

Is prostitution a
victimless crime?
essay



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Prostitution, as described by the Merriam-Webster's Dictionary (1997), is the selling of sexual favors for money or the devoting of oneself or one's talent to an unworthy cause (p. 589). In another frame of reference, prostitution has been called a "victimless crime." What exactly is a "victimless crime"? West's Encyclopedia of American defines it as:

crime where there is no apparent victim and no apparent pain or injury. This class of crime usually involves only consenting adults in activities such as prostitution, sodomy, and gambling where the acts are not public, no one is harmed, and no one complains of the activities (2008).

This classic definition of these types of crime implies there is not any victim of the criminal behavior who experiences harm. From a theoretical perspective, conflict theorists may hold that victimless crimes are established as a type of social control over morality by politically powerful people or groups who find them offensive or undesirable while functional theorists may hold that social needs, not societal power, are the underlying condition of labeling victimless behaviors as criminal (Greek, C. E., 2005).

Why are some consensual acts considered illegal while others are not?

McWilliams (1996) asserts consensual activities' prohibitions and restrictions have their basis in religion while O'Donnell (2000) in addressing the price of victimless crime laws, proposes those crime laws are a form of morality control and religious persecution that uphold the opinions of the law-controlling majority with regards to race, ethnicity and political stances.

The issue in victimless crimes is that society has created laws to prohibit certain types of conduct considered to be against the public interest and when supposed victims freely consent to be the victim in one of these crimes; the question is whether the state should make an exception from the law for the situation. For the purpose of this paper, prostitution and the issues of concern in the legalization of this victimless crime is explored.

Upon examining prostitution as a victimless crime, it seems evident there are victims at some level but most of the harm seems to be self-inflicted. Looking at the puzzle of the involved behaviors, having sex and asking for money, each by themselves are perfectly legal. Having sex with someone, even an unknown person is legal, and asking for money is legal but, when the two behaviors are linked into one single instance, a criminal act results. The two separate legal behaviors cannot constitute an illegal behavior for if no person is harmed, or if harm occurs by informed consent of the willing parties, how can it be considered a criminal act? One arguable stance presented is that consensual acts are not without risk and when adults consent to take part in the acts, why should the resulting action be deemed criminal by legal social rules? What kinds of problems can the law solve and what kind of problems does the law create?

Among the many proponents of de-criminalizing victimless crimes the concept of unconstitutionality is consistently cited (Hardaway, 2000; McWilliams, 1998; O'Donnell, 2000; National Platform of the Libertarian Party, 2002). A prominent vocal critic of criminalizing these termed victimless crimes, such as prostitution, is Robert Hardaway.

Hardaway is a professor of Law at the University of Denver's School of Law who has written and co-written numerous texts and articles on legal and community interest matters. Hardaway's 2003 book, *No Price Too High: Victimless Crimes and the Ninth Amendment*, as cited by Cox in a 2004 review, presents a powerful and strongly-argued perspective which argues the criminalization of victimless crimes violate the Ninth Amendment to the United States Constitution (2004). Cox notes the criminalization of these crimes as well as amount of money it takes to enforce the laws are unsound policies according to Hardaway. Although, in the case of drugs, crime against property and person are related to drug use, Hardaway, per Cox (2004), attributes the harm of drug use to the laws rather than the use of drugs themselves. According to Cox, Hardaway uses the example of Prohibition to explain the supply and demand concept of the argument stating: " crime and violence do not emanate from some physiological effect of the drug, but the drug laws themselves" and with the decriminalization of drugs, neighborhood drug dealers would be put out of business effectively breaking the business-end of organized crime (105). Hardaway further posits, according to Cox, " legalizing personal vices is justified by a considered weighing of the costs and consequences of criminalization" (30), (2004).

ProCon. org has a website which addresses the issue of whether or not prostitution should be legalized and many statements were provided on this website of both the pro and con sides of the issue: " No person's human or civil rights should be violated on the basis of their trade, occupation, work, calling, or profession" [Prostitution Education Network, 1996]; " prostitution violates the right to physical and moral integrity...violates the prohibition of

torture and of cruel, inhuman or degrading treatment..” [Hoffman, C., 1997]; “...prostitution laws are...a violation of the right of individual privacy because they impose penal sanctions for the private sexual conduct of consenting adults...” [American Civil Liberties Union, 2007]; “...few activities are as brutal and damaging to people as prostitution...” [U. S. Department of State, 2004] (ProCon, 2009).

Of all opposition members, the most prominent is Melissa Farley, a research and clinical psychologist at the San Francisco non-profit organization, Prostitution Research and Education. Farley has written numerous peer-reviewed articles on the subject (Farley, M., 2006). Farley’s numerous research articles provide a well-rounded look at the subject matter of prostitution, the sex industry, exploitation of women, as well as the myriad of troubling issues arising from when men purchase women in prostitution. In the 2006 article, Prostitution, Trafficking, and Cultural Amnesia: What We Must Not Know in Order to Keep the Business of Sexual Exploitation Running Smoothly, Farley posits “ prostitution is sexual violence that results in massive economic profit for some of its perpetrators” and is a much like slavery in that it is a “ lucrative form of oppression” (p. 102). Farley goes further to remark on “ prostitution’s legal status (legal, illegal, zoned, or decriminalized)” or the location of the activity “(strip club, massage parlor, street, and escort/home/hotel)” the danger to women is still tremendous (p. 103). Farley’s discussion on the peer-reviewed literature which documents the violence so prevalent in prostitution and states: “ Violence is commonplace in prostitution whether it is legal or illegal” (p. 106). Citing a Canadian commission on prostitution and pornography which reported the “

death rate of women in prostitution as forty times higher than that of the general population” and a 2001 Vancouver prostitution research study by Cler-Cunningham and Christensen which reported a “ thirty-six percent incident of attempted murder, Farley contends “ prostitution can be lethal” (p. 107).

Farley’s detailed look at legalized and illegal prostitution can impact the perception of the sex industry as a whole. However, within the United States Constitution’s first ten amendments, also known as the Bill of Rights, are provisions which may present a strong argument for abolishing criminalizing prostitution and other victimless crimes.

The First, Fourth, Fifth, and Ninth Amendments are of particular interest in this dialogue of supporting the decriminalization of prostitution. Although victimless crimes such as prostitution are not specifically addressed in the Constitution there seems to be an arguable position that victimless crime laws violate First Amendment restrictions against laws “ respecting an establishment of religion” especially since religious and moral values seem to provide the foundation for many of the laws.

The Fourth Amendment’s provisions on search and seizure seems to be violated by such devices as warrantless search and seizures which are often utilized to obtain evidence for prosecutorial purposes. The privacy of innocents can be threatened as enforcement of the law requires police and investigators to engage in extensive monitoring, wiretapping, and surveillance of suspects and the public. Some people believe that these warrantless search and seizures and victimless crime laws are a means of

political power over selected portions of the population which are unequally enforced against the poor and minorities thereby violating the due process clause of the Fifth Amendment (Kruttschnitt, 1984; McWilliams, 1998; Nussbaum, O'Connell, 2000; 1999; Schur, 1971, 1980, 1983).

The Ninth Amendment to the United States Constitution has direct bearing on such modern day constitutional issues such as abortion, gay rights, and the right to die. Farber (2007) considers the Ninth Amendment the 'key to understanding' the liberties Americans were to enjoy under the Constitution as envisioned by the Founding Fathers describes the purpose of the Ninth Amendment and the Founders' intent: to protect the rights the Founders' assumed but failed to enumerate or specify in the Bill of Rights. Like the rest of the original Bill of Rights, per Farber, the Ninth Amendment only limits federal power rather than state government powers. The Fourteenth Amendment came along later and addressed the state government and within that Amendment the Privileges or Immunities Clause is paired with the Ninth Amendment (Lash, 2004; Farber, 2007).

America is in first place in the world for the number of incarcerated individuals as highlighted by a Pew Center report that found 1 in every 100 American adults are behind bars with its prison population having tripled in the last 20 years. Spending on prisons has more than quadrupled and the American taxpayers are slowly crushed by this wasteful spending. At an average cost of over \$19, 000 per prisoner, taxpayers are facing a bill of over \$44 billion per year to keep people locked away (Pew, 2004).

Coinciding with this rising prison population is the increase in the number of private prisons which increased from five in 1995 to 100 in 2005. Herivel and Wright () in their book " Prison Profiteers-Who Makes Money From Mass Incarceration" reports private prison industry has seen increased profits and lobbied extensively for more frequent and longer prison sentences and traces the flow of monies designated for the public good and ends up in the " pockets of enterprises dedicated to keeping prison cells filled" (From their book jacket).

History has shown that criminalizing victimless crimes will drive the practice underground where violence, extortion, and coercion are most likely to thrive. This was particularly noticed when the 18th Amendment and later the Volstead Act, 1919, which made it illegal to manufacture or sell " beer, wine, or other intoxicating malt or vinous liquors" it was not illegal to possess it for personal use. The prohibition, originally intended to reduce beer consumption in particular, actually a failure and ended up increasing hard liquor consumption and created a new business, " bootlegging," defined as the unlawful manufacture, sale, and transportation of alcoholic beverages without registration or payment of taxes which became widespread and a staple of organized crime (Prohibition).

Almost every individual has the ability and moral capacity to judge what is helpful or harmful to them and it does not make sense for other people to dictate what choices should be made. When individuals commit acts harmful to themselves, the action should be termed as immoral, not illegal. The criminalization for the act of prostitution should not be determined by social effects of an individual's actions or by the moral or religious views of society.

Every person needs freedom to make choices and accept the consequences for without these consequences, growth and experiential development will be hindered.

If an adult man-or an adult woman, wants to engage in sexual relations with another adult man or woman who charges a fee for his or her services, they should be able to do so without the fear of being guilty of a crime. It does not mean that prostitution should not be subjected to certain legal requirements such as health laws. Removing prostitution from criminal statutes and providing a designation as a business entity subjected to business requirements, prostitution can be taxed, sex workers can obtain health and safety rights other employees have, and problems of abuse and graft associated with police jurisdiction of such a business can be dealt with more effectively with better protection from violence and abuse for those individuals who work within the industry. In a 2001 article written for the New Zealand Herald, Sue Bradford, MA, Member of New Zealand's Parliament says it best: " prostitution has been a career option for some people since history began. Nothing any law has done has changed or will change that...I believe we would all be better off to accept the job choice that some adults make as valid and worthy of care and compassion for all our sakes" (2001).

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