

# Whores<sup>†</sup> In Court: Judicial Processing of Prostitutes in the Boston Municipal Court in 1990

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Kay is a former prostitute.<sup>1</sup> She first started hooking to support her boyfriend's heroin addiction. Later, she worked the streets of Boston and New York to support her own drug habit. Once on the street, heroin helped make her experience more tolerable. Kay generally made between \$200 and \$300 a night, for roughly five hours' work,<sup>2</sup> but any money earned was immediately spent on drugs.

In time, Kay was arrested and sentenced to serve three months at the Massachusetts Correctional Institution at Framingham (MCI-Framingham). Incarceration cost her the job as a university administrator she had held for fourteen years. While in prison, Kay received no counseling for her drug addiction and her already low self-esteem dropped still further. Upon release, Kay again turned to drugs. Her addiction worsened. Out of work and out of money, she returned to prostitution.

In 1990 Boston police arrested more than two hundred fifty women for prostitution and common nightwalking/common streetwalking.<sup>3</sup> This number does not include arrests for disorderly conduct.<sup>4</sup> Counting prostitution-related disorderly conduct cases, the number of women arrested on prostitution-related

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<sup>†</sup> Many street prostitutes self-identify as "whores," or more frequently the vernacular "ho." I mean to imply no disrespect in using the term.

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1. Interview with Kay, in Somerville, Mass. (Mar. 28, 1991). I have used Kay's street name, as she wished to retain her anonymity.

2. The going rate seems to be from \$20 to \$50 for a blow job, the most common activity. If a prostitute is able to see ten men a night, she can earn from \$200 to \$500 for an evening's work. Each encounter generally runs no longer than twenty to thirty minutes. Interview with J.W. by Ayelet Waldman, in Boston Municipal Court, Boston, Mass. (Mar. 26, 1991).

3. This figure includes multiple arrests of some individuals in that year. See *infra* part I.

4. Despite the fact that the Massachusetts courts have specifically held the disorderly conduct statute inapplicable to prostitution-related activities, the police continue to arrest most prostitutes under this statute. See *Commonwealth v. Blavackas*, 419 N.E. 2d 856, 858-859 (Mass. App. Ct. 1981) discussed *infra* text accompanying notes 42-49.

charges in Boston each year would approach roughly one thousand.<sup>5</sup>

In Massachusetts, almost half the women chronically involved in the courts list prostitution as their usual illegal activity.<sup>6</sup> Studies show that nationwide, prostitutes may comprise more than fifty percent of the female prison population in large urban areas.<sup>7</sup> Every year, Boston and other cities spend hundreds of thousands of dollars on processing these women in court.

Based on a case study of the Boston Municipal Court's (BMC) treatment of prostitution-related crimes in the year 1990, this article will argue that prostitution should be decriminalized. First, the system has a minimal deterrent effect—women arrested and charged with this crime are more often than not released only to be arrested again. If this crime has any real victims, they are the prostitutes themselves, many of whom need drug counseling and safe haven, not punitive treatment.<sup>8</sup> This article recommends the removal of all state controls on prostitution and advocates the diversion of funds presently spent on court costs and incarceration to programs serving the needs of women who work as street prostitutes.<sup>9</sup>

In discussing the decriminalization of prostitution, it is important to

5. Interview with Sarah J. Hunt, Massachusetts criminal defense attorney, in Boston, Mass. (Mar. 26, 1991). Over 200,000 women are arrested for prostitution every year in the United States. Margo St. James, Address Before the 2nd World Whores' Congress at the European Parliament (Oct. 1, 1986) in *A VINDICATION OF THE RIGHTS OF WHORES* 78 (Gail Pheterson ed., 1989). Over the past decade, the number of people arrested for prostitution in the U.S. has increased by 20%. FEDERAL BUREAU OF INVESTIGATION, 1989 UNIFORM CRIME REPORTS, CRIME IN THE UNITED STATES 176 (1989). The FBI's 1989 report lists 107,400 estimated arrests for prostitution and commercialized vice. *Id.* at 172. This figure does not include arrests for loitering or disorderly conduct. In 1989, 119,786 women were arrested for disorderly conduct. *Id.* Many of these women were probably prostitutes as there was a 46% percent increase in the number of women arrested for disorderly conduct between 1980 and 1989. *Id.*

6. MARIAN KLAUSNER & BETSEY SMITH, OPENING DOORS FOR CHANGE: ALTERNATIVES TO INCARCERATION, A REPORT ON ALTERNATIVE SENTENCING FOR WOMEN 15 (1991). Between 1988-1990 the Boston-based organization Social Justice for Women conducted a survey among 65 of their alternative sentencing clients—women who are chronically involved in the courts and at risk of incarceration. The statistics cited in KLAUSNER & SMITH were based on this sample.

7. CORAMAE R. MANN, FEMALE CRIME AND DELINQUENCY 121-22 (1984). One-third of the women in jails and prisons throughout the United States are serving time for prostitution offenses.

8. This paper does not address the broader arguments of some feminists that: (1) prostitutes are inevitably victimized and dehumanized by selling their bodies to men for money, and that no matter what the working conditions, women should be discouraged/prevented from engaging in sex for money; and (2) prostitution harms all women in a social context where women are politically, economically and socially unequal, by reinforcing conceptions of female subordination and the commodification of women's bodies. See generally Jody Freeman, *The Feminist Debate Over Prostitution Reform: Prostitutes' Rights Groups, Radical Feminists, and the (Im)possibility of Consent*, 5 BERKELEY WOMEN'S L.J. 75 (1990); Laurie Shrage, *Should Feminists Oppose Prostitution?*, 99 ETHICS 352 (1989). However even if one believes that prostitution per se harms prostitutes and/or all women, the criminal justice system is not the place to redress that harm. No city has abolished prostitution through criminalization. Barbara Milman, *New Rules for the Oldest Profession: Should We Change Our Prostitution Laws?*, 3 HARV. WOMEN'S L.J. 37 (1980). In 1967 New York City instituted more lenient, non-criminal sanctions for prostitution. Two years into the experiment, the legislature again made prostitution a criminal offense. Throughout this period, the prevalence of street prostitution in New York remained unchanged. GILBERT GEIS, *ONE EYED JUSTICE* 198-200 (1974).

9. This article will focus on prostitutes who work on the street because they are the primary targets of prostitution laws. Ninety-nine percent of the prostitutes arrested in Boston were street-walkers. Nationwide, street prostitutes comprise 85-90% of arrested prostitutes. Priscilla Alexander, *Prostitution: A Difficult Issue for Feminists*, in *SEX WORK* 196 (Frédérique Delacoste & Priscilla Alexander eds., 1987).

distinguish decriminalization from legalization. Nevada is currently the only state in the U.S. where prostitution has been legalized in certain counties. Legalization, as it is understood in the United States, carries with it a full regime of government regulations and controls, similar to that for alcohol sales. In Nevada, prostitutes must work under the auspices of a brothel.<sup>10</sup> Women who wish to work independently may not legally do so.<sup>11</sup> Moreover, prostitutes must be tested for the HIV virus, and those who test positive are not permitted to continue their work at all.<sup>12</sup> In addition, the brothel system screens out prostitutes who use drugs.<sup>13</sup> This is not to say that drug-addicted or HIV-positive prostitutes change professions; these women are simply forced to work illegally.<sup>14</sup> Thus legalization may serve to make prostitution safer for some, but it does not eliminate the dangers of drug use and AIDS that plague most prostitutes on the street.

The first part of this article analyzes the disposition of prostitution-related cases in the BMC in 1990.<sup>15</sup> Parts II and III discuss the inconsistencies this system creates—the fact that most judges no longer treat prostitution as an act deserving criminal sanction, but police nonetheless continue to arrest women for selling sexual services. And despite evidence that judges are reluctant to treat prostitution as a serious crime, attempts to fully dismantle the prostitution laws have failed. Part IV outlines historical views of prostitution and female sexuality that may inform present day attitudes of judges and police officers. Part V attempts to demystify the link between prostitution and AIDS, the most pressing rationale for maintaining criminalization. Finally, Part VI looks briefly at the real dangers these women face and the protections they deserve.

### I. RESULTS OF THE SURVEY

*Many of the court officers, administrators, and judges interviewed by our staff expressed the belief that if not for prostitution cases, the Second Session of the BMC, as it currently functions, would not be necessary.*<sup>16</sup>

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10. Advantages for Nevada prostitutes include a safer environment in which to work, and freedom from fear of arrest. However, Nevada prostitutes are restricted from deciding how and when they will work. Brothels maintain a fixed work schedule, and prostitutes must yield as much as forty percent of their earnings to the brothel. Carole Campbell, *Prostitution, AIDS and Preventive Health Behavior*, 32 *Soc. Sci. & Med.* 1370, 1371-72 (1991).

11. Alexander, *supra* note 9, at 210.

12. Campbell, *supra* note 10, at 1370.

13. *Id.* at 1371.

14. *Id.* at 1372.

15. I examined a BMC computer generated list of all cases dealing with prostitution-related offenses disposed of in 1990.

16. Julie Pearl, *The Highest Paying Customers: American Cities and the Cost of Prostitution Control*, 38 *HASTINGS L.J.* 769, 777 (1987) (citing BOSTON UNIVERSITY LAW SCHOOL CENTER FOR CRIMINAL JUSTICE STUDY, *IMPLICATIONS FOR THE CRIMINAL LAW AND ITS ENFORCEMENT* 626 (1976) [hereinafter CJC STUDY]).

In order to analyze the processing of prostitutes in Boston's judicial system, I examined the court records of women charged with prostitution-related offenses in the BMC in 1990. I take the BMC as the focus of this analysis because it is there that the vast majority of Boston's prostitution cases are heard, given that it includes in its jurisdiction those districts of Boston where most street prostitution occurs.<sup>17</sup> In 1990, one hundred and sixty-three women were charged with two hundred and sixty-three prostitution-related offenses.<sup>18</sup> Of these, one hundred women were charged with prostitution; one hundred sixty with common nightwalking/streetwalking; and three with maintaining a house of prostitution. These numbers are not indicative of the actual number of prostitutes who work in Boston, or of the number of prostitutes arrested each year, due to the fact that most prostitutes are arrested under the disorderly conduct statute. Therefore, it is likely that the actual number of prostitution-related arrests is far larger.

While the police see prostitution as a law needing enforcement, and continue to arrest hundreds of prostitutes each year,<sup>19</sup> the majority of judges in Boston do not treat prostitution as a serious crime. In 1990, twenty percent of the prostitution-related cases against women in the BMC were dismissed outright (including findings of not guilty) and sixteen percent were continued without a finding (which operates as a dismissal unless the defendant commits a crime in the future).<sup>20</sup> Another thirty-eight percent of the women were given suspended sentences and/or probation. Six percent were fined; ten percent served time; and ten percent had cases pending or on appeal.<sup>21</sup> These dispositions appear to have little deterrent or rehabilitative effect; more than a third of the women whose cases I examined were arrested for a prostitution-related offense at least twice in the same year.<sup>22</sup>

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17. Ninety-seven percent of prostitution in Boston occurs in District 1 (which includes the Combat Zone) and District 4 (which includes Back Bay). Milman, *supra* note 8, at 11. Most of these areas are under the jurisdiction of the BMC.

18. Thirty-five percent of the women were rearraigned on prostitution-related offenses at least once in 1990. Again, this does not account for prostitutes who had multiple arrests in the same year under the disorderly conduct laws. For the most part, I am not including in my discussion the cases of male prostitutes, as my focus is on how prostitution laws reinforce sexist conceptions of women. The factors of gender and sexual orientation that enter into male prostitution (male prostitutes generally service a gay clientele) warrant a separate article. However, a broad comparison of the sentencing fates of male and female prostitutes, discussed *infra* at text accompanying notes 24-26, helps to highlight prejudices against sexually promiscuous women.

19. In 1985, Boston police arrested twice as many persons for prostitution as for all homicides, rapes, robberies, and assaults combined. Pearl, *supra* note 16, at 769.

20. See *infra* text accompanying note 23 for a chart of sentencing patterns for female prostitutes in the BMC in 1990.

21. Imposing fines on prostitutes only forces them to work doubletime to earn money for the fine. A former inspector with the New York City Vice Squad referred to judges who fine prostitutes as "the biggest pimp[s] of all." ARLENE CARMEN & HOWARD MOODY, WORKING WOMEN: THE SUBTERRANEAN WORLD OF STREET PROSTITUTION 185 (1985) (quoting Inspector Richard Dillon).

22. The 1990 repeat offender rate would be higher if I had been able to include prostitutes charged under the disorderly conduct statute.

Sentencing Patterns for Female Prostitutes in the BMC (1990)<sup>23</sup>

	Number of Cases	Percent of Total
Dismissed/Not Guilty	51	19.5%
Continuance Without a Finding	43	16.2%
Probation Only	43	16.2%
Suspended Sentence	59	22.3%
Fine	16	6.0%
Time Served	27	10.4%
Pending/On Appeal	24	9.4%
Total	263	100%

Boston police fail to target the worst criminal offenders—pimps. In 1990, only five men were arraigned in the BMC for deriving support from the work of a prostitute, and only three for procuring/soliciting clients for a prostitute. Four of these cases were dismissed, and one was on appeal at the completion of the survey. One Boston police detective noted the difficulty of bringing charges against pimps—prostitutes are generally reluctant to testify against their “man” out of fear, love, or loyalty.<sup>24</sup>

Differences in the judicial treatment of cases against male and female prostitutes revealed a clear bias.<sup>25</sup> While judges dismissed outright forty-three percent of the charges against male prostitutes, they dismissed only nineteen percent of those brought against female prostitutes.<sup>26</sup> The failure of the BMC to arraign a single customer in all of 1990 further highlights a double standard. There was not a single case of a defendant being charged with buying sexual services. Although most of the female prostitutes ultimately receive insubstantial sentences, the lingering sexism implicit in the arrest and dismissal statistics may help to explain why judges continue to criminalize prostitution,

23. Time served includes those sentenced to jail, those sentenced to attend drug treatment programs and persons whose suspended sentences were revoked. Defendant is sentenced to and credited for the number of days she spent in jail awaiting trial.

24. Interview with Marvin R. Emery, Detective, Boston Police Department, in Boston, Mass. (Apr. 18, 1991) [hereinafter Interview with Detective Emery].

25. The male prostitutes were all charged with selling sexual services. Thus the difference between the treatment of male and female prostitutes can only be attributed to gender and sexual orientation, since they are being charged with exactly the same crime. Whatever biases may exist against men selling sexual services to other men, it is nevertheless curious that male prostitutes received markedly different treatment.

26. One study of judicial processing of 2859 male and female prostitutes in a large city in Texas from 1973-1985 found that judges were most likely to find defendants guilty of prostitution if they were female or repeat offenders, or if they belonged to a minority. Women and minorities were most likely to receive jail time and minorities most likely to receive the harshest sentences. John H. Lindquist et al., *Judicial Processing of Males and Females Charged with Prostitution*, 17 J. CRIM. JUST. 277 (1989).

and why they appear reluctant to treat prostitution as a public health, unemployment, or welfare problem.

## II. THE POLICE

*When men sell women's bodies, or images of women's bodies, it is called pornography and it is legal, its right to exist vehemently defended with the first amendment. But when women sell their own bodies, it is called prostitution, and we can see what an imperative it's been to protect the rights of prostitutes in our society.<sup>27</sup>*

Even as judges dispose of prostitution cases with a slap on the wrist, the police as law enforcers continue to make arrests. Three basic arguments are used to justify police enforcement of prostitution laws. The most standard reason has little to do with the harm prostitution might cause. As long as prostitution remains a crime, police can claim, "It's on the books, so we enforce it." The other two justifications revolve around the perceived by-products of prostitution. Police accuse street prostitutes of frequently engaging in robbery or pickpocketing.<sup>28</sup> Thus, they justify arresting prostitutes on prostitution charges by arguing that they are preventing petty larceny in the process. The third reason police often give for targeting prostitutes in certain neighborhoods is that they are responding to complaints from residents who live in the areas where prostitution occurs. None of these justifications hold up under close scrutiny.

The argument that police are just upholding existing laws falls short because the law as written is so vague and broad that it would be just as easy to ignore as to enforce. Yet the police make a concerted effort to go after street prostitutes. The vast majority of prostitution arrests are made through the use of police decoys. This gives law enforcement officers unusually broad discretion over whom to target.<sup>29</sup> Arrest patterns in Boston reveal that the women targeted by the police decoys are the poorest, most vulnerable prostitutes—those who work on the street. Of the 263 women arraigned for prostitution related offenses in the BMC in 1990, all but three were arrested on the street.<sup>30</sup> The dearth of non-street walker arrests in Boston does not reflect a shortage of prostitutes working as call girls or masseuses. The Boston

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27. Donna M. Niles, *Confessions of a Priestessute*, in *SEX WORK*, *supra* note 9, at 149.

28. Interview with Detective Emery, *supra* note 23; Milman, *supra* note 8, at 9.

29. The personal values of individual police officers inevitably influence their application of the laws. This may lead to discriminatory arrest patterns. See Daniel Mendoza de Arce & Omar L. Peraza, *Institutional Discrimination in Criminal Justice Processes*, in *DISCRIMINATION IN ORGANIZATIONS* 296-97 (Rodolfo Alvarez & Kenneth G. Lutterman eds., 1979).

30. Two of the three off-street prostitutes were arrested for bringing clients to rooms in the Sheraton Hotel and charged with "maintaining a house of prostitution." The other was charged with "keeping a house of ill fame." (Arrest detail on file with author). Nationally, street prostitutes constitute only 10-20% of the prostitute workforce. Alexander, *supra* note 9, at 189.

Yellow Pages list numerous escort service with names like "Pussy Cat Escort Service" or "Allure Escort Referrals." The ads feature illustrations of bikini-clad women with the assurance "Sensitive young ladies always available." These businesses are cross-referenced in the "massage" section as "Pussy Cat Massage" and "Allure Massage" and provide the same telephone numbers.

Police who choose to arrest women under the prostitution laws engage in sexual stereotyping that criminalizes "indiscriminate" female sexuality (or, more cynically, women who dare to require payment for their sexual services) while ignoring the men who patronize prostitutes.<sup>31</sup> Police propensity to impose a double standard dovetails with a general disdain for streetwalkers. As one police detective put it: "The only guy who would go with an ugly whore at two in the morning has gotta be drunk."<sup>32</sup> In Massachusetts, the prostitution statutes apply equally to those selling and buying sexual services, but in 1990, not a single customer was arraigned in the BMC.<sup>33</sup> This is due in part to the use of undercover vice police to serve as "decoys" for prostitutes. Since most of the police officers are male, those arrested are generally women and a few male prostitutes. Of all the prostitution cases in the BMC in 1990, only eleven listed a "witness" (i.e., client) who was not a police officer.<sup>34</sup> Even when the witness was identified by name, however, there was only one complaint that specifically noted that the witness was issued a summons as well.

The prostitution statute in Massachusetts was specifically amended in 1983 to cover both the seller and buyer of sex for a fee.<sup>35</sup> Yet no cases involving clients actually showed up at the BMC in 1990. Boston police and a BMC judge noted that the police periodically conduct "sweeps" for prostitution

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31. Under the Model Penal Code, for example, only the prostitute and not the customer violates the law. MODEL PENAL CODE § 251.2. As Margo St. James sees it:

The great fear for men, who are running things, is that if whores have a voice, suddenly good women are going to find out how much their time is worth and how to ask for the money. I really think that women are being put in jail for asking for money.

Margo St. James, *The Reclamation of Whores*, in *GOOD GIRLS/BAD GIRLS: FEMINISTS AND SEX TRADE WORKERS FACE TO FACE* 82 (Laurie Bell ed., 1987).

32. Interview with Detective Emery, *supra* note 23.

33. Nationally, clients make up 5% of the persons arrested for violation of prostitution statutes. St. James, *supra* note 5, at 78.

34. Whenever police reports indicate a "witness" for a prostitution charge, they are referring to the client. Prostitution is defined as offering or engaging in sex for a fee. MASS. GEN. LAWS ANN. ch. 272 § 53A (West 1990). Therefore, witnesses of the crime are those who hear or see the women ask for money. In light of the fact that most prostitutes who work the streets of Boston are picked up by car to have sex there or in a hotel room, the only likely witness to the offer or demand for money is the client himself (or the police decoy).

35. Any person who engages, agrees to engage, or offers to engage in sexual conduct with another person in return for a fee, or any person who pays, agrees to pay or offers to pay another person to engage in sexual conduct, or to agree to engage in sexual conduct with another natural person may be punished by imprisonment in a jail or house of correction for not more than one year, or by a fine of not more than five hundred dollars, or by both such fine and imprisonment.

MASS GEN. LAWS ANN. ch. 272, § 53A (West 1990).

customers, arresting forty to fifty at a time, a few times a year.<sup>36</sup> However, the computer generated list of all prostitution related offenses in the BMC in 1990 did not include a single case of a client being arraigned.

Since the "sex for a fee" law was amended, the statistics for prostitution arrests show a marked decrease from 1241 in 1983 to 790 in 1984 to 389 in 1989.<sup>37</sup> This apparent slide is most likely *not* a reflection of a decreasing number of women working as prostitutes or being arrested for prostitution. Rather, the decrease can most likely be attributed to the elimination of a separate Boston Police Department vice squad in 1984, and the increasing tendency of the police to charge prostitutes with disorderly conduct, a crime not covered by the Boston Prostitution and Commercialized Vice statistics.<sup>38</sup>

Boston police currently arrest the majority of prostitutes under the disorderly conduct statute.<sup>39</sup> Detective Emery estimated that seventy percent of the prostitutes they arrest are brought in under a disorderly conduct charge.<sup>40</sup> A sample criminal complaint for a woman charged with disorderly conduct reads, "for being a disorderly person going into street, stopping motor vehicles causing a disturbance."<sup>41</sup> "Stopping motor vehicles" is also the activity most likely to appear in police complaints for common nightwalking. Police who do not have enough evidence to arrest prostitutes under the common nightwalking law rely on the vagueness of a disorderly conduct charge to justify the arrest, notwithstanding the fact that the disorderly conduct statute was written to apply to people who "disturb the peace," not prostitutes themselves.

Police use of the disorderly conduct statute against prostitutes persists despite a Massachusetts court ruling which held that the statute was not intended to be used against prostitutes. A 1981 case, *Commonwealth v. Blavackas*,<sup>42</sup> held that the disorderly conduct statute "is not primarily, if at all, directed at offensive sexual conduct."<sup>43</sup> The court relied on an earlier case, *Alegata v. Commonwealth*,<sup>44</sup> which had interpreted the disorderly

36. Interview with Detectives Marvin Emery and John Pumphret, Boston Police Department, Area A, in Boston, Mass. (Apr. 19, 1991); Interview with Judge Sally Kelly, Boston Municipal Court, in Boston, Mass. (Dec. 9, 1990).

37. BOSTON POLICE DEP'T, PROSTITUTION AND COMMERCIALIZED VICE RESEARCH AND ANALYSIS PRINTOUT (1990).

38. Interview with Detective Emery, *supra* note 23. Because the disorderly conduct law covers a broad range of activities, and is rather vague, it is easier to arrest people under that statute than under the prostitution laws.

39. *Id.*; Interview with Sarah Hunt, *supra* note 5. Hunt, a criminal defense attorney who represents roughly 250 prostitutes a year, confirmed that most of her clients are arrested under the disorderly conduct law.

40. Interview with Detective Emery, *supra* note 23.

41. Complaint (No. 256582), Boston Mun. Ct. (1990). The identities of the parties named in this complaint and those cited hereinafter were unavailable.

42. 419 N.E.2d 856 (Mass. App. Ct. 1981).

43. *Id.* at 858.

44. 231 N.E.2d 201 (Mass. 1967). A more recent case dealing with political protesters followed the *Alegata* interpretation of disorderly conduct:

A person is guilty of disorderly conduct if, with purpose to cause public inconvenience,

conduct law to require “proof at least of significant risk of violence or serious disturbance.”<sup>45</sup> The *Blavackas* court threw out the conviction of a woman who had been found guilty of disorderly conduct after two police officers saw her:

[A]s she stopped with hand signals four automobiles, each with a lone male operator. She engaged each operator in conversation for about a minute. Other traffic in significant volume was forced to go around the stopped automobiles. She stopped a fifth automobile . . . After a brief conversation between her and the vehicle’s operator, this vehicle was driven onto Murray Avenue where it stopped.<sup>46</sup>

The woman got into the car. The police followed and arrested her for disorderly conduct just as she was taking off the driver’s pants in a nearby driveway. This fact pattern, short of catching them in the act, matches the criminal complaints filed by Boston police officers who arrest prostitutes for disorderly conduct. Some judges are beginning to throw out disorderly conduct cases against prostitutes.<sup>47</sup> However, judges are unlikely to dismiss such cases without the relevant legal arguments from defense counsel. Many defense attorneys are not familiar with the history of these laws, and do not raise the proper legal objections to the court.<sup>48</sup>

The argument that prostitution increases the level of street crime in the neighborhoods where prostitutes work was specifically addressed in Barbara Milman’s 1976-77 study of prostitution in Boston. Milman compared street crime rates with prostitution rates in various areas of the city, and found that while prostitution and street crime often occur together, there is no evidence that prostitution causes or attracts street crime. In some neighborhoods, prostitution existed with no correspondingly higher level of street crime.<sup>49</sup>

Some people are upset by the presence of prostitutes in their neighborhood whether or not they believe prostitutes also engage in other street crimes. People object to seeing women sell themselves on their corner or are appalled that their children are witness to such activity. Many people do not like having to see homeless people on their sidewalk, but that is not a sufficient argument

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annoyance or alarm, or recklessly creating a risk thereof, he: (a) engages in fighting or threatening, or in violent or tumultuous behavior; (b) makes unreasonable noise or offensively coarse utterance, gesture or display, or addresses abusive language to any person present; or (c) creates a hazardous or physically offensive condition by any act which serves no legitimate purpose of the actor.

*Commonwealth v. Feigenbaum*, 536 N.E.2d 325, 327 (Mass. 1989) (citing *Alegata v. Commonwealth*, 231 N.E.2d at 211). Most of the activities street prostitutes are arrested for under a disorderly conduct charge, such as waving down cars and talking to unknown men, do not fall into any of these three situations.

45. 419 N.E.2d at 858.

46. *Id.*

47. Interview with Sarah Hunt, *supra* note 5; Interview with Detective Emery, *supra* note 23.

48. Interview with Sarah Hunt, *supra* note 5.

49. Milman, *supra* note 8, at 17-18.

for criminalizing homelessness.<sup>50</sup> If prostitution were legal, neighbors would have no more right to call the police than they do to call the police about pornographic book stores or other legal businesses which nevertheless annoy and disturb nearby residents. Under the current regime, since prostitutes have no legal way of notifying clients of their whereabouts, high visibility in public places is the easiest way to meet clients. If prostitution were decriminalized, prostitutes would not have to rely on sidewalk solicitation, and the social problem of offending uninvolved parties would diminish.

### III. IN COURT

Police discretion in arresting prostitutes is paralleled in the courtroom by the various judicial attitudes towards the crime.<sup>51</sup> As the 1990 BMC disposition statistics show, Boston's judges do not enforce prostitution laws with serious criminal penalties.<sup>52</sup> In only the rare case does a prostitute serve a sentence or pay a fine, but judges have not been willing to ignore the criminality of prostitution altogether. Even in the face of viable legal challenges, Massachusetts courts have refused to strike down prostitution laws. In 1977 the common nightwalking statute, chapter 272, section 53 of the Massachusetts General Laws, was challenged as unconstitutional on its face and as applied in *Commonwealth v. King*.<sup>53</sup> While the legal arguments against the law were based on discrimination theory and were not explicitly arguments for decriminalization, the case gave the court an opportunity to effectively decriminalize prostitution by striking down the law as discriminatory. The court upheld the law. The judge was not convinced by the argument that women were discriminated against when clients were not arrested, analogizing the situation to one which criminalizes the selling, but not the buying, of obscene goods.<sup>54</sup> The court also refused to find the enforcement of the laws discriminatory against women on the grounds that the police primarily arrested female and not male prostitutes, since no evidence was presented to the court that male prostitutes were not being arrested. The court noted that if such evidence did exist, a female prostitute could get her charges dismissed.<sup>55</sup>

In the wake of the *King* case, the Massachusetts Legislature passed Section 53A of the Criminal Code in 1983, making both the purchase and the sale of sexual services a crime.<sup>56</sup> A defendant successfully challenged discriminatory

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50. Unfortunately, some cities are starting to act as if it were.

51. A New York City outreach group for prostitutes tried posting a weekly list of judges sitting in each session, the sentences they were giving to prostitutes, and how they were handling outstanding warrants for unpaid fines resulting from previous convictions, so that the women could "decide intelligently whether they wanted to risk arrest in light of the penalties being dispensed." CARMEN & MOODY, *supra* note 21, at 160.

52. *See supra* part I.

53. 372 N.E.2d 196 (Mass. 1977).

54. *Id.* at 204.

55. *Id.* at 205.

56. MASS. GEN. L. ch. 272, § 53A.

application of the law in *Commonwealth v. An Unnamed Defendant*.<sup>57</sup> The testimony of a Brockton police officer that it was department policy not to arrest male customers showed discriminatory enforcement of sections 53 and 53A (the common nightwalker and "sex for a fee laws") on the basis of sex, and the complaints were dismissed.<sup>58</sup> However, as the BMC statistics make abundantly clear, police in Boston continue to enforce the law in a discriminatory manner, as no clients were arraigned in 1990.<sup>59</sup>

The practice of convicting under the nightwalking statutes solely on the basis of circumstantial evidence was challenged in 1986 in *Commonwealth v. Proctor*,<sup>60</sup> but the challengers were as unsuccessful as the *King* defendants. The court held that evidence of a specific and express act of solicitation is not required to convict a defendant of walking the streets for the purposes of prostitution. Circumstances alone sufficed. In *Proctor*, the defendant was convicted based on the following:

[O]n repeated occasions, over a period of two or three months, arresting officer saw defendant on street corner in area frequented by prostitutes, conversing with male motorists and getting into their vehicles, and that on night of her arrest defendant talked to a man who had stopped his car, had started to enter his car, but walked away as police officer approached.<sup>61</sup>

In a typical common nightwalking case from this past year, police observed a woman "on several recent occasions [sic] in the 'Combat Zone' Area in conversation with different unknown males and told [her] on each occasion to vacate the area." When she refused to leave, she was arrested.<sup>62</sup> The ludicrousness of the "conversation with different unknown males" standard becomes obvious if we imagine it being applied in a bar or a nightclub.

Some judges take the paternalistic view that prostitutes themselves are the victims of prostitution and arrest is in their own best interest. One BMC judge who refused to grant bail to a prostitute last year wrote on the bail papers:

Four arrests in 1990—she defaulted on each one. . . . She is seven and a half months pregnant. Charged last night with prostitution. Appears high—major drug problem. She needs help. Please do not release her.<sup>63</sup>

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57. 492 N.E.2d 1184 (Mass. App. Ct. 1986).

58. *Id.*

59. *See supra* text accompanying note 25.

60. 493 N.E.2d 879 (Mass. App. Ct. 1986).

61. *Id.* at 880 (quoting facts as described in headnote).

62. Complaint (No. 259775), Boston Mun. Ct. (1990).

63. Hearing on Motion to Grant Bail (No. 255721), Boston Mun. Ct. (1990).

One African-American female ex-judge at the BMC who heard prostitution cases daily described the tension this way:

The pull is that it always seems as if you can do something when you are sitting there, that you can turn this life around—can get this woman off the street. The pull in the other direction is that criminalization only enhances the oppression of the institution, which is especially true for the black prostitutes. The race factor makes them more vulnerable to arrest, to police harassment, and to prejudice in the courts as black defendants.<sup>64</sup>

This judge made it her policy to refuse to hear cases against prostitutes unless the customer was arrested as well.<sup>65</sup>

In recent years, the outbreak of AIDS has created a new “justification” for enforcing prostitution laws. The concern that judges in the BMC reveal most frequently in the court papers I examined is that the AIDS epidemic has made prostitutes a public health threat, and that the judicial system should be mobilized to stem the spread of AIDS in this context. As one BMC judge put it, “There ought to be posters up in the Combat Zone that say “Prostitution = Death.”<sup>66</sup> Some judges in the BMC will use the knowledge that a prostitute has AIDS to deny her or him bail or make bail exceptionally high. One judge hearing the bail argument for one female prostitute refused to set bail: “Three separate cases of prostitution, common nightwalking (2 cases). Defendant has AIDS. Defendant is a public health risk.”<sup>67</sup>

One example of this mentality is the current trend in some states requiring mandatory HIV testing of people arrested for or convicted of prostitution. At least nine states currently have such laws.<sup>68</sup> Nevada has created a separate criminal offense for people who prostitute knowing they have AIDS.<sup>69</sup> Yet as Carole Campbell points out, using mandatory AIDS testing might not encourage these prostitutes to leave the streets.<sup>70</sup> The felony charge that accompanies these new laws might give a prostitute a more serious record, making it even more difficult for her to get a “straight” job. Furthermore, prostitutes have no support programs to help them change careers. Many women will continue to prostitute no matter what the criminal consequences

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64. BARBARA M. HOBSON, *UNEASY VIRTUE: THE POLITICS OF PROSTITUTION AND THE AMERICAN REFORM TRADITION* 224 (1987) (quoting Margaret Burnham, former judge, Boston Mun. Ct.).

65. Interview with Sarah Hunt, *supra* note 5.

66. Interview with Judge Sally Kelly, *supra* note 36.

67. Hearing on Motion to Grant Bail (No. 255827), Boston Mun. Ct. (1990).

68. Larry O. Gostin, *Public Health Strategies for Confronting AIDS: Legislative and Regulatory Policy in the United States* 261 *JAMA* 1621, 1626 (1989).

69. See Larry Gostin, *The Politics of AIDS: Compulsory State Powers, Public Health, and Civil Liberties* 49 *OHIO ST. L.J.* 1017, 1041 n.128 (1989).

70. Campbell, *supra* note 10, at 1376.

because they have no occupational choices.<sup>71</sup>

#### IV. THE HISTORY OF PROSTITUTION LAWS

For two hundred years, prostitution was a common law offense in the colonies and later in the United States. It was not until the nineteenth century that states began to pass statutes specifically criminalizing prostitution.<sup>72</sup> Under the common law order, prostitution had been understood as the crime of selling one's body for gain. Under the statutory regime, however, judges began to penalize women who simply had "indiscriminate intercourse."<sup>73</sup> Many women who were simply on the street after dark were arrested for the crime of "nightwalking"—the assumption being that any woman on the street at that time intended to solicit money for sex.<sup>74</sup> The criminal law often treated prostitution as a status offense, and equated women's sexual non-conformity with criminal behavior.<sup>75</sup>

The criminal justice system placed considerable emphasis on, and used as a measure of women's criminality, the sexual histories of female offenders, often basing the sentence of the woman on this, rather than on the crime itself.<sup>76</sup> There was no parallel linking of male sexuality with male deviance. Indeed, the same acts committed by men were not even charged as crimes. In the beginning of the nineteenth century, one quarter of the persons arrested for public lewdness in Boston were men; by 1850, there were no such prosecutions.<sup>77</sup>

Conviction rates for accused prostitutes averaged eighty to ninety percent in the first half of the nineteenth century, while the average conviction rate for all crimes was sixty-five percent.<sup>78</sup> Prostitutes were also given longer sentences than persons convicted of other misdemeanors like drunkenness or vagrancy.<sup>79</sup>

Not all prostitutes were hounded by the police, however. Class and race bias influenced the enforcement of prostitution laws as much as gender.

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71. Campbell, *supra* note 10, at 1373.

72. By 1900 all the states had anti-prostitution statutes on the books. THOMAS C. MACKAY, *RED LIGHTS OUT: A LEGAL HISTORY OF PROSTITUTION, DISORDERLY HOUSES AND VICE DISTRICTS, 1870 - 1917*, at 123 (1987).

73. *Id.* at 50-54.

74. HOBSON, *supra* note 64, at 33. The nightwalking statute was written to apply to "fiddlers, peddlers, and many others who in their speech or behavior disturbed the public peace," but engaging in the sale or offer of sexual services was not an element of the nightwalking crime. *Id.* at 32.

75. *Id.* at 17. In 19th century Boston, for example, unwed mothers who applied for public charity could be sentenced to the workhouse where people convicted of misdemeanors were incarcerated, simply because they had children and were unmarried. *Id.* at 19.

76. *Id.* at 112.

77. *Id.* at 34.

78. *Id.* at 36.

79. More than 90% of women convicted of nightwalking or lewdness received sentences of three to six months in prison, while persons convicted of other misdemeanors averaged two to three month sentences. *Id.* at 117.

Women who serviced wealthier clients in private clubs and brothels were left alone, while the police cracked down on those who worked on the street or in dance halls and "disorderly houses" frequented by the "lower" classes.<sup>80</sup> The police targeted areas where working class, recent immigrant and black families tended to live.<sup>81</sup>

Boston lawmakers took aim at prostitution as one way of attacking the flood of immigrants who came to the city in the first decades of the nineteenth century.<sup>82</sup> Immigrant women who worked as street prostitutes were particularly vulnerable to arrest.<sup>83</sup> The attack on prostitutes as a symbol of the poor, dirty invading immigrant was reinforced by public health laws which branded prostitutes as the cause of sexually transmitted disease. The tendency to link women to the spread of venereal disease had far more to do with characterizations of sexually active women as "dirty" and "diseased" than with scientific evidence. Beth Bergman points out that "nineteenth century scientists believed that women could spread gonorrhea without having the disease, while some thought women innately possessed the disease."<sup>84</sup> In 1910, the New York State Legislature passed the Page Law, which mandated that all prostitutes be tested for venereal disease upon arrest.<sup>85</sup> If infected, the woman was held until she was no longer contagious. There was no similar requirement for the male clients of prostitutes. Legislators completely ignored the role of men in spreading the disease.<sup>86</sup> This double standard impeded the effort to check the spread of sexually transmitted diseases.

During World War I, U.S. government officials depicted prostitutes as spreaders of venereal disease who could potentially threaten the fighting capacity of the U.S troops. Government pamphlets described prostitutes as "enemy agent[s] sent from Germany to debilitate the American forces."<sup>87</sup> Any woman walking alone "near a military base risked being labeled a 'suspected prostitute.'"<sup>88</sup> This label could have serious consequences since federal laws required the quarantining of civilians suspected of being infected with venereal disease. The suspicion did not have to be based on any act of

80. *Id.* at 33. See also CARMEN & MOODY, *supra* note 21, at 5.

81. HOBSON, *supra* note 64, at 35.

82. Boston's population rose from 18,000 to 43,000 from 1790-1820, and the city seemed more dangerous to its longer settled residents. *Id.* at 12.

83. In mid-19th century Boston, 36% of all women, but 55% of all convicted prostitutes, were foreign-born. *Id.* at 88. Most of the immigrants were from Ireland. Black women were two percent of the jailed prostitute population. *Id.*

84. Beth Bergman, *AIDS, Prostitution, and the Use of Historical Stereotypes to Legislate Sexuality*, 21 J. MARSHALL L. REV. 777, 793 (1988) (citing PRINCE ALBERT MORROW, *SOCIAL DISEASES AND MARRIAGE, SOCIAL PROPHYLAXIS* 84 (1904)).

85. Martha Vicinius, *Sexuality and Power: A Review of Current Work in the History of Sexuality*, 8 FEMINIST STUD. 133, 134 (1982). The move in some states to require that convicted prostitutes be tested for AIDS replicates the pattern of the Page Law.

86. Bergman, *supra* note 84, at 795 n.102.

87. HOBSON, *supra* note 64, at 180 (citing ALLAN M. BRANDT, *NO MAGIC BULLET: A SOCIAL HISTORY OF VENEREAL DISEASE IN THE UNITED STATES SINCE 1880* 85-111 (1985)).

88. HOBSON, *supra* note 64, at 167.

solicitation.<sup>89</sup> Local health boards were empowered to hold women suspected of carrying venereal disease until they had been tested and the results were known, acting in effect like courts and jails. If a woman tested positive she could be detained until cured, and a positive test result was seen as virtual proof of a chastity offense.<sup>90</sup> Eighteen-thousand women were held under quarantine during this period.<sup>91</sup> The current trend among judges to refuse bail to prostitutes with AIDS harbors elements of a quarantine mentality.<sup>92</sup>

The campaign against sexually transmitted disease during World War I focused on controlling women's sexuality through the quarantine system. Army doctors did not distribute condoms to troops until World War II, even though physicians at the time of World War I were aware of the effectiveness of condoms in preventing V.D. In the first half of this century, public health officials assumed that prostitutes, rather than their customers, were responsible for transmission of V.D.; that poor, sexually promiscuous women were for all purposes prostitutes; and that male sexuality was too "explosive" to be controlled.<sup>93</sup>

#### V. THE CASE OF AIDS

Some BMC judges maintain they are forcibly removing prostitutes from the streets either to protect them from contracting AIDS or to prevent them from spreading the disease to their customers. Admittedly, a significant number of street prostitutes test positive for the AIDS virus.<sup>94</sup> However, several recent epidemiological studies question the extent to which heterosexual prostitution is responsible for the spread AIDS in the United States.<sup>95</sup>

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89. *Id.* at 167, 176.

90. *Id.* at 167.

91. *Id.* at 176. This number does not even include the large numbers of women who were inspected, held pending the results, and found to be uninfected. Forty-five percent of the cases of women suspected of being V.D. carriers were dismissed without arrest. *Id.*

92. Bergman, *supra* note 84, at 793. Some states have passed legislation which specifically allows for the quarantine of AIDS or HIV infected persons "who pose a serious threat to public health when less restrictive measures have failed to curtail their dangerous behavior." Gostin, *supra* note 68, at 1626 n. 108.

93. HOBSON, *supra* note 64, at 180.

94. Michael J. Rosenberg & Jodie M. Weiner, *Prostitutes and AIDS: A Health Department Priority?*, 78 AM. J. PUB. HEALTH 418 (1988).

95. *Id.* at 420; *See generally* Campbell, *supra* note 10. There is evidence that heterosexual prostitution is responsible for the spread of AIDS in some African countries. This trend is not necessarily applicable to the United States, and the CDC still does not consider prostitution as a recognized risk factor for AIDS. *Id.* For analyses of the risk to prostitutes, see Centers for Disease Control, *Antibody to Human Immunodeficiency Virus in Female Prostitutes*, 36 MORBIDITY & MORTALITY WEEKLY REP. 157 (1987) [hereinafter CDC, *Antibody to Human Immunodeficiency Virus*]; Centers for Disease Control, *Human Immunodeficiency Virus Infection in the United States: A Review of Current Knowledge*, 36 MORBIDITY & MORTALITY WEEKLY REP. 1, 8 (Supp. VI 1987) (summaries of 1987-88 studies showing prostitutes at risk for HIV infection).

While there is substantial data on HIV transmission from men to women, there are far fewer reported cases in the United States of women infecting men.<sup>96</sup> One reason is that, as compared to men, fewer women in the general population have the virus. A second explanation is the lower efficiency of female-to-male AIDS transmission.<sup>97</sup> As of April 1991, the Centers for Disease Control report women as the source of only thirty percent of all AIDS cases attributed to heterosexual contact.<sup>98</sup> This number may well be skewed given that some men refuse to admit to homosexual activity and falsely blame their AIDS infection on sex with a prostitute.<sup>99</sup> A New York City Department of Health study conducted from 1979-1989 showed only seven out of 17,000 men with AIDS whose risk factor was "sex with a woman."<sup>100</sup> One of the most recent studies of female-to-male transmission of AIDS looked at seventy-two male partners of HIV-infected women and found only one case in which the man had contracted HIV from his partner, as compared with a twenty percent transmission rate from men to women.<sup>101</sup> Even then, there is very little data indicating how many of the female-to-male AIDS transmission cases are due to sexual contact with a prostitute.<sup>102</sup>

Another factor which minimizes the risk of transmission is that the vast majority of street prostitutes provide oral sex rather than intercourse.<sup>103</sup> The chance of contracting AIDS from receiving unprotected oral sex is quite small.<sup>104</sup> Condom use further mitigates the risk of transmission.<sup>105</sup> In

96. Bergman, *supra* note 84, at 782 (citing Peterman, *Risk of HTLV-III/LAV Transmission to Household Contacts of Persons with Transfusion-Associated HTLV-III/LAV Infection*, Program and Abstracts of the 2d Int'l Conference on AIDS (1986)).

97. Nancy S. Padian, *Female-to-Male Transmission of Human Immunodeficiency Virus*, 266 JAMA 1664 (1991).

98. *Id.* at 1664 (citing CENTER FOR DISEASE CONTROL, HIV/AIDS SURVEILLANCE REPORT: YEAR-END EDITION (1991)); Campbell, *supra* note 10, at 1368.

99. One social worker who administered a questionnaire on AIDS transmission to people with AIDS (P.W.A.'s) in New York noted that after there had been media coverage on the role of Haitian prostitutes in spreading AIDS, she saw a noticeably larger number of persons with no identified risk attributing their infection to prostitutes. She noted that 63% of the P.W.A.'s who at first listed prostitutes as the source of their infection later changed their answers after she had gotten to know them and earned their trust. Bergman, *supra* note 84, at 784 n.34.

100. Donna King, *Prostitutes as Pariah in the Age of AIDS—A Content Analysis of Coverage of Women Prostitutes in The New York Times and The Washington Post, September 1985-April 1988*, 16 WOMEN & HEALTH 158 (1990) (citing AIDS Surveillance Unit, N.Y.C. Dep't of Health, AIDS Surveillance Update (1989)). See also Michael Bloor et. al., *Estimating Hidden Populations: A New Method of Calculating the Prevalence of Drug-Injecting and Non-Injecting Female Street Prostitution*, 86 BRIT. J. OF ADDICTION 1477, 1482 (1991).

101. Padian, *supra* note 97, at 1664. In the one case in which the male did contract the virus, he had repeated unprotected sexual contact with the same partner. If frequency of repeated contact is a factor in female-to-male transmission, this is another reason why prostitutes are less likely to transmit the disease to their clients, since most clients do not have frequent repeated sexual contact with the same streetwalker. *Id.*

102. Rosenberg & Weiner, *supra* note 94, at 421; See generally Campbell, *supra* note 10.

103. One estimate put oral sex at about 80% of the prostitution work in the United States. Lyn Hampton, *Health: Our First Concern*, in A VINDICATION OF THE RIGHTS OF WHORES, *supra* note 5, at 109, 127.

104. Alan R. Lifson, *Do Alternative Modes of Transmission of Human Immunodeficiency Virus Exist?*, 259 JAMA 1353, 1354 (1988) (oral-genital contact not independent risk factor for HIV infection and risk of HIV infection after extensive contact with infected saliva "extremely low").

short, recent data does not support the theory that prostitutes contribute significantly to the spread of AIDS in the United States.

Judges also see arrest/incarceration as a means of protecting prostitutes themselves from the risk of AIDS, a risk they view as inextricably tied to their work. Studies indicate, however, that in the United States prostitutes are at the greatest risk of contracting the HIV virus not from random intercourse with clients but through intravenous drug use. It is not surprising that a CDC study of prostitution in seven U.S. cities found that risk factors for AIDS in female prostitutes may be similar to those in other women living in the same geographic areas.<sup>106</sup> Prostitutes who do not use drugs tend not to be HIV-positive.<sup>107</sup> The 1987 CDC study found that approximately twenty percent of IV drug using prostitutes were HIV-positive, while only about five percent of non-IV drug using prostitutes also tested positive for the virus.<sup>108</sup> Fifty percent of the prostitutes in the 1987 study were IV drug users or had regular sex with boyfriends or lovers who took drugs intravenously.<sup>109</sup>

Nevertheless, even among drug using prostitutes who may be HIV-positive, there is no conclusive evidence that prostitutes in the United States are responsible for spreading AIDS to their clients. This is true even though HIV-infected women continue to work the streets. As Priscilla Alexander notes:

If prostitutes were effectively transmitting the AIDS virus to their customers, there would be far more cases of white, heterosexual males diagnosed with AIDS than is reflected in the current statistics because some IV users in New York have been infected with the AIDS virus since at least 1976, and a third to a half of street prostitutes use IV drugs. . . . The average street prostitute sees 1,500 customers a year.<sup>110</sup>

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105. Bergman, *supra* note 84, at 782; Campbell, *supra* note 10, at 1373. Prostitutes addicted to heroin and crack are less likely to insist on condom use, however, as they may be too high or too desperate for money to refuse a client who will not wear one. Alexander, *supra* note 9, at 204.

106. CDC, *Antibody to Human Immunodeficiency Virus*, *supra* note 95, at 158. This 1987 CDC study of AIDS and prostitutes surveyed 1396 prostitutes in Las Vegas, San Francisco, Los Angeles, Atlanta, Colorado Springs, Miami, Southern New Jersey and Northern New Jersey.

107. Rosenberg & Weiner, *supra* note 94, at 418; Campbell, *supra* note 10, at 1368.

108. Campbell, *supra* note 10, at 1368.

109. CDC, *Antibody to Human Immunodeficiency Virus*, *supra* note 95, at 157 *cited in* Campbell, *supra* note 10, at 1368. Approximately 54% of the MCI-Framingham women surveyed by Social Justice for Women between 1988-1990 had "a history of chronic intravenous drug abuse." KLAUSNER & SMITH, *supra* note 6, at 1. While many, but by no means all, of the women were incarcerated for prostitution, the report notes that many drug addicted women turn to prostitution to support their habit. *Id.* at 2, 9, 11. Drugs taken intravenously include heroin and crack-cocaine. *Id.* at 11.

110. Priscilla Alexander, *Prostitutes Are Being Scapegoated for Heterosexual AIDS*, in *SEX WORK*, *supra* note 9, at 248, 249. According to Alexander, a simple calculation, taking as its basis that perhaps five percent of 20,000 prostitutes in New York were infected in 1978, follows: 4,000 prostitutes x 1,500 customers x 3 years [to allow some time for incubation] x 20 percent [one estimate of the rate of female to male transmission] = 360,000 diagnosed cases of AIDS among the client population. However, only approximately seventy men [as of 1986] have been diagnosed with AIDS who claim contact with prostitutes as

As for the risk on the job, the 1987 CDC study found that female prostitutes are most likely to contract the HIV infection from their boyfriends or husbands, with whom they often do not employ safe sex practices.<sup>111</sup> Thus, overall, there is little scientific data to strengthen the claim of many judges that prostitutes must be kept off the streets to protect both their clients and themselves from the risk of AIDS.

## VI. ON THE STREETS

*I prefer to do this or else be on aid because regular jobs take all the money out, and if you got kids you got nothing left. Anyway, I gotta find me a house before I can get on aid. Having to work a job to get pay—it's too slow. But this is my job. I gotta work all the time. I worry about AIDS—very much so—and all the other diseases, too. I use condoms when I can get them. I also worry about the guys out there—they take your money, beat you up, kill you. I been hurt a bunch of times. A bunch of times. I had a knife pulled on me, they raped me, beat me up. My sister got a black eye the other day. . . . You work hard out there and they be trying to give you a hard time. The police say all the time, "Hey, you suck my dick and I won't arrest you." Even the lawyers and judges buy sex, I know some. It's bad out there.*<sup>112</sup>

Some judges recognize that prison may serve little rehabilitative or deterrent purpose for prostitutes. Yet they see incarceration as a safe haven from the violence and drug use prostitutes face on the street. However, the criminal "justice" system itself, which allows judges to jail prostitutes "for their own good," may be contributing to the dangers faced by streetwalkers. Under a system of criminalization, both clients and pimps may abuse prostitutes without criminal sanction, as prostitutes' own illegal activity makes them fear complaining to the police. Countries like the United States which have the strictest criminal prohibitions against prostitution also have the largest incidence of pimping, juvenile prostitution, and violence against prostitutes.<sup>113</sup> More prostitutes are murdered in the United States than in any

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their only risk factor, again indicating that prostitutes are not passing the disease as quickly as is commonly believed.

*Id.*

111. Rosenberg & Weiner, *supra* note 94, at 421. Condom use is often a way prostitutes distinguish sex with those they love from sex with clients. Sophie Day & Helen Ward, *The Praed Street Project: A Cohort of Prostitute Women in London*, in AIDS, DRUGS AND PROSTITUTION 61, 68 (Martin Plant ed., 1990).

112. Jane, featured on Carol Jacobson poster for *Street Sex: A Video Installation on Street Prostitution in Detroit* (on file with author).

113. Alexander, *supra* note 9, at 195-96.

other country.<sup>114</sup>

Mimi Silbert's study of sexual assault on street prostitutes revealed that seventy percent of the surveyed women reported that they had been raped while working the streets.<sup>115</sup> While these rapes occurred as often as eight to ten times a year, only four percent of the women reported their assault to the police.<sup>116</sup> Prostitutes are unlikely to report sexual assault because police departments tend to assume that rape is one of the "occupational hazards" of prostitution and do not follow up such complaints. A *San Francisco Examiner* study of police response to rape complaints in Oakland found a huge number of improperly investigated rape cases, many of which involved complainants who were prostitutes.<sup>117</sup> One out of four rape cases in Oakland were listed as "unfounded," although in many instances the police had not bothered to interview the complainant.<sup>118</sup> This dismissive attitude toward prostitute rape victims is not unique to Oakland's police force.<sup>119</sup>

The other major source of violence to prostitutes on the streets comes from pimps. Three different studies have concluded that physical abuse occurs in over half of the pimp-prostitute relationships.<sup>120</sup> More than half of the participants in one of the studies attested to being "beaten regularly or constantly."<sup>121</sup> The criminal complaint from one "deriving support" case brought against a pimp in the BMC last year suggests what form the violence can take:

Victim reports that she has been working as a prostitute for the defendant from 1/19/90 till 2/5/90, turning over in excess of \$1000 to the defendant. Victim also reports that the defendant did put a .38 caliber revolver to her head, at the corner of Church St. and Charles St. South, whereupon he took \$20.00 in U.S. currency from her,

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114. Margo St. James, *supra* note 5, at 79.

115. Alexander, *supra* note 9, at 201, 214 (citing MIMI SILBERT, *SEXUAL ASSAULT OF PROSTITUTES* (1981)).

116. *Id.*

117. Jane Gross, *203 Rape Cases Reopened in Oakland as the Police Chief Admits Mistakes*, N.Y. TIMES, Sept. 20, 1990 at A14. As a result of public outrage following the release of this article, the Oakland Police subsequently decided to review all the files for the cases that had been listed as "unfounded."

118. *Id.*

119. See Jane Gross, *To Some Rape Victims, Justice is Beyond Reach*, N.Y. TIMES, Oct. 12, 1990, at A14.

120. D. KELLY WEISBERG, *CHILDREN OF THE NIGHT* 108 (1985) (citing DOROTHY H. BRACEY, "BABY-PROS": PRELIMINARY PROFILES OF JUVENILE PROSTITUTES 37 (1979); MIMI H. SILBERT, NAT'L INST. OF MENTAL HEALTH, *SEXUAL ASSAULT OF PROSTITUTES: PHASE ONE* 60 (1980); ENABLERS, *JUVENILE PROSTITUTION IN MINNESOTA: THE REPORT OF A RESEARCH PROJECT* 70 (1978)). However, participants in a 1987 survey conducted by the Prostitutes Union of Massachusetts (PUMA), on the violence experienced by fifty female prostitutes, claimed that they were more likely to experience violence from a client or a family member upset with their prostitution than from a pimp. Only 20% of the women in the survey were streetwalkers. The remainder were "dirty mixers," women who work out of bars. Telephone Interview with Chris Womandez, Prostitutes Union of Massachusetts (PUMA), in Boston, Mass. (Apr. 12, 1991).

121. SILBERT, *supra* note 120, at 60.

telling her she had till 10:30 P.M. to come up with another \$200.00, or she would be dead.<sup>122</sup>

It is difficult to determine the extent to which prostitutes are involved in pimp relationships because many women refuse to admit that they are relinquishing money to a pimp. Eleanor Miller's study of street prostitutes in Milwaukee found that women very rarely work on the street completely independent of pimps.<sup>123</sup> Women working alone were known as "outlaws," a term that itself points to the pimp relationship as the norm.<sup>124</sup> Most attempts at independent working were brief. According to Miller, "men would simply not permit women to hustle in this fashion," independent of male control.<sup>125</sup>

Younger prostitutes in particular seem to rely on pimps. The average age of females entering the profession is fourteen.<sup>126</sup> One study of juvenile prostitutes found that only ten percent had never worked for a pimp, as compared with twenty-eight percent of the adult prostitute population.<sup>127</sup> The lowest estimates still place the majority of street prostitutes (sixty percent) under a pimp's control.<sup>128</sup>

Pimps convince prostitutes to work for them by offering protection against other violent men and/or by physical coercion. As an eighteen year old prostitute in New York City who works independently describes it:

[N]ot having a pimp does cause some problems because if the pimps on the streets know that a girl is renegading, they'll be on her ass. It's against their laws to not have a pimp. So if they know that a girl is renegading, they'll make it difficult for her to work. That's why almost every girl out there has one.<sup>129</sup>

While women themselves may make the initial decision to prostitute, they often find it difficult to survive alone on the street so long as prostitution remains illegal. The prostitutes in Miller's study gave all their proceeds to a pimp "in exchange for affection, an allowance, the status of their company,

122. Complaint (No. 254938), Boston Mun. Ct. (1990).

123. ELEANOR M. MILLER, STREET WOMAN 145 (1986).

124. *Id.* This same term is used in New York City and in Boston.

125. *Id.* Attorney Sarah Hunt related stories of Boston pimps who would send in clients to beat up women working on their own. Interview with Sarah Hunt, *supra* note 5.

126. D. Kelly Weisberg, *Children of the Night: The Adequacy of Statutory Treatment of Juvenile Prostitution*, 12 AM. J. CRIM. L. 1, 5-6 (1984); Margaret A. Baldwin, *Pornography and the Traffic in Women: Brief on Behalf of Trudee Able-Peterson, et. al., Amici Curiae in Support of Defendant and Intervenor-Defendants, Village Books v. City of Bellingham*, 1 YALE J.L. & FEMINISM 111, 123 (1989). One study of twenty street prostitutes in Camden, New Jersey found that half of the women started prostituting before they were eighteen. Matthew Freund et al., *Sexual Behavior of Resident Street Prostitutes with their clients in Camden, New Jersey*, 26 J. OF SEX RES. 467 (1989).

127. BRACEY, *supra* note 120, at 33.

128. Alexander, *supra* note 9, at 189.

129. MICHAEL ZAUSNER, THE STREETS: A FACTUAL PORTRAIT OF SIX PROSTITUTES AS TOLD IN THEIR OWN WORDS 35 (1986).

and some measure of protection, even if it is simply permission to use the man's name as a "keepaway" (from me) for other predatory men."<sup>130</sup>

If prostitution were not a crime, prostitutes would not be dependent upon pimps to protect them from police and clients. They would be free to press criminal charges against violent customers and against pimps who force women into working for them.<sup>131</sup> Under the current system, prostitutes correctly perceive that police will not investigate crimes committed against them, because officers treat these incidents as "hazards of the job," and do not bother to investigate them seriously.<sup>132</sup> Furthermore, were prostitution to be decriminalized, prostitutes could unionize and collectively demand safer working conditions from clients such as requiring all clients to wear condoms. Individually, prostitutes lack sufficient bargaining power to enforce such demands.

Decriminalization would have an unpredictable effect upon the other principal destructive force for streetwalkers: drug use. Currently, the majority of prostitutes who work the street use drugs.<sup>133</sup> It is difficult to determine whether drug use sends women onto the streets to earn money for their habit, or whether working the streets drives women to drugs.

One trait common among drug-using prostitutes is their relationship with drug-using men. According to Priscilla Damon, a counselor with Community Services for Women (a Boston-based alternative sentencing program for women), some prostitutes first venture into drug use in order to cement a relationship with an addicted lover.<sup>134</sup> Often it is not a pimp but a drug-addicted boyfriend who persuades a woman to begin selling her body.<sup>135</sup> One study found that women are most frequently introduced to drugs by men.<sup>136</sup> This is because "the control of the illegal distribution of drugs, especially heroin, is in the hands of men."<sup>137</sup> The same study also found that most women developed their drug addictions after being on the street.<sup>138</sup>

Putting prostitutes in prison, however, solves none of their problems. Prison is no cure for an addict. In Massachusetts, the women's prison at MCI-Framingham has no full-time drug counseling program. Thus, judges who jail prostitutes in the belief that they are rescuing addicts from drugs are not

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130. MILLER, *supra* note 123, at 37.

131. See Alexander, *supra* note 9, at 184-214.

132. See Gross, *supra* note 119.

133. See *supra* note 109.

134. Interview with Priscilla Damon, Community Services for Women, in Boston, Mass. (Jan. 4, 1991).

135. Interview with Kay, *supra* note 1.

136. MILLER, *supra* note 123, at 109.

137. *Id.*

138. *Id.* Many streetwalkers suffer from extremely low self-esteem, and may take drugs, as Kay did, both to boost their confidence and to survive the less appealing aspects of their trade. WEISBERG, *supra* note 120, at 91-93. The self-image problems of female prostitutes are often the result of sexual, emotional, and other forms of physical abuse in the home. Female prostitutes are extremely likely to have suffered both physical and sexual abuse as children. Two-thirds of the participants in one study of juvenile prostitutes in Minnesota said they were beaten by a family member. *Id.* at 93.

sending addicted women to a place where they can receive help.<sup>139</sup> As Kay's story illustrates, incarceration proves mostly unsuccessful in rehabilitating women who pass through the BMC. The recidivism rate, defined as "the return to a state or federal correctional institution, a county house of correction, or a jail for a period of thirty days or more within one year of . . . release," is twenty-five percent at MCI-Framingham.<sup>140</sup> Thirty-five percent of the women arraigned for prostitution-related offenses in 1990, not even counting those charged with disorderly conduct, reappeared in court on another prostitution charge at least once in the same year.<sup>141</sup> In her study of street prostitution in Milwaukee, Eleanor Miller found that jailing prostitutes had no deterrent or rehabilitative impact on the women, other than only temporarily reducing or stopping their drug use.<sup>142</sup>

However, some former prostitutes credit their arrest and time in jail as finally enabling them to leave the street. Jennifer Colasuono, a battered woman who was forced by her abusive husband to prostitute for an escort agency, wishes she had been arrested by the police because this would have stopped her sooner.<sup>143</sup> Kay also admitted that her arrest may have helped her quit prostitution, "because I couldn't humble myself to go into a place and ask for help."<sup>144</sup> She stressed, however, that while the arrest may have helped to take her off the street, only a detoxification program that also dealt with her emotional issues helped to keep her off. Being sent to MCI-Framingham without any counseling only worsened her situation.

In both Kay's and Jennifer's cases, the criminalization of prostitution failed to address the underlying problems in their lives—drug abuse and violence. Jennifer was able to escape from her abusive relationship only by attempting to kill her husband. Kay successfully left the streets only after she was referred to a drug counseling program.

While some of the problems facing prostitutes on the street can be directly solved by decriminalization, other problems demand additional measures. Prostitutes caught in violent, controlling relationships need safe houses;<sup>145</sup>

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139. MCI-Framingham, the only prison for women in Massachusetts, has only one part-time substance abuse counselor. About three to four hundred women go through MCI-Framingham each year, with about 475 there at any one time. High turnover also makes sustained drug treatment difficult. By the time a woman gets into a program, release from prison is imminent. Radio Interview by Tatiana Scheifer with Sister Jeannette Normandin, former chaplain, MCI-Framingham, and Marcie, inmate (Apr. 11, 1989). See also KLAUSNER & SMITH, *supra* note 6, at 3.

140. KLAUSNER & SMITH, *supra* note 6, at 5 (citing DANIEL P. LECLAIR, MASS. DEP'T OF CORRECTIONS, THE EFFECT OF COMMUNITY REINTEGRATION ON RATES OF RECIDIVISM: A STATISTICAL OVERVIEW OF DATA FOR THE YEARS 1971 THROUGH 1987, AT 8 (1990)).

141. See *supra* text accompanying note 22.

142. MILLER, *supra* note 123, at 133.

143. Jennifer Colasuono, Address at Feminism in the 90s: Bridging the Gap Between Theory and Practice (Feb. 9-10, 1991) (tape on file with YALE J.L. & FEMINISM).

144. Interview with Kay, *supra* note 1.

145. Many battered women's shelters do not accept prostitutes because they fear her pimp might arrive and provoke a violent encounter. Shelters also do not want the women to continue working the streets during their stay. Telephone Interview with Chris Womandez, *supra* note 120.

prostitutes trapped by drug addiction need access to substance abuse counseling. Prostitutes who voluntarily choose their work should be given the power to protect themselves and control their working environments.

One study found that women coerced into drug treatment programs by the criminal justice system enjoyed greater rehabilitative success than women who sought treatment on their own:

They do better, in part, because legal pressure keeps an addict in treatment for a longer period of time, and virtually all studies agree that the longer an addict receives treatment, the better his [or her] chances for long-term success. . . . For those referred to treatment by the courts, whose only other option is imprisonment or further legal sanctions, the incentive to complete treatment is even more powerful.<sup>146</sup>

But the study also found that women diverted into drug programs had a better rehabilitation rate than women sent to prison.<sup>147</sup> It cost at least \$20,000 to maintain each of the 3,461 women prisoners at MCI-Framingham in 1990.<sup>148</sup> In contrast, it costs \$8000 for a woman "to participate and complete an average residential recovery program" for drug abuse.<sup>149</sup>

## VII. CONCLUSION

On February 11, 1991, two women in tight black leggings and hightop sneakers carried a cross down the aisle of the church at the Jesuit Urban Center in Boston. Following behind them was a draped coffin containing the body of Lori DeLury. DeLury was forty when she was stabbed to death while on the job. She was working as a prostitute to support her drug addiction, when one of her customers murdered her. Despite the fact that she had been arrested for prostitution and common streetwalking three times in the previous year, the intervention of the legal system which criminalizes prostitution did nothing to save her life.

Prostitution should be decriminalized. The endless shuffling of prostitutes through police stations and courtrooms serves no effective protective, rehabilitative or deterrent function. Efforts to jail prostitutes as temporary protection from pimps and drugs target the victim, not the danger. By way of example, it is difficult to imagine sending battered women to jail so as to protect them from their batterers, or to prevent them from going back into an

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146. KLAUSNER & SMITH, *supra* note 6, at 13 (citing OFFICE OF NAT'L DRUG CONTROL POLICY, UNDERSTANDING DRUG TREATMENT (1989)).

147. *Id.*

148. KLAUSNER & SMITH, *supra* note 6, at 13.

149. *Id.* Women suffering from drug abuse should not be arrested for prostitution as a pretext for forced drug treatment.

abusive situation. Even when prostitutes are imprisoned, they are likely to return to the streets upon release because the Massachusetts prison system fails to adequately address the *reasons* why women choose to sell sex.

Given that prostitution-related cases may comprise as much as fifteen percent of the caseload at the BMC,<sup>150</sup> a tremendous sum is being spent on arresting, holding, and then simply releasing women charged with prostitution. A study by Julie Pearl of the amount spent on arresting and processing Boston prostitutes in 1985 estimated the cost at \$1,196 *per case*.<sup>151</sup> Court costs alone for Boston prostitution cases totalled \$1,225,224.<sup>152</sup> Altogether, Pearl calculated that in 1985 Boston spent \$6,156,133 on the enforcement of its prostitution laws.<sup>153</sup> If judges and policy-makers are sincerely concerned about the violence, drug abuse and risk of disease threatening these women, funds presently spent on criminalization should be shifted to drug rehabilitation, counseling, and safe haven programs. At the very least, decriminalization will give prostitutes the chance to make choices, a possibility remote at best under the present system.

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150. Interview with Sarah Hunt, *supra* note 5. A 1972-73 study of the BMC by the Boston University Law School Center for Criminal Justice found that one quarter of the complaints (excluding moving traffic violations) were for prostitution cases. Pearl, *supra* note 16, at 777.

151. Pearl, *supra* note 16, at 797.

152. *Id.*

153. *Id.* In 1985, half of the sixteen largest cities in the United States spent more on prostitution control than on either education or public welfare. *Id.* at 772 (citing U.S. BUREAU OF THE CENSUS, CITY GOVERNMENT FINANCES IN 1981-82, SERIES GF82, No. 4, at 1-3 (1984)).