the NLRB and by the Supreme Court as to include undocumented or
illegal aliens working in the United States. However, the NLRB and the

63. Pierson, supra note 62.
64. See generally Chun, supra note 59.
65. For an illustration through historical fiction of male dominance in traditional unions see NORTH COUNTRY (Focus Features 2005) (illustrating the struggles of a group of women
within their union at a mine in Northern Minnesota).
66. See id.
67. See Chun, supra note 59, at 245-46 (“Unions today remain a male-dominated enterprise from the highest officer positions down to the rank and file. The low percentage
of female membership does not appear to be from reluctance to participate since women
began organizing their own unions as early as 1903 and have successfully participated in
traditional pressure tactics and labor management confrontations.”).
68. For a discussion of the importance of collective bargaining in sex worker communities, see Gall, supra note 30, at 22 (“The recent trend towards [sic] unionizing sex
workers is therefore a critical development in the sex workers' rights movement, marking a
transition from focusing on civil and political rights to economic issues and worker rights.”).
70. See Howard, supra note 53, at 686 (“The Court recognized that the task of
interpreting the meaning of 'employee,' as defined by section 152(3), is left to the Board. It
fully supported the Board's interpretation in this case based on two grounds: first, that the
breadth of section 152(3) is striking, as it applies to 'any employee' with only a few specific
Supreme Court have determined that independent contracts are not protected by the Act\(^7\) nor are they protected by subsequent legislation designed to protect the individual employee.\(^7\)

Feminist scholars argue that women's work, including sex work, is excluded by interpretations of the NLRA's definition of 'employee' because of its departure from the concrete definition of organized linear exchange of wage labor.\(^7\) In some jurisdictions, exotic dancers have successfully argued that under an 'economic realities' test, their work falls within the definition of 'employee' because their financial livelihood is directly dependent on their employers, usually the owner of the club where they work.\(^7\) Sex workers, however, do not neatly fall under this rubric because their employers are clients who determine the length and limits of the employment.\(^7\) Although common understandings of employment\(^7\) and limitations, none of which include illegal aliens; and second, that the extension of the Act to include illegal aliens is consistent with the Act's purpose of protecting and encouraging collective bargaining. Citing De Canas v. Bica and NLRB v. Jones & Laughlin Steel, the Court recognized that if illegal aliens were excluded from the Act, a potential subclass of workers could be created consisting of illegal aliens working under substandard terms and conditions with no recourse to complain. This subclass would erode the unity of all employees and diminish the effectiveness of the labor unions.\(^7\) (citing De Canas v. Bica, 424 U.S. 351 (1976); NLRB v. Jones & Laughlin Steel, 301 U.S. 1 (1937)).

71. See Chun, supra note 59, at 237 ("As for employee protection, most labor laws cover only employees, not independent contractors. By and large federal statutes apply only to 'employees.' Thus independent contractors are excluded from coverage under Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act (ADEA), Fair Labor Standards Act (FLSA), the Occupational Safety and Health Act (OSHA) and the Employee Retirement Insurance Security Act (ERISA). More importantly . . . independent contractors are categorically exempt from coverage under the Labor Management Relations Act (LMRA). Thus, under the LMRA, independent contractors are free to act collectively, but only employees are protected by the LMRA.").

72. See Id.; In re U.S. Bedding Co., 52 N.L.R.B. 382, 388 (1943) (holding that limitations on the protection of an employee would not be based on "race, creed, color, or national origin.").

73. See CHRIS BEASLEY, SEXUAL ECONOMYTHS: CONCEIVING A FEMINIST ECONOMICS 21 (St. Martin's Press 1994) ("Women's labour, characterised by its operation in the private sphere, is not linear. It is not a linear exchange (appropriation) with a clear temporal, spatial order and organised, enforced fixed 'prices.' There is no set or steady rate of exchange for its 'product'/services, no precise contract and no formalised system of competition/scarcity of the kind that can be distinguished in relation to wage labour.").

74. Chun, supra note 59, at 239-40 ("Under the FLSA, an 'economic realities' test is used which looks at whether the putative employee is economically dependent upon the alleged employer. A number of cases challenging the independent contractor characterization under the FLSA have resulted in a finding that dancers are employees, not independent contractors. Jurisdictions in Alaska, Colorado, Florida, Illinois, Oregon and Texas have found that dancers under the conditions presented were employees entitled to minimum wage in addition to any tips they earned.").

75. See DORAI, supra note 5, at 93 ("A relationship between a client and a sex worker differs from others in that it is the client alone who decides on its length and the limits of his emotional or physical involvement. Some men view their use of sexual services as a way of
definitions of employment desirable to feminists\textsuperscript{77} might include sex workers, the statutory definition of "employees" does not.

D. Organizing Outside the NLRA: Domestics

Sex workers, however, can benefit from the organization techniques developed in other communities to form collective bargaining units outside the NLRA. Although these units do not inherently have the power to require legally binding bargaining like unions under the NLRA, they are effective nonetheless in achieving goals such as increasing wages, creating a safer working, and obtaining health care insurance. Domestic workers, who care for children and maintain the smooth operation of other peoples' family units from within the home, have achieved some of their workplace goals through bargaining under an occupational cooperative organization.

Domestic work is a low-wage occupation. Individuals in this line of work experience great hardship in their organizing efforts because of the nature of the work. Unlike traditional union trades, domestic workers interact directly with their clients, domestics are less likely to be familiar with unionizing techniques, these workers are not employed at a common job site, they are not employed by a common employer, and the domestic workforce is not largely comprised of white males.\textsuperscript{78} In fact, domestics exploring an aspect of their sexuality privately and under controlled conditions. Although a degree of friendship or complicity may develop over time, the reciprocity and commitment characteristic of friendships and love relationships are generally absent."\textsuperscript{76}.

76. Jane L. Collins, Unwaged Labor in Comparative Perspective: Recent Theories and Unanswered Questions, in Work Without Wages: Comparative Studies of Domestic Labor and Self-Employment 3 (Jane L. Collins & Martha Gimenez eds., State University of New York Press 1990) ("In popular usage, the terms 'work' or 'labor' have come to imply the exchange of one's time and effort for wages. The intellectual trajectory of the last two centuries . . . narrowed the concept of work from the sense of all productive effort to that of productive effort performed for someone else. This 'someone else' owned the means of work and controlled the conditions under which the work was performed. The narrower use of the term reflected an understanding of the underlying logic of capitalist productive relationships.").

77. Beasley, supra note 73, at xiii (1994) ("A specifically feminist economics requires that feminism become the basis for speculation about the parameters for discussion, the significance of issues within the field of that discussion, and the compatibility or convergence of other perspectives dealing with economics. . . . [F]eminism [is] . . . an epistemology which is directed towards securing recognition that women/feminine/female are as crucial an element of the human as men/masculine/male. This is not to claim for feminist theory a homogeneous character but to suggest, despite the existence of internal contention, that it is possible to identify some of its broad goals, purposes and constituting categories.").

78. Smith, supra note 61, at 69-71 ("Scholars have identified several characteristics of low-wage service work that clash with the conventional organizing model and that are exacerbated in the context of domestic service work. First, many service jobs entail personal service, with workers interacting directly with clients, patients, or customers. The
may represent one of the most challenging groups of employees to organize:

As a group, domestic service workers are disproportionately poor women of color. Earning a mean annual wage of $15,160, they experience greater levels of poverty than do workers in any other occupation. In light of their meager earnings, domestic service workers often lead a hand-to-mouth, paycheck-to-paycheck existence. Job-related benefits such as medical coverage, health insurance, paid holidays, paid vacation, or paid sick leave, are largely unheard of within the field of domestic service.  

Moreover, because of the nature of their work and the market, domestic workers are forced to secure work through extremely informal oral contracts from multiple employers. These characteristics cause domestic work to fall outside of the NLRA and most other legislation created to protect employees.

presence of these third parties complicates the conventional 'us-them' view of workplace relations. . . . Second, because there is very little union density among service sector jobs, service workers are less familiar with organizing and its advantages relative to their manufacturing counterparts. . . . Third, traditional organizing depends heavily on a group of workers employed at a common job site for a single employer, such that both the employer and the bargaining unit are easily identifiable. . . . Fourth, industrial unionism envisions the organization of workers on an employer-specific basis. Many low-wage service workers, however, pose a challenge to this strategy because they frequently lack long-term attachments with particular employers. . . . Finally, unions historically have privileged the needs of white male workers, while according only scant attention to the interests of other groups. This may hinder effective organizing within the service industry as women and minorities are disproportionately represented among low-wage service jobs.

80. "In order to survive, most domestics must secure multiple sources of employment such that they are constantly engaged in the job search process. When jobs are secured, the terms and conditions of employment that are agreed upon usually take the form of verbal discussions consisting of vague oral promises that leave workers vulnerable to abuse and subject to the whims of employers. And while informal sharing of information among workers helps to standardize job terms, the final negotiation between employer and employee typically occurs 'without the benefit of guidelines established by government, unions, employment agencies or private firms.'") (citing Pierrette Hondagneu-Sotelo, Latina Immigrant Women and Paid Domestic Work: Upgrading the Occupation, 12 CLINICAL SOC. REV. 257, 261 (1994).

81. Smith, supra note 61, at 56-58 ("Historically, domestic service workers were excluded from the labor standards regime forged during the Progressive Era and the New Deal. They were denied workplace rights under the Fair Labor Standards Act (FLSA), the National Industrial Recovery Act (NIRA), and the Social Security Act (SSA), as well as the NLRA. While today's paid household workers have been brought under the aegis of some of these laws—most notably the SSA and the FLSA—legal progress has been tempered by a culture of non-compliance and under-enforcement. Many household employers fail to regard themselves as employers or to perceive their homes as workplaces, and the private character of the work leads commentators to challenge the extension of labor laws to the household employment relationship.").
Although domestics are excluded from the definition of ‘employee’ contained in formal legal protections of employees, the employment marketplace is changing to accommodate the recent proliferation of service based professions like domestic work. This shake-up of the traditional labor market has brought about part-time, temporary, day-labor, seasonal work, and illegal employment situations collectively identified as contingent employment. Sex workers fall within this category of employee.

Organizing contingent employees raises many serious questions about traditional bargaining techniques:

Can groups of domestic service workers effectively “bargain” with so many different employers? The short answer is that they cannot, at least not in the manner contemplated by the NLRA. Imagine for the moment that a group of domestics joined together and designated a union as their representative, and that the household employers of those workers were legally obligated to bargain with the union. What would such a bargaining model look like? How many workers would constitute an appropriate bargaining unit? Because the workers would most likely work for different employers, would the union have to bargain for a separate agreement for each worker? Moreover, because most domestics work for several households simultaneously, would a given worker have different, potentially conflicting agreements depending on the particular employer? Given that the household employment relationship is tenuous, often lasting for short time periods, would the union have to constantly negotiate new agreements as the workers acquire situations with new employers? What would constitute good faith bargaining on the part of the employer? Would the government monitor the quality

82. Id. at 47-48 ("The one-on-one relationship between household employer and employee, combined with the job's location within the private sphere of the home and its casual nature, have led many to regard domestic service as an occupational oddity that defies organization. When compared to the traditional employment arrangement of permanent, full-time employment with a single employer, domestic service is clearly out of step. Yet, it no longer seems so anomalous when considered against the shifting economic landscape. As service jobs proliferate and replace manufacturing jobs, alternative work arrangements have expanded. Today, increasing numbers of individuals are 'contingent workers' whose work relationships diverge from the traditional employment arrangement. In a workplace replete with part-time employees, independent contractors, home workers, temporary employees, leased employees, and a variety of other forms of contingent employment, the work lives of private paid household workers have become somewhat normalized.") (citing Sharon R. Cohany, Workers in Alternative Employment Arrangements, 119 MONTHLY LAB. REV. 31 (1996); Karl E. Klare, Toward New Strategies for Low-Wage Workers, 4 B.U. PUB. INT. L.J. 245, 256-57 (1995) ("defining the contingent workforce as part time work; sub-contracting; leasing; or independent contractor arrangements; temporary work; day-labor; seasonal work; and illegal work relationships")).
of each negotiation to determine whether each individual household is bargaining in good faith? Finally, if an employer were legally compelled to negotiate, would not the employer most likely turn instead to a "maid-for-hire" commercial agency? These questions suggest that the most effective form of bargaining for contingent employees like domestics and sex workers lies outside the formal structure of the NLRA.

E. Occupational Organizing

Occupational unionizing is one way to effectively organize outside the strictures of the NLRA by organizing around a common occupation instead of a common employer. Employees involved in occupational unions can use their bargaining power to set standards across the profession, enforcing those standards against all employers within the profession. The problem with occupational unionizing lies in the administrative process of bringing together employees who do not work at a common site. However, more grassroots based organizing techniques like door-to-door advertising,

83. Smith, supra note 61, at 79-80.
84. Id. at 68 ("Against this historical backdrop, and in light of the contemporary economic difficulties confronting paid household workers, it is tempting to offer a quick-fix solution; namely, rectify the past by bringing these workers within the scope of collective bargaining statutes. While this rectification should be encouraged, it may achieve little from a practical standpoint. Such is the case, in part, because domestic service—as a form of low-wage service work—does not fit easily into the model of industrial or worksite unionism that undergirds the collective bargaining process in this country. Designed with manufacturing jobs in mind, industrial unionism has been most effective when applied to 'male, full-time workers in mass production industries.' That approach is badly out of step with the rise of service sector jobs, particularly low-wage service work.") (citing Alan Hyde, Employee Caucus: A Key Institution in the Emerging System of Employment Law, 69 CHI.-KENT L. REV. 149, 151 (1993)).
85. Id. at 80-81 ("In her work on the labor history of waitresses, Professor Dorothy Sue Cobble articulates a model of 'occupational unionism.' In contrast to industrial unionism, which unites workers based on a common employer or a common work site, occupational unionism cultivates solidarity among workers premised on a shared occupational identity. This model proved effective in organizing waitresses because, like many of today's low-wage service workers, they frequently moved from employer to employer; yet, they remained attached to waitressing over time. In light of this intra-occupational mobility, waitress unionists advocated for portable workplace rights and benefits that workers could carry from one employer to another.") (citing DOROTHY SUE COBBLE, DISHING IT OUT: WAITRESSES AND THEIR UNIONS IN THE TWENTIETH CENTURY 9 (1991)).
86. Id.
87. See id. at 76-77 ("Trying to unify . . . a diffuse group of workers is a daunting but not insurmountable task. The SEIU's solution has been a type of 'bus stop' activism, with organizers searching for workers by going door-to-door, combing residential neighborhoods and shopping malls, contacting churches, and waiting at bus stops.") (citations omitted).
appearances at social events, and even waiting at popular public transportation hubs have proved effective. These techniques proved especially effective for the Service Employees International Union in organizing 74,000 homecare workers in Los Angeles across sex, race, and economic lines.

F. Cooperative Organizing

Occupational organizing can be enhanced through utilizing the cooperative structure. This approach allows workers to organize under internally agreed-upon terms instead of dictates of the government or requirements of employers. Domestic workers have successfully used the cooperative method of organizing:

While the cooperatives vary according to the particular perspective of each organization, they share common features. Most involve loose-knit associations of workers and function as employment agencies by providing members access to a pool of jobs without having to pass on a significant percentage of their salaries to an intermediary. In terms of the services provided, domestic cooperatives tend to focus solely on housekeeping to the exclusion of child-care services. Similar to the modest setup of the DWIU, they are often located in church basements and community centers. Members usually rotate staffing the cooperative and typically pay dues to cover administration costs. To attract prospective employers, cooperatives engage in aggressive outreach, by distributing flyers and advertising in newspapers and the Yellow Pages. Jobs secured through the cooperative are assigned to members based on a mutually-agreed upon system.

This structure allows workers who are excluded from the protection of the NLRA, like contingent employees such as domestics and sex workers, to

88. Id.
89. See id. at 73-74 (“In February 1999, the SEIU [(Service Employees International Union)] successfully organized 74,000 homecare workers in Los Angeles, achieving the largest union victory in the United States since 1937. The result of a decade-long battle, the campaign was hailed as indicative of organized labor’s ‘new commitment . . . to focus on women, minorities, and low-wage workers’ . . . . [H]ome-care work exists as a form of women’s work that employs disproportionate numbers of women of color. [It also] occur[s] within the privacy of individual homes and involve[s] a range of personal service activities necessary for maintaining people on a daily basis. . . . Most home-care workers receive minimum wages and work on a part-time, contingency basis. Benefits such as health insurance and pensions are rare. Not surprisingly, these conditions promote tremendous turnover.”) (citing Michael White, Health-Care Workers Vote to Unionize: Landslide Victory, NAT‘L POST, Feb. 27, 1999, at D9).
90. Id. at 86-87.
organize effectively on their own merits. Cooperatives are especially effective where workers are often the victims of violence and abuse at the hands of their employers. Cooperative organizations benefit their members by allowing them control over and responsibility for maintaining occupational standards, as well as benefit employers by providing job education and training.

G. The Domestic Workers’ Industrial Union

Domestic workers in Denver, Colorado, founded a cooperative organization, Domestic Workers’ Industrial Union (DWIU), to improve their bargaining power within the market for domestic workers. The DWIU contacted and organized all of the working domestics in Denver. As a group, the cooperative decided that all ads offering domestic services would be placed and administered through the DWIU. The group organized a catalog of domestic workers and when a potential employer called, the group would choose a worker from the catalog to send to the interview. The DWIU was able to control the wages paid to domestics in Denver by requiring its members to refuse jobs that offered work at a wage below a pre-determined threshold; this threshold was set by the members of

91. See id. at 51 (“[T]he cooperative structure can facilitate the organization of workers even as they have been denied rights under the NLRA. Similar to other new and proposed forms of employee organizations, the domestic service cooperative foretells of a time in the not-too-distant future when increasing numbers of workers may look to improve their economic lot through means that 'owe nothing to governments or employers.’”) (citing Alan Hyde, Employee Organization in High Velocity Labor Markets, Presented to the New York University 50th Annual Conference on Labor (May 29-30, 1997), available at http://andromeda.rutgers.edu/~hyde/org.html (last visited Feb. 20, 2007).

92. See Smith, supra note 61, at 89-90 (“A cooperative-based organizing approach can also help foster respect for paid household workers. . . . The cooperative structure offers an additional advantage over individual domestic arrangements by helping to distance workers from many of the highly personalistic and often abusive aspects of the negotiating process. . . . Cooperatives can also greatly reduce the stress associated with the job search process.”).

93. See id. at 82-83 (“Peer management stresses worker control over and responsibility for the development, maintenance, and enforcement of occupational standards. A key component of peer management is job training programs that give workers an opportunity to acquire new skills and maintain existing skill levels. Union-sponsored waitress hiring halls, for example, operated apprenticeship programs for inexperienced waitresses that combined classroom experience and on-the-job training. Peer management also benefits employers by providing trained, competent labor in highly unstable job markets backed by the union's willingness to be held accountable for the performance of its members. The shared commitment to quality on the part of both union and employer helps to eliminate much of the adversarial tension that so frequently characterizes labor-management relationships.”).

94. See generally id. at 83-86.

95. Id.

96. Id.

97. Id.
Employers were forced to pay the DWIU's agreed-upon wage because no domestic worker in Denver would work for a lesser wage. This example illustrates a powerfully effective use of the cooperative structure to gain control over working conditions similar to those gained by formal unions under the NLRA's collective bargaining process. Although sex workers have formed unions both in the United States and abroad, none of them have used the occupation and cooperative models together.

H. Existing Sex Worker Organizations

Groups of sex workers have coalesced in different areas throughout the world to promote different aspects or concerns surrounding sex work. In the United States, a group called Call Off Your Old Tired Ethics (COYOTE) was formed to fight the criminalization of prostitution. "As the first and best-known prostitutes' rights group in [sic] United States, COYOTE was originally founded to provide a 'loose union of women'—a coalition of housewives, lawyers, feminists, and prostitutes—to expose laws and law enforcement procedures that make prostitution problematic." Although commonly referred to as a prostitutes' union, COYOTE's work is dedicated to advocating for the repeal of existing prostitution laws, to reframing prostitution as a credible occupation and to protecting prostitute's rights. Although the group has outlasted severe...
criticism and accusations of racism and classism from other feminist organizations. COYOTE's efforts have not brought about the sweeping change originally hoped for.

Outside the United States, groups of organized sex workers have proliferated over the last decade:

In the last decade, groups of sex workers around the world have voiced their grievances collectively and many have successfully formed unions. In Britain, the International Union of Sex Workers joined the GMB union in 2002 and has unionized two lap dancing clubs. In Germany, the Verdi public sector union is currently recruiting and organizing prostitutes in Dortmund and Hamburg, where it has helped set up a Works Council in one brothel. In the Netherlands, the long-standing Red Thread, a prostitutes' rights group, has become part of the FNV union confederation. In the U.S., dancers at San Francisco's Lusty Lady peepshow unionized and gained recognition in 1996, and then, following closure by the management, bought the club and turned it into a workers' cooperative in 2003. Other global sex workers' unions include the Canadian Guild for Erotic Labour, the Australian Workers in the Sex Industry, and New Zealand's UNITE. Other types of sex worker organizations exist in South Africa, Finland, Eire, Greece, India, China, Argentina, Trinidad, and Tobago.

associated with prostitution are directly related to the prohibition of prostitution and the stigma attached to sex and especially sex work.

See Bernstein, supra note 6, at 110 (“COYOTE has tended to react defensively to its critics from groups such as USPROS (US Prostitutes Collective) and WHISPER (Women Hurt in Systems of Prostitution Engaged in Revolt), who maintain that their celebrations of 'happy hookerdom' are the result of white, middle-class privilege, and that they are atypical and unfit spokeswomen for the majority of prostitutes-whose 'choice of profession' is made under far greater constraints.”).

See also Kotiswaran, supra note 46, at 178-79 (“It is unclear how many prostitute women's organizations exist in India. Time and again, newspapers report on the mobilization of prostitute women in larger cities such as Kolkata, Mumbai and New Delhi. . . . The standard agenda of these groups seems to be (i) to curb police harassment of prostitutes; (ii) to legalize, license and levy taxes on prostitutes so as to monitor their health and to prevent the spread of HIV/AIDS; (iii) to abolish both forced and child prostitution; (iv) to provide child care facilities and boarding schools for the children of prostitutes; (v) to make available bank loans for older prostitutes in order to set up small businesses; and (vi) to form co-operative credit societies to protect prostitute women from money-lenders who charge exorbitant interest rates on loans.”); Audacia Ray, Global News Shorts, SPREAD, Fall 2005, at 22, 23 (“Eighty female Central American sex workers gathered in El Salvador's capital to share their experiences with organizing and demand that their human rights be respected. The women attending the conference collectively asked that they be called sex workers rather than prostitutes and that it be recognized that their work is performed voluntarily rather than by force. The participants in the event traveled from Guatemala, Honduras, El Salvador, Nicaragua, and Costa Rica and together pointed out that
Although the successes of these organizations have been mixed, their existence suggests a profound and widespread interest among sex workers in collective organization. The next portion of this comment illustrates how sex workers can effectively achieve higher wages, safer and healthier work environments, and potentially even benefits through the formation of occupational cooperatives.

III. SEX WORKER OCCUPATIONAL COOPERATIVES: WORKING HARD FOR BETTER EMPLOYMENT

The NLRA changed labor relations forever, even if it only changed how employers and employees frame the work relationship. Although sex workers were excluded from the protections of the NLRA because of the nature of their work, sex workers and exotic dancers have formed informal unions to ameliorate their working conditions. "The number of unionized work places is still small considering the size of the industry, but any journey begins with small steps: trade unionism in other industries took decades to establish itself. The recent movement towards sex worker unionization is significant, and it may represent the beginning of something big."

The next step for sex worker unions is to take advantage of the framework for organizing established by other communities. The occupational cooperative developed and implemented by and for domestic workers offers sex workers an effective means of achieving higher wages, safer and healthier work environments, and potentially even health benefits.

A. Sex as Work for Organizational Purposes

In large part, the occupational cooperative framework is easily transferable to the sex worker community because of the similarities in the work involved. Practically, sex work has much in common with domestic work. Both kinds of workers can be classified as independent contractors who work directly with clients instead of through a middleman employer. The wages for both kinds of work are determined unilaterally by clients.

their principal problems are police abuse, the inefficiency of health systems, discrimination, and violence. Gretel Quiroz, from Costa Rica, stated that the principal struggle for sex workers in her country is to gain the ability, at the end of their working years, to obtain a pension like any other public or private employee. 'So that we do not become elderly people who have nothing.'

105. See generally Gall, supra note 68 (illustrating some attempts at focusing on the economic situations of sex workers).

106. As previously discussed, sex workers are excluded from coverage under the NLRA because their work is illegal and independently contracted even if it were legal. See supra Part II.B (defining employees covered by the NLRA).

107. Gall, supra note 30, at 23.
The work in both occupations can be sporadic and all-consuming at the same time. Neither occupation has a central employer. Neither field is well-regulated to protect the worker. Neither field is subject to taxes or minimum wage, maximum hours, or benefits regulations. Both fields involve great amounts of social stigma.

"[P]rostitution is compared to other types of 'emotional labor,' encompassing 'activities and jobs for which care and feeling are required, commodified and commercialized, such as airline service work, acting, psychotherapy, massage work or childcare.' The social inability to recognize women's work as labor comparable to traditional industrial labor prevents both domestic workers and sex workers from achieving better working conditions individually or through statutorily protected organization techniques. Improving workplace conditions for domestic and sex workers requires making commodities out of the services they offer by reformulating the economy to place a higher value on services like childcare, housekeeping, and providing pleasure. In this way, the sex worker can be seen as a service provider like a doctor, lawyer, teacher, or even waitress. Domestic workers in the DWIU in Denver, Colorado, were able to reformulate the market for domestics by forming an occupational cooperative that agreed upon and demanded from employers a minimum remuneration for domestic work. Although, because of the legality question, sex workers may not be able to meet as openly and advertise as openly as did the DWIU, sex workers can expand upon the self-regulation and informal unions already in place to form cooperatives.


109. See Kemala Kempadoo, Introduction: Globalizing Sex Workers' Rights, in GLOBAL SEX WORKERS: RIGHTS, RESISTANCE, AND REDEFINITION 3 (Kamala Kempadoo & Jo Doezema eds., Routledge 1998) ("The idea of the sex worker is inextricably related to struggles for the recognition of women's work, for basic human rights and for decent working conditions. The definition emphasizes flexibility and variability of sexual labor as well as its similarities with other dimensions of working people's lives.").

110. See Momocca Momocco, Japanese Sex Workers: Encourage, Empower, Trust and Love Yourselves!, in GLOBAL SEX WORKERS: RIGHTS, RESISTANCE, AND REDEFINITION 180 (Kamala Kempadoo & Jo Doezema eds., Routledge 1998) ("Sex work should be regarded as an established form of labor like any other. Any pleasure is now a commodity in society, and sexual pleasure can also be seen as a commodity. By regarding sex work as labor, we'll be able to revitalize non-business sex, to create sex without power imbalances.").

111. See Bernstein, supra note 6, at 97-98 ("The 'sex worker' may be seen as a worker like any other (although better paid), or she may come to emblemize not just someone making do under the inevitable constraints of patriarchy, but the subversive strategist par excellence.").

112. See generally DORAIS, supra note 5, at 22-23 ("[W]e were surprised at the extent of self-policing in the sex trade. Strippers, for example, cannot do as they please with clients,
across the occupation that set minimum wages, minimum safety and health standards, and potentially even demand benefits. As long as members of these cooperatives refuse clients who will not meet the agreed upon standards, sex worker occupational cooperatives can take control of the sexual economy.

B. Potential Benefits of SWOCs

Control of the sexual economy is earned through the divide-and-conquer approach to controlling the market. This economic control by organized sex workers represents a kind of power seldom known to many women and minorities in the industry. Economic control, however, is not the only benefit of forming occupational cooperatives in the sex industry. “In work places where recognition of sex worker unions has already been established, like the Lusty Lady, Majingos in London, or brothels in Australia and the Netherlands, significant advances have been made in winning better terms and conditions for sex workers, particularly regarding issues such as arbitrary dismissal, minimum wage, payment for on-call hours, health and safety standards, and ending or reducing house fees.”

Organizing sex workers may also bring about the ability for individual sex workers to have better control over their clientele. Sharing information about clients in cooperative meetings and supporting each other in not

113. See Momocco, supra note 110, at 179 (“In my present workplace, which derives from traditional Japanese brothels of the nineteenth century, the manager is a woman and the employees are all women as well. Women working under male managers are subject to the principle of ‘divide and rule’ by management for the sake of profit. In contrast, in my present workplace, despite occasional conflicts, the women have a sense of community. We don’t disturb each other’s privacy, but privacy is maintained because we respect each other.”).

114. See Chun, supra note 59, at 250 (“Despite past shortcomings of unions, the labor movement has done more for the economic well-being of women and poor people than any other social institution. Women who belong to unions earn higher wages as a result of collective bargaining than those who are not members. Additionally, unions proportionally provide more advantages for women and persons of color than for white men.”).

115. See Gall, supra note 30, at 23; See also Chun, supra note 59, at 250-51 (“Outside of wages, a union can increase job security, provide increased employee benefits and better working conditions. In the case of exotic dancers, although there are many high wage earners in the industry, these dancers would still benefit significantly from the support of a union. The sexual harassment faced on the job from both patrons and management could be taken more seriously if addressed through a union. Many workers would probably not take the initiative against their employer unless they had union support. Knowing that a union is fighting on their side may provide critical support to an otherwise isolated and demoralizing working environment.”).
servicing unfavorable clients places sex work outside the cartel of male domination.116 This long list of benefits can only come to fruition through organization. The most effective means of creating organization involves occupational cooperatives as developed by domestic workers. However, although these organizations would bring about significant progress for sex workers, the very act of organization also brings about risks for sex workers.

C. Potential Problems with SWOCs

The biggest problem facing sex workers who wish to unionize in the United States is the illegal quality of sex work. However, it is important to note that illegality is not a complete bar to some forms of organization, and, in some cases, it is not a bar to even formal unionization.117 Other illegal workers have been granted the ability to organize by the Supreme Court:

In Sure-Tan, the owners of Sure-Tan and Surak Leather Company (employer), after attempting to disrupt an NLRB collective bargaining election in their Chicago plant, caused five Mexican employees to be deported. Subsequently, an order from the Board was issued against the employer (affirmed with slight modification by the court of appeals) which called the action of the employer a violation of sections 8(a)(1) and 8(a)(3) of the NLRA.118

In Sure-Tan, the Supreme Court eventually determined that illegal aliens would be allowed to unionize.119 The Court suggested that covering illegal aliens furthered the NLRA’s broad policy goal of protecting the most vulnerable employees:

The most persuasive argument is reliance on the policy and purpose of the Act. As stated in section 1 of the Act, its purpose is to encourage collective bargaining and protection of the employees' right to organize. If illegal aliens were not included in the Act, an employer could potentially use them to his

116. See Bernstein, supra note 6, at 101 ("[I]mportant barriers to degradation are established by allowing the prostitute to refuse to perform sex; by ascertaining that there is informed consent; by prohibiting male brokerage; and by ensuring that she has other life options. This constellation of circumstances, she maintains, is present for few, if any, sex workers in contemporary American society.").
117. Because there is some scholarship focusing on the ability of illegal aliens to organize in the United States, this comment does not reinvent the wheel by fully exploring the issue of criminality in sex work.
118. Howard, supra note 53, at 680.
119. See id. at 680-81 ("The Supreme Court held in Sure-Tan that the Act should be extended to illegal aliens and that the reporting of such illegal alien employees to the Immigration and Naturalization Service (INS) might constitute an unfair labor practice.").
advantage against the unions. The employer would be able to hire illegal aliens knowing full well that they would be at his mercy, that if they caused any trouble he could have them deported and hire others in their place.120

Similarly, this policy argument supports allowing sex workers to unionize despite the illegal nature of their work. Sex workers are probably even more vulnerable to employer abuse than illegal aliens and therefore it would further NLRA goals to allow them to organize. Although the inclusion of illegal aliens has not yet formally been extended to sex workers, the potential exists.

Although legality does not bar sex workers from forming occupational cooperatives, going forward in their organization in an open way or in an open environment may attract unwanted attention.121 This risk is exacerbated by the potential for hostile client reaction.122 Clients who are angered by sex workers’ attempts to control the market, to win better wages and a safer, healthier work environment, may be quick to identify or report sex workers to the police. However, sex workers may have a defense to this reporting based on the Supreme Court’s holding in Sure-Tan, Inc. v. NLRB, which states that employers cannot report undocumented aliens to the Immigration and Naturalization Services (INS) in retaliation for or to assuage attempts at unionizing.123 Retaliatory reporting is also unlikely because the clients of sex workers are also considered criminals under the law.124

Even if cooperatives were extraordinarily successful and brought about some kind of formal recognition of sex work, other problems for sex workers might ensue. Formal recognition could in turn bring financial burdens on sex workers in the form of taxes and other regulations125 as well

120. Id. at 687 (citing 29 U.S.C. § 141 (1982)).
121. See Kempadoo, supra note 109, at 2 (“Since prostitution is a criminal and highly stigmatized activity in many countries, speaking out can be a dangerous act—exposing the individual sex worker, sex worker organization, or rights advocate to easy identification by the authorities, parents and the community, possibly giving rise to harassment.”).
122. See Gall, supra note 30, at 23 (“Employer hostility has, of course, been marked. This is particularly true in the U.S., Canada, Britain, and Australia, where management has engaged in strategies of suppression such as sackings, victimization, violence, and favoritism, as well as offering substitutions such as house moms, concessions, and staff forums. Management deploys 'surface bargaining' to undermine collective bargaining to avoid and crush unionization. A common response has been, 'Who needs a union? We're small enough and friendly enough to sort these issues out amongst ourselves.'”).
123. See Howard, supra note 53, at 680-81 (“The Supreme Court held in Sure-Tan that the Act should be extended to illegal aliens and that the reporting of such illegal alien employees to the Immigration and Naturalization Service (INS) might constitute an unfair labor practice.”).
125. See Gall, supra note 30, at 23 (“[I]n places where prostitutes are now obliged to pay
as compromising workers’ anonymity. However, these kinds of problems are inordinately distant. Moreover, in order for sex workers’ income to be taxed, their employment would have to be formally recognized by the government. This recognition is not likely to happen until social stigmas decline. A decline in social stigmas will reduce the importance of anonymity. In that sense, problems sex workers might face due to unionization are somewhat mutually exclusive.

IV. So We’d Better Treat Them Right

Regardless of the politics and the personal feelings on the subject of prostitution, sex workers perform jobs that require an enormous amount of hard work, generous self-deprecation, and little remuneration. Unionization in the form of occupational cooperative organizing offers a means of improving the quality of sex workers’ lives while avoiding the question of criminality. The process of organization, even if unsuccessful, can be therapeutic in many ways:

The road to unionization is a long one, especially for dancers yet to be classified as employees. However, if these legal and social barriers can be overcome, unionization can improve working conditions and raise morale. Because many dancers fear retaliation from management, or feel powerless to effectuate a change, a collective voice can benefit them more than other classes of workers. The power of a collective voice and group action can help balance bargaining power between dancers and management. Even for unionization efforts that ultimately fail, the process of organizing can still bring awareness and

taxes due to legal recognition of their work, they must now forfeit their anonymity by registering or filing with the state. Perhaps ironically, the dialogue among sex workers affirming that sex work is socially, emotionally, and financially rewarding, and that sex workers are entrepreneurs exploiting their clients—rather than the other way around—has created a climate that is in some ways an obstacle to unionization.”

126. See Chun, supra note 59, at 244 (“For those who wish not to conform to group activity or want to remain independent, a union may seem as controlling as club management since joining a union would obligate them to pay dues and abide by decisions made through majority vote, with or without their personal approval.”).

127. See Brewis & Linstead, supra note 47, at 273 (“[P]rostitution differs from other industries because what is being sold here - the prostitute's sexuality - is usually associated with the non-commercial private sphere and its values of intimacy, love and affect. Still, from the client's perspective, it is also important to acknowledge the modern commodification of pleasure and the recognition since the mid-nineteenth century of the right of individuals to periods of leisure as a deserved release from work . . . .”)(citation omitted); Bernstein, supra note 6, at 96 (“While other forms of labor, even gendered ones, also rely upon the legal fiction of 'property in the person' that can be contracted out independently of the contracting self, prostitution is unique because it entails that the woman's (sexual) self be contracted out not just incidentally, but necessarily.”).
momentum towards workplace equality.\textsuperscript{128}

It is time to remove the focus of academic work from sex work with regard to criminalization/legalization and place the focus on improving sex workers' lives as laborers. Positive changes can be made within the community through the use of occupation cooperative organization. I will conclude this work by reframing the opening narrative to illustrate how a sex worker occupational cooperative organizational meeting might take place:

In a dimly lit room at a private location, a group of sex workers come together to discuss their work. Although their agenda is full with things like promoting health and safety standards, standardizing wages, and obtaining health benefits, the men and women share their stories from the job. Some share stories about clients agreeing to the new standards, and others share stories about skeptical clients they turned down. What they all agree on is the lessened amount of animosity they face in the workplace after the cooperative was formed. The meeting turns back to how the group can obtain a healthier work environment, higher wages, and health benefits of some kind. The present members decide to vote on requiring clients to wear condoms. Over the next few weeks, all the members of the cooperative vote via email and the new regulation carries: thanks to the cooperative, these sex workers now are required to work a little less hard for their money and under safer conditions.

\textsuperscript{128} Chun, \textit{supra} note 59, at 252.