

3-2021

Prostitution Decriminalization Campaigns in the United States: Libertarianism or a "Decent Society"

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Recommended Citation

Raphael, Jody (2021) "Prostitution Decriminalization Campaigns in the United States: Libertarianism or a "Decent Society";" *Dignity: A Journal of Analysis of Exploitation and Violence*: Vol. 6: Iss. 2, Article 1. <https://doi.org/10.23860/dignity.2021.06.02.01>

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Abstract

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Keywords

USA, decriminalization, prostitution, sex trade, sex work, liberty, libertarianism, "decent society" New Hampshire, Rhode Island, Washington, D.C., New York, Oregon

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Acknowledgements

The author thanks Dignity Editor-in-Chief, Donna Hughes, for her detailed editing and suggestions that have greatly improved this article. She is also grateful to Dublin philosopher Johnny Lyons, author of *The Philosophy of Isaiah Berlin*, for his helpful tutorial on the philosophy of Isaiah Berlin. The author and Dignity thank the following people for their time and expertise to provide details and a fact check for this article: Taina Bien Aime, Executive Director, The Coalition Against Trafficking in Women; Eleanor Kennelly Gaetan, Director of Public Policy, National Center of Sexual Exploitation; and Darlene Pawlik, member, New England Association Against Sexual Exploitation.

PROSTITUTION DECRIMINALIZATION CAMPAIGNS IN THE UNITED STATES: LIBERTARIANISM OR A “DECENT SOCIETY”?

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ABSTRACT

Recently, legislative campaigns to totally decriminalize the sex trade industry in a handful of U.S. states and the District of Columbia failed, but a look at campaign supporters and their arguments demonstrates that libertarian principles are mainly guiding their efforts. This article explores how libertarianism principles, when applied to the sex trade, could bring about severe and lasting harm to others, including sellers of sex, potential victims of sex trafficking to meet the new demand, and the general community. Philosophic principles of liberty have been incorporated by courts, which find that liberty is never absolute and requires a balancing test in order to create a "decent society."

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The extent of a man’s or a people’s liberty to choose to live as he or they desire must be weighed against the claims of many other values, of which equality, or justice, or happiness, or security, or public order are perhaps the most obvious examples. For this reason, it cannot be unlimited (Isaiah Berlin, 1998b, p. 240).

WITHIN THE LAST TWO YEARS bills to totally decriminalize prostitution and the sex trade were introduced in several states, including New York and Vermont, and in the District of Columbia (Washington, D.C.). There were also proposals in New Hampshire and Rhode Island to establish decriminalization study commissions. The bills failed to pass in each state and the District of Columbia.

The decriminalization proponents advocate for the liberty or right to both solicit and buy sex. However, these strict libertarians ignore the fact that “Total liberty for wolves is death to the lambs” (Berlin, 1998, p.10).

It is the goal of total decriminalization that has caused these bills’ defeat because total decriminalization also totally ignores the harm of the sex trade industry suffered by sellers, individuals in danger of being victims of sex trafficking, and the families of buyers that became apparent in the policy debate. Nor do proponents recognize the adverse effects on communities with such an expansion of the sex trade industry in their midst. They fail to see how decriminalization will increase sex trafficking of minors and young people as demand for paid sex rises because of the legal change. Decriminalization advocates minimize or ignore facts, such as pimp control over the

sellers of sex and violence from buyers that have been documented by social science research and law enforcement. Their proposals harm some of the very persons for whom they purport to advocate.

How then to deal with the libertarian claims? The answer is that liberty has never been absolute in the United States democracy. Courts have upheld government efforts that interfere with individual liberty if they can articulate a legitimate governmental interest to prevent harm to the community or groups of individuals in it. Philosopher Isaiah Berlin in his famous essays on liberty provides a framework to guide us. He views this as a *balancing act between liberties* that ensures that our society is humane and moral (Berlin, 1998a). He writes that compromises always have to be found:

If the liberty of myself or my class or nation depends on the misery of a number of other human beings, the system which promotes this is unjust and immoral (Berlin, 1998b, p.197).

In 2020 we have seen the same lack of concern for the rest of the community in the stance of those refusing to wear a mask during the COVID-19 pandemic in the U.S., when the freedom to unmask can infect and even cause death to others. In February 2021 we saw Senator Rand Paul (R, Kentucky), who defiantly refuses to wear the required mask on the Senate floor, being castigated by other Senators concerned about their own safety (Bolton, 2021). It would appear that these absolutists are only out for themselves, with no concern for others in the community. Happily, in the main, courts have upheld these governmental efforts, such as mask mandates and restaurant closings.

Application of libertarian principles to the sex trade industry must be resisted if we wish to live in a decent society; a close look at the positions of decriminalization proponents in the United States within the last few years, makes this abundantly clear.

In the United States, each of the 50 states control criminal law within its borders, and currently, except in Nevada's rural areas, prostitution is illegal. Therefore, each jurisdiction will be discussed separately. This article reviews/summarizes the efforts to decriminalize prostitution in states in which the introduced bills obtained some traction. In 2020 in Louisiana, 2019 in Maine, and 2017 in Massachusetts and Hawaii, decriminalization measures were introduced but died for lack of further action and will not be discussed here. All the sponsors of the bills to decriminalize prostitution discussed below were Democrats.

The Washington, D.C. Battle

In June 2019 At-large Council member David Grosso introduced a bill to decriminalize prostitution in the nation's capital. The bill, the Community Safety and Health Amendment Act of 2019, was a revised version of a decriminalization bill he filed in October 2017 that never obtained a hearing. This time, four of the Council's 13 members signed on as co-sponsors. Two main groups, the LGBTQ community and groups concerned with incarceration of Black people, spearheaded the decriminalization effort. The act repealed provisions against the selling of sex or pimping as long as the individuals involved were over the age of 18 years and were voluntarily participating; it also simply repealed laws making places of prostitution unlawful, with no legal limitations or restrictions (Grosso, 2019).

Grosso maintained that decriminalization would allow individuals in the sex trade industry to better screen clients, negotiate safer sex practices, and report incidents of

trafficking, or buyer and police violence. Immigrants, LGBTQ individuals, and persons of color are especially adversely affected by the criminalization of prostitution, he stated (Grosso, 2019). Unlike other decriminalization advocates, Grosso made mention of violence in the sex trade in consensual exchanges: “Eighty percent of street-based workers experience violence,” he wrote in his press release, hence the need to be able to screen customers without police interference (Grosso, 2019). However, he does not appear to notice an inconsistency. If prostitution is so violent, why would anyone want to expand the market by decriminalizing the activity?

The bill’s sponsor announced that he developed the legislation in close partnership with the Sex Worker Advocates Coalition (SWAC), which organized a group called DECRIMNOW, consisting of almost two dozen local and national organizations, including Black Lives Matter, D.C. Center for the LGBTQ Community, and ACLU DC (DECRIMNOW, 2019). LGBTQ advocates emphasized that as longstanding bias against trans women of color forces them to engage in prostitution for economic survival, they should not be punished: Many, especially trans women of color, turn to sex work to survive after experiencing discrimination or abuse and being denied access to employment, housing, and healthcare (Chibbaro, 2019).

HIPS (Harm Reduction Experts Improving Lives), another major organizing group that promotes the health, rights, and dignity of individuals and communities impacted by the sex trade industry or drug use. Advocates who take a stand against criminalizing communities of color and mass incarceration, argued that criminalization of prostitution results in the brutalization, assaults, and murder of members of its community by police. Spellman, a prominent spokesperson for the D.C. bill and a trans woman of color who has been active in the sex trade for many years claimed: “Decriminalizing sex work makes the entire black community safer” (Spellman, 2019). She talks as if all prostitution is consensual. “I understand the need to protect people,” she told the *New York Times*, “and there are people being exploited, but not in the numbers people think” (Williams, 2019).

The *Washington Post’s* intervention may have determined the battle’s result. Representatives from two area not-for-profits, one a survivor of prostitution, persuaded the newspaper to print their op ed piece against the proposed legislation (Frundt & Vafa, 2019). *Washington Post* columnist Colbert I. King published two columns against the measure (King, 2019a; King 2019b). A few days after King’s columns, the newspaper aired an editorial against the bill (*Washington Post* Editorial Board, 2019).

The columns and editorial reminded readers that decriminalizing the purchase of sex would invite more men into the sex market, not just from surrounding areas but from all over, as the district draws people from all over the country and the world to do business and for tourism. As a result, traffickers would target the most vulnerable local women and youth to meet that demand, as well as traffic more women and girls from around the U.S. and from abroad to meet this enlarged demand. Columnist King was especially graphic in pointing out that decriminalization would bring brothels and sex buyers to readers’ own streets, as the legislation allows the use of homes, hotels, health clubs, and apartments for prostitution use. King asked if:

Thus, “the sex industry,” seeking to ply its trade in or around parks playgrounds, schools, shopping areas, residential neighborhood and dog parks, would have full protection of D.C. laws? What say you, D.C. residents? (King, 2019a).

In contrast, mainstream liberal media outlets, such as *The Nation* and *The New Republic* magazines, along with a host of e-publications, touted the initiatives, often written by, or generously quoting from the same advocates for decriminalization (Grant, 2019; Chen, 2017; North, 2019; and Crabapple, 2019).

A mid-October 2019 hearing of the Council's Judiciary and Public Safety Committee lasted a total of 14 hours and had to be continued the next day. One media source reported 180 witnesses, most opposed to the measure. Following the emotional marathon hearing and an inundation of thousands of e-mails, the chairperson immediately announced he planned no vote in the committee. "There seems to be a lot of contention," he said. "There's not a consensus on what that path forward looks like." The sponsor was quoted as saying "I think we should bring it to the ballot box" (Lang, 2019).

To defeat the D.C. decriminalization bill required a long and hard-fought battle to get beyond worthy concerns about criminal justice reform for Blacks and new-found interest in the lives of gay and transgender persons. The total lack of concern about issues of abuse, violence, and coercion in the sex trade industry on the part of decriminalization advocates is shocking. When D.C. residents understood how under the bill, prostitution would permeate all areas of the district, including their own neighborhoods, opposition grew and defeated the effort.

The New York State Debate

Nine days before the end of the spring 2019 legislative session, two newly elected New York State senators from the metropolitan New York City area, Julia Salazar from Brooklyn and Jessica Ramos, from Queens, along with two assembly members, Richard Gottfried and Yuh-Line Niou, introduced legislation to decriminalize prostitution in New York State along lines completely similar to the D.C. measure (McKinley, 2019). Supporters of the bill included a similar blend of LGBTQ organizations and those concerned with the incarceration of Black people organized as Decrim NY, consisting of approximately 30 organizations (Luo, 2019). LGBTQ concerns dominated the New York State decriminalization debate. Many members of the group's steering committee receive funding from George Soros's Open Society Foundations (confidential communication to author, 2019). The bill died seven days later when Governor Andrew Cuomo announced he would not sign it due to the lack of time to thoroughly consider its ramifications (Escobar, 2019). Opponents of the proposal, organized into the New York Alliance Against the Legalization of Prostitution, reported they spoke with a minimum of three dozen New York legislators, none of whom said they would support the proposed legislation (confidential communication to author, 2019). However, on February 10, 2020, the measure's sponsors reintroduced the identical bill (Associated Press, 2020), where it has languished in committee. In the 2021 legislative session the bill increased its sponsorship three-fold (15 sponsors), still not enough to move it for deliberation, but the bill is still alive.

Advocates of the bill called for the necessity of the sex trade industry for the economic support of LGBTQ individuals: prohibiting prostitution would be "an end to what is for many of us, our only means of economic survival." In addition, they averred that "patronizing a prostitute" is a charge used by the police to harass and arrest people for

sexual behaviors that defy heterosexual norms of morality...this is a reminder of the continuation of state-sanctioned violence enacted on queer bodies (Luo, 2019a).

Thus, the Coalition in support of decriminalization cannot support the Nordic Model, which retains criminalization for the buyers of sex while lifting it for those who sell sex, because in their view this would end the means of survival for LGBTQ sex sellers.

And in the New York State campaign there was also a defense of sex *buyers* as being constituents deserving of representation (Grant, 2019). In a meeting with opponents of the bill, the measure's sponsors clearly supported the right of buyers to purchase sex. Senator Ramos, whose borough of Queens is thought to be a big sex trafficking hub involving immigrants (Misday, 2019), was said to have remarked that many of her constituents are lonely undocumented male immigrants who could get deported just for seeking companionship in a brothel (confidential communication to author, 2019; Luo, 2019a).

None of the coalition for decriminalization campaign materials make reference to pimping or sex trafficking; all prostitution, seemingly, is violence free: "We see no constitutionally adequate basis to criminalize sex solely because one consenting adult pays another" (Luo, 2019b).

In 2021 the battle then moved to skirmishes involving races for the New York City Council and New York City mayor. One advocate reports a conversation with a candidate for the City Council who said he wanted more information about "sex work," since all the political endorsements he is seeking are requiring that he first support decriminalization, whether it is the Working Families Party, Democratic Socialists of America, or the Village Independent Democrats (confidential communication to author, 2020).

In New York, support for decriminalization of the sex trade industry has developed into a litmus test for liberal or progressive bona fides. Even more than in Washington, D.C., advocates of rights for gay and trans individuals seem oblivious to the harms to sellers of sex; at best they minimize them. They seek to characterize the discussion only around the rights and liberties of LGBTQ sellers of sex, without consideration for the harm done to others in the community-sellers, those sex trafficked, families affected by both buyers and sellers, and the larger community (Heinz, 2020).

At the end of January 2021 Senator Liz Krueger (D-Manhattan) announced the introduction of a bill decriminalizing the selling of sex but not its purchase, freeing those selling sex for survival from jail and providing them with help, but keeping criminal penalties for those who buy sex, and those who traffic individuals or operate brothels. Krueger explained that sex buyers drive the demand, which increases the amount of trafficking and all the exploitation that comes with it (Fonrouge, 2021).

New England

To-date, libertarianism has dominated decriminalization efforts in New England. In 2019 Rhode Island, as well as New Hampshire and Vermont, became a "test case for a new legal approach to sex work" (Anderson, 2019b), when a new organization, Decriminalize Sex Work, came to town. The longtime leader of the national Marijuana Policy Project, Rob Kampia, who was involved in successful campaigns to legalize marijuana in 10 states, announced in early February 2019 he would be spearheading a national push to legalize prostitution. Kampia claimed he had more than \$1 million in donations, with \$700,000 coming from California libertarians Scott and Cyan Banister. The husband and wife team are venture capitalists, investing in hundreds of companies. Scott is a marijuana rights activist and a former supporter of libertarian Senator Ron Paul's presidential campaign (Wikipedia, 2021). In 2016 his wife Cyan came out as a *genderqueer*, which means, she explains, that she is both a man and a woman, all

in a woman's body. She started a new company called Zivity, a pin-up photography site, that celebrates the art of the nude body, predominately female (Hempel, 2016). Kambia said that many of the wealthy donors who backed marijuana legalization were supporting his new organization. The new leader admitted that as marijuana legalization's early successes came through ballot initiatives, he could imagine such prostitution referenda in more liberal, relatively sparsely populated states such as Alaska, Maine, or Oregon as early as 2022 or 2024 (Nelson, 2019).

Kambia's stewardship of the new organization, with offices in Austin, Texas, Washington, D.C., and New York City (UPRISE RI, 2019), has not been without contention, as 20 activist attendees at an organizing summit unsuccessfully demanded that he not associate publicly with any prostitution decriminalization groups (Shugerman, 2019). Their demand was due to allegations of sexual harassment against him within the Marijuana Policy Project, leading to a three-month medical leave for therapy, the eventual loss of his leadership position at the organization, and his ouster from the National Cannabis Industry Association's board of directors the following year. The unmarried libertarian admitted to sexually loaded chatter and crude language in the office, declaring "I think I'm hypersexualized." During his announcement, Kambia revealed he has paid for sex, although not frequently (Shugerman, 2019).

Almost immediately Kambia put New England in his sights by hiring two lobbying firms, a Republican group based in New Hampshire's state capital (Legislative Solutions) and a Chicago-based Democratic entity for Rhode Island, (The Bradford Group), hoping he could jump start a national movement. (Hughes, 2019).

New Hampshire, The "Live Free or Die" State

The libertarian group became involved in New Hampshire in 2019. Earlier, in 2018, New Hampshire Governor Chris Sununu announced he would veto a bill introduced to establish a legislative committee to study decriminalizing "sex work":

There are those in the legislature who want to explore legalizing prostitution. I am 100 percent against it, and would veto the bill if it reaches my desk (Solomon, 2018).

But in a bi-partisan vote, the House passed the bill anyway, 177-134 (Solomon, 2018). In March 2018, after a long hearing, the New Hampshire Senate committee voted 21-3 to kill the measure (Pawlik, 2019).

Representatives of the national group Decriminalize Sex Work made their first official appearance in the state, appearing before a House committee in January 2019 to oppose a bill that would have toughened penalties against customers of underage girls in prostitution, raising them from three-and-a-half to seven years in prison to up to 15 years (Hayward, 2019). The group explained that it wanted the legislature to look at all the prostitution laws together, and indeed the bill was put on hold for further study of the issue (Associated Press, 2019).

In her testimony before the committee, Kaythin Bailey, Decriminalize Sex Work's communications director, explained that the group was pursuing a state-by-state strategy, and given the state's libertarian reputation, New Hampshire was one of the earliest on which it is concentrating (Hayward, 2019). One Democratic state senator did introduce a bill to study the decriminalization of prostitution in the state, but later withdrew it (Hayward, 2019).

Rhode Island

Several days after Kampia announced his New England decriminalization effort, Rhode Island Representative Anastasia Williams, along with four other representatives, introduced a House Resolution to study the health and safety import of revising commercial sexual laws in Rhode Island. By citing research purporting to prove that decriminalization would improve health and safety, the bill made clear that the study commission would begin with a bias toward decriminalization. The composition of the proposed study commission also reflected this pre-ordained result. Of the 12 members, one spot was designated for COYOTE RI, a sex worker decriminalization group, and two for individuals engaged in commercial sex appointed by the Speaker of the House, who might well be influenced in these choices by COYOTE, meaning that at least a quarter of the group could be supporting total decriminalization (Anderson, 2019a). According to monthly reports filed with the Rhode Island Department of State, Decriminalize Sex Work paid the Bradford Group \$3,000 a month to lobby for the bill to create a study commission in the state (Hughes, 2019).

A hearing in the House Judiciary Committee at the end of April 2019 brought out both proponents and critics. Just three days later the committee announced it was holding the bill for further study. (Anderson, 2019b). The day before, a *Providence Journal* editorial against the proposed study commission reminded everyone of the history of prostitution legislation in Rhode Island, and as a result it seemed to some that no one with any political savvy wanted to repeat an earlier multi-year battle. The story is this: In 1980 in Rhode Island indoor prostitution was decriminalized when a bill to decrease the penalty of prostitution from a felony to a misdemeanor for soliciting on the street also removed the criminal section banning prostitution, enabling prostitution to be decriminalized if it occurred indoors. As documented by journalists, scores of spas, actually brothels, cropped up around the state, exploiting women and girls, many of them of Asian origin, who were held with no ability to escape (*Providence Journal* Editorial Board, 2019). The newspaper's editorial reminded readers of how Rhode Island became a sex trafficking site and a sex trafficking destination:

In those dark days, Rhode Island had a well-deserved reputation as a hellish haven for sex trafficking. These "spas," rather than being luxurious relaxation centers that the name implies, were all too often houses of horror (Shapiro & Hughes, 2017). *The Providence Journal* described it this way:

Rhode Island for a time permitted indoor prostitution to be legal, the only state to do so (aside from Nevada, where it was allowed in some rural counties). We saw what happened. So-called "spas" popped up around the state. Foreign women, many of them Asian, were enticed to come to America, and then held as virtual slaves. Young women who were addicted and destitute turned to prostitution out of desperation...It is sad, then, to see some politicians advocate for rebranding prostitution as "sex work" as if it were just another service industry-and to kindle the process for legalization (*Providence Journal* Editorial Board, 2019).

In Vermont a group of lawmakers in January 2020 introduced a bill decriminalizing the sale of sex between two consenting adults. Another measure would have created a study committee to make recommendations for modernizing Vermont's sex work laws (Elletson, 2020). The bill passed the House, but progress was halted when the head of the Senate Judiciary Committee stated that at the present time it was meeting on COVID-19 matters only (Burris, 2020). These proposals for study groups

are an obvious attempt for decriminalization organizations to get their foot in the door, especially with study group composition stacked in favor of decriminalization.

In New England, the initiators of decriminalization bills are motivated by pure libertarian principles—the need, in their view, to get government off people’s backs. They are often or usually supported by financial contributions from out-of-state wealthy libertarians. They receive support from the commercial sex trade industry hiding under the mantra of human rights. Opponents of their efforts must switch the debate to confront the harm of the sex trade and provide the public with the facts it needs for a more nuanced picture. It would appear that many in Rhode Island, involved in the earlier fierce debates to correct the law that was modified now have a better understanding of the facts of prostitution. However, the libertarian message may have more resonance in New Hampshire and Vermont, with attempts at ballot box referenda having a greater chance of success there.

Oregon

Circumstances surrounding the introduction of a new bill in the western U.S. state of Oregon are similar to the New England efforts: an out-of-state advocate and funding from a libertarian philanthropist. A bill to totally decriminalize the sex trade industry was introduced in February 2021, at the request of a New York City sex worker group, part of an organization receiving funds from the George Soros Open Societies Foundations (Urban Justice Center, 2020). The bill’s sponsor gloated, pointing out that Oregon was one of the first to legalize recreational marijuana. “We seem to do really well at passing these libertarianesque things” (Shepard, 2021). Decriminalization advocate Mariah Grant, an Oregon native now working in New York City, stated she had a donor for the effort, Aaron Boonshoft, a Portland resident who has made a gift of \$1.2 million to the campaign (Shepard, 2001). Grant did not rule out attempting to decriminalize the sex trade through the same method Oregon struck marijuana and meth from the criminal code: the ballot box (Shepherd, 2021).

Individual vs. Community

From a review of these efforts it is clear that many of these advocates of decriminalization are interested in more than just the rights and protection of those selling sex; they strongly support the liberty to both buy and sell sex—thus the decriminalization of the whole sex industry. This stance would lead a large number of individuals, including those of color and gay and transgender persons, into an activity these advocates often admit is violent and one often taken up for survival. We also see that extending libertarian principles of the marijuana and gay rights fields to the sex trade industry is inapt; no accounts of individuals being coerced to smoke marijuana or to get into a single sex relationship or union have come to light. Yet proponents of decriminalization fail to engage with this difference; if they do acknowledge it, they claim that after decriminalization all complaints about violence can be directed to law enforcement, apparently assuming that it would be safe for victims to go to the police and that law enforcement can singlehandedly round up all perpetrators and hold them accountable, wishful thinking indeed.

Throughout U.S. history, no liberty principle has been deemed absolute; governments, upheld by the courts, have allowed infringement of liberties if others in the community would be adversely affected. Not only can one not shout fire in a crowded theater, but, also, for example, government is allowed to require children to be inoculated before attending school, where, unprotected from disease, they could infect other children, with the disease quickly spreading throughout the larger community

beyond the school. Over a hundred years ago the U.S. Supreme Court upheld a local smallpox vaccination requirement, ruling: “There are manifold restraints to which every person is necessarily subject for the common good. On any other basis, organized society could not exist with safety to its members” (*Jacobsen v. Massachusetts*, 1905).

One of the greatest scholars of liberalism, Professor Isaiah Berlin of Oxford University, agrees with the necessity to limit liberty, because restraint is often needed to protect the same rights for the weak and the less gifted. Without this, he writes, there is “no possibility of remaining human as we understand the word.” (Berlin, 1998a, p. 10). Liberty may have to be curtailed, “in order to make room for social welfare, to feed the hungry, to clothe the naked, to shelter the homeless, to leave room for the liberty of others, to allow justice or fairness to be exercised” (Berlin, 1998a, p. 11).

What, then, to do when liberty principles collide? The first requirement of a “decent society” is to maintain a “precarious equilibrium that will prevent the occurrence of desperate situations, of intolerable choices,” Berlin writes (1998a, p.15). To do otherwise, to fail to balance competing liberties, “To force people into the neat uniforms demanded by dogmatically believed-in schemes is almost always the road to inhumanity” (p. 16).

A Decent Society

As they have been more concerned with advocating for individual rights against the state, many feminist advocates have unfortunately failed to understand Berlin’s basic concept of a “decent society” and the role that resolving competing liberties plays. Thirty years ago, one legal scholar, Catharine MacKinnon, did, writing that the libertarian concept of sexual freedom would be the death of feminism: “It [the feminist movement] criticized the ruling concept of freedom, especially sexual freedom, unpacked and unmasked it as a cover for the freedom to abuse.” MacKinnon saw that feminism was collective, libertarianism individualist (MacKinnon, 2007).

Berlin’s philosophy of liberalism has found approval from a variety of courts, which in lawsuits brought against current prostitution prohibitions have confirmed the right of government to curtail individual freedoms in pursuit of goals such as prevention of harm to others and safeguarding human dignity. Recently, in upholding France’s new law penalizing buyers of sex, in February 2019 the Constitutional Council of France, for example, upheld the measure as consistent with Article 4 of the Declaration of Human rights of 1789:

Liberty consists in being able to do anything that does not harm others; thus, the exercise of the natural rights of every man has no bounds other than those that ensure to the other members of society the enjoyment of these same rights (France Constitutional Council, 2019).

Three years ago, in an appeal to the U.S. Ninth Circuit Court of Appeals brought by the American Civil Liberties Union, arguing the unconstitutionality of California’s criminalization of prostitution, the Court found that the state’s law was intended to discourage human trafficking and violence against women, as well as preventing contagious disease, approving “the right of the state to promote a common good that might impede individual freedom of actions” (*Erotic Service Provider v. Gascon*, 2018). Most cases brought during the COVID-19 pandemic also confirm this principle, finding that civilization is as much about limits and responsibilities as it is about liberty. Just recently a Nevada Court denied the petition of a woman in a legal brothel to

reopen the establishment closed by state government due to the COVID-19 pandemic. She argued that brothels could implement mitigation strategies to prevent the spread of the virus, just as any other business. The Court wasn't buying; implicitly acknowledging the right of the state to slow the course of the virus, it asked how would the regulatory body be able to ensure compliance, when it could not watch any transaction? (Rodriguez, 2021).

Chicago Tribune columnist Steve Chapman has put it well:

Taking risks with one's own health is an exercise of liberty. But exposing others to disease is a violation of their liberty...Your control over your body extends to such matters as what you eat, what you drink and whether you get a tattoo or piercing. It doesn't extend to actions that may harm or endanger others (Chapman, 2020).

Arguing for total decriminalization of prostitution during a deadly pandemic takeschutzpah, a blatant disinterest in the well-being of prostituted individuals or the larger community, a strange sort of blindness. Within the last year concern for the community has forced some governments abroad to deny the previously granted rights of the buyers by closing legal brothels, where social distancing is an impossibility and where a deadly disease can be spread from one participant to another, and then out into the broader community. If the importance of community becomes better understood, the case against decriminalization is strengthened. Will the pandemic, however, have a long-term and lasting effect on our sense of community once it has been brought under control?

Yes, prostitution is about the sexual act, but it is about power, control, coercion, abuse, and violence against the sex seller by traffickers and buyers. Any person or group advocating total decriminalization of prostitution should be pressed to address the harm the proposal would unleash on the sellers of sex, those who are at risk of becoming targets of traffickers due to increased demand, and the community in which these activities occur. A "decent society" (Berlin, 1998) requires nothing less than a focus on the harm done to others by those exercising their "liberty" to buy sex.

ACKNOWLEDGMENTS

The author thanks Dignity Editor-in-Chief, Donna Hughes, for her detailed editing and suggestions that have greatly improved this article. She is also grateful to Dublin philosopher Johnny Lyons, author of *The Philosophy of Isaiah Berlin*, for his helpful tutorial on the philosophy of Isaiah Berlin. The author and Dignity thank the following people for their time and expertise to provide details and a fact check for this article: Taina Bien Aime, Executive Director, The Coalition Against Trafficking in Women; Eleanor Kennelly Gaetan, Director of Public Policy, National Center of Sexual Exploitation; and Darlene Pawlik, member, New England Association Against Sexual Exploitation.

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Raphael, Jody. (2021). Decriminalization campaigns in the United States: Libertarianism or a “decent society.” *Dignity: A Journal of Sexual Exploitation and Violence*. Vol. 6, Issue 2, Article 1. <https://doi.org/10.23860/dignity.2021.06.02.01> Available at <http://digitalcommons.uri.edu/dignity/vol6/iss2/1>.

REFERENCES

- Anderson, P. (2019(a), February 14). Rep. Williams wants ‘frank’ talk about R.I.’s prostitution laws. *Providence Journal*. Retrieved from <https://www.providencejournal.com/news/20190214/rep-williams-wants-frank-talk-about-ris-prostitution-laws/>
- Anderson, P. (2019(b), April 30.) Critics of criminal prostitution laws urge changes at R.I. House hearing. *Providence Journal*. Retrieved from <https://providencejournal.com/news/201904301/critics-of-criminal-prostitution-laws-urge-changes-at-r.i.-house-hearing/>
- Associated Press (2019, February 7). N.H. bill to toughen child sex trafficking penalties put on hold. *Associated Press*. Retrieved from <https://nhpr.org/post/nh-bill-to-toughen-child-sex-trafficking-penalties-put-hold#stream/0/>
- Associated Press (2020, June 2). Bill to legalize prostitution reintroduced in the state legislature. Retrieved from <https://news.wbfo.org/post/bill-legalize-prostitution-reintroduced-state-legislature/>
- Berlin, I. (1998(a). “The pursuit of the ideal,” in *The proper study of mankind: An anthology of essays*. New York: Farrar, Straus and Giroux.
- Berlin, I. (1998(b). “Two concepts of liberty,” in *The proper study of mankind: An anthology of essays*. New York: Farrar, Straus, and Giroux.
- Bolton, A. (2021, February 4). Democratic senator dem-ands Paul wear a mask on Senate floor. *The Hill*. Retrieved from <https://thehill.com/homenews/senate/537428-democratic-senator-demands-rand-paul-wear-a-mask-on-senate-floor/>
- Burris, A. (2020, March 23). E-mail communication in author’s possession.
- Chapman, S. (2020, November 19). The pandemic spawns false claims about freedom. *Chicago Tribune*. Retrieved from <https://chicagotribune.com/columns/steve/chapman/ct-column-covid-alito-atlas-freedom-chapman-20201118-4kqut2nnfbd7lev4dhvtukx4je-story.html/>
- Chen, M. (2017, October 31). DC may soon be the first US city to decriminalize sex work. *The Nation*. Retrieved from <https://www.thenation.com/article/dc-may-soon-be-the-first-us-city-to-decriminalize-sex-work/>
- Chibbaro, L. (2019, October 23). No vote planned for DC sex work decriminalization bill. *Washington Blade*. Retrieved from <https://www.washingtonblade.com/2019/10/23/no-vote-planned-for-dc-sex-work-decriminalization-bill/>
- Crabapple, M. (2019, March 11). ‘Whores but organized’: Sex workers rally for reform. *New York Review of Books Daily*. Retrieved from <https://www.nybooks.com/daily/2019/03/11/shores-but-organized-sex-workers-rally-for-reform>
- DECRIMNOW: A campaign to decriminalize sex work in D.C. (no date). Retrieved from <https://www.decrimnow.org/about/>
- Elletson, G. (2020, January 4). Sex work decriminalization bill introduced in Vermont. Valley News. Retrieved from <https://www.vnews.com/Sex-work-decriminalization-bill-introduced-in-Vermont-31762313/>
- Erotic Service Provider v. Gascon, 881 F.3rd 792 (9th Circuit Court of Appeals, 2018).

- Escobar, A. (2019, June 18). Cuomo quashes prostitution bill for now. *The Tablet*. Retrieved from <https://thetablet.org/Cuomo-ny-state-prostitution-lawmakers/>
- Fonrouge, G. (2021, January 25). New bill would decriminalize, support sex workers in New York. *New York Post*. Retrieved from <https://nypost.com/2021/01/25/new-bill-would-decriminalize-sex-work-in-new-york/>
- France Constitutional Council (2019). Decision n 2018-761 QPC.
- Grant, M. G. (2019, June 10). A historic breakthrough for sex workers' rights. *The New Republic*. Retrieved from <https://newrepublic.com/article/154111/new-york-bill-decriminalization-prostitution-sex-worker-rights/>
- Grosso, D (2019). Councilmember David Grosso re-introduces legislation to decriminalize sex work in D.C. Press release retrieved from <http://www.davidgrosso.org/grosso-analysis/2019/6/3/councilmember-david-grosso-re-introduces-legislation-to-decriminalize-sex-work-in-dc/>
- Hayward, M. (2019, January 24). Advocates emerge in New Hampshire to promote prostitution legalization. *New Hampshire Union Leader*. Retrieved from <https://www.unionleader.com/news/crime/advocates-emerge-in-new-hampshire-to-promote-prostitution-legalization/>
- Heinz, Andrea. (2020). A mule for the patriarchy: Waking up to the harm of prostitution to wives and families. *Dignity: A Journal on Sexual Exploitation and Violence*. Vol. 5: Iss 3, Article 5. <https://doi.org/10.23860/dignity.2020.05.03.05>
- Hempel, J. (2016, November 18). The venture capitalist who is both a man and a woman. *Wired*. Retrieved from <https://www.wired.com/2016/10/the-venture-capitalist-who-is-both-a-man-and-a-woman/>
- Hughes, D. (2019, March 17). Rhode Island targeted to decriminalize sex work. *RI News Today*. Retrieved from <https://rinewstoday.com/rhode-island-targeted-to-decriminalize-sex-work/>
- Jacobsen v. Massachusetts, 197 U.S. 11 (U.S. Supreme Court 1905).
- King, C.I. (a) (2019, August 9). Are D.C. residents really ready to live in a 'sex tourist destination?' *The Washington Post*. Retrieved from <https://www.washingtonpost.com/opinions-are-dc-residents-really-ready-to-live-in-a-city-thats-a-sex-tourist-destination/2019/08/09/ad2109e2-bazz-11e9-9091-6a96e67dc/>
- King, C. I. (b) (2019, August 30). D.C.'s bill to decriminalize prostitution has a big blind spot. *The Washington Post*. Retrieved from <https://www.washingtonpost.com/opinions/dcs-bill-to-decriminalize-prostitution-has-a-big-blind-spot-2019/08/30/7d81190e-ca7e-11e9-a4f3-/>
- Lang, M. (2019, November 17). D.C. effort to decriminalize sex work won't move forward after 14-hour hearing. *The Washington Post*. Retrieved from <https://washingtonpost.com/local/dc-politics/dc-effort-to-decriminalize-sex-work-wont-move-forward-after-tense-14-hour-hearing/2019/11/16/b7c77358-06ef-11ea-ac12/>
- Luo, N. (2019(a), May 16). Press statement: Our response to Speaker Corey Johnson's remarks on the sex trades today. Retrieved from <https://www.decrimny.org/post/press-statement-our-response-to-speaker-corey-johnson-s-remarks-on-the-sex-trade-today/>
- Luo, N. (2019(b), June 10). For immediate release: Decrim NY, legislators intro first statewide bill to decriminalize sex work. Retrieved <https://www.decrimny.org/post/for-immediate-release-decrim-ny-legislators-intro-first-statewide-bill-to-decriminalize-sex-work/>
- MacKinnon, C. (2007). "Liberalism and the death of feminism" in *Women's lives, men's laws*. Boston: Balknap Press.

- McKinley, J. (2019, June 11). Bills to decriminalize prostitution are introduced. Is New York ready? *The New York Times*. Retrieved from <https://www.nytimes.com/2019/06/11/nyregion/prostitution-legal-ny.html/>
- Misdary, R. (2019, June 4). Sex trafficking in Queens is shaping the district attorney primary race. *AMNY Newsletter*. Retrieved from <https://www.amny.com/news/queens-prostitution-district-attorney-1-31901470/>
- Nelson, S. (2019, February 4). Pot legalization activist turns sights on prostitution, 'comes out' as client. *The Washington Examiner*. Retrieved from <https://washingtonexaminer.com/news/pot-legalization-activist-turns-sights-on-prostitution-comes-out-as-client/>
- North, A. (2019, August 2). The movement to decriminalize sex work, explained. *Vox.com*. Retrieved from <https://www.vox.com/2019/8/2/206925271/sex-work-decriminalization-prostitution-new-york-dc/>
- Pawlik, D. (2019, March 14). E-mail communication in author's possession.
- Providence Journal Editorial Board (2019, February 19). Let's not revive prostitution horror. *Providence Journal*. Retrieved from <https://digital.olivesoftware.com/olive/ODN/ProJoApp/shared/ShowArticle.aspx?doc=TPJ%2F2019%F02%2F2F19&entity=Ar01501&mode=text&sk=52ED8D3C/>
- Rodrigues, J. (2021, January 9). Court rules against petition to reopen brothels, which have been shut down for nearly 10 months. *The Nevada Independent*. Retrieved from <https://the-nevadaindependent.com/article/court-rules-against-petition-to-reopen-brothels-which-have-been-shut-down-for-nearly-10-months/>
- Shapiro, Melanie & Hughes, Donna M. (2017). Decriminalized prostitution: Impunity for violence and exploitation. *Wake Forest Law Review*. Vol 52. pp.533-560.
- Shepard, S. (2021, February 10). An east coast advocacy group is using Oregon as a testing ground for decriminalizing sex work. *Willamette Week*. Retrieved from <https://www.wweek.com/news/2021/02/10/an-east-coast-advocacy-group-is-using-oregon-as-a-testing-ground-for-decriminalizing-sex-work/>
- Shugerman, E. (2019, February 4.) Rob Kampia, weed activist with #MeToo past, is now pushing sex work reform. *The Daily Beast*. Retrieved from <https://www.the-dailybeast.com/rob-kampia-weed-activist-with-metoo-past-is-now-pushing-sex-work-reform/>
- Solomon, D. (2018, January 13). House bucks Sununu on study of prostitution decriminalization. *New Hampshire Union Leader*. Retrieved from <http://201-ulweb.newscyclecloud.com/House-bucks-Sununu-on-study-of-prostitution-decriminalization/>
- Spellman, T. (2019, September 9). Decriminalizing sex work makes the entire black community safer. *The Root*. Retrieved from <https://www.theroot.com/decriminalizing-sex-work-makes-the-entire-black-communi1837905200>
- Uprise RI. Prostitution advocacy group launches national campaign to decriminalize sex work. *Uprise RI*. Retrieved from <https://upriseri.com/2019-02-03-sex-work/>
- Urban Justice Center. Annual Report 2020. Retrieved from <https://urbanjustice.org/wp-content/uploads/2020/12/Annual-Report-2020-reduced-file-size.pdf/>
- Washington Post Editorial Board (2019, September 2). D.C.'s bill to decriminalize prostitution would hurt the people it aims to help. *The Washington Post*. Retrieved from https://www.washingtonpost.com/opinions/dcs-bill-to-decriminalize-prostitution-would-hurt-the-people-it-aims-to-help/2019/09/02/228b5d06-cb56-11e9-afe-ca46c8d573c0_5/
- Wikipedia (2021). Scott Banister. Retrieved from <https://n.wikipedia.org/wiki/scott-banister/>

Williams, T. (2019, October 17). In Washington, a fight to decriminalize prostitution divides allies. *The New York Times*. Retrieved from <https://www.nytimes.com/2019/10/17/us/washington-legal-prostitution.html/>