
ARTICLE

SEX TRAFFICKING AND CRIMINALIZATION:
IN DEFENSE OF FEMINIST ABOLITIONISM

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INTRODUCTION

In debates regarding what sort of policy and legal responses are most appropriate in addressing the problem of sex trafficking, it is possible to identify two sides: abolitionists and nonabolitionists. Abolitionists seek to end both sex trafficking and prostitution generally, while nonabolitionists seek to end sex trafficking while allowing prostitution to continue.¹ The motivational grounding of the abolitionist movement is diverse: some people support abolitionist reforms based on conservative or reactionary political commitments, while others support abolitionism from a feminist point of view. An approach to sex trafficking that seeks to abolish both sex trafficking and prostitution generally, as part of a larger set of feminist commitments and goals, is typically referred to (and will be referred to below) as “feminist abolitionism.”

Broadly speaking, feminist abolitionism tends to favor developing policy and legal responses to sex trafficking that implement what has been coined the “Swedish model.”² This model includes social-welfare policies that assist people in exiting and avoiding prostitution; public education campaigns to raise awareness of the harms experienced by prostituted people³ and to change social norms that support sex traf-

¹ Segregating the two sides into respective camps in these terms is, admittedly, somewhat of an oversimplification. There are, of course, many areas of both actual and potential agreement between the sides, and it is possible to develop a more nuanced approach that blends aspects of each. This Article is an attempt to identify areas of agreement while providing a detailed explanation and defense of abolitionism.

² For a helpful overview of the Swedish model, see Gunilla Ekberg, *The Swedish Law That Prohibits the Purchase of Sexual Services: Best Practices for Prevention of Prostitution and Trafficking in Human Beings*, 10 VIOLENCE AGAINST WOMEN 1187 (2004).

³ The choice of terminology here calls for some explanation. If there is one thing abolitionists and nonabolitionists can agree on, it is that the term “prostitute” should be avoided, because of its problematic historical use and resulting negative connotations. Disagreement abounds, however, regarding the best choice of substitute terminology. Abolitionists tend to favor “prostituted people” while nonabolitionists tend to favor “sex worker.” Indeed, these tendencies are so marked that one can typically identify the political leanings of an author based on her choice between these two terms. In what follows, I will use the terms “prostituted people” and “people who sell sex” interchangeably to refer to the people with whom prostitute-users engage in sexual acts of prostitution. I mean for these terms to apply across the whole range of persons so designated, without limitation based on the degree of autonomy exercised by

ficking and prostitution; and criminal law reforms that penalize trafficking, pimping, and the purchase of sex, while decriminalizing the sale of sex.⁴

In general, feminist abolitionism's recommendations with respect to social-welfare provision, education, and criminalizing both trafficking and pimping have been largely uncontroversial. Similarly, the call to decriminalize the sale of sex is relatively uncontroversial, at least among feminist reformers.⁵ However, the abolitionist recommenda-

these people: the terms are meant to cover both the most enslaved and the most freely choosing. I accept the critique likely to come from nonabolitionists that the term "prostituted people" suggests that I mean to limit my considerations to pimped prostitution (and that I am thus wrongly suggesting that all prostitution is pimped). I do not believe that all prostitution is pimped, and I do not intend to limit the term "prostituted people" to people engaged in pimped-prostitution. Grammatical awkwardness aside, I will assume that a prostituted person may not necessarily be a pimped person. I further accept the critique likely to come from abolitionists that the term "people who sell sex" suggests an implausibly high degree of autonomy, bordering on the characterization of these people as "sex workers," and that a more accurate term would be "people who are sold for sex." As stated above, I do not mean for my choice of terminology to suggest anything with regard to the degree of autonomy exercised by the people with whom prostitute-users engage in sexual acts of prostitution. If "prostituted people" is thought by nonabolitionists to suggest too little autonomy, and if "people who sell sex" is thought by abolitionists to suggest too much, then perhaps employing both terms interchangeably will achieve a virtuous mean.

⁴ As its name suggests, the Swedish model was first implemented in Sweden, *see* Lag om förbud mot köp av sexuella tjänster (Svensk författningssamling [SFS] 1998:408) (Swed.) [Act Prohibiting the Purchase of Sexual Services] (criminalizing users of people who sell sex), although more recently the model has been adopted in Norway. *See* Ulrikke Moustgaard, *Prostitution Legislation at a Turning Point: Will They Go the Same Way?*, NIKK MAGASIN, 1.2009, at 24, available at <http://www.nikk.uio.no/?module=Articles;action=Article.publicShow;ID=891> (discussing the criminalization of prostitution in Nordic countries, including Norway's decision to ban the purchase of sexual services beginning in 2009). South Korea moved toward adopting the Swedish model with two acts passed in 2004. *See* Act on the Prevention of Prostitution and Protection of Victims Thereof, Statutes of South Korea, Act No. 7212 (Mar. 22, 2004); Act on the Punishment of Procuring Prostitution and Associated Acts, Statutes of South Korea, Act No. 7196 (Mar. 22, 2004). Finland prohibits the purchase of sex from victims of human trafficking and pandering (i.e., pimping). Rikoslaki [Penal Code], 20:8 (Fin.). As discussed further below, England and Wales have recently prohibited "[p]aying for sexual services of a prostitute subjected to force, threats . . . or any other form of coercion, or . . . deception." Sexual Offences Act, 2003, c. 42, § 53A (Eng.) (as amended by Policing and Crime Act, 2009, c. 26, § 14 (Eng.)). A similar model is presently being advocated in Illinois by the Chicago Alliance Against Sexual Exploitation. *See* End Demand Illinois, <http://www.enddemandillinois.org> (last visited Apr. 15, 2010) (focusing on the harm inflicted on the "women and girls in the sex trade").

⁵ Clearly this reform proposal remains controversial among conservative and reactionary abolitionists who view selling sex as immoral and would prefer to penalize both buyers and sellers. *See, e.g.*, United States v. Bitty, 208 U.S. 393, 401 (1908) (characterizing "[t]he lives and example of . . . women who for hire . . . offer their bodies to indiscriminate intercourse with men" as hostile to "reverent morality which is the source

tion to criminalize the *purchase* of sex has been a source of considerable controversy.⁶

Some think that the feminist-abolitionist call to criminalize the purchase of sex faces insurmountable objections. Typically these objections are based on the purported existence of prostituted people whose experiences do not fit the feminist abolitionists' conceptualization of commercial sex as violence against women.⁷ If selling sex is a genuinely consensual and valuable experience for some people, the argument goes, then feminist abolitionism's arguments against buying sex must fail.⁸ This Article considers what concessions, if any, feminist abolitionism should make in response to this objection and articulates two justifications for criminalizing the purchase of sex that are immune to the objection.

My argument proceeds in four steps. First, I provide an overview of feminist abolitionism, setting out its explanation of why sex trafficking and prostitution are problematic, and distinguishing feminist abolitionism from conservative and reactionary forms of abolitionism. Second, I examine two assumptions that underpin feminist abolitionism's account of sex trafficking and prostitution and concede that selling sex *can* be a genuinely consensual and valuable choice for some

of all beneficent progress in social and political improvement"); *Shaw v. Dir. of Pub. Prosecutions*, [1962] A.C. 220 (H.L. 1961) (appeal taken from Eng.) (upholding a conviction for advertising the sale of sex as a "conspiracy to corrupt public morals"); Roger Scruton, *Old Profession, New Toleration: The State of Prostitution, and the Harm It Causes*, NAT'L REV., June 19, 2006, at 42, 43 (defending the condemnation of selling sex as "not just puritan bigotry" but instead "a recognition of a profound truth" that selling sex is tantamount to "abusing the body," which thereby "harden[s] the soul").

⁶ See, e.g., Janet Halley et al., *From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism*, 29 HARV. J.L. & GENDER 335, 396-98 (2006) (criticizing Sweden's approach to sex trafficking for driving the industry deeper underground, resulting in more dangerous conditions for sex workers); Julia O'Connell Davidson, *'Sleeping with the Enemy'? Some Problems with Feminist Abolitionist Calls to Penalise Those Who Buy Commercial Sex*, 2 SOC. POL. & SOC'Y 55, 62 (2003) (arguing against the focus on reducing demand for prostitution, noting that it aligns feminist groups with unlikely allies such as anti-immigration politicians); Teela Sanders & Rosie Campbell, *Why Hate Men Who Pay for Sex? Exploring the Shift to 'Tackling Demand' in the UK* (contending that the vilification of men who pay for sex may do more harm than good to those working in the sex industry), in DEMANDING SEX: CRITICAL REFLECTIONS ON THE REGULATION OF PROSTITUTION 163, 163-64 (Vanessa E. Munro & Marina Della Giusta eds., 2008).

⁷ See Halley et al., *supra* note 6, at 351 (describing the "pro-work" view of prostitution, which views prostitution as a liberating act that allows a woman to "take[] control of her own body"); O'Connell Davidson, *supra* note 6, at 61 (noting that some people who sell sex prefer their mode of employment as a means of making a living).

⁸ See O'Connell Davidson, *supra* note 6, at 61.

people. Third, I outline two arguments that, despite this concession, continue to offer robust support for criminalizing the purchase of sex. Finally, I examine arguments against criminalizing the purchase of sex and consider what, if any, qualifications are required in defending feminist abolitionism.

I. WHAT IS FEMINIST ABOLITIONISM?

Since I am offering an argument in defense of feminist abolitionism, it seems fitting to start by providing a general account of what I understand this label to mean. Feminist abolitionism, as I understand it, is action taken in an effort to end sex trafficking that is motivated by a belief that such trafficking harms women in ways tending to sustain and perpetuate patriarchal structural inequalities.⁹

It is possible, albeit perhaps less common, to argue in defense of abolitionist policies in response to sex trafficking from a Millian liberal perspective, by which I mean a political perspective concerned with limiting the use of the criminal law to targeting conduct that causes

⁹ For a detailed account of what I mean by the term “patriarchal structural inequalities,” see MICHELLE MADDEN DEMPSEY, PROSECUTING DOMESTIC VIOLENCE 147-53 (2009). In sum, I use the term “patriarchy” as a placeholder, to represent a particular kind of wrongful structural inequality against which feminism is concerned to act. In *Prosecuting Domestic Violence*, I analyzed patriarchy in terms of three aspects: sex discrimination, sexism, and misogyny. *Id.* at 139-47. For further discussion of these elements, see *supra* Section I.A. I do not mean to suggest in this Article that all feminist abolitionists endorse my account of patriarchal structural inequality or, relatedly, my understanding of feminism as action taken in opposition to patriarchy. It seems clear, however, that some basic commitments do tend to inform feminist-abolitionist thought, including (1) the understanding of gender as a social construction, specifically as a hierarchical structural inequality in which women are subordinated to men; (2) the belief that this structural inequality is neither eradicable nor inevitable—that it can be dismantled and that realization of a post-patriarchal society is possible; (3) the belief that prostitution is central to the maintenance of patriarchal structural inequality and that the institution of prostitution would not exist in its current form or, perhaps, not exist at all in a post-patriarchal society; and (4) the belief that working to abolish the institution of prostitution is one important means of pursuing the goal of dismantling structural inequalities more generally. Broadly speaking, feminist abolitionism’s account of sex inequality and its understanding of the role of prostitution in maintaining sex inequality are influenced by the work of Catharine MacKinnon. See, e.g., CATHARINE A. MACKINNON, FEMINISM UNMODIFIED (1987) [hereinafter MACKINNON, FEMINISM UNMODIFIED]; CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE (1989) [hereinafter MACKINNON, FEMINIST THEORY]; Catharine A. MacKinnon, *Prostitution and Civil Rights*, 1 MICH. J. GENDER & L. 13 (1993). For an illuminating defense of feminist abolitionism from a radical feminist perspective, see Kathy Miriam, *Stopping the Traffic in Women: Power, Agency and Abolition in Feminist Debates over Sex-Trafficking*, 36 J. SOC. PHIL. 1, 13-14 (2005).

harm to others.¹⁰ Indeed, in many respects, the two theories of criminalization I develop below in defense of feminist abolitionism are fully consistent with a traditional Millian liberal view regarding the proper scope of the criminal law, for both arguments are grounded in the premise that buying sex causes harms to others—specifically, to prostituted people. The arguments I shall offer are not, therefore, grounded in a concern to prevent mere offense or nuisance,¹¹ self-inflicted harms,¹² or harmless wrongdoing.¹³

¹⁰ There are, of course, many other aspects of Millian liberalism, but the one I refer to here is the famous “harm principle” articulated by John Stuart Mill in his essay, *On Liberty*, in which he declares, “[T]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.” JOHN STUART MILL, *ON LIBERTY AND OTHER ESSAYS* 14 (John Gray ed., Oxford Univ. Press 1998) (1859). The most thorough and influential examination of the scope of the harm principle (and related principles relevant to limiting the scope of the criminal law) remains Joel Feinberg’s four-volume series, *The Moral Limits of the Criminal Law*. See 1 JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO OTHERS* (1984); 2 JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW: OFFENSE TO OTHERS* (1985); 3 JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO SELF* (1986); 4 JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW: HARMLESS WRONGDOING* (1988).

¹¹ As Feinberg articulated the offense principle,

It is always a good reason in support of a proposed criminal prohibition that it would probably be an effective way of preventing serious offense (as opposed to injury or harm) to persons other than the actor, and that it is probably a necessary means to that end

2 FEINBERG, *supra* note 10, at 1 (emphasis omitted). For arguments against criminalizing offensive conduct, see A.P. SIMESTER & ANDREW VON HIRSCH, *Penalising Offensive Behaviour: Constitutive and Mediating Principles*, in *INCIVILITIES* 115, 115-16 (A.P. Simester & Andrew von Hirsch eds., 2006); A.P. Simester & Andrew von Hirsch, *Rethinking the Offense Principle*, 8 *LEGAL THEORY* 269, 271 (2002). The issue of whether mere offense can justify criminalization featured prominently in the famous Wolfenden Report debates in the 1950s regarding the criminalization of prostitution-related activities. See REPORT OF THE COMMITTEE ON HOMOSEXUAL OFFENSES AND PROSTITUTION, 1957, Cmnd. 247, at 140 para. 249 (Eng.) (“[W]e feel that the right of the normal, decent citizen to go about the streets without affront to his or her sense of decency should be the prime consideration . . .”).

¹² Curiously, Feinberg characterized the harms experienced by prostituted people (insofar as they were recognized by him as harms at all) as *self-inflicted* harms, grouping them together with conduct such as “aiding and abetting a suicide, ‘mercy killing,’ agreed-upon surgical mutilation, [and] duels.” 3 FEINBERG, *supra* note 10, at 172. It is not clear to me why any of these examples should be considered cases of self-inflicted harm as opposed to cases of harm to others in which the harmed person has (presumably) consented to the harm or risk of harm. If one were looking for cases of *self-inflicted* harms, one would think that examples such as suicide, self-mutilation (“cutting”), or self-starvation might serve as better examples. Presumably, Feinberg’s understanding of self-inflicted harms was inspired by his particularly expansive application of the *volenti* maxim (whose name is derived from the Latin phrase *volenti non fit injuria*, which means, “To one who consents, no wrongful harm is done”). Under

This Article defends a particularly *feminist* abolitionism by its recognition of two further points regarding the harm often experienced by prostituted people. The first point is more thinly feminist, while the second point adds a more significant feminist character to my arguments. First, my arguments emphasize the fact that very often prostituted people are women or girls and, further (and here is where the feminist element comes in), *that women and girls are human beings*. In other words, the harm done to prostituted women and girls is “harm to others” in the Millian sense: it is harm to other *human beings*.¹⁴ Again, this is a rather thin sense of what it means for an otherwise liberal argument to be feminist, but given the long history of women’s absence from purportedly liberal theory and political practice, it bears noting.¹⁵

Second, my arguments are more robustly feminist insofar as they take into account the patriarchal character of the harms at issue. Specifically, I recognize that harms often suffered by prostituted people are the kind that tend to sustain and perpetuate patriarchal structural inequality, that patriarchal structural inequality is wrongful (this is where the feminist element comes in¹⁶), and that the harms’ tendency

Feinberg’s interpretation of the *volenti* maxim, one’s consent not only converts an otherwise wrongful harm into a nonwrong, but actually transforms the consenting subject into the agent of the action itself, “transfer[ring] at least part of the responsibility for one person’s act to the shoulders of the consentor.” *Id.* at 174-76.

¹³ It is, of course, possible to construct arguments against the purchase of sex that emphasize the sense in which this conduct is wrongful without attending to the fact that it is also harmful. Arguments grounded in the wrongfulness of objectification or commodification, for example, need not attend to the question of harm, although they frequently elide the distinction between wronging and harming. For the classic exposition of the wrongfulness of commodification (albeit one that rejects abolitionist reforms defended below), see MARGARET JANE RADIN, *CONTESTED COMMODITIES* (1996). For an argument that *selling* sex is not wrongful, despite its tendency toward objectification and commodification, see MARTHA C. NUSSBAUM, *SEX & SOCIAL JUSTICE* 276, 276-78 (1998).

¹⁴ For a discussion of the failure to recognize women and girls as human beings in international human rights discourse, see CATHARINE A. MACKINNON, *ARE WOMEN HUMAN?* 141-42, 180-82 (2006).

¹⁵ See generally CAROLE PATEMAN, *THE SEXUAL CONTRACT* 41 (1988) (“In contemporary discussions of the state of nature . . . [the fact that human beings are sexually differentiated] is usually disregarded.”); JANICE RICHARDSON, *THE CLASSIC SOCIAL CONTRACTARIANS: CRITICAL PERSPECTIVES FROM CONTEMPORARY FEMINIST PHILOSOPHY AND LAW* 11 (2009) (noting women’s traditional exclusion from the theoretical frameworks of social contractarians).

¹⁶ It is, of course, possible to agree that the harms often suffered by prostituted people are the kind that tend to sustain and perpetuate patriarchal structural inequality without also taking the feminist view that such structural inequalities are wrongful. On that view, one I gratefully take to be uncommon, the tendency of these harms to

to sustain and perpetuate structural inequality informs their nature and quality. In other words, my argument is feminist insofar as it contends that a proper account of the nature of the harms in prostitution must acknowledge the relationship between these harms and patriarchal structural inequality.

A. *On Patriarchy and Prostitution*

In previous work, and in what follows below, I use the label patriarchy to refer to a wrongful structural inequality that bears explanatory force in understanding women's subordinated social status.¹⁷ The wrongness of patriarchal structural inequality, as I understand the concept, can be analyzed in terms of its tendency to sustain and perpetuate sex discrimination, sexism, and misogyny.¹⁸ For lack of space, I will not fully revisit my tripartite analysis of patriarchal structural inequality here, but will instead illustrate the relationship between the harms often suffered by prostituted people and these aspects of patriarchy.

At a high level of generality, all three aspects of patriarchal structural inequality involve failures to provide women with an adequate range of valuable options for pursuing lives conducive to human flourishing.¹⁹ Sex discrimination, as I use the term here, involves a failure to provide such valuable options based on a misconception of a person's attributes, needs, or interests, where the failure is based partially on the person's sex.²⁰ Such failures are particularly common in socie-

sustain and perpetuate patriarchal structural inequality might be thought to *mitigate* the wrongfulness of the harms. So, while the harm may be deemed problematic to the extent it caused physical pain or injury, its moral quality would be slightly redeemed by the tendency of the harm to keep women in their place.

¹⁷ See DEMPSEY, *supra* note 9, ch. 7 (providing a philosophical analysis of patriarchy).

¹⁸ *Id.* at 139-47.

¹⁹ Previously, I characterized the matter more simply, in terms of failures to provide women with valuable options. *Id.* at 140-48. Here, I note the relevance of "pursuing a life conducive to human flourishing" in order to provide a more explicit context for appreciating what makes an option valuable. I do not intend any significant change in meaning; rather, I seek merely to clarify an issue left open in my previous work. Space and scope preclude further development of these ideas here, but suffice it to say that my thinking has been influenced by the Aristotelian themes running through Professor Nussbaum's writings on human flourishing and human capacities. See generally MARTHA C. NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT (2000); Martha Nussbaum, *Human Functioning and Social Justice: In Defense of Aristotelian Essentialism*, 20 POL. THEORY 202 (1992).

²⁰ This account of sex discrimination tracks the work of Timothy Macklem, as refined by Denise Réaume. See TIMOTHY MACKLEM, BEYOND COMPARISON: SEX AND DISCRIMINATION 11 (2003) (arguing that because of "prevailing misconceptions of what it means to be a woman," women are denied access to opportunities and

ties that embrace “widespread promulgation of a false or irrelevant conception’ of women’s attributes, needs, or interests.”²¹ The link between sex discrimination and prostitution can be observed, for example, in situations where women and girls of a particular social caste, clan, class, race, ethnicity—or those who have suffered a form of abuse, typically sexual—are thought to be suited to a life of prostitution, based on the conditions of their birth or subsequent abuse.²²

Often, however, the failure to provide women with an adequate range of valuable options for pursuing lives conducive to human flourishing is based not on any misconception but rather on simply a failure to value women and girls as human beings. I refer to such failures under the heading of sexism, as distinct from sex discrimination. Sexism consists in failures to provide women and girls with that to which they are entitled—e.g., food, shelter, medical attention, care, education, economic resources, and other necessities—based simply on a failure to value women and girls as human beings.²³ While conditions of sexism create a context that is conducive to the proliferation of harms to prostituted people, there is also a feedback loop between sexism and these harms, for the harms often suffered by prostituted people have a tendency to sustain and perpetuate sexist social conditions (i.e., conditions in which women and girls are not valued as human beings). Put simply, a world in which women are not valued as human beings tends to be a world in which harms to prostituted people will be common; a world in which such harms are common tends to be one in which women are not valued as human beings. Understood accordingly, part of the wrongfulness of the harms suf-

resources that they need to live successful lives); Denise Réaume, *Comparing Theories of Sex Discrimination: The Role of Comparison*, 25 OXFORD J. LEGAL STUD. 547, 549 (2005) (refining Macklem’s account of what it means “to be a woman” to focus more on women’s “attributes, needs, or interests”). For a more detailed discussion of sex discrimination, see DEMPSEY, *supra* note 9, at 140-45.

²¹ DEMPSEY, *supra* note 9, at 140 (quoting MACKLEM, *supra* note 20, at 154; Réaume, *supra* note 20, at 549).

²² See, e.g., NICHOLAS D. KRISTOF & SHERYL WUDUNN, *HALF THE SKY: TURNING OPPRESSION INTO OPPORTUNITY FOR WOMEN WORLDWIDE* 3-9 (2009) (discussing the phenomenon of intergenerational female prostitution in the Nutt clan near the Nepalese-Indian border); *id.* at 23-24 (describing the attitude expressed by an officer working at the Indian border).

²³ See, e.g., Amartya Sen, *More than One Hundred Million Women Are Missing*, N.Y. REV. BOOKS, Dec. 20, 1990, at 61, available at <http://www.nybooks.com/articles/3408> (documenting the “missing women” phenomenon, brought about by systematic failures to provide women and girls with adequate nutrition, shelter, and medical care).

ferred by prostituted people is the tendency of these harms to sustain and perpetuate sexism.

Finally, no accounting of the harms suffered by prostituted people would be complete without regard to the third aspect of patriarchal structural inequality: misogyny. Unlike sex discrimination and sexism, both of which involve the failure to provide women with valuable options either through ignorance or apathy, misogyny entails maliciously choosing to inflict harm based on a hatred of women. The harms often suffered by prostituted women illustrate all too well the extent to which misogyny often motivates this violence;²⁴ at the same time, these harms have a tendency to sustain and perpetuate misogyny.²⁵ Again, the feedback loop between these harms and patriarchal structural inequality informs a proper understanding of the wrongfulness of the harm, insofar as part of the wrongness of the harms lies in their tendency to sustain and perpetuate misogyny.

The point of this analysis is simply to explain the sense in which the harms at issue in this Article are not adequately understood as merely physical or even psychological harms to the individual prostituted women themselves.²⁶ To be sure, the harms suffered by prostituted women are often physical, involving injury to the body in the form of cuts, bruises, broken bones, and even death;²⁷ moreover, the harms are often psychological as well, involving posttraumatic stress,

²⁴ See, e.g., Sex Professionals of Canada, Bad Client List, <http://www.spoc.ca/bad.html> (last visited Apr. 15, 2010) (providing extensive records of prostitute-users who have raped and violently assaulted prostituted people from 2003–2009).

²⁵ These feedback loops are established when knowledge of the harms suffered by prostituted people becomes known and inspires misogynistic attitudes and actions.

²⁶ In this regard, the feminist understanding of the harms of prostitution is importantly distinct from viewing prostitution as a public health issue. Cf. Eliot Ness, *Federal Government's Program in Attacking the Problem of Prostitution*, FED. PROBATION, Apr.–June 1943, at 17, 18 (arguing that curtailing prostitution is necessary for disease prevention).

²⁷ See Melissa Farley et al., *Prostitution & Trafficking in Nine Countries: An Update on Violence and Posttraumatic Stress Disorder*, in PROSTITUTION, TRAFFICKING, AND TRAUMATIC STRESS 33, 33–34 (Melissa Farley ed., 2003) (surveying 854 prostituted women and finding that a majority of those surveyed had been subjected to physical violence); Ameporn Ratinthorn et al., *Trapped in Circle of Threats: Violence Against Sex Workers in Thailand*, 30 HEALTH CARE FOR WOMEN INT'L 249, 256–66 (2009) (detailing sources and categories of violence against prostituted people); Milena Simic & Tim Rhodes, *Violence, Dignity and HIV Vulnerability: Street Sex Work in Serbia*, 31 SOC. HEALTH & ILLNESS 1, 4–9 (2009) (“Street sex workers found themselves caught in a cycle of violence . . .”); Cathy Zimmerman et al., *The Health of Trafficked Women: A Survey of Women Entering Posttrafficking Services in Europe*, 98 AM. J. PUB. HEALTH 55, 56–57 (2008) (surveying women entering posttrafficking services and finding high rates of physical and sexual abuse in trafficking victims).

depression, anxiety, and dissociative disorders, among others.²⁸ My point is not to deny the seriousness of these harms to individual bodies or minds. Rather, my point is that these harms are not *best* understood from an individualistic point of view: they are best, or at least better, understood from a *feminist* point of view—one that takes into account the tendency of these harms to sustain and perpetuate patriarchal structural inequality, which subordinates women as a group.²⁹

Of course, not every reader will embrace a feminist point of view on these matters—and so before leaving this analysis, I wish to emphasize that the argument below is not strictly dependent on its feminist premises.³⁰ Even if one rejects the connections with patriarchy set out above and chooses to understand the harms at issue in merely individualistic terms, the argument below still stands. For the argument below is, at its core, a harm-based argument. If the harms at issue, however understood, are serious enough to be worthy of criminal prohibition, then they are adequate to motivate the arguments set out below. In other words, there is no need for the reader to agree, even, that patriarchy exists, much less care about it as a particular problem. One can fully embrace the course of argument below and endorse its conclusions simply by agreeing that when human beings are threatened with violence, bruised, beaten, threatened, or otherwise subjected to violence, they are suffering real and serious harms—harms that are sufficient to motivate a response by the criminal law.

B. *Abolitionism's Strange Bedfellows*

In order to better clarify what feminist abolitionism is, it is worth pausing to reflect on what it is not. Specifically, I wish to examine the ways in which feminist abolitionism is importantly distinct from conservative and reactionary flavors of abolitionism.

²⁸ See Melissa Farley & Howard Barkan, *Prostitution, Violence, and Post-Traumatic Stress Disorder*, 27 *WOMEN & HEALTH* 37, 44-45 (1998) (examining the prevalence of PTSD in a study of San Francisco prostituted-women); see also JUDITH LEWIS HERMAN, *TRAUMA AND RECOVERY* 76-84 (1992) (comparing the techniques used to subjugate women in prostitution to the experiences of “hostages, political prisoners, and survivors of concentration camps”).

²⁹ In my account of the harm experienced by prostituted women, therefore, “although the person is kept in view, the touchstone for analysis and outrage is the collective group called women.” MACKINNON, *FEMINIST THEORY* *supra* note 9, at 40 (internal quotation marks omitted).

³⁰ To be clear, what I mean by “the feminist premises of the argument” are the premises set out in this Section, which claim that the harms often experienced by prostituted people have a tendency to sustain and perpetuate patriarchal structural inequality.

It is an oft-heard complaint that feminist abolitionists have unwisely aligned themselves with conservative or reactionary forces.³¹ There are two versions of this argument, one that questions the wisdom of feminist abolitionists jumping into bed, so to speak, with conservative and reactionary political allies, and one that impugns the ideological basis of feminist abolitionism as mirroring conservative and reactionary accounts of sexual morality. The former argument, I concede, bears some force—albeit not all that its advocates suggest. The latter argument, I contend, is grounded in an implausible distortion of feminist abolitionism and should be rejected.

In her article, *‘Sleeping with the Enemy’? Some Problems with Feminist Abolitionist Calls to Penalise Those Who Buy Commercial Sex*, Julia O’Connell Davidson launches the “strange bedfellows” critique of feminist abolitionism.³² Citing examples of feminist abolitionists working with “police chiefs calling for more extensive police powers and tougher sentencing policy, anti-immigration politicians calling for tighter border controls, and moral conservatives urging a return to ‘family values,’” O’Connell Davidson impugns feminist abolitionists for forging “alliances with those who would more usually be viewed as ‘enemies’ of feminism and other progressive social movements.”³³ The gist of O’Connell Davidson’s complaint, in other words, is that feminist abolitionists have sold out to those who have an interest in sustaining the very sorts of structural inequalities we oppose. In our eagerness to effect legal and political change, the argument goes, we have either endorsed policies that are antithetical to feminism more generally, or have at the very least lent political support to conservative and reactionary politicians who endorse such policies.

I think there is some basis for the “strange bedfellows” critique, but it is not as compelling or expansive in its scope as suggested

³¹ See generally Jacqueline Berman, *The Left, the Right, and the Prostitute: The Making of U.S. Antitrafficking in Persons Policy*, 14 TUL. J. INT’L & COMP. L. 269, 283-88 (2006) (describing the “unlikely” partnership between the Christian right and radical feminists); Melissa Ditmore, *Trafficking in Lives: How Ideology Shapes Policy* (arguing that the alliance between feminists and political conservatives has led to the passage of “dangerous” legislation), in TRAFFICKING AND PROSTITUTION RECONSIDERED 107, 112-22 (Kamala Kempadoo ed., 2005); O’Connell Davidson, *supra* note 6, at 59-61 (cautioning against a union between feminists and state actors); Penelope Saunders, *Traffic Violations: Determining the Meaning of Violence in Sexual Trafficking Versus Sex Work*, 20 J. INTERPERSONAL VIOLENCE 343, 351-60 (2005) (noting that the antitrafficking agenda that results from the union between feminist abolitionists and conservatives is “clearly antithetical to the struggle for women’s rights”).

³² O’Connell Davidson, *supra* note 6, at 55.

³³ *Id.*

above. To see why this is so, it is first necessary to separate *directly* endorsing pernicious policies from working with those who endorse such policies. Clearly, endorsing such policies oneself is worthy of criticism. The form of critique appropriate to such advocacy, however, is not a “strange bedfellows” critique. For example, anyone operating under the banner of feminist abolitionism who frames arguments against prostitution based on support for traditional “family values” would indeed be worthy of criticism—but on grounds that she has directly endorsed a pernicious tradition that reinforces patriarchy. (It would, therefore, also raise questions as to whether that person has accurately applied the description “feminist” to her advocacy.)

The “strange bedfellows” critique, in contrast, must be reserved for cases in which feminist abolitionists work to achieve policy and legal reform alongside those who seek the same policy and legal reforms, but for reasons that are inconsistent with feminism. *That* version of the critique hits its mark, for certainly feminist abolitionists have worked with politicians who endorse a variety of policies that are inconsistent with feminist commitments. Yet, this critique is hardly withering to feminist abolitionism, for while it is an unfortunate reality of political life that not everyone embraces feminism, it is sometimes necessary in order to achieve feminist goals to work with those who reject feminism.³⁴ Given the deep and sustained disagreements regarding values and background reasons that form our political landscape, if we waited until everyone agreed on every value and background reason for every policy we hope to secure before making political alliances to actually achieve those policy ends, social coordination around contentious issues would become impossible.³⁵ Of course,

³⁴ Accounts of the passage of Title VII, which prohibits employment discrimination on the basis of, *inter alia*, sex, speak to this phenomenon. In its original form, the bill did not provide protection from discrimination on the basis of sex. During debate, sex was added to the list of prohibited grounds of discrimination in an effort to defeat the bill. This popular version of events is recounted and queried in Jo Freeman, *How “Sex” Got into Title VII: Persistent Opportunism as a Maker of Public Policy*, 9 LAW & INEQ. 163 (1991).

³⁵ Indeed, the ability to overcome conflicts regarding values and background reasons may contribute to the justification of coalition-based policy creation. Just as with human rights discourse, “part of the value, and hence part of the justification, for people having rights in the first place” is that such rights give rise to a “convergence consideration,” which in turn “allows us to get beyond our disagreements about the (other) values by which those rights-assignments are justified.” John Gardner, “*Simply in Virtue of Being Human*”: *The Whos and Whys of Human Rights*, 2 J. ETHICS & SOC. PHIL. 1, 9-10 (2008). Despite continuing disagreement regarding background reasons that support the policy, agreement as to adoption of a given policy can allow us to make some progress on the question of how a particular case should be handled under that

there are limits to this coalition-building approach: sometimes the risk of lending an air of legitimacy to bad actors by entering into alliance with them is not worth the cost.³⁶ But, as a general critique of political maneuvering, the “strange bedfellows” critique packs little punch in a landscape of diverse political commitments and urgent need for policy reform.

Second, it is necessary to separate the substantive issues highlighted by O’Connell Davidson’s critique, for it is not clear that *all* of them are problematic. The policies under attack include (1) endorsing more extensive police powers and tougher sentencing policies; (2) endorsing anti-immigration policies; and (3) endorsing traditional family values.³⁷ Taking matters in reverse order, I would certainly agree that much of what goes under the label “traditional family values” is inconsistent with feminism and thus any purportedly feminist abolitionist who directly endorses such policies should probably turn in her membership card at the next meeting. Moreover, endorsing anti-immigration policies strikes me as deeply in conflict with basic feminist commitments and thus likely to be inconsistent with feminist abolitionism.³⁸

policy, without having to dredge up the conflicting background reasons that underpinned our convergence on the policy in the first place.

³⁶ Feminist abolitionists, for example, have been split on the wisdom of alliances with the Bush Administration, both with regard to the substance of the particular policies and the risk of lending political legitimacy to an administration that was neither in support of feminist aims more broadly nor even consistently abolitionist in its own activities. For an anti-abolitionist account of the alliances between abolitionists and the Bush Administration, see Ditmore, *supra* note 31, at 117-22. For a critique of Bush-era antitrafficking policies in the U.S. Department of Justice, see Michelle Madden Dempsey, *D.O.J. Model State Anti-Trafficking Statute: Critique and Revision*, in *PORNOGRAPHY: DRIVING THE DEMAND IN INTERNATIONAL SEX TRAFFICKING* 274 (David E. Guinn ed., 2007).

³⁷ O’Connell Davidson, *supra* note 6, at 56.

³⁸ By “basic feminist commitments,” I mean commitments to oppose wrongful structural inequalities along multiple intersecting axes, albeit from a point of view particularly concerned with recognizing and responding to the reasons generated by the wrongful structural inequality of patriarchy. See DEMPSEY, *supra* note 9, at 135. There may be, of course, anti-immigration arguments that are grounded in a concern with avoiding exacerbating existing inequalities. See, e.g., Research Group on the Global Future, Ctr. for Applied Pol’y Research, Brain Drain (July 20, 2005), <http://www.cap-lmu.de/fgz/statistics/brain-drain.php> (objecting to liberalized immigration on grounds that “brain-drain” from less developed nations will widen existing inequalities). If, however, anti-immigration policies are grounded in xenophobia or a belief that certain people (“us”) are entitled to more resources and power than others (“them”) simply by virtue of national citizenship, then such arguments strike me as inconsistent with basic feminist commitments. On immigration policy and social justice generally, see PHILLIP COLE, *PHILOSOPHIES OF EXCLUSION* 1-15 (2000); KEVIN R.

With regard to the first issue, however, it is unclear to me why endorsing more extensive police powers and tougher sentencing policies is necessarily inconsistent with feminist commitments. In a society in which women are suffering serious harms and where perpetrators are granted de facto impunity, a feminist use of the criminal law *can* achieve feminist goals.³⁹ One need only reflect on legal reforms regarding domestic violence to see the context in which this alliance would not necessarily be inconsistent with feminist goals.⁴⁰ Of course, such reforms run the *risk* of increasing the power of officials who are not committed to the feminist use of that power—but in circumstances where the police, prosecutors, and judges (or at least some critical mass of them) are in fact committed to the feminist use of their institutional powers, there is no inconsistency with feminist goals.⁴¹

Leaving the “strange bedfellows” argument to one side, let us consider an argument that impugns feminist abolitionism by claiming that its ideological basis mirrors conservative and reactionary accounts of sexual morality. In comparison to the relatively innocuous “strange bedfellows” argument above, which merely claims that feminist abolitionists work too closely with conservative and reactionary political

JOHNSON, OPENING THE FLOODGATES: WHY AMERICA NEEDS TO RETHINK ITS BORDERS AND IMMIGRATION LAWS 18-26 (2007). For an argument in favor of liberalizing immigration laws to address trafficking, see Karen E. Bravo, *Free Labor! A Labor Liberalization Solution to Modern Trafficking in Humans*, 18 *TRANSNAT'L L. & CONTEMP. PROBS.* 545, 571-73 (2009).

³⁹ This is not to say that it necessarily will—but simply that it might very well be worth a try. For an optimistic account of this possibility in the context of domestic violence prosecution, see DEMPSEY, *supra* note 9. For a compelling examination of the ways in which the criminal law and perhaps even appeals to state power more generally, have been in tension with feminist antiviolence goals, see KRISTIN BUMILLER, *IN AN ABUSIVE STATE: HOW NEOLIBERALISM APPROPRIATED THE FEMINIST MOVEMENT AGAINST SEXUAL VIOLENCE* ch. 4 (2008). Still, while all of these works underscore the risk of backlash and the importance of feminists working *outside* existing state institutions and legal systems, they do not justify the conclusion that working *inside* (as well) is necessarily inconsistent with achieving feminist goals.

⁴⁰ For example, reforms that permit police to arrest for domestic violence offenses without personally observing the offenses and sentencing policies that mandate court supervision in domestic violence cases are both expansions of the state's criminalization powers that are not necessarily inconsistent with feminist goals. For a review of these developments, see Joan Zorza, *The Criminal Law of Misdemeanor Domestic Violence, 1970–1990*, 83 *J. CRIM. L. & CRIMINOLOGY* 46, 53-65 (1992). The backlash effect of many domestic violence reforms in the criminal justice system, while introducing a healthy dose of skepticism and caution, was not a necessary effect of these reforms.

⁴¹ In “strange bedfellows” critiques that target feminist abolitionists' associations with law enforcement officials, there is often a hint that the categories of “law enforcement official” and “feminist” are mutually exclusive. As I hope to have demonstrated in previous work, they are not. See, e.g., DEMPSEY, *supra* note 9.

forces, the ideological argument is that feminist abolitionists actually *agree* with conservatives on fundamental ideological issues. Penelope Saunders offers a version of this argument when she claims that “[a]bolitionist feminists tap into widely held beliefs about the harms women face due to their sexual vulnerability. This is the ideological element that connects conservative and abolitionist feminist agendas.”⁴²

This critique rests on an invalid distortion of the basic commitments underpinning feminist abolitionism. It fails to acknowledge the extent to which conservative or reactionary abolitionism’s fundamental understanding of why prostitution is problematic differs from feminist abolitionism’s understanding. Conservative and reactionary abolitionists tend to view the wrongness of prostitution in religious terms, which focus on the sanctity of human sexuality as expressed within the confines of heterosexual monogamous marriage and judge all other forms of sexual activity—such as adultery, prostitution, homosexual sex, and masturbation—as worthy of condemnation.⁴³ Moreover, women’s sexual vulnerability is viewed as natural and proper rather than a problematic symptom of wrongful patriarchal structural inequality. From this perspective, sex trafficking is considered wrong for the same kinds of reasons that any sexual activity outside the confines of heterosexual, monogamous marriage is considered wrong.

Conservative abolitionists seek to abolish the commercial sex industry because it transforms existing social forms that they would rather wish to conserve: namely, traditional heterosexual patriarchal marriage and family.⁴⁴ To conservative abolitionists, traditional social forms are under threat. In response, they seek to shore up traditional values by abolishing social institutions they view as threatening. Reac-

⁴² Saunders, *supra* note 31, at 355.

⁴³ For a particularly stark contrast between conservative and reactionary abolitionism and feminist abolitionism, consider the following from the website Christ Is the Only Way to Heaven!, www.jesus-is-savior.com (last visited Apr. 15, 2010): Pages on the site call for the abolition of prostitution as a particularly objectionable form of fornication. See Prostitution Is Wicked!, http://www.jesus-is-savior.com/Evils%20in%20America/prostitution_is_wicked.htm, (last visited Apr. 15, 2010) (“Marriage is honourable in all, and the bed undefiled: but whoremongers and adulterers God will judge.” (quoting *Hebrews* 13:4)). At the same time it condemns feminism—even feminist theology—as “diabolical.” Feminist Theology?, http://www.jesus-is-savior.com/Evils%20in%20America/Feminism/feminist_theology.htm (last visited Apr. 15, 2010).

⁴⁴ The phrase “social form” is borrowed from the writings of Joseph Raz. See JOSEPH RAZ, *THE MORALITY OF FREEDOM* 307-13 (1986) (defining “social forms” as “forms of behavior which are in fact widely practised in . . . society”). For a detailed discussion of social forms, see DEMPSEY, *supra* note 9, at 137-39.

tionary abolitionism, in comparison, views the social forms of traditional heterosexual patriarchal marriage and family as already having been more or less transformed. In response to this transformation, reactionaries seek to abolish prostitution to reestablish or reentrench traditional heterosexual patriarchal marriage and family.

For feminist abolitionists, however, prostitution is wrong because it so often harms women, both individually and by virtue of its tendency to sustain and perpetuate patriarchal structural inequality.⁴⁵ This focus is central to the feminist understanding of why prostitution is deeply problematic and thus a fitting target for abolition. While the harms women face are central to feminist abolitionism's understanding of prostitution, they are secondary—if present at all—in the conservative and reactionary understanding of why prostitution is wrong.⁴⁶

Of course, conservative and reactionary theories of abolitionism need not be religiously grounded (folks can endorse traditional patriarchal social forms without believing that God agrees with them) and, *mutatis mutandis*, feminist abolitionism need not be devoid of religious premises (folks can critique traditional patriarchal social forms and believe that God agrees with them). The key distinction is simply the respective understanding of why sex trafficking and prostitution should be abolished: feminists support abolitionism as a means to challenge and ultimately dismantle patriarchal structural inequality, while conservatives and reactionaries support abolitionism as a means to maintain or reestablish patriarchal structural inequality. On this key ideological element, therefore, conservative and feminist abolitionism are not connected at all; instead, they are diametrically opposed.⁴⁷

⁴⁵ See *supra* Sections I.A. and I.B.

⁴⁶ It is possible for conservative and reactionary abolitionist accounts to borrow the language of harm to articulate their claims. In this regard, Bernard Harcourt observes that the harm principle is “effectively collapsing under the weight of its own success.” Bernard E. Harcourt, *The Collapse of the Harm Principle*, 90 J. CRIM. L. & CRIMINOLOGY 109, 113 (1999). However, insofar as the substance of conservative and reactionary objections to prostitution continues to focus on the threat prostitution poses to traditional patriarchal social forms, these harm-based arguments remain ideologically at odds with feminist abolitionism. For this reason, I respectfully decline to follow Harcourt's characterization of feminist arguments grounded in a concern regarding harm to women as part of a “proliferation of conservative harm arguments.” *Id.* at 147-54.

⁴⁷ Cf. *supra* note 31 and accompanying text.

II. ON PROSTITUTION: SOME ASSUMPTIONS AND CONCESSIONS

Before presenting my arguments in favor of criminalizing the purchase of sex, it is worth noting two assumptions that underpin both arguments: (1) many prostituted people experience substantial harm in prostitution, and (2) prostitution is not valuable enough to outweigh those harms. I will consider the plausibility of these assumptions in the final Section of this Article, but for now, note what these assumptions do *not* entail.

First, these assumptions do not entail that every person who sells sex is harmed in prostitution. Rather, for the sake of argument, it is possible to concede that people can genuinely consent to selling sex, that their consent negates any wrongful harm they might experience, and that in fact some people do consent.⁴⁸ Note that these concessions are entirely consistent with the first assumption above that many prostituted people do experience substantial harm in prostitution. Indeed, in light of these concessions, we might refine that assumption as follows: many prostituted people experience substantial harm in prostitution, though some do not. The fact that some people do not experience harm does not, of course, diminish the urgency or importance of the fact that many do. In other words, abolitionist arguments need not establish that *all* instances of prostitution are harmful; rather, it is sufficient to motivate these arguments that often prostituted people are harmed in prostitution, that the harm is substantial, and that the value of prostitution is inadequate to justify that harm.

Second, my assumptions do not deny that prostitution *can* be genuinely valuable for some people. Rather, my second assumption is merely that whatever value prostitution may have, it is not valuable enough to outweigh the harms experienced by many prostituted people. So, to be clear, I am willing to concede for the sake of argument that there are instances of prostitution that do not amount to sex trafficking, that some people view selling sex as a genuinely valuable option, and that in viewing prostitution as a valuable option, these people are not necessarily mistaken, misguided, deluded, or suffering from some form of false consciousness.⁴⁹

⁴⁸ See M. Madden Dempsey, *Rethinking Wolfenden: Prostitute-Use, Criminal Law, and Remote Harm*, 2005 CRIM. L. REV. 444, 449-50 (making similar stipulations, but cautioning against mistaking a conceptual concession for a factual conclusion).

⁴⁹ These stipulations should neutralize common arguments against feminist abolitionism. For a particularly well-developed account of these arguments, see Janie Chuang, Student Article, *Redirecting the Debate over Trafficking in Women: Definitions, Paradigms, and Contexts*, 11 HARV. HUMAN RTS. J. 65, 84-96 (1998).

These concessions may appear to fly in the face of feminist abolitionism's understanding of prostitution, for, admittedly, feminist abolitionists often characterize prostitution simply as "violence against women."⁵⁰ Are the stipulations offered above inconsistent with such a characterization? Have I conceded so much to its critics that my argument can no longer be properly understood as feminist?

I believe the answer is no—the feminist-abolitionist characterization of prostitution as violence against women is not inconsistent with the concessions above. Nonetheless, feminist abolitionism's characterization of prostitution is often uncharitably interpreted in a way that would render it inconsistent with my concessions.⁵¹ This interpretation accuses feminist abolitionism of making a sweeping conceptual claim about prostitution: that the mere exchange of sex for money counts as violence.⁵²

Examples of this interpretation can be found in a recent critique of feminist abolitionism offered by Ronald Weitzer. Professor Weitzer criticizes feminist abolitionists for claiming that prostitution is violence against women and dismisses this claim as a conceptual one—rather than a claim about what is typically or often the case.⁵³ His criticism is particularly perplexing and unjustifiable given the weak evidentiary support he offers to sustain it. Weitzer singles out a quote

⁵⁰ See, e.g., Janice G. Raymond, *Prostitution as Violence Against Women: NGO Stonewalling in Beijing and Elsewhere*, 21 WOMEN'S STUD. INT'L F. 1 (1998); Finn MacKay, *Prostitution Is Violence Against Women 2*, <http://www.ldnfeministnetwork.ik.com/attachments/ProstitutionIVAW.pdf> (last visited Apr. 15, 2010); Feminist Coalition Against Prostitution (FCAP), *Prostitution Is Violence Against Women*, <http://www.fcap.btik.com> (last visited Apr. 15, 2010) ("We are a coalition of UK Feminist individuals and groups who believe that prostitution is violence against women.").

⁵¹ See, e.g., Ronald Weitzer, *Flawed Theory and Method in Studies of Prostitution*, 11 VIOLENCE AGAINST WOMEN 934, 934-35 (2005) [hereinafter Weitzer, *Flawed Theory*] (arguing that feminist theorists "view prostitution as categorically evil"); Ronald Weitzer, *Rehashing Tired Claims About Prostitution: A Response to Farley and Raphael and Shapiro*, 11 VIOLENCE AGAINST WOMEN 971, 973 (2005) (decrying "the equation of prostitution with violence" as "a central radical feminist tenet").

⁵² See, e.g., Weitzer, *Flawed Theory*, *supra* note 51, at 941-42 (asserting that, in feminist theory, "[v]iolence is intrinsic to the very definition of prostitution, so there can be no prostitution without violence"). For a similar critique, see Kamala Kempadoo's complaint that "the global sex trade cannot be simply reduced to one monolithic explanation of violence to women." Kamala Kempadoo, *Women of Color and the Global Sex Trade: Transnational Feminist Perspectives*, 1 MERIDIANS 28, 28 (2001). As explained herein, however, feminist abolitionism need not offer a "monolithic explanation" of sex trafficking or prostitution in order to support its response to these social phenomena.

⁵³ See Weitzer, *Flawed Theory*, *supra* note 51, at 936 (arguing that the feminist conceptualization of prostitution as violence is a "flawed theory" because it is impossible to verify or disprove).

from Janice Raymond, a feminist abolitionist, in which she claims that “[t]he sexual service provided in prostitution is most often violent.”⁵⁴ Of course, the fact that a practice is *most often* violent is perfectly consistent with a conceptual claim that the practice is not *necessarily* violent (i.e., that it does not, as a conceptual matter, count as violence itself). So, the nonconceptual interpretation was open to Weitzer. Yet, instead of interpreting Professor Raymond’s words in a way that would have aligned her conceptual account of prostitution with one he finds more plausible, Weitzer opts for the uncharitable interpretation. He does so by seizing on Raymond’s use of the word “intrinsic” in her claim that “violence is intrinsic to prostitution.”⁵⁵ Weitzer, presumably, took Raymond to mean “intrinsic” in the sense of “by its very nature; . . . essential.”⁵⁶ If that was her intended meaning, then her account of prostitution differs from both Weitzer’s and mine. Of course, it is entirely possible that when Raymond claimed that “violence is intrinsic to prostitution” she meant “intrinsic” in the sense of “situated within” the practice of prostitution.⁵⁷ Indeed, given that the point of Raymond’s discussion was to illustrate the violence that often occurs during the very performance of commercial sex acts, the latter definition seems more plausible.

On this account, we can understand the feminist-abolitionist claim that “violence is intrinsic to prostitution” to mean that violence occurs *within* the practice of prostitution (i.e., within the very performance of the commercial sex act). And of course it does. Even Weitzer does not deny that.⁵⁸ Now, whether this intrinsic violence occurs often might remain an issue that Weitzer and Raymond still have to debate—but Weitzer avoids this substantive debate by mischaracterizing the feminist-abolitionist claim about prostitution as one that alleges all acts of prostitution are, as a matter of conceptual necessity, violent.

In sum, Weitzer’s interpretation of feminist abolitionists’ claims about prostitution should be rejected because it ignores the target of the feminist critique: the social practice of prostitution in the real

⁵⁴ *Id.* at 942 (quoting Janice G. Raymond, *Prostitution on Demand: Legalizing the Buyers as Sexual Consumers*, 10 VIOLENCE AGAINST WOMEN 1156, 1175 (2004)).

⁵⁵ *See id.* at 941-42 (quoting Raymond, *supra* note 54, at 1175) (claiming that radical feminists’ argument that “violence is intrinsic to prostitution” obviates the need to determine how much violence actually occurs).

⁵⁶ 8 THE OXFORD ENGLISH DICTIONARY 22 (R.W. Burchfield ed., 2d ed. 1989).

⁵⁷ *Id.*

⁵⁸ *See* Weitzer, *Flawed Theory*, *supra* note 51, at 945-46 (“Violence in prostitution is a serious problem.”).

world.⁵⁹ As a social practice, rather than an abstract concept, prostitution is subject to the feminist critique because violence is typical of its practice. The feminist claim that “prostitution is violence against women” can therefore be more charitably understood as a claim that treats violence against women as an umbrella concept, extending over a number of related social phenomena, such as domestic violence, rape, sexual harassment, and stalking. Each phenomenon bears salient resemblances to the others, in virtue of the tendency each has to sustain and perpetuate patriarchal structural inequalities.⁶⁰ In this sense, each phenomenon is properly categorized as violence against women.

III. CRIMINALIZING THE PURCHASE OF SEX

Now that we have a better sense of what feminist abolitionism is, we can ask what does it *want*? As noted in Part I, feminist abolitionism advocates the abolition of sex trafficking and prostitution. These goals, of course, are not unconnected. Moreover, they are not isolated from the feminist project of dismantling patriarchal structural inequality and all wrongful structural inequalities in general. From a feminist-abolitionist view, therefore, abolition of prostitution is instrumentally valuable to the abolishment of sex trafficking, and the abolishment of sex trafficking is both intrinsically valuable and instrumentally valuable in creating a post-patriarchal society.

As noted in the Introduction, feminist abolitionism advocates a multifaceted approach to abolishing sex trafficking. The touchstone of this approach is providing realistic and valuable alternatives for prostituted people or those who are at risk of being prostituted. In practice, this involves decriminalizing the sale of sex and providing social welfare such as adequate shelter, nutrition, healthcare, drug rehabilitation, education, childcare support, employment opportunities, and other resources and support depending on circumstances. Alongside these reforms, feminist abolitionists seek to hold traffickers, pimps, and abusive customers accountable for causing direct harm to

⁵⁹ Of course, criticism of prostitution can focus solely on the commodification of sex, without attending to the harms prostitution causes in the real world, but such an abstraction—which obscures the relationship between commodification and subordination—would provide little basis for objecting to commodification in the first place. See RADIN, *supra* note 13, at 160-63 (“Commodification of significant attributes of personhood cannot be easily uncoupled from wrongful subordination.”).

⁶⁰ For a similar account of the relationship between rape and domestic violence, see Michelle Madden Dempsey, *What Counts as Domestic Violence? A Conceptual Analysis*, 12 WM. & MARY J. WOMEN & L. 301, 328-29 (2006).

prostituted people. The third aspect of the feminist-abolitionist approach to sex trafficking focuses on public-education campaigns. Through the use of popular media, abolitionists seek to change the social norms that support sex trafficking, by encouraging communities to recognize its existence and its harmfulness, and ultimately to repudiate the norms that sustain it.⁶¹

One controversial way in which feminist abolitionists have sought to achieve their goals is through the criminalization of the purchase of sex. At first glance, this approach may seem overly broad: Why criminalize the *purchase* of sex when the problem is the *trafficking* of sex? Why not simply focus on the traffickers and leave the buyers alone? Surely, if we could stop the traffickers, then sex trafficking would be abolished—goal accomplished, case closed. Once we abolish sex trafficking, we might very well be left with innocuous or even valuable forms of prostitution—but given the concessions above, that result should not be a matter of regret, right? For I just admitted, did I not, that prostitution can be genuinely valuable? If so, then why target the purchase of sex generally? Is the feminist-abolitionist call to criminalize the purchase of sex actually inconsistent with the supposed concessions offered above? In other words, once we seek to criminalize the purchase of sex, are we showing our hand—revealing our true, yet undisclosed, belief that prostitution itself is the problem?

Well, no . . . but we are revealing something about what we take to be the relationship between both (1) sex trafficking and the purchase of sex generally and (2) sex trafficking and prostitute-use. In order to illustrate these relationships and frame the arguments below, it will be helpful to set out a simplified timeframe that identifies key events occurring in the typical practice of sex trafficking and the purchase of sex more generally. I will use the labels *T1*, *T2*, and so on, to indicate sequential points, although it is not necessary that each of these events takes place in the chronology set forth below. Specifically, the events occurring at *T2*, *T3*, and *T4* need not occur sequentially.

T1: Trafficker traffics Victim;⁶²

⁶¹ For a discussion of the range of methods advocated under the Swedish model, see Ekberg, *supra* note 2, at 1188-91.

⁶² I will adopt the definition of trafficking set out in Article 3 of the U.N. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, which states in relevant part that

(a) "Trafficking in persons" shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or

T2: Purchaser pays for sex with Victim;

T3: Purchaser has sex with Victim;

T4: Trafficker receives some or all of the payment made by Purchaser at *T2*;

T5: Trafficker continues to traffic Victim (and possibly traffics additional victims).

It is not strictly relevant to the analysis that follows whether the Purchaser has sex with the Victim before or after paying, or whether the Trafficker profits before or after the Purchaser has sex with the Victim. Rather, my reason for delineating discrete timeframes is to isolate the relevance of each event in context, so as to appreciate the relationship between sex trafficking and the purchase of sex more generally. The ordinal relationship among these instances is largely irrelevant; instead, the most salient features are the motivational and contextual relationships between these events. Specifically, the motivational relationship between the events at *T4* and *T5* is key to the argument from complicity set out below; while the contextual relationship between *T1* and *T3* is key to the argument from endangerment set out below. These arguments are explained in the following two Sections.

other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;

(b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used.

G.A. Res. 55/25, Annex II, art. 3, U.N. Doc. A/RES/55/25 (Jan. 8, 2001) [hereinafter Palermo Protocol].

Given that this definition is a mouthful, recounting it each time I refer to trafficking below will prove awkward. I will therefore use the phrase “force, threats, coercion, etc.” to capture the sort of events that occur at *T1*. I do not, however, mean to imply that the definition of trafficking in the Palermo Protocol is limited to cases involving force, threats, or coercion. For a critique of misrepresentations of the terms of the Palermo Protocol definition, which unduly limit the scope of what counts as trafficking, see Kaethe Morris Hoffer, *A Response to Sex Trafficking Chicago Style: Follow the Sisters, Speak Out*, 158 U. PA. L. REV. 1831 (2010).

A. *The Argument from Complicity*

One argument supporting the feminist-abolitionist call to criminalize the purchase of sex is grounded in a theory of complicity responsibility. Complicity is a form of responsibility that focuses on the contribution one person makes to another person's wrongdoing.⁶³ With respect to any given wrong, the person who commits the wrong directly is referred to as the principal, while the person who "acts with the consequence or result that the principal commits the wrong" is called the accomplice.⁶⁴ For example, if *A* encourages *P* to murder *V*, and *P* murders *V*, then both *P* and *A* are responsible for the death of *V* in virtue of the contribution each made to that harm: *P* contributed to the death of *V* by murdering him, whereas *A*'s contribution to *V*'s death was her encouragement of *P*. The key to understanding accomplice responsibility, therefore, is the notion that the accomplice's conduct makes a difference to the principal's wrongdoing.⁶⁵

With regard to criminalizing the purchase of sex, the argument from complicity focuses on the buyer's complicity in the harms committed by traffickers and violent pimps against prostituted people. Stated in terms of its key premises, the argument is that

- (1) purchasing sex creates market demand for prostitution;

⁶³ My argument is not that people who buy sex are already liable under the criminal law doctrines of complicity. Rather it is that these people are responsible for wrongdoing by virtue of the complicitous relationship that their conduct bears to the harms inflicted on prostituted people. For two particularly helpful accounts of this sense of complicity responsibility, see CHRISTOPHER KUTZ, *COMPLICITY* 209-18 (2000), and John Gardner, *Complicity and Causality*, 1 *CRIM. L. & PHIL.* 127, 128 (2007).

⁶⁴ Gardner, *supra* note 63, at 141. In criminal law, complicity liability or accomplice liability involves holding the accomplice liable for the principal's crime. *See, e.g.*, 18 U.S.C. § 2(a) (2006) (providing for the punishment of accomplices as principals); Accessories and Abettors Act, 1861, 24 & 25 Vict., c. 94, § 8 (Eng.) (same). The common law distinctions between different forms of accessory participation—for example, aiding, abetting, counseling, procuring, inducing, and encouraging—and categorizations such as "accessory before the fact" versus "accessory after the fact" are not relevant to our discussion.

⁶⁵ The particular *kind* of difference that must be made is a matter of some debate, but all sides agree that the test for complicity is met in cases where the accomplice's conduct makes a but-for causal contribution to the principal's wrongdoing. For the sake of simplicity in outlining the argument here, I will focus on this sort of contribution. For arguments on both sides of the causal-contribution debate in complicity responsibility, compare the view expressed in Gardner, *supra* note 63, which argues that there is no way to participate in the wrongs of another without causally contributing to them, with that expressed in Christopher Kutz, *Causeless Complicity*, 1 *CRIM. L. & PHIL.* 289 (2007), which argues that "we can be complicit in others' wrongs without making a [causal] difference to the occurrence of these wrongs." *Id.* at 290.

- (2) the market demand for prostitution creates a profit motive for traffickers and pimps to satisfy that demand (i.e., to procure and maintain a supply of people who will sell sex or be sold for sex);
- (3) the profit motive generated by market demand encourages traffickers and pimps to procure and maintain a supply of people who will sell sex or be sold for sex;
- (4) in procuring and maintaining a supply of people who will sell sex or be sold for sex, traffickers and pimps often engage in harmful conduct against these prostituted people (using, for example, force, threats, coercion, etc. against them);
- (5) thus, by purchasing sex, one encourages conduct by traffickers and pimps that is often harmful to prostituted people.

According to the argument from complicity, the direct harm at issue is the use of threats, force, coercion, or other harmful measures by traffickers and pimps against prostituted people. It is therefore the traffickers and pimps who are responsible as principals, while those who purchase sex are indirectly responsible as accessories. People who buy sex, in other words, are complicit in the harms directly inflicted by traffickers and abusive pimps, in virtue of the market demand generated by the buyers' purchase of sex and the influence this demand has on the conduct of traffickers and abusive pimps.

One objection to the argument from complicity is grounded in the claim that people who purchase sex are not proper targets for criminalization because their conduct is not culpable. I will refer to this objection as the "objection-from-culpability." According to this objection, people who purchase sex may in fact encourage traffickers and abusive pimping but this mere fact does not constitute a culpable contribution to these harms.

The grain of truth in this objection is that, typically, legislatures are not justified in using the criminal law to prohibit nonculpable conduct.⁶⁶ The objection fails, however, because people who purchase sex typically are culpable with regard to the risk of contributing to trafficking and abusive pimping. Moreover, in the rare instances in which culpability is lacking, there remains adequate justification for imposing liability on prophylactic grounds.

⁶⁶ See DOUGLAS HUSAK, *OVERCRIMINALIZATION* 66 (2008).

At the risk of oversimplification, it can be said that culpability is a matter of one's state of mind as it relates to the harms to which one causally contributes.⁶⁷ States of mind such as intention and purpose are paradigmatic mental states for grounding culpability.⁶⁸ For example, in the complicity-responsibility case outlined above, in which *A* encourages *P* to murder *V*, *A* would be culpable for encouraging *P* if her purpose in so doing or the intention with which she acted was to bring about the death of *C*.

It is possible, however, to be complicit in another's harmful conduct without having a culpable purpose or intention. *A* might have simply complained about *V* to *P*, never intending to encourage *P* to harm *V*. If *P* nonetheless took *A*'s complaints as encouragement to kill *V*, then *A* would in fact be complicit in the death of *V*. However, if we assume that *A* had no idea that her complaints might encourage *P* to harm *V*, then *A* would not be culpable for her complicity.

Neither extreme seems to capture the typical case of buying sex. While some particularly bad actors may purchase sex with the purpose or intention to encourage traffickers and pimps to harm prostituted people, it seems fair to assume that this is probably not typically the case.⁶⁹ On the other hand, most people who purchase sex surely are not so naïve as to fail to realize that their conduct generates a market demand that is quite often satisfied through trafficking and abusive pimping. Indeed, it seems fair to assume that people who purchase sex typically *do* realize that their conduct generates a market demand for prostitution and that the demand for prostitution is often satisfied through trafficking and abusive pimping.⁷⁰

⁶⁷ See generally Rollin M. Perkins, *A Rationale of Mens Rea*, 52 HARV. L. REV. 905 (1939) (exploring the concept of mens rea in the criminal law context).

⁶⁸ *Id.* at 908-11.

⁶⁹ It may, however, be more typical than commonly understood. See, e.g., *infra* notes 70-71.

⁷⁰ A recent survey of prostitute-users included statements like these:

I don't get pleasure from other people's suffering. I struggle with it but I can't deny my own pleasures. In Cambodia I knocked back a lot of children; it makes it hard to sleep at night. But I don't see the point in making a moral stance.

[By paying for sex] [y]ou are the boss and get what you want.

Everyone recognises the objectification as part of the business exchange of prostitution.

JAN MACLEOD ET AL., CHALLENGING MEN'S DEMAND FOR PROSTITUTION IN SCOTLAND: A RESEARCH REPORT BASED ON INTERVIEWS WITH 110 MEN WHO BOUGHT WOMEN IN PROSTITUTION 14-20 (2008), available at <http://www.prostitutionresearch.com/ChallengingDemandScotland.pdf>.

Of course, even if the typical buyer recognizes the risk that his conduct contributes to trafficking and abusive pimping, he may wish that this were not so. Other things being equal, he may prefer a world in which he can purchase sex without contributing to these harms. But, given the realities of the world as it is, he nonetheless purchases sex, aware of the risk that he may indeed be contributing.⁷¹ Where buyers realize that their market conduct creates the risk of trafficking and abusive pimping, they possess the mens rea of recklessness and are thus culpable in their complicity.⁷²

In cases where people purchase sex while aware of their contribution to trafficking and abusive pimping (or at least aware of the risk of their contribution) the objection from culpability fails. But are all people who purchase sex aware of the risk that they could be contributing to trafficking and abusive pimping? Those with adequate financial resources, for example, may convince themselves of their ability to buy their way out of such complicity by restricting themselves to high-priced “call girls” or women who do not have pimps.⁷³ They may indeed convince themselves that segments of the prostitution market can be isolated, such that market demand in so-called “elite” prostitution does not contribute to trafficking and abusive pimping. The realities of “elite” prostitution, however, suggest otherwise: paying more

⁷¹ For a study of men who buy sex, see TEELA SANDERS, *PAYING FOR PLEASURE: MEN WHO BUY SEX* (2008). One man, a thirty-six-year-old charity worker, stated of having sexual encounters with prostitutes working on the streets,

[T]o be honest I feel it's exploitation. . . . [Prostituted people] are there because they're desperate and they've nothing else to do and there's no other choice for them. I mean . . . I don't feel happy about doing that because I'm aware that some of the people I saw . . . were fairly obviously drug addicts. Quite a lot of them I suspect may have been quite young; sort of sixteen, seventeen. . . . I mean I wasn't proud about [it] It was interesting and it was fascinating but wrong.

Id. at 52.

⁷² See Sanford H. Kadish, *Reckless Complicity*, 87 J. CRIM. L. & CRIMINOLOGY 369, 378-82 (1997) (discussing recklessness as adequate to ground culpability for complicity).

⁷³ Sanders concludes that these men demonstrated “concern with the exploitation” in prostitution and viewed the purchase of sex in some market segments as unacceptable. SANDERS, *supra* note 71, at 53. There are two interesting points to note regarding Sanders's study. First, the evidence does indeed support the conclusion that the men recognized that many prostituted people in these market segments were being harmed and that purchasing sex in these markets would contribute to the continuation of these harms. See *id.* (“Most men demonstrated an awareness of the types of exploitation that are associated with the sex industry”). Second, the men's recognition of this fact did not, by and large, deter them from purchasing sex. See *id.* at 49-56 (describing how the men's recognition of exploitative behavior “informed which markets they approached” but did not necessarily deter them from purchasing sex altogether).

for sex does not guarantee that the sex is not procured through harmful means.⁷⁴ Moreover, as with many markets, demand for high-priced goods impacts the market as a whole—the purchase of sex in the “elite” segment of the prostitution market may have a tendency to encourage demand and supply throughout.⁷⁵

Even if some people who purchase sex sincerely believe that their conduct does not encourage trafficking or abusive pimping—in other words, they lack the mens rea of recklessness—it may nonetheless be justifiable to prohibit buying sex without regard to proof of mens rea. Such criminal offenses—referred to as strict liability offenses⁷⁶—are notably distinct from culpability-based offenses, insofar as they cannot be justified on retributive grounds. A legislature may, however, draw upon harm prevention as justification for enacting such offenses, provided that the penalty for violating the prohibition is at a fairly low level.⁷⁷ The ability of a strict liability prohibition against purchasing sex to provide epistemic guidance to buyers would also arguably contribute to its justification, particularly given the extent to which buyers

⁷⁴ See, e.g., *Man Gets 8 Years for Turning Teen into Prostitute: Another Name Put on Sex Offender Registry*, TORONTO STAR, June 18, 2008, at A14, available at 2008 WLNR 11461066 (reporting the case of Josh Mfizi, who abusively pimped a teenage girl and charged buyers three hundred dollars per hour).

⁷⁵ An example of this phenomenon can be found in the relationship between market demand for genuine designer handbags and knock-off replicas, in which elite-segment market demand (i.e., demand for the expensive, genuine bags) creates an “aspirational effect” that in turn generates market demand in non-elite segments (i.e., demand for knock-offs). See Jonathan M. Barnett, *Shopping for Gucci on Canal Street: Reflections on Status Consumption, Intellectual Property, and the Incentive Thesis*, 91 VA. L. REV. 1381, 1408-11 (2005) (noting that “non-elite consumers” are likely to “value more highly the relevant good . . . given a perceived increase in the frequency of usage among elite consumers”).

The more attenuated the market dynamics, the less risk any prostitute-user has of contributing to the ultimate harm, but this “argument from reduced probabilities does not in principle defeat the case for reckless complicity.” Kadish, *supra* note 72, at 381.

⁷⁶ Of course, the sort of offense I have in mind would not be entirely strict as to each element of the actus reus. Rather, it would be strict only as to the risk that the buyer’s conduct contributes to trafficking and abusive pimping. With respect to the actus reus element of purchasing sex, however, the normal mens rea requirements would apply.

⁷⁷ See, e.g., Sexual Offences Act, 2003, c. 42, § 53A (Eng.) (as amended by Policing and Crime Act, 2009, c. 26, § 14 (Eng.)) (criminalizing the act of “paying for sexual services of a prostitute subjected to force, threats, . . . or any other form of coercion, or . . . deception” in England and Wales). It is irrelevant under the statute whether the buyer is, or ought to be, aware that the trafficker or pimp has engaged in such harmful conduct. *Id.*

are motivated to err in estimating the contribution their conduct makes to trafficking and abusive pimping.⁷⁸

Framed in these terms, does the argument from complicity prove too much? If people who buy sex can be criminalized in virtue of their conduct's contribution to trafficking and abusive pimping, what principled objection can there be to criminalizing people who buy *any* goods or services in markets where supply chains are procured and maintained through harmful means? For example, if the market demand I generate through my purchase of Nike running shoes encourages actors in the supply chain to use child labor to supply the shoes,⁷⁹ can I properly be criminalized according to the argument from complicity?

Julia O'Connell Davidson and Bridget Anderson gesture toward this *reductio ad absurdum* objection to the argument from complicity in their report on market demand in trafficking:

[T]he idea that the entire commercial sex market should be eradicated in order to tackle the problem of trafficking for prostitution[] is as draconian and wrong-headed as the idea that it is necessary to eliminate demand for carpets in order to address the problem of forced and child labour in the carpet industry.⁸⁰

There are, of course, significant differences between the purchase of shoes or carpets and the purchase of sex that may limit the force of the *reductio* objection. Two key differences may justify extending the argument from complicity to the purchase of sex, even if other forms of market demand might not be appropriately targeted. First, markets for goods such as shoes and carpets introduce multiple actors into the supply chain, attenuating the relationship between the purchaser and the directly harmful conduct perpetrated against the forced or child laborers. While this consideration is not a principled objection to the

⁷⁸ SANDERS, *supra* note 71, at 55-56; *see also* Julia O'Connell Davidson, *Eroticizing Prostitute Use* (discussing rationality errors by people who purchase sex, for example, the "fiction of mutuality"), in *PROSTITUTION* 189, 209-11 (Roger Matthews & Maggie O'Neill eds., 2003).

⁷⁹ *See* Steve Boggan, *Nike Admits to Mistakes over Child Labour*, *INDEPENDENT* (London), Oct. 20, 2001, at 15 (reporting Nike corporation's admission that it "blew it" by employing child labor in developing countries).

⁸⁰ BRIDGET ANDERSON & JULIA O'CONNELL DAVIDSON, *INT'L ORG. FOR MIGRATION, IS TRAFFICKING IN HUMAN BEINGS DEMAND DRIVEN? A MULTI-COUNTRY PILOT STUDY* 10-11 (2003), *available at* http://www.compas.ox.ac.uk/fileadmin/files/pdfs/Bridget_Anderson/BA1_Anderson%20IOM%20report.pdf. Neither Anderson nor O'Connell Davidson endorses this argument, which they characterize as equally problematic as those calling for the abolition of prostitution. *Id.* at 11.

argument from complicity, it does caution against extending its scope into complex multistep manufacturing markets.⁸¹

A second distinction of note between buying sex and buying shoes or carpets lies in the relationship between the person who does the buying and the sorts of harms inflicted on the person who is subjected to force, threats, coercion, etc. In buying shoes or carpets, one does not inflict any additional, direct harm on the person who was forced to manufacture the goods. In buying sex, however, this additional harm—or at least the risk of it—is directly inflicted by the purchaser in the sexual act of prostitute-use. The infliction of this additional harm (or risk thereof) establishes another key normative link between the purchaser of commercial sex and the harms of trafficking and abusive pimping.

Dennis Baker emphasizes the importance of establishing this normative link when he observes that a person can be responsible for causing harm by “creat[ing] ‘the demand’ for the conduct that causes the primary harm.”⁸² But this fact, standing alone, is not sufficient to establish the normative link required in order to justify criminalizing the demand-creator’s conduct. For, as Baker observes, “merely influencing another’s criminal choice is not sufficient for establishing a normative link.”⁸³ He illustrates this point by asking whether a television crew should be held criminally liable for “creating the demand for nude and violent street protests” that it happens to record for the news program.⁸⁴ “Would it not be an intolerable extension of criminal responsibility,” Baker asks, “if television crews were held criminally liable for exercising their lawful rights and liberties, simply because it might encourage others to engage in criminality?”⁸⁵

Baker is clearly correct that merely influencing another’s criminal choice is not sufficient to establish a normative link between that person’s conduct and the relevant harm. As Baker’s hypothetical aptly illustrates, people influence one another’s criminal choices in all sorts of ways that would not make them complicit in causing the resulting harms. The street protesters’ violence may well have been heightened

⁸¹ See Kadish, *supra* note 72, at 381 (acknowledging that as intervening actors increase in number, the probability of harm decreases and approaches a point where risks created are too tenuous to constitute recklessness).

⁸² Dennis J. Baker, *The Moral Limits of Criminalizing Remote Harms*, 10 *NEW CRIM. L. REV.* 370, 386-87 (2007).

⁸³ *Id.*

⁸⁴ *Id.* at 387.

⁸⁵ *Id.*

by the presence of the television crew—but we should not, on those grounds alone, conclude that the harm caused by the protest is fairly imputed to the crew.

There are, however, a number of reasons why the television-crew hypothetical is inapposite to the concerns raised by my argument. First, the potential defendants isolated in Baker's hypothetical (the television crew) do not occupy a relevantly similar position to people who purchase sex, since the crew does not create market demand for the violent activity. Rather, in some sense at least, it is the television *audience* that creates the market demand. So, in order to isolate the relevant potential defendants (those who create market demand), we have to ask about the responsibilities of viewers who constitute the television audience of the news footage (or, even more on point, we should ask about the responsibility of the "pay-per-viewers," who pay to observe the particular footage at issue).

Second, the hypothetical fails to identify any relevant harm in the sense that concerns my argument from complicity. If my argument focused on the exploitation of prostituted people (rather than on the harms they suffer), then Baker's hypothetical might suggest an interesting comparison to reality TV shows or videos that arguably exploit their participants.⁸⁶ Assuming participants in these shows are exploited, we can ask whether pay-per-viewers are normatively linked to that exploitation by virtue of the fact that they generate its market demand. I think the answer is clearly yes—there is a normative link. As such, pay-per-viewers of exploitative footage are typically complicit in the exploitation they pay to watch, by virtue of their creation of market demand. Importantly, however, this conclusion does not tell us anything interesting about whether such pay-per-viewers can properly be criminalized. It simply suggests that (1) exploitation should not count as harm for the purpose of applying the harm principle in the context of criminalization (which is why I do not rely on it for the prostitute-use argument); and (2) the normative link Baker seeks is quite easily satisfied in the typical case.

In responding to Baker's hypothetical above, I limited my conclusion to the claim that pay-per-viewers of exploitative footage are *typically* complicit in the exploitation they pay to watch. This limitation

⁸⁶ For contenders on a list of exploitative reality television shows and videos, consider the 2009 season of *Britain's Got Talent*, which ended with the mental breakdown and hospitalization of Susan Boyle, and videos such as the *Girls Gone Wild* series. See *Susan Boyle Suffers Emotional Breakdown*, PEOPLE.COM, May 31, 2009, <http://www.people.com/people/article/0,,20282349,00.html>.

allows for the possibility that a person may be justified in contributing to wrongdoing by generating market demand and, if justified, would not be properly deemed complicit, all things considered.⁸⁷ For example, in purchasing the exploitative footage in order to study—and ultimately remedy or limit—its negative effects, a purchaser makes a causal contribution that would render her prima facie complicit in the exploitation. Yet, by virtue of the justification she has for making the purchase, she would not properly be considered complicit, all things considered.⁸⁸

A similar argument regarding complicity and justification operates in the context of paying for sex and exonerates the conduct of people like Nicholas Kristof, a Pulitzer Prize-winning journalist for the *New York Times*. Kristof has spent the better part of fifteen years studying prostitution in locations such as Cambodia and India.⁸⁹ His methodology for gaining access to interview subjects is to pose as a prostitute-user and pay brothel keepers for the “services” of prostituted women and girls.⁹⁰ Once Kristof is alone with the prostituted women and girls, he attempts to gather information regarding, inter alia, the trafficking and the abusive pimping to which they are subjected.⁹¹ He then uses that information to publicize the plight of women and girls prostituted throughout the world and encourage action to end these abuses.⁹² By paying money to the brothel keepers—a payment that brothel keepers believe is made in exchange for sex with the prostituted women and girls they control—Kristof contributes to the harms of trafficking and pimping in the same way that any other purchaser does: he generates market demand. According to the argument from

⁸⁷ For a discussion of complicity and justification, see generally Gardner, *supra* note 63, at 138-40. See also John Gardner, *Justification and Reasons*, in HARM AND CULPABILITY 103 (A.P. Simester & A.T.H. Smith eds., 1996).

⁸⁸ See Gardner, *supra* note 63, at 140 (arguing that some questions of justification need to be addressed before classifying an agent as complicit, including whether alternative wrongs were avoided).

⁸⁹ These experiences are recounted in KRISTOF & WUDUNN, *supra* note 22, at 29, 35, 37-38; Nicholas D. Kristof, *Asian Childhoods Sacrificed to Prosperity's Lust*, N.Y. TIMES, Apr. 14, 1996, at A1 [hereinafter Kristof, *Asian Childhoods*]; Nicholas D. Kristof, Op-Ed., *Girls for Sale*, N.Y. TIMES, Jan. 17, 2004, at A15 [hereinafter Kristof, *Girls for Sale*]; Nicholas D. Kristof, Op-Ed., *Leaving the Brothel Behind*, N.Y. TIMES, Jan. 19, 2005, at A19 [hereinafter Kristof, *Leaving the Brothel Behind*]; Nicholas D. Kristof, Op-Ed., *Stopping the Traffickers*, N.Y. TIMES, Jan. 31, 2004 at A17 [hereinafter Kristof, *Stopping the Traffickers*].

⁹⁰ See Kristof, *Girls for Sale*, *supra* note 89 (“The only way to have access to the girls is to appear to be a customer.”).

⁹¹ See *id.* (documenting a discussion with a prostituted teenage girl in Cambodia about her experiences and desire to free herself).

⁹² *Id.*

complicity, Kristof is therefore *prima facie* complicit for those harms. However, if Kristof's payments to the brothel keepers allow him to obtain information that he then uses in order to reduce the total incidence of trafficking and prostitution (or other wrongs), and if that reduction is the reason *why* Kristof made the payments, then he cannot properly be deemed complicit all things considered. In other words, insofar as Kristof is justified in paying the brothel keepers, his contribution to the harms of trafficking and abusive pimping amounts merely to *prima facie* complicity and not complicity all things considered.⁹³

A final, related objection to the argument from complicity concerns the question of criminalizing people who choose to sell sex: if people who choose to *buy* sex are complicit in driving the prostitution market, are the people who choose to *sell* sex not complicit as well? Or, to state the question differently, if anyone actually does freely choose to sell sex, is she not complicit as well? As Julia O'Connell Davidson and Bridget Anderson put the point, "[W]e could almost say that supply generates demand rather than the other way round."⁹⁴ If the argument from complicity extends to criminalizing those who choose to sell sex, it would pose a serious objection to the feminist-abolitionist project, since feminist abolitionism has, almost uniformly, rejected criminalizing the sale of sex.

The resolution to this apparent dilemma for feminist abolitionism lies in recognizing the complexity of the notion that someone has freely chosen to sell sex. No choice is free in the sense of being wholly without constraint, and of those who might be said to have made a choice to sell sex, most do so because of economic need or other pressures—which is simply to say that prostitution "is not an option many women choose with alacrity, when many other options are on their plate."⁹⁵ This fact suggests that most people who sell sex are in a similar normative position to that examined above in the case of Kristof's purchase of sex. Insofar as people choose to sell sex, they are *prima facie* complicit for driving demand—but insofar as they do so for good reasons—for example, to pay for living expenses, provide for children,

⁹³ See Gardner, *supra* note 63, at 139-40 (discussing the propensity of potential accomplices to a crime to justify their conduct "by reference to the difference that [they] made to the overall incidence of wrongdoing").

⁹⁴ ANDERSON & O'CONNELL DAVIDSON, *supra* note 80, at 41.

⁹⁵ NUSSBAUM, *supra* note 13, at 296.

or fund their education—their conduct is justified, and thus they are not properly deemed complicit all things considered.⁹⁶

B. *The Argument from Endangerment*

Another argument supporting the feminist-abolitionist call to criminalize the purchase of sex is grounded in a theory of responsibility for endangerment. One is responsible for endangering another if one's conduct creates a significant risk of harming that person. Note that one can still be responsible for endangering another person even if no harm actually results. The key to endangerment, rather, is simply posing the risk of harm. As Antony Duff puts it, “[i]f the risk is not actualised, I merely endanger him; if it is actualised, I endanger him and harm him.”⁹⁷

Unlike the argument from complicity, which focuses on the buyer's conduct at the time of *paying* for sex, the argument from endangerment focuses on the buyer's conduct at the time he is actually *having* sex with a prostituted person. Stated in terms of its key premises, the argument from endangerment picks up where the argument from complicity left off:

- (1) In procuring and maintaining a supply of people who will sell sex or be sold for sex, traffickers and pimps often engage in harmful conduct (e.g., force, threats, coercion, etc.) against these prostituted people;
- (2) but for the threats, force, coercion, etc., these prostituted people would not submit to commercial sex;
- (3) having sex with someone who would not submit but for force, threats, coercion, etc., harms that person;
- (4) in having sex with a prostituted person, one risks having sex with someone who would not submit but for force, threats, coercion, etc.;

⁹⁶ See *supra* text accompanying notes 87-93. If there are any people who sell sex without good reason—in other words, people who have no economic need or any other justifiable reason for participating in the market for sex—then the argument from complicity would extend to condemning their conduct. However, given the extreme unlikelihood that any significant number of people fall into this category, and given the likelihood that their conduct may otherwise be excused, there are strong reasons to stand by feminist abolitionism's blanket refusal to endorse criminalizing the sale of sex.

⁹⁷ R.A. DUFF, ANSWERING FOR CRIME 151 (2007).

- (5) thus, in having sex with a prostituted person, one risks harming that person.

According to the argument from endangerment, the direct harm at issue is the sexual conduct with a person who has been forced, threatened, coerced, etc., into submitting to the commercial sex act. The purchaser is no longer merely an accomplice to the traffickers' or pimps' directly harmful conduct (as is the case in the argument from complicity); rather, according to the argument from endangerment, it is the purchaser himself who is the principal. He directly inflicts the harm—or at least takes the risk that he may be directly inflicting this harm.

In cases where force, threats, coercion, or deception used by the trafficker are sufficient to vitiate the prostituted person's consent to engage in commercial sex, the harm inflicted by the purchaser in the act of prostitute-use is not simply risked, it is actually inflicted. This harm, inflicted directly on the prostituted person, is tantamount to the harm experienced in the paradigmatic sexual offenses of rape and sexual assault.⁹⁸ Being subjected to rape or sexual assault is, of course, typically extremely harmful to the victim⁹⁹—this is the harm to which Evelina Giobbe referred when she famously characterized the purchase of commercial sex in prostitution as “buying the right to

⁹⁸ See Victor Tadros, *No Consent: A Historical Critique of the Actus Reus of Rape*, 3 EDINBURGH L. REV. 317, 335 (1999) (“It would seem unobjectionable to convict [a] client of rape if he was aware that [a prostituted person] was being threatened with force.”). I characterize these harms as “tantamount” to rape and sexual assault to allow for distinction between these harms, which are serious and considerable in their own right, and the harms experienced by prostituted people when they experience sexual violations in prostitution that are more commonly identified as rape or sexual assault.

⁹⁹ For a classic study of the harms of sexual violence, see LIZ KELLY, *SURVIVING SEXUAL VIOLENCE*, 186-216 (1988). The harmfulness of sexual violation in prostitution, of course, is typically not a one-time event but is instead part of a continuing pattern, with each incident of prostitute-use contributing to the harm. For a detailed analysis of the harms suffered by chronically traumatized people, including prostituted people, see generally JUDITH LEWIS HERMAN, *TRAUMA AND RECOVERY* 7-74 (1992). Melissa Farley has documented the harmfulness of sexual violation in prostitution in a series of works. See *PROSTITUTION, TRAFFICKING, AND TRAUMATIC STRESS* (Melissa Farley ed., 2003) (providing a collection of essays about prostitution and traumatic stress); Melissa Farley, *Prostitution and the Invisibility of Harm*, 26 *WOMEN & THERAPY* 247, 248 (2003) (criticizing the “social and legal refusal to acknowledge the harm of prostitution”); Melissa Farley et al., *Prostitution in Five Countries: Violence and Post-Traumatic Stress Disorder*, 8 *FEMINISM & PSYCHOL.* 405 (1998) (documenting the violence and traumatic stress inflicted on women who are prostituted). For a discussion of the limitations of the trauma model to understanding sexual violence, see Sharon M. Wasco, *Conceptualizing the Harm Done by Rape: Applications of Trauma Theory to Experiences of Sexual Assault*, 4 *TRAUMA, VIOLENCE & ABUSE* 309, 309-22 (2003).

rape.”¹⁰⁰ As Giobbe correctly observes, “[i]n order for a choice to be made freely there must be an absence of coercion or violence.”¹⁰¹ Where coercion and violence are present, the act of prostitute-use is tantamount to rape.¹⁰²

As I conceded above, it is possible that some people who sell sex genuinely consent to do so. In those instances of prostitute-use, the purchaser does not inflict the sort of harm identified here. Rather, the person who purchases sex merely *risks* imposing this harm. To risk the infliction of harm on another person is to endanger that person. Endangerment—which can be distinguished from an attack¹⁰³—is best understood as “the creation of risk without any intention to cause either the relevant substantive harm or the risk of it.”¹⁰⁴ In the criminal law, endangerment is paradigmatically criminalized as an offense that requires a mens rea of recklessness (i.e., an awareness of taking an unjustified risk). Indeed, many jurisdictions have a blanket offense covering all forms of reckless endangerment.¹⁰⁵ Such offenses are grounded on the belief that “[i]f we act, without justification, in a way that we realise might harm others, when that prospective harm

¹⁰⁰ Evelina Giobbe, *Prostitution: Buying the Right to Rape*, in RAPE AND SEXUAL ASSAULT III 143, 143 (Ann Wolbert Burgess ed., 1991).

¹⁰¹ *Id.* at 144.

¹⁰² On one account of consent, what we might call a relational account, the use of force, threats, coercion, etc., by *T* against *V* in order to secure *V*'s submission to sex with *D* does not vitiate *V*'s consent to *D*, unless *D* actually knew—or at least suspected—that *V* had submitted under such conditions. If *D* is genuinely ignorant of the background conditions under which *V* submits, the argument goes, her consent remains unaffected. This account of consent strikes me as inconsistent with our best understanding of consent and instead captures cases in which *V* does *not* consent to *D* yet the question of whether *D* is culpable for his conduct remains to be determined by other considerations—for example, whether his ignorance was culpable. If *D*'s ignorance is culpable, then he is not to blame for inflicting this harm on *V*, yet he causes *V* harm nonetheless. See Dempsey, *supra* note 48, at 448 n.24 (explaining my belief that “English rape law treats consent as a non-relational concept, whereby force employed by *X* can negate *Y*'s consent to *Z*” (italics added)). My thanks to Andrew von Hirsch for pressing me on this point.

¹⁰³ Here, I follow Antony Duff's helpful analysis. See R.A. Duff, *Criminalizing Endangerment*, in DEFINING CRIMES 43, 51 (R.A. Duff & Stuart P. Green eds., 2005).

¹⁰⁴ *Id.*

¹⁰⁵ See, e.g., ALA. CODE § 13A-6-24 (2006) (“A person commits the crime of reckless endangerment if he recklessly engages in conduct which creates a substantial risk of serious physical injury to another person.”); COLO. REV. STAT. § 18-3-208 (2008) (similar); CONN. GEN. STAT. § 53a-63 (West Supp. 2007) (similar); N.Y. PENAL LAW § 120.20 (McKinney 2009) (similar).

provides a conclusive reason against acting thus, we do wrong; we do wrong *to* those whom we thus endanger.”¹⁰⁶

Understood according to a theory of criminalization grounded in the argument from endangerment, the sort of offense I have in mind would be properly characterized as what Duff calls an “implicit endangerment” offense.¹⁰⁷ Duff correctly notes that some endangerment offenses (“explicit endangerment” offenses) are articulated in terms of elements that require proof that the actual risk at issue was posed. Examples include offenses such as dangerous driving and reckless endangerment.¹⁰⁸ Framed as an explicit endangerment offense, the purchase of sex would be prohibited only in instances where the prostituted person *actually had been* subjected to background conditions that would vitiate her consent to the subsequent commercial sex act.¹⁰⁹ In

¹⁰⁶ Duff, *supra* note 103, at 53. Note, however, that the identification of wrongful harm would not, in itself, justify criminalizing the conduct. Further considerations would have to be taken into account to do so. Duff would add the further requirement that the conduct at issue be sufficiently public in nature, rather than address mere private wrongdoing. *See id.* I shall assume here that the case of purchasing sex in the context of the prostitution industry as currently practiced is adequately public so as to meet Duff’s concerns. In previous work, I have questioned the fruitfulness of employing the public/private dichotomy in this way. *See* DEMPSEY, *supra* note 9, at 31-41. The public/private dichotomy, particularly as applied in the context of violence against women, has long been a target of feminist critique. *See generally* Anita L. Allen, *Coercing Privacy*, 40 WM. & MARY L. REV. 723 (1999) (offering a thoughtful treatment of these critiques and a reconstruction of the value of privacy).

¹⁰⁷ Duff, *supra* note 103, at 59 (characterizing an “implicit endangerment” offense as an offense whose definition contains no explicit reference to harm).

¹⁰⁸ *Id.*

¹⁰⁹ The recently adopted law in England is framed as an explicit endangerment offense (albeit a strict-liability one):

- (1) A person (*A*) commits an offence if—
 - (a) *A* makes or promises payment for the sexual services of a prostitute (*B*),
 - (b) a third person (*C*) has engaged in exploitative conduct of a kind likely to induce or encourage *B* to provide the sexual services for which *A* has made or promised payment, and
 - (c) *C* engaged in that conduct for or in the expectation of gain for *C* or another person (apart from *A* or *B*).
- (2) The following are irrelevant—
 - (a) where in the world the sexual services are to be provided and whether those services are provided,
 - (b) whether *A* is, or ought to be, aware that *C* has engaged in exploitative conduct.
- (3) *C* engages in exploitative conduct if—
 - (a) *C* uses force, threats (whether or not relating to violence) or any other form of coercion, or

those cases, the agreement to purchase sex poses an actual risk of harm to the nonconsenting prostituted person, namely, the risk that she will be subjected to a nonconsensual commercial sex act.

The offense I have in mind, however, would not require actually posing a risk. It would instead criminalize the purchase of sex in all instances as an “implicit endangerment” offense. As Duff has explained, “[I]mplicit [endangerment] offences lay down rules that are intended to capture part of the content of the standards declared in the explicit offences.”¹¹⁰ They are, in other words, intended to identify the context in which the risk of harm is likely to materialize, without requiring that the harm in fact materialize in any given case. Examples include driving with blood alcohol content in excess of a certain level, speeding, and impersonating a medical doctor or lawyer.¹¹¹

One important benefit to enacting the prohibition against buying sex in terms of an implicit, rather than an explicit, endangerment offense is the tendency such a definition has to “promote certainty and consistency: citizens can know what they may or may not do.”¹¹² Indeed, framed as an implicit endangerment offense, the goals of certainty and consistency are well served. The prohibition is simple: do not buy sex. Compare this prohibition to the one that might be framed as an explicit endangerment offense: do not buy sex from someone who has been forced, threatened, coerced, etc.¹¹³ The benefits of certainty and consistency in this area are particularly acute given the deep and abiding conflicts in judging the borderline of concepts such as consent, force, coercion, etc. This point is well illustrated by one buyer who observed,

(b) C practises any form of deception.

Sexual Offences Act, 2003, c. 42, § 53A (Eng.) (as amended by Policing and Crime Act, 2009, c. 26, § 14 (Eng.)) (italics added). As noted in the previous section, the English law seems to draw justification from both the argument from complicity and the argument from endangerment.

¹¹⁰ Duff, *supra* note 103, at 60.

¹¹¹ *Id.* at 59; *see also, e.g.*, 42 PA. CONS. STAT. ANN. § 2524 (West 2004) (making unauthorized practice of law in Pennsylvania a misdemeanor); 63 PA. CONS. STAT. ANN. § 422.10 (West 2010) (prohibiting the unlicensed practice of medicine); 75 PA. CONS. STAT. ANN. § 3362 (West 2006) (prohibiting driving in speed in excess of posted limits); 75 PA. CONS. STAT. ANN. § 3802 (West 2008) (prohibiting driving under the influence of drugs or alcohol in Pennsylvania).

¹¹² Duff, *supra* note 103, at 60.

¹¹³ *See, e.g., supra* note 109 (quoting the Sexual Offences Act, 2003, c.42, § 53A (Eng.)).

The organized crime aspect does concern me. I suppose that it's more the worry of things like the illegal immigrants and women under duress. I think it's that aspect of duress that sort of concerns me as much as anything. And it's always a fine line, isn't it, as to what counts as duress.¹¹⁴

Moreover, the need for certainty in prohibiting the purchase of sex on grounds of endangerment is particularly pressing in light of the fact that buyers are often inept at gauging the genuineness of a prostituted person's consent. Rather than recognize possible signs of background conditions that might suggest that the prostituted person is not genuinely consenting, buyers are typically highly motivated "to construct some kind of fiction of mutuality around their encounters with prostitutes."¹¹⁵ In other words, buyers are particularly likely to err on the side of sex, rather than on the side of caution.¹¹⁶ Thus, if it is indeed "always a fine line . . . as to what counts as duress"¹¹⁷—and, conversely, what counts as consent¹¹⁸—and if prostitute-users are prone to cognitive errors in judging where that fine line lies,¹¹⁹ then it is advisable to draw the line brightly by prohibiting the purchase of sex generally.

Before considering objections to the argument from endangerment, it is worth noting that this argument does not justify imposing significant punishment or harsh condemnation upon people who purchase sex. As with the argument from complicity, the sorts of penalties envisioned under the argument from endangerment would be limited to fines, public service, or perhaps education regarding the harms of trafficking and prostitution.¹²⁰

¹¹⁴ SANDERS, *supra* note 71, at 54-55.

¹¹⁵ O'Connell Davidson, *supra* note 78, at 209.

¹¹⁶ A similar phenomenon occurs in cases of speeding and drunk driving. It is possible that some people do not actually pose a risk, despite driving at high speeds or with an elevated blood alcohol content; yet, because "we are notoriously prone to exaggerate our driving skills[,] and someone who is in a hurry, or who has already had a drink, is not well placed to decide whether he can drive safely at that speed, or after another drink," it may be justifiable to adopt a general bright-line rule based on alcohol content rather than actual impairment. Duff, *supra* note 103, at 61.

¹¹⁷ SANDERS, *supra* note 71, at 54-55.

¹¹⁸ On the converse relationship between duress and consent in the criminal law of rape, see generally Anne M. Coughlin, *Sex and Guilt*, 84 VA. L. REV. 1 (1998).

¹¹⁹ See O'Connell Davidson, *supra* note 78, at 209-13 (describing the tendency of prostitute-users to view their sexual encounters as mutually enjoyable).

¹²⁰ On the topic of educating prostitute-users regarding the harms experienced by prostituted people, see generally Iris Yen, *Of Vice and Men: A New Approach to Eradicating Sex Trafficking by Reducing Male Demand Through Educational Programs and Abolitionist Legislation*, 98 J. CRIM. L. & CRIMINOLOGY 653 (2008).

Still, even if the proposed penalties are limited, does the argument from endangerment risk proving too much? Is it possible to extend its logic to cover *all* instances of sexual conduct—commercial *and* noncommercial? After all, in every instance of sexual conduct, there is *some* risk that one of the parties is not genuinely consenting. Given our limited ability to know with certainty whether our partners are genuinely consenting, are we not posing an unjustified risk of harming our partners each time we have sex? In my opinion, the argument from endangerment does not extend so far. Rather, I believe its scope is limited, by virtue of the comparative likelihood of nonconsent in each context. Based on the plausible assumption that the likelihood that a prostituted person is not genuinely consenting to commercial sex is greater than the likelihood that there is a lack of genuine consent in noncommercial sex, the distinction marks a salient place to draw the line and prevents the argument from endangerment from extending to noncommercial sex *tout court*.

A final objection to the argument from endangerment might be launched from the perspective of those who freely choose to sell sex. In seeking to deter buyers from purchasing sex for fear of the risk that the person selling sex might not be genuinely consenting, are feminist abolitionists treating the sellers as if they were children? As Julia O'Connell Davidson notes, "[F]emale sex workers at the top end of the commercial sex market have been telling [feminist abolitionists] that they wish to continue to do what they do."¹²¹ If this is so, then who are we to tell them they cannot continue? In response to this critique, feminist abolitionists can point first to the fact that nothing in their project supports prohibiting the sale of sex. In a direct sense, we are not telling these women that they cannot continue to do what they wish to do—rather, we are simply attempting to discourage prostitute-users from doing what *they* do. Moreover, as noted above, feminist abolitionism need not even deny the possibility that some people who sell sex do so freely. So, *pace* O'Connell Davidson, it is not the case that feminist abolitionism "ignor[es]" the fact that these women "wish to continue to do what they do."¹²² Rather, the point of the argument from endangerment is simply that there are many prostituted women who do *not* freely choose to sell sex; that buyers are not in a good epistemic or motivational position to judge which women are freely choosing and which are not; and that the risk of harm posed to the noncon-

¹²¹ O'Connell Davidson, *supra* note 6, at 61.

¹²² *Id.*

senting prostituted women vastly outweighs the benefits realized by freely choosing prostituted women. In other words, the feminist-abolitionist response to the woman who freely chooses to sell sex is not to deny that she exists or to treat her as a child; it is instead to say that her choice to sell sex does not justify the risk of harm posed to other prostituted people who *are* sold against their will.

IV. DEFENDING FEMINIST ABOLITIONISM

A. *Does Feminist Abolitionism Support Policing Morality?*

The above arguments provided a rational basis for criminalizing the purchase of sex on two alternative grounds: (1) that the market dynamics of purchasing sex render buyers complicit in the harm prostituted people suffer at the hands of traffickers and abusive pimps; and (2) that buying sex constitutes endangerment insofar as prostitute-use poses a risk of causing direct harm to prostituted people who have not genuinely consented to the commercial sexual act. Both arguments are grounded on the link between buying sex and the harms suffered by prostituted people. As such, both arguments are fundamentally harm-based arguments.

Of course, it is also the case that it is morally wrong to engage in conduct that renders one complicit in the harms inflicted on prostituted people or that directly risks inflicting such harms; indeed, it may very well be morally wrong to purchase sex for reasons that have little or nothing to do with the harms to prostituted people.¹²³ Yet, while all this is true, it is crucial to note the distinctions between these lines of thought and the arguments developed in Part III, for neither argument offered above in support of criminalizing the purchase of sex rests solely on the morally wrongful quality of this conduct. In other words, the arguments developed above are *not* arguments in favor of morals-based legislation; they do not call for the criminalization of buying sex simply on the grounds that buying sex is morally wrong. Instead, they are harm-based arguments calling for the criminalization of buying sex because such a purchase causes harm to others.¹²⁴ There

¹²³ The anticommodification literature, for example, has developed strong arguments against buying sex that do not depend on the harms caused to prostituted people. See RADIN, *supra* note 13, at 131-36 (considering commodification and prostitution).

¹²⁴ That buying sex is morally wrong operates as a side constraint to its justifiable criminalization, but it does not itself justify the criminal sanction. For insightful argu-

are, of course, arguments that can be offered in favor of criminalizing the purchase of sex solely on grounds of its moral wrongfulness, or on the ground that such conduct causes harm to someone or something other than prostituted people,¹²⁵ but those are not the arguments under consideration here. Rather, the point of criminalizing the purchase of sex, according to the argument from complicity and the argument from endangerment, is to prevent harm to others, specifically, to prostituted people.¹²⁶

B. *Is a Blanket Prohibition on the Purchase of Sex Unduly Broad?*

Ronald Weitzer has accused feminist abolitionism of casting too wide a net in its calls to criminalize the purchase of all sex. The better option, he argues, is to limit our condemnation to the most harmful segments of the commercial sex industry, such as street prostitution.¹²⁷ Feminist-abolitionist groups, he claims, “can be criticized for . . . fail[ing] to draw important distinctions between different types of prostitutes.”¹²⁸ This failure, he claims, is grounded in feminist aboli-

ments in favor of limiting the scope of criminalization to wrongful conduct, see HUSAK, *supra* note 66, at 66.

¹²⁵ It is commonly thought that the arguments famously put forth by Lord Devlin in PATRICK DEVLIN, *THE ENFORCEMENT OF MORALS* 14-15 (1959), would, if sound, justify criminalizing prostitution on moral grounds alone. Yet Devlin’s arguments are better understood as at least quasi-harm-based, insofar as he was concerned about the harm of societal disintegration through a lack of shared positive morality. See Gerald Dworkin, *Devlin Was Right: Law and the Enforcement of Morality*, 40 WM. & MARY L. REV. 927, 931 (1999) (noting Devlin’s “equation of immorality with treason and his advocacy of the right of any state to defend against . . . the harm that would occur if the actual moral code of a society were allowed to be attacked and weakened”). Modern scholars have also supported morals-based legislation. See, e.g., ROBERT P. GEORGE, *MAKING MEN MORAL: CIVIL LIBERTIES AND PUBLIC MORALITY* 47 (1993) (“[L]aws that effectively uphold public morality may contribute significantly to the common good of any community . . .”); see also Thomas Søbirk Petersen, *New Legal Moralism: Some Strengths and Challenges*, 4 CRIM. L. & PHIL. (forthcoming June 2010) (examining arguments for and against the new legal moralism).

¹²⁶ There are myriad other harm- or nuisance-based arguments that have been offered in support of criminalizing prostitution across the board. See, e.g., Ronald Weitzer, *The Politics of Prostitution in America* (describing grievances articulated by neighborhood campaigns against prostitution, including harassment of women, costs to merchants, and neighborhood decline), in *SEX FOR SALE* 159, 166-70 (Ronald Weitzer ed., 2000).

¹²⁷ See *id.* at 170 (“Commercial sex in private appears to be acceptable [to the public at large], as long as it has no spillover effects in the public arena.”); Ronald Weitzer, *Flawed Theory and Method in Studies of Prostitution*, 11 VIOLENCE AGAINST WOMEN 934, 945 (2005) (arguing that street prostitutes are more vulnerable to violence than prostitutes in indoor settings).

¹²⁸ Weitzer, *supra* note 126, at 174.

tionists' embrace of "the radical feminist line on prostitution (seeing it as inherently oppressive and demeaning)."¹²⁹ Yet, as I hope the argument from complicity and the argument from endangerment have demonstrated, it is possible to build a harm-based argument against the purchase of sex without endorsing the idea that all prostitution is harmful (or oppressive, demeaning, etc.). The question then becomes whether it is possible to carve out an exception for certain types of prostitution—to hold that buying sex in certain contexts is permissible, while in other (more harmful) contexts, it is not. To do so, we would have to be confident that such distinctions can be made. Yet, as Melissa Farley has demonstrated, it is naïve to believe we can neatly separate different segments of the prostitution market.¹³⁰

Moreover, the proposal to carve out an exception for certain types of prostitution ignores the logic of the argument from complicity. According to that argument, the buyer is responsible for causing harms to prostituted women not because he directly inflicts the harm through his act of prostitute-use, but because his purchase of sex generates demand for the commercial sex market, which thereby encourages the trafficking and abusive pimping that often supplies this market. Thus, even if it were possible to identify a segment of the prostitution market in which buyers did not directly inflict harm on prostituted people, it would have to be established that the buyers' market demand did not encourage trafficking and abusive pimping in other market segments. *If* it were possible to segment the prostitution market and *if* demand in elite prostitution did not contribute to market growth in more problematic market segments, then the objection from overbreadth would hit its mark. The feminist-abolitionist response, however, is that neither "if" reflects a plausible account of the market dynamics of prostitution as currently practiced.¹³¹

¹²⁹ *Id.* For objections to Weitzer's interpretation of feminist arguments regarding prostitution, see *supra* text accompanying notes 51-60.

¹³⁰ See Melissa Farley, *Prostitution Harms Women Even If Indoors: Reply to Weitzer*, 11 VIOLENCE AGAINST WOMEN 950, 955 (2005) ("In practice, indoor prostitution increases the trick's safety, but it does nothing to decrease psychological trauma for the prostituted woman. The social invisibility of indoor prostitution may actually increase its danger.").

¹³¹ See Richard Poulin, *The Legalization of Prostitution and Its Impact on Trafficking in Women and Children*, <http://sisyphe.org/spip.php?article1596> (last visited Apr. 15, 2010) (arguing that "the legalization of prostitution . . . generates a colossal expansion of [the prostitution] industry and of the trafficking which is its corollary"); see also MARY SULLIVAN, COAL. AGAINST TRAFFICKING IN WOMEN, WHAT HAPPENS WHEN PROSTITUTION BECOMES WORK? AN UPDATE ON LEGALISATION OF PROSTITUTION IN AUSTRALIA 14-16 (2005), http://action.web.ca/home/catw/attach/Sullivan_proof_01.pdf

C. *Will Criminalizing the Purchase of Sex Actually
Reduce Harm to Prostituted People?*

The arguments above support criminalizing the purchase of sex on grounds that buying sex harms prostituted people. In order for criminal laws prohibiting the purchase of sex to be justifiable, it may be thought necessary for criminalization to have the opposite effect and actually reduce harm to prostituted people.¹³² If the laws are ineffective in reducing harm to prostituted people, or worse yet, if they have the unintended consequence of increasing those harms, they will not be justifiable.¹³³ This argument is not limited to the realm of prostitution. Any use of the criminal law may generate unintended consequences, and optimistic reformers must remain vigilant to this possibility.¹³⁴

In the context of prostitution debates, there are three issues that are worth separating regarding the likely impact of criminalizing the purchase of sex: First, whether criminalizing the purchase of sex deters men from buying sex. Second, whether prostituted women will suffer fewer harms if men are deterred from buying sex. Finally,

(discussing the increase in illegal trafficking accompanying the expansion of the legalized prostitution markets in Australia).

¹³² There is, however, some debate in criminal law theory regarding this matter. In a traditional interpretation of Mill's harm principle, the fact that a person's conduct causes harm to others is a good reason in favor of criminalizing that conduct. See I FEINBERG, *supra* note 10, at 11 ("John Stuart Mill argued in effect that the harm principle is the *only* valid principle for determining legitimate invasions of liberty . . ."). In a more recent reinterpretation of the harm principle, though, "it is the harm prevented by the law, rather than the harm done by the criminal offence, that matters in determining whether the principle was satisfied." John Gardner, Book Review, NOTRE DAME PHIL. REV., Aug. 3, 2008, <http://ndpr.nd.edu/review.cfm?id=13805> (reviewing HUSAK, *supra* note 66). In some respects, the latter interpretation allows for a wider scope of criminalization, insofar as it allows for criminalization of conduct that is not itself harmful. (For criticism of this latter interpretation, see HUSAK, *supra* note 66, at 72.) In other respects, however, the latter interpretation of the harm principle restricts the scope of justifiable criminalization, for the law must actually reduce the harm that it is intended to reduce and must "do so in a way that is proportionate to the harm actually prevented." Gardner, *supra*.

¹³³ In other words, I am accepting the limitations imposed by both the traditional and more recent interpretations of the harm principle discussed *supra* note 132.

¹³⁴ As John Gardner observes,

[L]egislators often assume that criminalizing an activity tends to reduce its incidence, or at least tends to eradicate its worst excesses. They ignore the reality that banning an activity often drives it underground where it become[s] more profitable (and hence more attractive to appalling people) as well as harder to supervise (and hence more appalling).

Gardner, *supra* note 132.

whether, if men were criminalized for purchasing sex but did so nonetheless, that would increase the harm to prostituted women.

On the first issue, opinion is split. The most pessimistic voices in this debate conclude that criminalization will not only fail to deter but that it may increase demand among men for whom the risk of buying sex is an “erotic factor.”¹³⁵ Research based on interviews with men who buy sex, however, provides a far more optimistic view of the likely deterrent effect of criminalization. Indeed, empirical research regarding demand for prostitution has found that there are a number of equally effective means of deterring men from buying sex, including the use of criminal penalties.¹³⁶ The effect of the Swedish law is currently being evaluated by the Swedish government,¹³⁷ but early signs indicate that it has deterred the purchase of sex, resulting in a reduction of trafficking and street prostitution.¹³⁸

Regarding the second issue, it is important to recall that the feminist-abolitionist project is not solely about criminalizing the purchase of sex. It would be naïve to think that criminalization of buyers, standing alone, will have the desired effect of reducing harm to prostituted women. Rather, the criminalization of the purchase of sex is one part of a broader project that includes the provision of social welfare to prostituted people as a key component. Early reports suggest that the provision of these resources, in combination with the criminalization of buyers, has had a positive impact on the welfare of prosti-

¹³⁵ BELINDA BROOKS-GORDON, *THE PRICE OF SEX* 259 (2006). Curiously, Brooks-Gordon fails to cite any evidence in support of this claim.

¹³⁶ See RACHEL DURCHSLAG & SAMIR GOSWAMI, *CHI. ALLIANCE AGAINST SEXUAL EXPLOITATION, DECONSTRUCTING THE DEMAND FOR PROSTITUTION: PRELIMINARY INSIGHTS FROM INTERVIEWS WITH CHICAGO MEN WHO PURCHASE SEX* 3 (Ruth Durchslag et al. eds., 2008), available at <http://www.caase.org/pdf/resources/17-deconstructing-the-demand-for-prostitution.pdf> (reporting on the results of a study in which eighty-three percent of men interviewed stated that the threat of jail time would deter them from purchasing sex); MACLEOD ET AL., *supra* note 70, at 26-28 (explaining that the most effective deterrents were, not surprisingly, the most condemnatory and shaming penalties, such as being added to a sex offender registry; having their picture or name on a billboard, local newspaper, or the Internet; or having to spend time in jail).

¹³⁷ See, e.g., *Sweden to Evaluate Effects of Prostitution Law*, LOCAL, Apr. 24, 2008, <http://www.thelocal.se/11322/20080424> (describing the Swedish inquiry into the effects of Sweden's ban on prostitution).

¹³⁸ See JULIE BINDEL & LIZ KELLY, *LONDON METRO. UNIV., A CRITICAL EXAMINATION OF RESPONSES TO PROSTITUTION IN FOUR COUNTRIES: VICTORIA, AUSTRALIA; IRELAND; THE NETHERLANDS; AND SWEDEN* 72-79 (2003) (reporting increasing public support, a significant decrease in street prostitution, and a decrease in Sweden's attractiveness to traffickers); Ekberg, *supra* note 2, at 1193, 1199 (noting a decrease in the incidence of street prostitution and a positive effect in reducing trafficking).

tuted women in Sweden.¹³⁹ Of course, it should come as no surprise that the provision of social welfare has a harm-reduction effect. The real issue is whether criminalizing buyers enhances this effect—can the harm-reduction effect of the Swedish model be achieved without criminalizing the purchase of sex? If so, then the feminist-abolitionist arguments fail to justify penalizing buyers. Yet, insofar as the two aspects of the feminist-abolitionist project are mutually reinforcing—providing a “holistic approach to the problems of prostitution”¹⁴⁰—there remain good reasons to criminalize the purchase of sex alongside the provision of social welfare to prostituted people.

The third issue highlights the greatest problem confronting feminist abolitionism: the risk of unintended consequences.¹⁴¹ Is it possible that criminalizing the purchase of sex will not only fail to deter but will in fact make things worse for prostituted women?¹⁴² One

¹³⁹ See BINDEL & KELLY, *supra* note 138, at 78 (noting a marked decrease in prostitution-related violence since the passage of Sweden’s law).

¹⁴⁰ *Id.* at 25.

¹⁴¹ Victoria Nourse puts the point well: “Feminist reforms have a kind of built-in, albeit unpredictable, capacity for failure; like the apple harboring the worm, they harbor the possibility of their own undoing.” Victoria Nourse, *The “Normal” Successes and Failures of Feminism and the Criminal Law*, 75 CHI.-KENT L. REV. 951, 953 (2000). For this reason, Aya Gruber is correct to counsel caution in using progressive feminist reforms to address violence against women, for, as she notes, “[e]ven ‘progressive’ criminal reforms rest on the assumption that proper education of state actors will enable the criminal system to empower rather than subordinate minorities. . . . [H]owever well-intentioned, most criminal law reforms end up becoming yet another procedural vehicle for warehousing the worst off.” Aya Gruber, *The Feminist War on Crime*, 92 IOWA L. REV. 741, 822-23 (2007) (footnote omitted). Yet, as Nourse points out, “[t]his does not mean that reform is futile, but it may simply mean that reform demands perpetual vigilance.” Nourse, *supra*, at 978.

¹⁴² The unintended consequences of criminalizing the purchase of sex include the harms that may be suffered disproportionately by men who are already socially disempowered. Given the negative uses of criminal law throughout history and still today, such as racist law-enforcement policies, there is reason to resist using the criminal law as a tool for positive social change. See generally MICHAEL TONRY, *MALIGN NEGLECT—RACE, CRIME, AND PUNISHMENT IN AMERICA* (1995) (discussing the disparate impact crime-control policies can have on disadvantaged communities); Angela J. Davis, *Benign Neglect of Racism in the Criminal Justice System*, 94 MICH. L. REV. 1660, 1663 (1996) (reviewing TONRY, *supra*) (discussing racial discrimination within the criminal justice system). Since racism is fundamentally inconsistent with feminist commitments to abolish all wrongful structural inequalities, feminists should resist any reforms that will tend to exacerbate racism. See DEMPSEY, *supra* note 9, at 129-35. This risk of unintended consequences poses a serious objection to feminist abolitionism. Yet, it is important to bear in mind that feminist-abolitionist reforms like the Swedish model, if adopted in the United States, would not expand the criminal law’s power; it would reduce it. At present, in most jurisdictions throughout the United States, both sellers and buyers are criminalized. Feminist abolitionist reforms would therefore restrict the power of the criminal law by decriminalizing people who sell sex. Thus, to the extent

obvious way this problem might arise is through a reduction of street prostitution and a corresponding rise in indoor prostitution. The effect of criminalizing the purchase of sex may be that prostitution is driven indoors, where its “social invisibility . . . may actually increase its danger.”¹⁴³

The risk of unintended consequences is a serious concern for the feminist-abolitionist project. Even if criminalization has the desired deterrent effect on potential buyers (thereby reducing the overall amount of trafficking, abusive pimping, and infliction of harm through prostitute-use), it is unlikely that complete abolition will ever be achieved. Thus, even while the overall amount of harm to prostituted people is reduced, those who are unable to exit may be subjected to even greater harm. Of course, the risk of increased harm to a relatively smaller number of people does not in itself defeat the feminist abolitionists’ argument; it does, however, starkly illustrate the cost of the proposed criminal law reforms. While these costs must be kept in mind, it is crucial to recall that the goal of criminalization is not simply a short-term readjustment of the costs and benefits of prostitution.¹⁴⁴ Rather, the goal of the feminist-abolitionist project is a long-term transformation to a post-patriarchal society: one in which prostitution likely would not exist at all, and if it did, would represent one of a range of valuable options available to all people.¹⁴⁵

that current criminal laws are being used in racist and other problematic ways (e.g., by targeting disempowered women of color who sell sex, while allowing relatively powerful middle-class white men to go free), the proposed reforms would improve the criminal justice system by limiting its scope.

¹⁴³ Farley, *supra* note 130, at 955.

¹⁴⁴ See Nourse, *supra* note 141, at 978 (“Statutory reform rarely ends anything. It may transform the debate, yet it would be naïve to believe that it could ‘end’ a matter as ancient as sexism. This does not mean that reform is futile, but it may simply mean that reform demands perpetual vigilance.”).

¹⁴⁵ It is difficult, of course, to know whether this long-term goal will be achieved, particularly in light of the fact that there has never been a widespread adoption of the feminist abolitionist program. If, in the end, abolition does more good than harm, then this consideration lends further support to my argument. While abolitionists adopt an optimistic stance toward unknown contingencies (perhaps to the point of being, as Gloria Steinem puts it, “hopeaholics”), nonabolitionists remain rather more pessimistic. Gloria Steinem, *I’m a Hopeaholic. There’s Nothing George Bush Can Do About It*, *GUARDIAN* (London), Sept. 13, 2005, at 28. For insightful reflection on the difficulties of securing reliable data regarding prostitution and sex trafficking, see Hila Shamir’s discussion in Halley et al., *supra* note 6, at 405-06.

D. *Is Criminalization Antithetical to Feminism?*

Feminists have—or at least should have—a healthy skepticism about using the criminal law to achieve feminist goals.¹⁴⁶ Ultimately, criminalization is about the enforcement of norms under threat of force. While criminalization does not always involve the actual use of physical violence, the threat of violence is always lurking in the background of any criminal prohibition. After all, criminal prohibitions are not merely suggestions for good conduct being offered by the state. Rather, they are directives by which the state claims authority over its subjects—and they are backed by the threat and often the use of violence.

There is, therefore, something ironic and troubling about feminist abolitionism's proposal to fight violence against women by using the criminal law with its implicit threat or explicit use of violence.¹⁴⁷ This objection, however, ignores three crucial points regarding the power of the state to impose criminal sanctions as it relates to the feminist-abolitionist project. First, as a general matter, in societies where the state holds a monopoly on power and wields that power through the criminal law, those who wish to effect positive social change disengage from the state and its criminal law at their peril. In other words, ignoring the state's power will not make it go away. Second, it is important to note that feminist abolitionism's call to criminalize buying sex is not, in most jurisdictions, a call for an *expansion* of the criminal law. In most states throughout the United States and under federal law, it is *already* a crime to buy sex. Thus, no new laws would have to be passed against buying sex. Feminist abolitionists are simply calling upon societies and their legal officials to rethink the rationale for these prohibitions and to enforce the laws in a way that is

¹⁴⁶ See, e.g., BUMILLER, *supra* note 39, at 2 (acknowledging the importance of recognizing “the limitations of using state power to advance the interests of women”); Halley et al., *supra* note 6, at 337-40 (discussing the limitations of the criminal law in effectively combating the abuses feminists seek to eliminate and criticizing those who imagine criminalization to be a perfect solution to such abuses); Nourse, *supra* note 141, at 977-78 (concluding, from an analysis of particular feminist reforms of criminal law, that often such reforms are less effective than feminists would hope because “[s]ocial norms of inequality have tended to perpetuate themselves in the criminal law”).

¹⁴⁷ See Halley et al., *supra* note 6, at 341 (“It is very odd, then, to see across the range of [feminist] projects . . . a strong trend to advocate . . . very state-centered, top-down, sovereigntist feminist rule preferences [emphasizing criminal enforcement].”). For additional consideration of reasons why feminist abolitionism should be wary of expanding the scope of criminal law, see *supra* note 141 and accompanying text. See also Halley et al., *supra* note 6, at 337 (expressing concern regarding the exercise of discretion and interpretation of injustices in the administration of the criminal justice system).

consistent with the understanding that their justification lies in the links between buying sex and harms suffered by prostituted people. Finally, it is also the case that in most states throughout the United States and under federal law, it is already a crime not only to buy sex but also to *sell* sex. Under feminist reforms, laws penalizing the sale of sex would be abolished, thereby *restricting* the scope of the criminal law. Thus, at least with respect to jurisdictions in which both sale and purchase are presently criminalized, feminist abolitionism advocates reigning in the power of the criminal law.

CONCLUSION

This Article has attempted to explain and defend a feminist-abolitionist response to sex trafficking and prostitution. It has examined some common critiques of feminist abolitionism: that it equates all prostitution with violence against women; that it denies the possibility of freely choosing to sell sex; that it is “in bed” with the right wing; and that it seeks to impose moral laws rather than recognize the autonomy of women who sell sex. By tackling these critiques and, notably, conceding the possibility that some women do freely choose to sell sex, this Article has launched a new path for understanding and defending feminist-abolitionist arguments. The arguments developed herein illustrate that feminist abolitionism’s call to criminalize the purchase of sex can be justified by reference to the harms suffered by prostituted women, without maintaining that these harms are an inevitable or necessary component of prostitution.

The defense of feminist abolitionism developed herein has not, however, been unqualified. The arguments made regarding complicity and endangerment would not justify a harshly punitive or condemnatory response to the purchase of sex. Moreover, with respect to the issue of criminalization, the risk of unintended consequences was identified as a crucial consideration that might very well limit the force of the feminist-abolitionist argument in jurisdictions where buying sex is not already criminalized. However, such considerations pack considerably less punch in jurisdictions like many throughout the United States where both buying and selling sex are currently prohibited.¹⁴⁸

The take-home message of this Article is twofold. First, the purchase of sex can be justifiably criminalized on grounds of the harm it

¹⁴⁸ See *supra* note 142 and accompanying text.

causes to prostituted people, even if it is the case that some prostitution is not harmful. Second, in jurisdictions like many throughout the United States, there are good reasons for us to rethink our rationale for criminalizing prostitution, to adopt a feminist-abolitionist framework that justifies criminalization of the purchase of sex on grounds of its harm to prostituted people, and to abolish laws that criminalize the sale of sex.