

THE BEST LITTLE WHOREHOUSE IS NOT IN TEXAS: HOW NEVADA'S PROSTITUTION LAWS SERVE PUBLIC POLICY, AND HOW THOSE LAWS MAY BE IMPROVED

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IF YOU CAN'T BEAT IT, REGULATE IT

The world's oldest profession defies obsolescence.¹ Some of the first recorded evidence of prostitution dates back to the fifth century B.C.E.,² and if millennia-old trends continue, "johns" will persist in shelling out currency for quickies until the Apocalypse hits. Prostitution is international and ubiquitous,³ and in 1959 the United Nations itself declared that prostitution should not be considered a criminal offense.⁴ Yet it remains a troublesome and divisive legal issue in the United States, where prostitution is punishable everywhere except for a few counties in Nevada.⁵

In America, prostitution resists workable laws because it resides on the Constitution-old fault line dividing the people's civil liberties from the state's police power objectives: While it seems logical that privacy rights should enable citizens to barter sex for money, at least in the seclusion of the parties' homes,⁶ the state's interests in public health, safety, welfare, and morals have

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¹ *Legalised Prostitution; Street Cleaning*, THE ECONOMIST (United Kingdom ed.), Sept. 7, 1991, at 44 ("Some put the number of prostitutes in America as high as 500,000; roughly one in six American men has been a client . . .").

² Emma Goldman, *The Traffic in Women*, 13 HASTINGS WOMEN'S L.J. 9, 12 (2002). Herodotus wrote of a custom where every woman, once in her life, was obligated to go to the Temple of Mylitta (the Babylonian Venus) and have sex with the first stranger who threw a coin in her lap—this was a way to worship the goddess. *Id.*

³ See *History of Prostitution—Sex in the City* (History Channel television broadcast, Dec. 21, 2000).

⁴ Barbara Brents & Kathryn Hausbeck, *State-Sanctioned Sex: Negotiating Formal and Informal Regulatory Practices in Nevada Brothels*, 44 SOC. PERSP. 307, 310 (2001).

⁵ *Id.* at 308, 315; see *infra* Part I.B.

⁶ Cf. *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting) ("[I]ndividual decisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of 'liberty' protected by the Due Process Clause of the Fourteenth Amendment. Moreover, this protection extends to intimate choices

historically entitled government to criminalize the trade altogether.⁷ The methods by which foreign countries govern prostitution run the gamut from out-and-out abolition, where prostitutes receive the death penalty,⁸ to deregulation and decriminalization, where prostitutes are permitted to form unions and where brothels may be listed on the stock exchange.⁹ This Note argues the best way to legislate prostitution from a public policy standpoint lies somewhere in between these two extremes and is exemplified by Nevada's brothel system. Indeed, Nevada fortifies public health, safety, welfare, and morals precisely by sanctioning prostitution under certain regulated conditions.¹⁰

The Nevada brothel system is not an ideal model in that many of its regulations are unofficial, outdated, and inefficient.¹¹ But it succeeds because it recognizes prostitution as a reality and therefore functions to protect all the affected parties, as opposed to the other forty-nine states, which make a crime out of a commerce that has withstood the test of time.¹² However, "the public's attitude [toward prostitution] has always been ambivalent at best,"¹³ and over the past seven years, the future of the industry in Nevada has grown more uncertain: Three Nevada counties in which prostitution is legal came close to criminalizing it,¹⁴ meanwhile, the Nevada Legislature in 2005 approved an entertainment tax that excludes brothels even though the brothel industry itself

by unmarried as well as married persons.") (citations and footnotes omitted), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003); *see infra* text accompanying note 179 (prostitution is a kind of commerce).

⁷ Cf. *Edwards v. Reno*, 742 P.2d 486, 489 (Nev. 1987) ("Pursuant to the power to regulate to protect the public's health, safety, welfare and morals, a city may regulate peddlers and solicitors and may go so far as to prohibit both without infringing on due process rights."); *see infra* Parts I-III.

⁸ For example, prostitution is punishable by death in Iran. Robert Postawko, *Towards an Islamic Critique of Capital Punishment*, 1 UCLA J. ISLAMIC & NEAR E.L. 269, 270 (2002).

⁹ For example, prostitutes are unionized in Amsterdam. Carlin Meyer, *Reclaiming Sex from the Pornographers: Cybersexual Possibilities*, 83 GEO. L.J. 1969, 2002 (1995). The brothel Daily Planet, incorporated in Melbourne, Australia, is on that country's stock exchange. Richard Gluyas, *Brothel Arouses Market Interest*, THE AUSTRALIAN, May 2, 2003, at 21, available at 2003 WLNR 7591883.

¹⁰ *See infra* Part II.

¹¹ *See* Brents & Hausbeck, *supra* note 4, at 312 ("Somehow legal prostitution exists in modern times while operating under many of the practices and premises of simple, Old West, small-town governance.").

¹² *See id.* at 308.

¹³ Allen Lichtenstein, *Conflicting Laws and Conflicting Attitudes Towards Licensed Prostitution in Nevada* 11 (date unknown) (unpublished paper presented at the annual conference of the FWPCA, on file with Nevada Law Journal).

¹⁴ The Board of Commissioners for Ely County voted on Aug. 26, 1999 for proposed ordinance #407 to illegalize prostitution, but it was immediately vetoed by Mayor Bob Miller. Barbara Brents & Kathryn M. Hausbeck, *Pro-Family, Pro-Prostitution: Discourses of Gender, Sexuality & Legalized Prostitution in a Nevada Town* 1-2 (2000) (unpublished paper presented before the Midwest Sociological Association, Chicago, Apr. 2000), <http://www.unlv.edu/faculty/brents/research/msspaper.ely.pdf>. In July 2004, Nye County Commission Chairman Henry Neth proposed that a measure to close the county's six brothels be put on the next ballot. The county commission voted 3-2 not to put this issue on the ballot. Molly Ball, *Brothels in Nye County to Stay Legal*, LAS VEGAS SUN, July 7, 2004, at 1B. For the November 2, 2004 election day, the Coalition to End Prostitution gathered enough signatures to put a measure to prohibit prostitution on the Churchill County ballot, which the voters rejected. Marlene Garcia, *Fate of Brothels in County on Nov. 2 Ballot*, LAHONTAN VALLEY

lobbied to be included (in part to lend prostitution a greater air of legitimacy).¹⁵ With the volatility of this issue nearing an apex in Nevada, the time is ripe to examine the relevant laws' efficacy in furthering police power objectives and, in addition, to explore how those laws may be improved.

This Note's argument that Nevada takes one of the more optimal policy approaches to the prostitution question is prefaced by Part I, which gives a brief legal history of prostitution in Nevada with an emphasis on Nevada Supreme Court cases and State statutes. Part II explains how Nevada's State laws as well as various county codes make the business of brothel prostitution both practical and desirable from a public policy standpoint. Part III points out the Nevada brothel system's general shortcomings and proposes suggestions for a new Nevada statute that would better serve public health, safety, welfare and morals.¹⁶

I. FROM COWBOYS TO TRUCKERS: A LEGAL HISTORY OF NEVADA'S OLDEST PROFESSION

A. Pre-WWII

For Nevada, the nineteenth century geneses of today's world-famous casinos were the gold and silver mines.¹⁷ The influx of literal gold diggers hoping to strike it rich resulted in three men for every woman, which, perhaps inevitably, spawned a meretricious saloon society of miners, hustlers, railroad builders, cowboys, and brothel prostitutes.¹⁸ Shortly after Nevada achieved statehood in 1864,¹⁹ the Nevada State Legislature passed municipal incorporation laws that allowed incorporated cities to regulate brothel prostitution.²⁰ Similarly in 1881, the Legislature passed the Town Board Act, authorizing county commissioners to regulate brothels in *unincorporated areas*.²¹ Mean-

NEWS, Oct. 12, 2004, at A1; *Voters Approve Churchill Brothels*, LAS VEGAS REV.-J., Nov. 4, 2004, at 6B.

¹⁵ Richard Abowitz, *The Life*, LAS VEGAS WKLY., June 23, 2005, at 30; see also Ray Hagar, *Lawmakers Consider State Brothel Tax*, RENO GAZETTE-J., Feb. 9, 2003, at 1A.

¹⁶ Prostitution is a broad topic and encompasses such issues as homosexual prostitution, human trafficking, and the prostitution laws of foreign countries. For space purposes, this Note concentrates on Nevada law and limits its analysis to heterosexual prostitution between female workers and male customers.

¹⁷ See, e.g., *Pittsburg Silver Peak Gold Mining Co. v. Tax Comm'n*, 235 P. 643 (Nev. 1925) ("Prior to January, 1916, and since 1907, the Pittsburg Silver Peak Gold Mining Company and its subsidiary companies, including the Silver Peak Railroad Company, operated certain gold and silver mines in Esmeralda County of large value . . .").

¹⁸ Natalie Patton, *Men Continue to Outnumber Women in the State*, LAS VEGAS REV.-J., Sept. 10, 2001, at 1A; Rebecca Mead, *Letter from Nevada: How to Make an Honest Living from the Oldest Profession*, NEW YORKER, Apr. 23, 2001, at 74 ("Toward the end of the nineteenth century, there were three men for every woman . . . Nevada, unlike its neighbor Oregon, was not settled by small farmers agitating for moral reform; instead, it remained a saloon society, dominated by cowboys and hustlers."); Nicole Bingham, *Nevada Sex Trade: A Gamble for the Workers*, 10 YALE J.L. & FEMINISM 69, 85 (1998) ("Prostitution in this frontier state originally existed around mining camps, railroads, and cattle towns.").

¹⁹ Michael S. Green, *The Mississippi of the West?*, 5 NEV. L.J. 57, 58 (2004).

²⁰ Guy Louis Rocha, Presentation by Nevada State Archivist of the History of Prostitution in Nevada (Aug. 4, 1999), <http://www.nvbrothels.net/infoHistory.shtml>.

²¹ *Id.*

while, every other state moved to proscribe selling sex for money,²² culminating in 1917 with the federal government's shutdown of Storyville in New Orleans, the once legally defined prostitution district.²³

By ceding authority over the regulation of brothels to counties and cities, the Nevada Legislature made prostitution a matter of local rather than State-wide prerogative, causing each county's and city's brothel rules to be uniquely customized for that particular locale.²⁴ But over the next half-century, the Legislature did institute some regulations that every locality which permitted prostitution had to observe: In 1887, brothels were forbidden from being on a principal street or thoroughfare or within four hundred yards of schools;²⁵ by 1903, brothels could no longer be located within four hundred yards of any house of worship either;²⁶ and in 1937, Nevada's State Board of Health started to require that brothel prostitutes submit to weekly checkups for gonorrhea and monthly blood tests for syphilis.²⁷ More recently in 1979, the Legislature prohibited the advertising of brothels in counties which have outlawed them.²⁸ In 1987, non-brothel prostitution was made explicitly illegal in Nevada;²⁹ bolstering this law are criminal penalties for pandering, soliciting, encouraging prostitution and living off the proceeds of a prostitute.³⁰ In addition, sheriffs and district attorneys who are neglectful in enforcing these statutes are guilty of a misdemeanor.³¹

Despite the existence of approximately three dozen statutes regulating the exchange of sex for a fee,³² the evolution of legalized prostitution in Nevada reflects the power of the individual county as opposed to the State and individual cities.³³ For instance, brothels had long been tacitly tolerated in downtown Las Vegas's red light district, called Block 16.³⁴ But in 1942, the Board of Commissioners of Clark County (in which Las Vegas is located) suddenly

²² Bingham, *supra* note 18, at 69.

²³ Gerald L. Neuman, *Anomalous Zones*, 48 STAN. L. REV. 1197, 1211 (1996); *see also History of Prostitution*, *supra* note 3.

²⁴ Brents & Hausbeck, *supra* note 4, at 311 ("There is a patchwork of local legislation—some formal, some informal and unofficial; some old and traditional, some new and efficient—that sets the parameters and standards for the brothel industry.").

²⁵ Rocha, *supra* note 20; *see* NEV. REV. STAT. §§ 201.380-90 (2003).

²⁶ Rocha, *supra* note 20; *see* NEV. REV. STAT. § 201.380 (2003).

²⁷ Rocha, *supra* note 20; *see* NEV. ADMIN. CODE ch. 441A, § 800 (2003).

²⁸ *Princess Sea Indus., Inc. v. State*, 635 P.2d 281, 284 (Nev. 1981); *see* NEV. REV. STAT. §§ 201.430-40 (2003). The law outlawing brothel advertising in counties which have outlawed prostitution was upheld after being challenged on First Amendment grounds in *Princess Sea*, where the Nevada Supreme Court recognized a "'common-sense' distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation [such as prostitution], and other varieties of speech." *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455-56 (1978). In a later Nevada Supreme Court case, the court held the escort service in question advertised illegally merely by telling a customer over the phone that it offers "special services." *Washington v. Clark County Liquor & Gaming Licensing Bd.*, 683 P.2d 31, 34 (Nev. 1984).

²⁹ Brents & Hausbeck, *supra* note 4, at 313; NEV. REV. STAT. § 201.354 (2003).

³⁰ *See* NEV. REV. STAT. §§ 201.300-.330, 201.360 (2003).

³¹ *Id.* § 201.410.

³² *Id.* §§ 41.1397, 175.301, 201.295-440, 207.030, 244.345.

³³ *See infra* text accompanying notes 34-42.

³⁴ Rocha, *supra* note 20.

branded Block 16 a nuisance and ordered its closure.³⁵ In the ensuing case *Kelley v. Clark County*,³⁶ the Nevada Supreme Court found for Clark County on the premise of county supremacy:

[T]he charter power of the City of Las Vegas to regulate, prohibit and prescribe the location of and suppress all houses of ill-fame, bawdy houses, and other charter provisions as to nuisances, have [sic] not supplanted the authority and duty of the board of county commissioners of Clark County under the state laws, to institute and maintain abatement proceedings against plaintiffs for maintaining the alleged nuisances within the county.³⁷

Seven years later in *Cunningham v. Washoe County*,³⁸ the Nevada Supreme Court reaffirmed its position that counties retain the authority to close down brothels as nuisances *per se*, which the court defined as "injurious to health, or indecent and offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property"³⁹ The brothel owner in *Cunningham* argued her business should be allowed to remain open since it abided by relevant State laws in that it was not on a main thoroughfare or within four hundred yards of any church or school.⁴⁰ But the court explained State statutes serve merely as a bedrock of prostitution laws upon which individual counties can build their own, more restrictive policies.⁴¹ Therefore, the fact that a brothel resided off the beaten path and abided by the four hundred yard rules did not immunize it from being shut down as a nuisance *per se*.⁴²

B. Post-WWII

The course prostitution has taken in Nevada also reflects the political realities of the time.⁴³ While *Kelley v. Clark County* was being litigated, the nation had just entered World War II, and the Federal Security Agency urged that all prostitution near military bases be suppressed to help halt the spread of venereal disease to the soldiers.⁴⁴ After all, during World War I, more soldiers procured sexually transmitted diseases than were injured in battle.⁴⁵ By 1948, the rural counties reopened many of their brothels, but Las Vegas and Reno chose to keep prostitution illegal, in part to cultivate a more wholesome

³⁵ The reason behind Block 16's closure had less to do with public morality and more to do with its proximity to Nellis Air Force base. The Air Force was concerned about raising "the ire of wives back home of the military personnel stationed there The economic benefit of the base clearly outweighed those of the brothels." Lichtenstein, *supra* note 13, at 2.

³⁶ *Kelley v. Clark County*, 127 P.2d 221 (Nev. 1942).

³⁷ *Id.* at 224.

³⁸ *Cunningham v. Washoe County*, 203 P.2d 611 (Nev. 1949).

³⁹ *Id.* at 612 n.2.

⁴⁰ *Id.* at 612-13; see NEV. REV. STAT. §§ 201.380-90 (2003).

⁴¹ *Cunningham*, 203 P.2d at 613.

⁴² See *id.*

⁴³ See *infra* text accompanying notes 44-47.

⁴⁴ Richard Symanski, *Prostitution in Nevada*, 64 ANNALS ASS'N AM. GEOGRAPHERS 357, 359 (1974).

⁴⁵ Ram Ganesan & Loretta Ann Soosayraj, *For Limited Protection?*, NEW STRAITS TIMES (Malaysia), Dec. 25, 2001, at 5 (Health section).

image.⁴⁶ “[C]asinos were booming as a result of the Air Force base [T]he gaming industry increasingly came to sell itself as clean and legitimate by distancing itself from prostitution.”⁴⁷ By 1951, Clark County (including the city of Las Vegas) and Washoe County (including the city of Reno) had closed all remaining red light districts as public nuisances.⁴⁸

In the 1970s, some Nevada counties (Storey being the first) that have long regulated prostitution took a more official stance on the issue by officially legalizing brothels via ordinance.⁴⁹ But when former brothel owner Joe Conforte tried to secure a license to open a brothel in Clark County, which maintained for the last two decades an unofficial policy against legalized prostitution, the State legislature responded in 1971 by prohibiting the licensing of prostitution in any county with a population exceeding two hundred thousand people, a statistic fashioned specifically for Clark, Nevada’s largest county⁵⁰ (the Nevada brothels’ popularity and lucrative potential precluded any chance of a State-wide ban).⁵¹ This population limit has since been upped to four hundred thousand to take into account the burgeoning populations of Nevada’s other counties where prostitution is legal.⁵² This statute, which in effect prohibits prostitution in only one county, illustrates the legislature’s overall minimalist approach to prostitution by following “the tradition of leaving the question of whether and how to license brothels to the rural counties.”⁵³

By the 1980s, the Nevada counties of Lyon, Churchill, Mineral, Lander, Esmeralda, and Nye followed Storey County’s suit and passed ordinances allowing for the licensing of brothels.⁵⁴ Not only did licensing foster a sturdier civic relationship between county officials and brothel owners, but also it subsided the brothel owners’ thirty-plus year fear that their respective counties might spontaneously shut them down at any moment as public nuisances vis-à-vis *Kelley* and *Cunningham*.⁵⁵ Further allaying this fear was the 1977 Nevada case *Nye County v. Plankinton*,⁵⁶ brought when Nye County officials attempted to shut down the Chicken Ranch brothel as a public nuisance.⁵⁷ The supreme court found against the county on the rationale that the 1971 State statute allowing counties with under two hundred thousand people to regulate prostitu-

⁴⁶ Barbara Brents & Kathryn Hausbeck, *Bodies, Business and Politics: Corporate Mobilization and the Sex Industries* 28 (1999) (unpublished paper presented before the American Sociological Association, Chicago, Aug., 1999), <http://www.unlv.edu/faculty/brents/research/ASA99Corpmob3.pdf>.

⁴⁷ *Id.*

⁴⁸ Rocha, *supra* note 20.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ Brents & Hausbeck, *supra* note 46, at 28-29 (“[B]rothels were too much a part of the local economy in rural areas to gain enough legislative support for a statewide ban.”).

⁵² Rocha, *supra* note 20; see NEV. REV. STAT. § 244.345 (2003).

⁵³ Lichtenstein, *supra* note 13, at 4.

⁵⁴ Rocha, *supra* note 20.

⁵⁵ See Rocha, *supra* note 20 (“An effective way to avoid a brothel being closed as a public nuisance was to officially legalize the operation by ordinance as opposed to just regulating the activity.”); see *supra* text accompanying notes 35-42.

⁵⁶ *Nye County v. Plankinton*, 587 P.2d 421 (Nev. 1978).

⁵⁷ *Id.* at 422.

tion implicitly eliminated the common law presumption that brothels are nuisances *per se*, thereby overruling *Cunningham*.⁵⁸

Although brothels are no longer considered nuisances *per se*,⁵⁹ Nevada counties have still reserved the authority to close brothels under the guise of police power objectives.⁶⁰ In 1978 for instance, after having granted licenses for seven years, Lincoln County outlawed prostitution via an initiative referendum⁶¹ because the policing and regulation problems appurtenant to legalized prostitution grew too taxing on county resources.⁶² When Lincoln brothel owners sued in the ensuing 1980 case *Kuban v. McGimsey*,⁶³ the court found for the county and maintained the following:

The nature of the businesses [brothels], coupled with the burden of policing and regulation upon the county, are alone sufficient reasons for limiting the number of such businesses or, as here, the complete proscription of these businesses. . . . As long as police power is validly exercised, even previously lawful business may be prohibited.⁶⁴

The court also opined that brothel owners, fully aware of the uneven and checkered evolution of prostitution laws in Nevada, assume the risk that their business may at any given time be outlawed or subject to new regulations.⁶⁵ The court quotes a 1953 Nevada case whose admonition about the vocational hazards of running a brothel rings as true today as it did fifty years ago: "There has never been a time in the history of (prostitution) in this state when the operator or investor in such enterprises has been free from such occupational risks."⁶⁶

Meanwhile, the federal government, like all the state governments except for Nevada's, continued to legislate against prostitution in any form.⁶⁷ Back in 1910, Congress passed the Mann Act (a.k.a. White Slavery Act),⁶⁸ prohibiting

⁵⁸ *Id.* at 423 ("In our view, this licensing scheme [NEV. REV. STAT. § 244.345(8)] is repugnant to and, by plain and necessary implication, repeals the common law rule that a house of prostitution constitutes a nuisance *per se*.").

⁵⁹ *Id.*

⁶⁰ See *infra* text accompanying notes 61-64.

⁶¹ The initiative passed by two-thirds of the county's voters. Lichtenstein, *supra* note 13, at 4.

⁶² *Kuban v. McGimsey*, 605 P.2d 623, 627 (Nev. 1980).

⁶³ *Id.* at 623.

⁶⁴ *Id.* at 627 (citations omitted).

⁶⁵ *Id.* ("As long as the police power is validly exercised, even previously lawful businesses may be prohibited.").

⁶⁶ *Id.* (quoting *Primm v. City of Reno*, 252 P.2d 835, 838 (Nev. 1953) but replacing "legalized gambling" with the prostitution parenthetical).

⁶⁷ See *infra* text accompanying notes 68-72.

⁶⁸ Lichtenstein, *supra* note 13, at 8. The Mann Act (a.k.a. White Slavery laws) is currently codified at 18 U.S.C. §§ 2421-2424 (2000). This Note will not analyze how the Mann Act interacts or may be reconciled with legalized prostitution in Nevada, which is an issue the federal government has rarely addressed. But see *U.S. v. Pelton*, 578 F.2d 701 (8th Cir. 1978) (found defendant guilty of violating the Mann Act in part for transporting women to Winnemucca, Nevada, to work at a licensed brothel, Penny's Cozy Corner). See generally Joanna S. Liebman, *The Underage, the "Unborn," and the Unconstitutional: An Analysis of the Child Custody Protection Act*, 11 COLUM. J. GENDER & L. 407, 416 n.56 (2002).

[I]t is questionable today whether the Mann Act could be applied by the federal government to prohibit prostitution in Nevada, since that is obviously an affirmative act by the state government

the transportation of a person "with intent that such individual engage in prostitution."⁶⁹ In 2004, Congress passed an amendment stating that federal grants from tax dollars that go to international groups for the purpose of fighting HIV will not support any organizations that promote prostitution.⁷⁰ The bill's author, Representative Todd Akin, said, "[e]fforts to eradicate prostitution are not only among the most important public health matters that need to be taken, but the most important human liberation efforts in our world today."⁷¹ Also recently, the United States Department of Defense declared a zero-tolerance policy for members of the military who engage in prostitution.⁷²

Currently, there are approximately thirty-six existing brothel licenses in Nevada, and twenty-seven to thirty brothels are open for business at any given time.⁷³ Prostitution is legal in the counties of Storey, Lyon, Lander, Churchill, Mineral, Esmeralda, and Nye, where the county commissions retain the right to regulate prostitution and issue brothel licenses.⁷⁴ Four other counties outlaw brothels in unincorporated areas but implicitly allow incorporated areas to permit legalization by municipal option: the five towns (incorporated areas) that regulate prostitution are Winnemucca (of Humboldt County), Ely (of White Pine County), and Carlin, Wells, and Elko (all of Elko County); presently there can be no brothels in Pershing County because it has no incorporated areas.⁷⁵ Prostitution remains illegal in Clark County (by state statute), in Nevada's capi-

to allow prostitution within its borders. A woman traveling to Nevada to become a prostitute would have a good legal leg on which to stand under the newly redefined breadth of the right to travel under *Saenz v. Roe*, 526 U.S. 489 (1999)], and the Mann Act might be inapplicable under that holding. Thus, the right to travel cases, combined with the newly narrowly defined Commerce Clause, might pose a problem to a Congress that tried to regulate intrastate morality.

Id. See also David B. Kopel & Glenn H. Reynolds, *Taking Federalism Seriously: Lopez and the Partial Birth Abortion Ban Act*, 30 CONN. L. REV. 59, 82 n.98 (1997) ("It is not suggested that congressional power to ban the movement of a prostitute from Los Angeles to Seattle can be enforced by a ban on purely intra-state prostitution, including in areas where prostitution is legal, such as certain counties in Nevada.").

⁶⁹ 18 U.S.C. § 2421.

⁷⁰ The bill was attached to the Commerce, Justice, State Appropriations Act for Fiscal Year 2005. *House Adopts Rep. Akin Amendment*, US FED NEWS, July 8, 2004, available at <http://www.lexis.com>.

⁷¹ Keith Peters, *Anti-Prostitution Amendment Passes*, July 12, 2004, <http://www.family.org/cforum/fnif/news/a0032826.cfm>.

⁷² Samantha L. Quigley, *DoD Fights Human Trafficking with Training, Awareness*, AMERICAN FORCES PRESS SERVICE, Sept. 21, 2004, http://www.dod.gov/news/Sep2004/n09212004_2004092109.html ("The DoD . . . is implementing new provisions of the Uniform Code of Military Justice that will punish the patronizing of prostitutes. There also have been steps taken in Korea, and recently NATO policy was instituted with the leadership of the United States.").

⁷³ Brents & Hausbeck, *supra* note 14, at 2.

⁷⁴ Brents & Hausbeck, *supra* note 4, at 314-15. See STOREY COUNTY, NEV., CODE ch. 5.16 (2001); LYON COUNTY, NEV., CODE ch. 3 (1994); LANDER COUNTY, NEV., CODE ch. 5.16 (2001); CHURCHILL COUNTY, NEV., CODE ch. 5.20 (2005); MINERAL COUNTY, NEV., ORDINANCE No. 186A (2005); ESMERALDA COUNTY, NEV., ORDINANCE No. 124 (1972); NYE COUNTY, NEV., CODE ch. 9.20 (2001).

⁷⁵ Brents & Hausbeck, *supra* note 4, at 314-15. See WINNEMUCCA, NEV., CITY CODE § 5.24 (1994); ELY, NEV., CITY CODE ch. 6 (2001); WHITE PINE COUNTY, NEV., CODE ch. 10.28.010; CARLIN, NEV., BROTHEL CODE ch. 9 (2004); ELKO, NEV., CITY MUN. CODE ch. 4-9 (2001); WELLS, NEV., BROTHEL CODE ch. 6 (2001).

tal, Carson City, and in the counties of Washoe, Lincoln, and Douglas (all by ordinances).⁷⁶ Eureka County's codes do not address prostitution and therefore neither allow nor prohibit it.⁷⁷

Although prostitution has existed as a legal industry in more than half of Nevada's seventeen counties, the debate as to the merits of prostitution remaining legal never falls below the radar for long.⁷⁸ In the past six years, prostitution came close to being illegalized in Nye County⁷⁹ and the town of Ely.⁸⁰ In 2003, the Nevada legislature discussed the possibility of taxing prostitution.⁸¹ That same year Las Vegas Mayor Oscar Goodman remarked on a local radio show that he would be open to exploring the possibilities of legalized prostitution within Las Vegas city limits, reinventing East Fremont Street as a "little Amsterdam—a red light district with legalized brothels and a medical clinic."⁸² For this past Election Day on November 2, 2004, the Coalition to End Prostitution had gathered enough signatures to put a measure to illegalize prostitution on the Churchill County ballot, which the voters rejected.⁸³ On June 16, 2005, the town board in rural Pahrump (of Nye County) voted not to repeal an ordinance banning brothels within town limits.⁸⁴ And perhaps most notably, Daily Planet, a brothel corporation located in Melbourne, Australia, has scouted out areas in Pahrump for the prospective opening of the state's biggest brothel to date, to be called Metropolis City.⁸⁵

Why brothels persevere in Nevada could perhaps be attributed to the reality that "prostitution has been around for a long time, the businesses of brothels seem to be fairly well controlled, and the houses serve some sort of social function."⁸⁶ In addition to brothel prostitution constituting an integral element

⁷⁶ Brents & Hausbeck, *supra* note 4, at 315. See CLARK COUNTY, NEV., CODE ch. 12.08.015 (2005); WASHOE COUNTY, NEV., CODE ch. 53.170 (2005); LINCOLN COUNTY, NEV., CODE ch. 7-2-1 (2004); DOUGLAS COUNTY, NEV., CODE ch. 9.20 (2003); CARSON CITY, NEV., MUN. CODE ch. 8.04.110 (2005).

⁷⁷ Brents & Hausbeck, *supra* note 4, at 315.

⁷⁸ See *infra* text accompanying notes 79-85.

⁷⁹ Ball, *supra* note 14, at 1B.

⁸⁰ Brents & Hausbeck, *supra* note 14, at 1-2.

⁸¹ Hagar, *supra* note 15, at 1A.

⁸² Erin Neff, *Legalized Prostitution: Vegas Brothels Suggested*, LAS VEGAS REV.-J., Oct. 24, 2003, at 1A (quoting Las Vegas Mayor Oscar Goodman from a radio show on Oct. 22, 2003).

⁸³ Garcia, *supra* note 14, at 1A, 10A; *Voters approve Churchill brothels*, *supra* note 14, at 6B.

⁸⁴ Henry Brean, *Cheered on, Pahrump board rejects lifting ban on brothels*, LAS VEGAS REV.-J., June 15, 2005, at 1A, 8A. This decision was motivated more by morals than money:

The town board member who sponsored the brothel amendment is quoted in the paper as estimating that this would've meant about \$13 million over the next decade for cash-starved Pahrump; probably more tax revenue than any other business in the town. Though the bill would have created no new brothels and there was a common-sense financial benefit to making this annexation, Pahrump's citizens didn't want to have as part of their city the same brothels that were already a long-standing part of their community.

Abowitz, *supra* note 15, at 30.

⁸⁵ Bill Kaufmann, *Putting the Sin Back in Sin City; Las Vegas Trying to be World's No. 1 Playground for Adults*, CALGARY SUN (Alberta, Canada), May 11, 2003, at 30.

⁸⁶ HELEN REYNOLDS, *THE ECONOMICS OF PROSTITUTION* 98 (1986).

of Nevada's history, it also represents a "relatively significant and stable source of county income" in several of Nevada's smaller towns.⁸⁷ However, the unique and arguably questionable nature of the brothel business keeps it prone to county referendums calling for its abolition.⁸⁸ If legalized prostitution is going to remain a vital part of Nevada's future free from spontaneous shut-downs and the pendulum swings of social acceptance, it is essential to examine the public policies legalized prostitution serves as well as to explore how the existing laws may be enhanced to serve those policies better.

II. HOW BROTHEL PROSTITUTION SERVICES MANKIND, NOT JUST MEN

Nevada is the only state that regulates prostitution as a tactic to further the State's police power objectives of promoting public health, safety, welfare, and morals.⁸⁹ Statistics on the health and safety of Nevada's licensed brothel workers and their customers indicate both parties are more protected under the current system than if they were to conduct their commerce outside the bounds of the law.⁹⁰ Brothel prostitution in Nevada also serves as a very lucrative business, funneling millions of dollars a year not only to the sex workers and brothel owners but also to the counties which regulate them via tax dollars.⁹¹ Perhaps most importantly, Nevada's brothel prostitutes are not sexual slaves but rather "independent contractors"⁹² who choose how to earn their living.

In contrast, illegal prostitution in Nevada, which is punishable as a misdemeanor,⁹³ paints a much bleaker picture replete with high incidents of disease and battery affecting both prostitutes and customers.⁹⁴ There is evidence to indicate that some of Nevada's illegal prostitutes are trafficked in or are underage.⁹⁵ In addition, counties where prostitution is illegal pay hefty sums towards law enforcement in the futile attempt at prevention and punishment.⁹⁶ This part demonstrates how the Nevada brothel system, operating in conjunction with State statutes and county codes, constitutes an effective method of legalized prostitution because it advances the police power objectives of health, safety, welfare, and morals. This part also explores how regulated brothel pros-

⁸⁷ Brents & Hausbeck, *supra* note 46, at 27.

⁸⁸ See, e.g., Garcia, *supra* note 14, at A1.

⁸⁹ Cf. *Kuban v. McGimsey*, 605 P.2d 623, 627 (Nev. 1980) ("A regulation which actually prohibits [a business] does not constitute a taking when . . . such regulation promotes the health, safety, welfare or morals of the community and thus is a valid exercise of police powers.").

⁹⁰ See *infra* Part II.A; see also Neff, *supra* note 82, at 1A ("At his weekly news conference Thursday, [Las Vegas Mayor Oscar] Goodman said there are pragmatic reasons to back legalized prostitution. Those include the acknowledgement that illegal prostitution is occurring and that brothels could provide safer, regulated and revenue-generating sex, he said.").

⁹¹ Lois Gormley, *Prostitution Pumps Millions into Nevada's Economy*, NEVADA OUTPOST, Dec. 11, 1998, available at <http://www.jour.unr.edu/outpost/community/achives/com.gormley.prostitute.html>.

⁹² Brents & Hausbeck, *supra* note 4, at 311; Bingham, *supra* note 18, at 93.

⁹³ NEV. REV. STAT. § 201.354 (2003).

⁹⁴ See Neff, *supra* note 82, at 10A; see *infra* Part II.A.

⁹⁵ See *infra* Parts II.A., D.

⁹⁶ Brents & Hausbeck, *supra* note 4, at 308 ("[P]rostitution control policies cost taxpayers an average of \$7.5 million annually per city."); see *infra* text accompanying note 238.

titution allows the prostitutes to enjoy an element of professionalism in their work. Finally, the logistics of the brothel system is compared to those of street-walking, escort services and decriminalized prostitution in order to illuminate the policy benefits unique only to regulated brothel prostitution.

A. *Health, Safety, and Welfare*

All of Nevada's approximately thirty brothels⁹⁷ function in relatively the same manner.⁹⁸ The customer parks in the brothel's lot or is dropped off if he is using a car service.⁹⁹ Many of the brothels are encircled by a high chain link fence, and there is generally only one gate open at any given time.¹⁰⁰ The customer enters the parlor.¹⁰¹ The available prostitutes form a lineup, after which the customer chooses his prostitute and she leads him to her bedroom.¹⁰² Once there, the prostitute and customer engage in price negotiations, which are overheard by the madam or another manager via intercom.¹⁰³ Then the prostitute and customer return briefly to the front office where the prostitute tells the madam the terms of the deal, and the customer pays.¹⁰⁴ Before the service begins, the prostitute checks the customer's genitals for visible signs of venereal disease.¹⁰⁵ The bedrooms may be equipped with emergency buttons that the prostitute can press in case her customer refuses to wear a condom and she requires intervention from a security guard.¹⁰⁶

The Nevada State Health Division estimates that 365,000 sex acts are performed annually in the State's brothels, creating the possibility of one thousand chances daily for STDs to be transmitted via a legal, state-sanctioned commerce.¹⁰⁷ Consequently, the Nevada Administrative Code, as amended in 1985, outlines stringent health codes prostitutes and brothel owners must follow.¹⁰⁸ Counties that have legalized prostitution require that everyone applying to be a brothel prostitute takes an initial blood test for HIV and syphilis and provide a cervical specimen for gonorrhea and chlamydia.¹⁰⁹ Before a prostitute is granted a work card and hired at a brothel, she must secure a state health

⁹⁷ Brents & Hausbeck, *supra* note 14, at 2.

⁹⁸ See *infra* text accompanying notes 99-106.

⁹⁹ See, e.g., *Frequently asked questions and answers*, <http://www.sherisbrothel.com/contact/help/faq/#limoService> (last visited July 14, 2005).

¹⁰⁰ See, e.g., Mead, *supra* note 18, at 76 (Mead describes the entrance of the Moonlite Bunny Ranch: "At the end of the driveway is an unprepossessing single-story white building, surrounded by a high chain-link fence and accessible only through a locked gate.")

¹⁰¹ See *id.* at 82.

¹⁰² See *id.* Sometimes customers go to the bar first, where there is no line-up and the prostitutes instead informally approach the customers. See *id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 84.

¹⁰⁵ *Id.* at 82.

¹⁰⁶ *Condom Use High in Nevada Brothels*, Apr. 10, 1998, http://www.worldsexguide.org/nv_legal.txt.html (explicit content).

¹⁰⁷ *Towns Want Modest, Not Glitzy, Brothels; Nevada: Legalized Prostitution Is Embraced by Some Communities*, TELEGRAPH HERALD (Dubuque, Iowa), July 15, 2001, at A6.

¹⁰⁸ Brents & Hausbeck, *supra* note 4, at 313; See NEV. ADMIN. CODE ch. 441A, §§ 010-325, 775-815 (2003).

¹⁰⁹ NEV. ADMIN. CODE ch. 441A, § 800(1) (2003).

card certifying she has no STDs.¹¹⁰ Throughout the course of her employment, brothel prostitutes are ordered to submit to weekly pap smears to check for gonorrhea and chlamydia as well as monthly blood tests for HIV and syphilis.¹¹¹ In 1988, the State Health department mandated condom use for all sex acts;¹¹² accordingly, many brothels post signs that condom use is mandatory.¹¹³ If a prostitute ever tests positive for a disease other than HIV, she may not work until a physician reinstates her health card after she is cured.¹¹⁴ If she tests positive for HIV, she must be reported to the State Health Board;¹¹⁵ in addition, it would be a felony for her ever to work as a prostitute again, carrying a punishment of two-to-ten years in jail or a \$10,000 fine or both.¹¹⁶ Giving brothel owners incentive to monitor their employees' health, Nevada holds a brothel owner liable if a customer contracts HIV from a brothel prostitute that has already tested positive.¹¹⁷

In 1999, when Ely's city council voted to prohibit prostitution and revoke the licenses of its three brothels after prostitution had been legal there for over one hundred and twelve years,¹¹⁸ Mayor Bob Miller vetoed the prohibition on the grounds that keeping brothel prostitution legal and regulated would help prevent the spread of HIV,¹¹⁹ as he explained in the town meeting:

This opportunity is in the form of controlling this potential problem through legal prostitution. It is our moral responsibility as elected and appointed officials, to limit to the best of our ability, the potential of this killer in our society. Our legal brothel ordinance is a reasonable effort toward the realization of this potential.¹²⁰

Mayor Miller's reasoning is well-supported, considering that no brothel prostitute in Nevada has tested positive for HIV since 1986, the year mandatory testing for brothel prostitutes was instituted.¹²¹ Statistics show legal prostitutes contract fewer STDs than not only illegal prostitutes¹²² but also the female population as a whole.¹²³

The key to the excellent health of Nevada's brothel prostitutes is only partly attributable to the health requirements as outlined in the Nevada Admin-

¹¹⁰ Brents & Hausbeck, *supra* note 4, at 314.

¹¹¹ NEV. ADMIN. CODE ch. 441A, § 800(3) (2003); *see also* *Information—Health Benefits*, <http://www.nvbrothels.net/infoHealthBenefits.shtml> (last visited July 14, 2005).

¹¹² Brents & Hausbeck, *supra* note 4, at 314; *see* NEV. ADMIN. CODE ch. 441A, § 805 (2003).

¹¹³ Brents & Hausbeck, *supra* note 4, at 314.

¹¹⁴ *Id.*; *see* NEV. ADMIN. CODE ch. 411A, § 800(4).

¹¹⁵ Brents & Hausbeck, *supra* note 4, at 320; *see* NEV. ADMIN. CODE ch. 441A, § 800(4) (2003).

¹¹⁶ NEV. REV. STAT. § 201.358 (2003). In *Glegola v. State*, 871 P.2d 950 (Nev. 1994), a prostitute who solicited an officer in a Reno bar after having repeated notice that she was HIV positive received fifteen of the then-maximum twenty years. *Glegola*, 871 P.2d at 951, 953.

¹¹⁷ NEV. REV. STAT. § 041.1397 (2003).

¹¹⁸ Brents & Hausbeck, *supra* note 14, at 1-2 (this Ely City Council Meeting took place Aug. 26, 1999; the proposed ordinance in question, #407, would have revoked the licenses of Ely's three brothels on High Street, the west side of town).

¹¹⁹ Brents & Hausbeck, *supra* note 4, at 320-21.

¹²⁰ *Id.*

¹²¹ *Id.* at 314.

¹²² *Id.*; *see* Neff, *supra* note 82, at 10A.

¹²³ Brents & Hausbeck, *supra* note 4, at 321.

istrative Codes. The State law requiring prostitution to take place only in legal brothels¹²⁴ coupled with typical brothel rules that require their prostitutes remain on the premises during the tenure of their contract¹²⁵ are what make the health codes work. By prostitutes staying physically restricted to the brothel, there is little logistical opportunity for prostitutes to have unprotected sexual relations with men who are non-customers, especially since most brothels disallow anyone besides customers and local authority from entering the brothels.¹²⁶ In this way, brothels serve as a kind of gilded cage whereby prostitutes sacrifice their mobility for their health.

In addition to being more disease free, Nevada's brothel prostitutes are also more harm-free, as the insulated nature of the brothels offers prostitutes near foolproof protection from theft, fraud or crime.¹²⁷ As aforementioned, high chain link fences often surround the premises,¹²⁸ security guards are on duty,¹²⁹ and there are usually emergency buttons in all the bedrooms that prostitutes can press if they fear for their safety.¹³⁰ Roy Slaughter, manager of Sheri's Brothel in Nye County,¹³¹ summed up the advantages of the brothel system with respect to the police power objectives of public health and safety:

We (Sheri's) don't allow drugs, we don't allow excessive alcohol drinking, we don't allow trashy behavior, we only do upgraded girls here. In Las Vegas, where prostitution's illegal, they're getting robbed, they're transmitting (diseases), they're not using protection; I would never, ever go to a prostitute in Las Vegas. I can't imagine why it's not legal in Clark County and regulated and taxed.¹³²

B. *Morals*

That prostitution is not universally accepted as a moral practice is perhaps best illustrated by the fact that Nevada's prostitution statutes are listed under the condemnatory chapter heading "Crimes Against Public Decency and Good Morals."¹³³ Well aware of prostitution's moral questionability, brothels make sure their confidential sexual services show up on customers' credit card bills not under the brothel's name but rather a discrete corporate title.¹³⁴

¹²⁴ NEV. REV. STAT. § 201.354 (2003).

¹²⁵ Brents & Hausbeck, *supra* note 4, at 323-25. This practice, called "lockdown," is practiced primarily in the brothels of Southern Nevada. Abowitz, *supra* note 15, at 31.

¹²⁶ See Brents & Hausbeck, *supra* note 4, at 323. Ely does not allow males, apart from the owner or manager of the brothel, to reside on the premises, presumably to minimize the chances of prostitutes having sex outside of brothel commerce. ELY CITY, NEV., CODE ch. 3-6-13(D) (2001).

¹²⁷ See *Information—Legal*, <http://www.nvbrothels.net/infoLegal.shtml> (last visited July 14, 2005).

¹²⁸ See, e.g., *supra* text accompanying note 100.

¹²⁹ See *Information—Health Benefits*, <http://www.nvbrothels.net/infoHealthBenefits.shtml> (last visited July 14, 2005).

¹³⁰ *Condom Use High*, *supra* note 106.

¹³¹ Dan Bell, *Upfront: Fox in the Cat House?*, LAS VEGAS WEEKLY, Dec. 14, 2000, available at http://www.lasvegaskweekly.com/departments/12_14_00/upfront1.html.

¹³² *Id.*

¹³³ NEV. REV. STAT. § 201 (2003).

¹³⁴ See *Frequently Asked Questions*, <http://www.nvbrothels.net/newFAQ.shtml> (last visited July 14, 2005).

State laws which require brothels to remain a sufficient distance from schools, houses of worship or main thoroughfares¹³⁵ arguably function to uphold morals by keeping brothels relatively out-of-sight, thereby balancing “the historic tolerance for legal prostitution with more genteel public sensibilities.”¹³⁶ In the 1999 Ely town meeting in which the mayor vetoed the county commissioners’ decision to prohibit prostitution, one of the townsmen pointed out that brothels actually help keep prostitution invisible: “These women [brothel prostitutes] do not come and knock on your door and walk in your house to disrupt your family. But, if you stop to think, the TV and your computer bring all the filth into your house that you could possible [sic] want”¹³⁷ Indeed, brothels tend to cut down on street prostitutes in the surrounding areas while the absence of brothels increases them, as observed by Dennis Hof, owner of the Moonlite Bunny Ranch in Carson City: “With the closure of the Mustang Ranch . . . there has been a proliferation of illegal hooking in Reno.”¹³⁸

Perhaps in recognition of the potential immorality of a legalized sex trade, the State and all but one of its counties where prostitution is legal limit how it may be advertised.¹³⁹ State law prohibits brothel advertising in counties where it is illegal,¹⁴⁰ and even where brothels are legal, Nevada proscribes advertising in public theaters, streets and highways.¹⁴¹ Many of the county ordinances that regulate prostitution are vague and enforced at-will, but some explicitly command that advertising remain discreet.¹⁴² Brothel signs in Wells must be approved by the county’s board of councilmen before they can be erected or changed; Elko and Churchill go so far as to prohibit computer advertising; and Ely doesn’t tolerate any brothel advertising whatsoever.¹⁴³

By keeping brothels legal but also somewhat removed from major thoroughfares as well as under-advertised, the State implicitly seems to recognize prostitution is not a universally accepted practice and should therefore not be plainly visible to those who object to it. Furthermore, these zoning and advertising laws which in effect require brothel customers to take a deliberate walk or drive to a gated area for a hush-hush, hedonistic purpose possibly imbue the

¹³⁵ NEV. REV. STAT. §§ 201.380-390 (2003). In practice, however, many brothels in Nevada are located just a few blocks from main thoroughfares. Brents & Hausbeck, *supra* note 4, at 321.

¹³⁶ Lichtenstein, *supra* note 13, at 1.

¹³⁷ Brents & Hausbeck, *supra* note 14, at 10.

¹³⁸ Dennis Hof, *Get Girls into Legal Brothels*, RENO NEWS & REV., Jan. 10, 2002, at 7.

¹³⁹ Brents & Hausbeck, *supra* note 4, at 319.

¹⁴⁰ NEV. REV. STAT. § 201.430(1)(b) (2003). This law frustrates brothel owners who want to advertise their services to tourists in Las Vegas and Reno. Furthermore, it raises the yet unsettled question as to whether websites violate this statute.

¹⁴¹ *Id.* § 201.430(1)(a). In practice, however, billboards placed on private property are often visible from adjacent highways and thoroughfares. Lichtenstein, *supra* note 13, at 10.

¹⁴² See *infra* text accompanying note 143.

¹⁴³ Brents & Hausbeck, *supra* note 4, at 319; WELLS, NEV., BROTHEL CODE ch. 3-6-29(C) (2001); CHURCHILL COUNTY, NEV., CODE ch. 5.20.240 (2005); ELKO, NEV., CITY MUN. CODE ch. 4-9-15(C) (2001); ELY, NEV., CITY CODE, ch. 3-16-13(C) (2001).

act with a harmless degree of shame,¹⁴⁴ not adverse to the State's interest in promoting morality and family values.¹⁴⁵

C. Professionalism

In some respects, brothel workers and owners are bona fide professionals in that they must abide by various state and local laws, which, in turn, aim to advance public policy.¹⁴⁶ In order to become a brothel prostitute, the woman has to apply for a work card from the county sheriff's office or city police department.¹⁴⁷ "[T]he registration procedure is therefore not distinguishable from that for other workers . . ."¹⁴⁸ Brothels cannot hire women under the age of twenty-one, except in Mineral County where the age minimum is eighteen.¹⁴⁹ Arguably, brothels are bowing to public morals by hiring only women who are legally adults and theoretically mature enough to decide whether to enter such a physically-exacting profession. Brothels also cannot hire women if they have been convicted of a felony in the past five years or a misdemeanor in the past year,¹⁵⁰ which in effect keeps brothels from functioning as havens for potentially dangerous fugitives or recent offenders.

Similar to prostitutes, brothel owners have their own set of codes to follow that serve public policy.¹⁵¹ Most counties do not grant brothel licenses to applicants convicted of a "felony, drug charge, theft, embezzlement, or crimes involving use of a deadly weapon; if they have been involved in illegal businesses or financial insolvency . . ."¹⁵² Like any other business that sells alco-

¹⁴⁴ In Clark County, where prostitution is illegal, first time offenders who are caught patronizing prostitutes may attend "john school" and pay a fee rather than go to prison and procure a criminal record: The six-to-eight hour one-day course, which consists of learning about STDs and child prostitution, is referred to by law enforcement as a "blame, shame, and frame" class. Kate Hausbeck, *Ground Zero: Bad Girls and Good Johns: Street Prostitutes Get Prison, Purchasers Get Preaching*, LAS VEGAS WEEKLY, June 28, 2001, available at http://www.lasvegasweekly.com/2001/departments/2001_06_28/upfront_ground_zero.html.

¹⁴⁵ In an effort to achieve moral legitimacy and to stay in their respective county's good graces, Nevada's bigger brothels often give back to the community in the form of scholarships, uniforms for fire departments and sports teams, and funds for needy families or fire victims. Brents & Hausbeck, *supra* note 4, at 327; see also Mary Thompson, *Brothel Comes to Aid of Neighbors*, RENO GAZETTE-J., Mar. 9, 2001, at 1C. Not limiting its charity to purely wholesome causes, the Moonlite Bunny Ranch offered free sex to the first fifty soldiers who showed up after the current Iraq War started. Alex Cukan, *Jockstrip: The World as We Know It*, UNITED PRESS INT'L, June 5, 2003, available at LEXIS, Nexis Library, UPI File. The Chicken Ranch also offers discounts to soldiers and veterans. Abowitz, *supra* note 15, at 30.

¹⁴⁶ See *infra* text accompanying notes 147-60.

¹⁴⁷ Brents & Hausbeck, *supra* note 4, at 324. These work cards are the same as those issued to hotel and casino employees. *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*; MINERAL COUNTY, NEV., ORDINANCE No. 186A, § XII(3)(g) (2005).

¹⁵⁰ Mead, *supra* note 18, at 79.

¹⁵¹ See *infra* text accompanying notes 152-57.

¹⁵² Brents & Hausbeck, *supra* note 4, at 317. Daily Planet, a Melbourne-based brothel corporation which is aspiring to build in Nevada, hired former madam Heidi Fleiss as a consultant for the project. The corporation was quick to announce that, due to her status as a felon, Fleiss is not "financially involved" with this particular project. *Aussie Brothel Firm Eyes Nevada*, THE RECORD (Kitchener-Waterloo, Ontario), May 10, 2003 (Sat. final ed.), at A17.

hol, brothels which maintain bars must secure liquor licenses, which, in turn, necessitate the brothel owners complying with its appurtenant health and safety requirements.¹⁵³ Nor are brothels immune to local building codes specifying not just the size, type and location of buildings but also strict details regarding safety and hygiene.¹⁵⁴ Lander County, for instance, mandates brothels supply a county-approved source of water, its bathrooms offer soap and towels, its kitchens provide clean appliances, and its bedrooms include hampers as well as clean sheets and towels that are laundered after each use.¹⁵⁵ The city of Ely and Carlin County's brothel codes empower the city council to close a brothel without prior notice if it imperils "public health, safety, or morals."¹⁵⁶ Indeed, Churchill County actually closed down the Salt Wells Villa Brothel when it was deemed the bar could not access potable water.¹⁵⁷

Perhaps the most business-like aspect of brothel prostitution is brothel owners and prostitutes draw up actual written contracts memorializing their respective duties.¹⁵⁸ The contracts usually specify the prostitutes work three weeks out of the month and they split the fee fifty/fifty.¹⁵⁹ Prostitutes also pay for their room and board, usually nineteen dollars a day.¹⁶⁰ These contracts often specify grievance procedures and mobility, meal and dress requirements.¹⁶¹ By entering into contracts with the brothels, prostitutes are in a safer, more legally sound position to seek remedies should the brothels breach the terms.

D. Non-brothel Prostitution

The brothel system comprises only one mechanism whereby prostitution may be carried out, but it is the healthiest, safest, least immoral as well as the most professional mode of bartering sex for money.¹⁶² In contrast, street prostitution, whereby prostitutes solicit customers outdoors, provides none of the financial predictability or health safeguards brothel life affords.¹⁶³ The women may be diseased or underage: In the first ten months of 2003, Las Vegas police arrested three hundred sixty-eight prostitutes who tested positive for HIV and

¹⁵³ See Gormley, *supra* note 91.

¹⁵⁴ Brents & Hausbeck, *supra* note 4, at 318.

¹⁵⁵ LANDER COUNTY, NEV., CODE ch. 5.16.100(G) (2001).

¹⁵⁶ ELY CITY, NEV., CODE ch. 3-6-15 (2001); CARLIN, NEV., BROTHEL CODE ch. 5-9-19 (2004). It is interesting to note from a policy standpoint that the emergency revocation clauses in the codes of Churchill, Elko and Lander Counties omit the word "morals" as a reason to close brothels. Brents & Hausbeck, *supra* note 4, at 318; CHURCHILL COUNTY, NEV., CODE ch. 5.20.140(A)(5) (2005); ELKO, NEV., CITY MUN. CODE ch. 4-9-16(A)(6) (2001); LANDER COUNTY, NEV., CODE ch. 5.16.110(A)(5) (2001).

¹⁵⁷ Garcia, *supra* note 14, at A1, A10.

¹⁵⁸ Brents & Hausbeck, *supra* note 4, at 325.

¹⁵⁹ *Id.* at 326.

¹⁶⁰ Lois Gormley, *Prostitution: It's Not Just a Job It's a Career*, NEVADA OUTPOST, Dec. 11, 1998, available at <http://www.jour.unr.edu/outpost/commnity/archives/com.gormley.prostitute3.html>. The Chicken Ranch brothel charges thirty dollars a day for room and board. Abowitz, *supra* note 15, at 32.

¹⁶¹ Brents & Hausbeck, *supra* note 4, at 325.

¹⁶² See *supra* Parts II.A.-C.

¹⁶³ See *Prostitution*, <http://www.fact-index.com/p/pr/prostitution.html> (last visited July 14, 2005).

one hundred twenty-seven prostitutes under eighteen.¹⁶⁴ Streetwalkers are often coerced into prostitution and kept subservient by pimps who hook them on drugs and beat them.¹⁶⁵ Furthermore, "more prostitutes are murdered in the United States . . . than anywhere else in the world."¹⁶⁶ Brothel prostitutes, on the other hand, actively seek out work themselves (many counties do not allow brothels to advertise using their addresses or phone numbers, so even posting "help wanted" ads is legally risky for brothels),¹⁶⁷ and the women may break contract with only monetary consequences and without the fear of physical assault. Because of the safety and health problems inseparable from streetwalking, the Nevada Supreme Court concluded in *Dinitz v. Christensen* that "the justification for the proscription under review [solicitation for the purposes of prostitution] is within the legitimate reach of Nevada's police power."¹⁶⁸

Some streetwalkers have alleged they are subject to verbal abuse not just by bystanders but also, more disturbingly, by police officers.¹⁶⁹ A 1994 article about San Francisco street prostitutes describes vice officers routinely fondling prostitutes after arresting them or pressuring them to exchange sexual favors for avoiding arrest.¹⁷⁰ Because all prostitution is illegal in San Francisco, the city's prostitutes are unwilling to file complaints for fear of exposing their forbidden vocation to the authorities.¹⁷¹ Therefore, "[p]rostitutes' safety and lives are often held in the hands of people who could easily hurt, abuse, and even murder them, and do so under the cover of law."¹⁷²

The plight of streetwalkers was one of the factors that propelled the Angel's Initiative, a movement based in Berkeley, California, to lobby California to repeal its prostitution laws.¹⁷³ In an open letter to Berkeley Councilwoman Maudelle Shirek, the Angel's Initiative argues in the same way the "three strikes you're out" policy does not seem to reduce crime and that the war on drugs does not seem to reduce drug use, criminalization does not reduce prostitution; meanwhile, city money is senselessly wasted on enforcement of anti-prostitution laws.¹⁷⁴ This initiative, which garnered sufficient signatures to be placed on the November 2, 2004 ballot,¹⁷⁵ did not pass,¹⁷⁶ but the mea-

¹⁶⁴ Neff, *supra* note 82, at 10A.

¹⁶⁵ *Prostitution*, *supra* note 163.

¹⁶⁶ Anne McClintock, *Screwing the System: Sexwork, Race, and the Law*, 19 BOUNDARY 2: FEMINISM & POSTMODERNISM (SPECIAL ISSUE) 70, 88 (1992).

¹⁶⁷ Brents & Hausbeck, *supra* note 4, at 313.

¹⁶⁸ *Dinitz v. Christensen*, 577 P.2d 873, 875 (Nev. 1978) (citation omitted).

¹⁶⁹ Jeremy Hay, *You're Under Arrest, Spread Your Legs*, 7 GAUNTLET MAGAZINE (1994), <http://www.bayswan.org/jeremy1.html> (last visited June 20, 2005) (online version printed under the title *Police Abuse of Prostitutes in San Francisco*).

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² The Feminist Argument for Decriminalizing Prostitution, Presented by: The Ladies Auxiliary Corps of Truth-Seekers (2001), <http://www.brianmclark.com/writing/prostitution.html>.

¹⁷³ See *Initiative for Berkeley*, <http://www.swop-usa.org/proposedinitiative.html> (last visited July 14, 2005).

¹⁷⁴ Open letter from Avaron Ipsen to Maudelle Shirek, Berkeley City Councilwoman (May 30, 2004), www.swop-usa.org/councilwoman_maudelle_shirek_.htm.

¹⁷⁵ Carolyn Marshall, *Bid to Decriminalize Prostitution in Berkeley*, N.Y. TIMES, Sep. 14, 2004, at A16.

sure illuminates the illegal prostitute's dilemma of having no recourse to report crimes inflicted upon her as long as prostitution itself is considered a crime.

In addition to streetwalking, the other main mode of illegal prostitution in Nevada takes the form of escort services, which usually involve customers calling the service by telephone and arranging for the escorts to meet them in a private residence or hotel room.¹⁷⁷ Although this *modus operandi* allows escorts to enjoy a higher degree of invisibility than do streetwalkers, Nevada law draws no distinction between sex that is blatantly solicited on the street and escorts who are discretely commissioned over the phone.¹⁷⁸ In 1983, when a Las Vegas escort arrested for illegal prostitution argued her due process rights were violated because the sexual service was performed in a private hotel room, the State countered prostitution is a type of commerce and therefore does not enjoy extensive privacy rights: "It is generally accepted that while the Due Process Clause does protect many aspects of intimate sexual relations privately engaged in between consenting adults, a state may nevertheless constitutionally regulate and prohibit commercialized sexual activities, such as prostitution and solicitation."¹⁷⁹ Moreover, because the sex acts take place outside the controlled environments that brothels offer,¹⁸⁰ escort services ensure the prostitute no immediate protection from customers who are violent or refuse to wear a condom, thereby rendering escort services as potentially dangerous as streetwalking.

E. Decriminalization

In treating the prostitution question, state governments in the U.S. have subscribed to either regulation (as in Nevada) or criminalization (the rest of the country), but none has taken the decriminalization approach, which sanctions prostitutes operating "the same as any other independently licensed business."¹⁸¹ In 1986, the International Committee for Prostitutes' Rights drafted the World Charter for Prostitutes' Rights, which called for the elimination of various regulatory measures, including zoning laws and mandatory health checks, so as to maximize civil liberties interests, including freedom of association, travel, and privacy.¹⁸² Proponents for decriminalization argue regulatory laws, which require prostitutes to be registered with the county and be reported to the State Health Board if they test positive for HIV, merely abrogate their right to privacy, "reflect a medicalization of deviance, the characterization of

¹⁷⁶ Mireya Navarro, *Long Silent, Oldest Profession Gets Vocal and Organized*, N.Y. TIMES, Dec. 18, 2004, at A12.

¹⁷⁷ *Prostitution in Nevada*, http://www.fact-index.com/p/pr/prostitution_in_nevada.html (last visited July 14, 2005).

¹⁷⁸ See NEV. REV. STAT. § 244.345 (2003).

¹⁷⁹ *State v. Eighth Judicial Dist. Court*, 668 P.2d 282, 283 (Nev. 1983) (citation omitted).

¹⁸⁰ See *supra* text accompanying note 177.

¹⁸¹ Brents & Hausbeck, *supra* note 4, at 309.

¹⁸² *Id.* at 309. Some of the most notable supporters of decriminalization are the ACLU, NOW, COYOTE ("Call Off Your Old Tired Ethics") as well as former Surgeon General Jocelyn Elders. *Id.* at 310.

prostitutes as vectors of disease,¹⁸³ and drive them to resort to the relative anonymity of street prostitution.¹⁸⁴

Decriminalization might be a reasonable approach to prostitution if there were no disease or violence associated with the commerce, but it would be logistically impossible for the State to ensure the health and safety of its prostitutes and customers in any area other than the enclosed, guarded safe haven of a brothel.¹⁸⁵ Furthermore, because brothel prostitutes fear neither danger nor arrest, they are in a more secure position to wield greater bargaining power with their customers.¹⁸⁶ Certainly, brothel guidelines prohibiting prostitutes from leaving the premises while they are working restrict their freedom of movement; however, there are numerous occupations, such as mining or the military, which legally require their workers to confine themselves within restricted areas for pre-determined periods of time because the nature of the job reasonably calls for such safeguards. Countering the theory that regulation actually discourages conformance is the fact that "[t]he Nevada counties that provide for legalized brothels have virtually no crime of illegal prostitution."¹⁸⁷ Because Nevada brothel prostitutes possess an exemplary health and safety record as opposed to Las Vegas's illegal prostitutes,¹⁸⁸ the State is justified in impinging on certain aspects of their civil liberties (which brothel prostitutes knowingly contract away) for the sake of its police power objectives.

Nevada upholds a Constitutional imperative to protect "fundamental rights such as privacy . . . travel, and freedom of association,"¹⁸⁹ so the various brothel rules which restrict working prostitutes to the premises and require them to submit to weekly check-ups may indeed infringe upon these civil liberties. In addition, Nevada asserts a public policy interest in "promoting stable marriages,"¹⁹⁰ so it is arguable that its prostitution laws, which in effect permit husbands to commit adultery with impunity under the veil of a legitimate business, contravene this objective. However, the health, safety and welfare benefits of regulated brothel prostitution far outweigh the heightened civil liberties associated with decriminalization as well as the moral high ground underlying criminalization, both of which, in turn, foster the unsafe practices of streetwalking and escort services.¹⁹¹ Furthermore, Nevada's State and county laws aim to keep brothels under-advertised and sheepishly hidden from major thoroughfares, a practice which serves to uphold public morality by impliedly shaming

¹⁸³ Brents & Hausbeck, *supra* note 4, at 307.

¹⁸⁴ Janice G. Raymond, *10 Reasons for not Legalizing Prostitution* (Mar. 25, 2003) www.prostitutionresearch.com/ten-reasons.html.

¹⁸⁵ See *supra* Parts II.A.-D.

¹⁸⁶ A journalist who stayed at the Chicken Ranch brothel in 2005 estimated that half of the men who negotiated with the prostitutes ended up leaving unserved because they were unable to reach an agreement. Abowitz, *supra* note 15, at 32. If the prostitutes did not feel safe in their brothel environment, it is conceivable more would have agreed to a lower price out of fear of customer retribution.

¹⁸⁷ *Information—Legal*, <http://www.nvbrothels.com/infoLegal.shtml> (last visited July 14, 2005).

¹⁸⁸ *Id.*

¹⁸⁹ *Jackson Water Works, Inc. v. Pub. Utils. Comm'n*, 793 F.2d 1090, 1093 (9th Cir. 1986) (citation omitted).

¹⁹⁰ *Kirkpatrick v. Eighth Judicial Dist. Court*, 64 P.3d 1056, 1062 (Nev. 2003).

¹⁹¹ See *supra* Parts II.A.-E.

prostitution.¹⁹² The Nevada Brothel Association itself does not claim the brothel system is more honorable than criminalization but maintains, in light of the fact prostitution is an inevitability, "the legal industry is the better of the two evils."¹⁹³ It is telling that in 1949 when eighty-nine countries ratified the United Nations convention that stated prostitution contradicts "human dignity," the United States (along with Germany and the Netherlands) opted not to sign, perhaps to protect Nevada's brothel system.¹⁹⁴ After all, if Nevada criminalized all prostitution, then it would have no footing to regulate it and advance the police power objectives that the State's legal prostitutes exclusively enjoy.

III. "WE THE PEOPLE OF NEVADA, IN ORDER TO CREATE A MORE PERFECT UNION BETWEEN THE STATE AND PROSTITUTION . . ."

Although the Nevada brothel system serves public policy in that it advances public health, safety, welfare and arguably protects morals, the laws that govern it require restructuring. Because counties rather than the State sustain control over most aspects of prostitution, the Nevada brothel system is decentralized and often haphazard.¹⁹⁵ Many of the counties' differing prostitution codes are often outdated and difficult to enforce, and the State has little incentive to enforce them because the counties, not the State, see the bulk of the revenue from brothel prostitution.¹⁹⁶ Moreover, because brothel prostitutes function as independent contractors receiving no employment benefits, they have very little power to influence the brothel system and improve their working conditions.¹⁹⁷

In order for the Nevada brothel system to develop into a model scheme of legalized prostitution that other states may consider emulating, three changes are necessary:¹⁹⁸ 1) The relevant laws require additional centralization and uniformity so that all brothels in the State are subject to similar regulations, leaving little room for misinterpretation and manipulation of the laws; 2) some kind of State tax on brothels needs to be instituted to give brothels more legitimacy and to give the State further motivation to oversee prostitution; and 3) brothel prostitutes warrant a more powerful professional status so they are in a better position to negotiate with brothel owners about the terms of their employment. The more centralized, lucrative and fair the Nevada brothel system is, the more effectively it will advance public policy.

A. *A Call for Uniform Laws*

Because the Nevada legislature granted counties the power to regulate brothels in the late nineteenth century,¹⁹⁹ there exist few State-wide uniform

¹⁹² See *supra* Part II.B.

¹⁹³ *Information—Mission Statement*, <http://www.nvbrothels.com/infoMission.shtml> (last visited July 14, 2005).

¹⁹⁴ *Prostitution*, *supra* note 163.

¹⁹⁵ See *supra* text accompanying note 11.

¹⁹⁶ Brents & Hausbeck, *supra* note 4, at 325; see *infra* text accompanying notes 236-37.

¹⁹⁷ See *The Feminist Argument for Decriminalizing Prostitution*, *supra* note 172.

¹⁹⁸ For an analysis on why the Nevada brothel system should not be emulated by other states, see Bingham, *supra* note 18, at 96.

¹⁹⁹ See *supra* Part I.A.

rules for brothel regulation and enforcement. Rather, a "patchwork"²⁰⁰ of differing county codes exist. For example, most counties view brothel prostitutes solely as independent contractors, whereas Churchill County considers them to be "employees" of the business.²⁰¹ Many counties permit licensed brothels to be located in both unincorporated as well as incorporated areas, whereas Elko allows brothels only within city limits.²⁰² Esmeralda County demands that brothels reside at least five miles (8800 yards) from an inhabited area,²⁰³ while Mineral County mandates a distance of only 300 yards.²⁰⁴ Most counties' and towns' brothel licensing boards ask applicants for such information as criminal records, past employment and source of funds, whereas Storey County requires no more than minimal information.²⁰⁵ And while all the counties apply due process procedures for licenses, appeals, fee structures, hearings, investigation conditions and advanced notice, counties part company as to how well they are enacted.²⁰⁶

Arguably, many brothel matters are best left in the hands of the individual county commissions, but the State should be involved in regulating the number of brothels per county. It seems logical that if brothel prostitution is the healthiest and safest way to exchange money for sex, then counties should make it no more difficult to obtain a brothel license than, for example, a liquor or gaming license.²⁰⁷ However, most Nevada counties license barely two-to-three brothels²⁰⁸ as a result of unwritten deals that existing brothel owners have made with local authority in order to minimize competition.²⁰⁹ Indeed, the counties' brothel ordinances often represent the unofficial laws and agreements that had already been in place prior to codification.²¹⁰ "[T]hey were created to protect the interests of existing brothel owners and to insulate the tradition of brothel prostitution from modernization It is therefore virtually impossible to build a new brothel."²¹¹ In addition, county and town boards are unwilling to confer licenses to anyone who is not local on the theory that native entrepreneurs will behave more deferentially to local authority and "not challenge the numerous loopholes in the law."²¹² Further rendering licenses more difficult for hopeful brothel owners to obtain is the fact that most counties make licenses site-specific and non-transferable.²¹³ So although regulated brothel prostitution meets Nevada's police power objectives of health, safety, welfare, and morals, the State's counties' codes function to restrict additional brothels from emerg-

²⁰⁰ Brents & Hausbeck, *supra* note 4, at 311.

²⁰¹ Garcia, *supra* note 14, at A10; *see* CHURCHILL COUNTY, NEV., CODE ch. 5.20.220 (2005).

²⁰² Bingham, *supra* note 18, at 88; *see* ELKO, NEV., CITY MUN. CODE ch. 4-9-3(B) (2001).

²⁰³ ESMERALDA COUNTY, NEV., ORDINANCE No. 124, § 3(A) (1972).

²⁰⁴ MINERAL COUNTY, NEV., ORDINANCE No. 186A, § VIII(1)(d) (2005).

²⁰⁵ Brents & Hausbeck, *supra* note 4, at 317; *see* STOREY COUNTY, NEV., CODE ch. 5.16.160 (2003).

²⁰⁶ Brents & Hausbeck, *supra* note 4, at 318.

²⁰⁷ *See* Lichtenstein, *supra* note 13, at 6.

²⁰⁸ Brents & Hausbeck, *supra* note 46, at 30.

²⁰⁹ Brents & Hausbeck, *supra* note 4, at 323.

²¹⁰ *See id.* at 321-323.

²¹¹ *Id.* at 322.

²¹² *Id.* at 323.

²¹³ *Id.* at 317.

ing. A State statute should be instituted which bases the number of brothel licenses available on something less nepotistic and more objective, such as county population.

Uniformity is lacking amongst not only county laws but also the Nevada Revised Statutes. For instance, NRS 201.354 outlaws prostitution or solicitation outside of a licensed brothel, implying that prostitution and solicitation are legal inside a licensed brothel.²¹⁴ Yet NRS 201.300, which defines pandering, does not make an exception for pandering occurring inside licensed brothels; this seems incongruous since the statutory definition of pandering can be as innocuous as “encourage[ing] . . . a person to . . . continue to engage in prostitution.”²¹⁵ Although it is standard operating procedure for a licensed brothel owner to keep a percentage of an in-house prostitute’s earnings,²¹⁶ doing so is a felony according to the plain language of NRS 201.320, which criminalizes “knowingly accept[ing], receiv[ing], lev[ying] or appropriat[ing] any money or other valuable thing, without consideration, from the proceeds of any prostitute.”²¹⁷ And under the plain language of NRS 201.340, not just brothel owners but also taxicab drivers or bus drivers who transport willing prostitutes to a brothel could be found guilty of pandering.²¹⁸ These latter laws obviously cannot be construed literally, but they easily could be if reworded—it can be as simple as adding language such as “Except as provided by NRS 201.345” By revising the language of Nevada’s prostitution statutes so that they interact seamlessly, there would be less room for misinterpretation and manipulation by brothel prostitutes, owners, staffers and customers alike. This revision could possibly propel counties to likewise update their outdated or difficult-to-enforce prostitution codes.²¹⁹

Perhaps the most vivid illustration of the Nevada brothel system’s decentralized and unevenly-enforced status is the method by which Joe Conforte, owner of the now defunct Mustang Ranch, managed to sidestep local laws.²²⁰ In the 1970s, he situated his brothel, consisting of mobile trailers with attached tractors, on the border of three counties.²²¹ Whenever county officials would call him on a violation, he eluded penalties simply by moving the trailers a few feet.²²² A recent example of the difficulty counties face in enforcing brothel laws occurred in 2004 when Nye County brothel owner Joe Richards repeatedly ignored the county’s orders to take down some of the brothel’s sexually explicit billboards in accordance with Nye’s brothel advertising codes.²²³ As a

²¹⁴ NEV. REV. STAT. § 201.354(1) (2003) (“It is unlawful for any person to engage in prostitution or solicitation therefor[e], except in a licensed house of prostitution.”)

²¹⁵ *Id.* § 201.300(1).

²¹⁶ Brents & Hausbeck, *supra* note 4, at 326.

²¹⁷ NEV. REV. STAT. § 201.320(1) (2003).

²¹⁸ *See id.* § 201.340(1) (“A person who knowingly transports or causes to be transported, by any means of conveyance, into, through or across this state, or who aids or assists in obtaining such transportation for a person with the intent to induce, persuade, encourage, inveigle, entice or compel that person to become a prostitute or to continue to engage in prostitution is guilty of pandering.”)

²¹⁹ *See, e.g., infra* notes 259-60.

²²⁰ Brents & Hausbeck, *supra* note 46, at 27.

²²¹ *Id.*

²²² *Id.*

²²³ Ball, *supra* note 14, at 1B.

last-resort tactic to get Joe Richards to cooperate, County Commission Chairman Henry Neth publicly announced that a measure to eliminate Nye County's six brothels should be put on the next ballot.²²⁴ This threat finally actuated Richards to take down the signs and prompted Nye to promise to update its vague rules on enforcement and advertising.²²⁵

The optimal approach for the Nevada brothel system to prevail, and in doing so promote public policy, is for the State to take a greater role in regulating prostitution by instituting a new State-wide, uniform and centralized legal infrastructure. If there existed clear brothel statutes that were enforced all across Nevada, maybe the chess-like legal tactics that Nye County and Joe Richards resorted to could be avoided. Certainly, what is considered right and moral may be a question of locale, as the Nevada Supreme Court explains in *Kuban v. McGimsey*:

We recognize that community standards and mores may differ from one community to another and even from time to time in the same community and that the county governing body, or the local electorate, as here, may see fit to adopt, repeal or amend ordinances to meet prevailing or then contemporary conditions. It is proper that the community most affected, either beneficially or adversely, have control over the area sought to be regulated.²²⁶

However, the counties rather than the State taking the helm in regulating prostitution results in a "patchwork" of codes and ordinances that are often outdated, disparate and difficult to enforce.²²⁷ Moreover, the same supreme court emphasized the importance of state intervention in *Kelley v. Clark*: "The suppression of nuisances injurious to public health or morals is among the most important duties of government. It is a governmental power as distinguished from matters of purely local concern."²²⁸ Although brothels are no longer presumed to be nuisances *per se*,²²⁹ prostitution is a practice that is potentially "injurious to public health."²³⁰ Prostitution is therefore not a purely "local matter" and requires more uniform and consistent regulation by the State.

B. A Call for Taxation

"[L]egalized prostitution in Nevada has certainly not achieved the same legal rights as other legitimate businesses."²³¹ The ultimate governmental measure that would grant Nevada brothels extra staying power for the purpose of advancing public policy is the taxation of brothels on a State level. Indeed, perhaps one reason the State does not currently try to exert more input on the brothel system is lack of financial incentive.

The Nevada Brothel Association estimates Nevada's brothels pull in about thirty-five million dollars a year.²³² But counties rather than the State see

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Kuban v. McGimsey*, 605 P.2d 623, 626 (Nev. 1980) (citation omitted).

²²⁷ *Brents & Hausbeck*, *supra* note 4, at 329.

²²⁸ *Kelley v. Clark County*, 127 P.2d 221, 223 (Nev. 1942) (citation omitted).

²²⁹ *Nye County v. Plankinton*, 587 P.2d 421, 423 (Nev. 1978).

²³⁰ *See supra* Part II.A.

²³¹ *Brents & Hausbeck*, *supra* note 4, at 320.

²³² *Brents & Hausbeck*, *supra* note 46, at 30.

money from brothel prostitution in the form of licensing fees, property tax, work card fees, investigation fees and liquor licenses, totaling about ten million a year.²³³ Robin River of the Nye County Assessor's Office outlines the valuable ways in which the county uses brothel taxes:

Their (brothels') tax dollars go into many county funds. They pay for all of the county's emergency services, the museum, juvenile probation and many capital projects. Also, the brothels pay \$7,500 every quarter for a privilege tax, and each brothel pays the county \$30,000 per year, and that does not include the liquor license or the \$62.50 per month that each employee pays for their sheriff's license.²³⁴

Meanwhile, Nevada counties that do not permit brothel prostitution "spend[] money on a lost cause . . . [and] miss collection of license fees, taxes, and other revenues that could be a significant income stream from a legal licensed and controlled industry."²³⁵ Because Nevada has no state-income tax, and because brothels pay no payroll, banking or business taxes,²³⁶ the singular revenue the State treasury sees from brothels comes from sales tax on alcohol and from business licenses, which impose quarterly twenty-five dollar fees for each full-time employee.²³⁷

It is estimated taxpayers spend approximately seven and a half million dollars on prostitution control policy per major city.²³⁸ Nevada State Assemblywoman Chris Giunchigliani proffered State-wide legalization of prostitution may save money in the long run, in part by cutting law enforcement costs: "Philosophically from a health and safety perspective [legalized prostitution] could make sense and police could actually focus on other issues."²³⁹ The Nevada statute barring counties with populations of more than four hundred thousand from regulating prostitution²⁴⁰ not only causes the State's most-populated city, Las Vegas,²⁴¹ to spend money needlessly on law enforcement to fight prostitution but also fails to further the police power objectives of health and safety. "[T]o satisfy due process, a statute must be reasonably related to a legitimate governmental interest."²⁴² Because brothel prostitutes and customers are healthier and safer than illegal prostitutes and the "johns" who patronize them,²⁴³ the population ban on legalized prostitution does not promote a legitimate governmental interest, let alone make sense financially.

Although Nevada's counties, as opposed to the State, receive the bulk of brothel fees,²⁴⁴ the counties themselves vary in the amount of money they collect from brothels. For instance, Lyon receives about \$245,000 a year from

²³³ Lois Gormley, *Red Light Districts Sweeten County Coffers*, NEVADA OUTPOST, Dec. 11, 1998, available at <http://www.jour.unr.edu/outpost/community/archives/com.gormley.prostitute2.html>.

²³⁴ Bell, *supra* note 131.

²³⁵ *Information—Mission Statement*, *supra* note 193.

²³⁶ Charlie LeDuff, *Nevada Turns to Brothels as a Budget Fix*, N.Y. TIMES, June 28, 2003, at A7.

²³⁷ Gormley, *supra* note 91.

²³⁸ Brents & Hausbeck, *supra* note 4, at 308.

²³⁹ Neff, *supra* note 82, at 10A.

²⁴⁰ NEV. REV. STAT. § 244.345 (2003).

²⁴¹ See *supra* text accompanying note 50.

²⁴² *Kuban v. McGimsey*, 605 P.2d 623, 627 (Nev. 1980) (citation omitted).

²⁴³ See Neff, *supra* note 82, at 10A.

²⁴⁴ See *supra* text accompanying note 233.

brothel prostitution, whereas Churchill sees only \$17,000 dollars a year.²⁴⁵ Licensing fees range from \$18,750 every three months in Storey County²⁴⁶ to fifty dollars every three months in Lander,²⁴⁷ and the investigation fee required for licenses ranges from \$4000 for every applicant in Lyon to seventy-five dollars in Winnemucca.²⁴⁸ Furthermore, some counties (i.e. Churchill) spend more on enforcing and regulating than they receive from brothel fees, which led to the 2004 ballot measure calling for the closure of Churchill County's brothels—the initiative eventually failed.²⁴⁹ If State money and enforcement were increasingly involved in the Nevada brothel system, perhaps there could be a State fund established to aid counties such as Churchill, where the brothel business drains rather than replenishes county resources.²⁵⁰ After all, it is in the State's public policy interest to keep brothels open even if they do not turn a profit.

Brothel owners have already expressed their willingness to pay additional taxes,²⁵¹ possibly because they know being taxed would make the State a financial ally of the brothel system and therefore would reduce chances of prostitution being illegalized by county initiative. Furthermore, being taxed would provide brothel owners added leverage to lobby for more favorable laws that they are currently too timid to pursue for fear of spontaneous shutdowns.²⁵² In 2003, the Nevada legislature considered Governor Kenny Guinn's proposal to include brothels as part of a 7.3 percent amusement tax that would apply to admission, concessions and merchandise sold by various businesses.²⁵³ However, the brothels did not make it into the final senate bill,²⁵⁴ nor were they included in the entertainment tax passed in 2005.²⁵⁵

C. *A Call for Prostitutes' Rights*

A major problem of the Nevada brothel system, aside from decentralized prostitution laws as well as little financial incentive for the State to regulate the brothels further,²⁵⁶ is that the prostitutes have no resources to improve their

²⁴⁵ Gormley, *supra* note 233. For the 2004-2005 fiscal year, the total annual revenue from brothels in Lyon County topped \$341,063. Telephone Interview with Office of the Clerk & Treasurer of Lyon County, Nev. (July 15, 2005).

²⁴⁶ STOREY, NEV., Res. 99-14 (June 15, 1999).

²⁴⁷ LANDER COUNTY, NEV., CODE ch. 5.16.130(M) (2001).

²⁴⁸ Telephone Interview with Office of the Clerk & Treasurer of Lyon County, Nev. (July 15, 2005); WINNEMUCCA, NEV., CITY CODE § 5.24.060 (1994); Brents & Hausbeck, *supra* note 4, at 317.

²⁴⁹ Garcia, *supra* note 14, at A1; *Voters Approve Churchill Brothels*, LAS VEGAS REV.-J., Nov. 4, 2004, at 6B.

²⁵⁰ *See id.*

²⁵¹ *See* Ed Vogel, *Live Entertainment Tax: Nearly All Brothels Exempt*, LAS VEGAS REV.-J., Aug 2, 2003, at 1B ("During hearings on tax bills, no opposition was expressed to proposals to tax brothels. Assemblywoman Sheila Leslie . . . praised [Nevada Brothel Association lobbyist George] Flint and the brothel association for their willingness to accept a tax.").

²⁵² *See id.*

²⁵³ Vogel, *supra* note 251, at 1B.

²⁵⁴ *See Tax Plans*, LAS VEGAS REV.-J., July 27, 2003, at 4B.

²⁵⁵ Abowitz, *supra* note 15, at 30.

²⁵⁶ *See supra* Parts III.A.-B.

working conditions and professional status.²⁵⁷ “Communities can impose legally questionable regulations because brothels fear protests will endanger their enterprise Many of the regulations on the prostitutes themselves violate their civil liberties.”²⁵⁸ For example, in Carlin, which is the only Nevada city that has written sheriff’s rules on prostitutes’ behavior, local brothel prostitutes are prohibited from seminude sunbathing, loitering in public dance halls or ball games, or from being in town past 7pm.²⁵⁹ And in Ely, a police order mandates that prostitutes who stop working at a brothel leave town as early as possible.²⁶⁰ Not only are non-brothel rules like these difficult to enforce, but also they do not serve any police power objectives. Even though prostitution may be morally questionable, there is no compelling policy reason for government to disallow prostitutes from communing in the town where they work, especially in the light of day where they may blend in with everyone else, as long as they receive health testing every time they return to the brothel.

Brothel prostitutes’ status as independent contractors²⁶¹ also contributes to their lower professional status. By not being regularly salaried employees, they do not receive unemployment and health benefits, retirement, vacation pay, maternity leave or overtime.²⁶² If they procure an STD, they lose time and money while recuperating without the benefit of sick pay.²⁶³ Brothel prostitutes also pay for all their own medical expenses, which usually include eighty-five dollars for monthly blood tests and fifty dollars for weekly medical examinations²⁶⁴ (presently just two counties mandate brothels pay for medical testing²⁶⁵). With the costs of health testing, clothing, cosmetics, taxes, room and board, tipping the brothel staff, and income splits, prostitutes end up earning nineteen-to-twenty-one cents per dollar.²⁶⁶ Brothel prostitutes also report a power difference between themselves and the owners, reducing the prostitutes’ ability to bargain effectively and to pressure the owners to improve their working conditions.²⁶⁷

In order to remedy these vocational downsides, Nevada should mandate brothel prostitutes receive employee status and its appurtenant benefits if they so choose. In addition, brothel prostitutes should be able to form collectives to lobby for better working conditions, as they may in the Netherlands, where

²⁵⁷ The Feminist Argument for Decriminalizing Prostitution, *supra* note 172.

²⁵⁸ Brents & Hausbeck, *supra* note 4, at 326.

²⁵⁹ *Id.* at 325. These sheriff rules, however, are rarely enforced by local officers. Instead, the individual brothel owners may decide whether they want these rules enforced. Telephone Interview with Officer Charles Rehder, Carlin, Nev. Police Dept. (July 15, 2005).

²⁶⁰ Brents & Hausbeck, *supra* note 4, at 311; Police Order for Ely and White Pine County, Nev., Special Police Orders to Control Prostitution, Rule 10, (1953) (signed by Sheriff T.J. McLaughlin & Chief of Police Jack Caylor).

²⁶¹ Brents & Hausbeck, *supra* note 4, at 311; Bingham, *supra* note 18, at 93.

²⁶² The Feminist Argument for Decriminalizing Prostitution, *supra* note 172.

²⁶³ See Brents & Hausbeck, *supra* note 4, at 311.

²⁶⁴ Gormley, *supra* note 160.

²⁶⁵ Brents & Hausbeck, *supra* note 4, at 321.

²⁶⁶ Hagar, *supra* note 15, at 17A.

²⁶⁷ The Feminist Argument for Decriminalizing Prostitution, *supra* note 172.

brothels were legalized in 1999.²⁶⁸ If the professional status of prostitutes is more legitimized, the women will have higher standing to pursue measures to better their own health, safety and welfare.

D. A Proposal

Since Nevada's attitude toward regulating prostitution over the last century and a half has consisted for the most part of county rather than State involvement,²⁶⁹ it is ironic that an insight into the Nevada brothel system's ultimate improvement lies in an 1871 Nevada State Assembly bill that was indefinitely postponed in the Senate and therefore never passed.²⁷⁰ The bill would have made prostitution legal throughout Nevada, thereby repealing "the option for any town or incorporated municipality to regulate houses of prostitution," (although local sheriffs would still retain the power to issue licenses).²⁷¹ Most importantly, "all license money and fees associated with issuing certificates of health to the prostitutes were to be paid into the county treasury, and a bawdy-house fund was to be maintained."²⁷² This money was intended to pay the prostitutes' medical expenses, thus leaving prostitutes with more of their earnings.²⁷³

The following outlines the main proposals for a prostitution reform statute which would build upon this aforementioned failed bill's purposes to make brothel prostitution legal in all of Nevada's counties and to use the money earned by brothels to help improve the working conditions of prostitutes as well as to advance public policy. This proposal attempts to elevate the business of brothel prostitution to a more legitimate status while acknowledging its uniqueness and special needs.

Outline for The Nevada Brothel System Improvement Act

In an effort to further the police power objectives of public health, safety, welfare, and morals with regard to brothel prostitution, the Nevada Legislature enacts the following provisions:

1. Brothel prostitution is legalized in all of Nevada, despite county population. The quota of brothel licenses that each county may issue is yet to be determined but should be based on objective criteria, such as population of square mileage. Because regulated brothels serve public policy more capably than illegal prostitution, brothels should not be as limited in number as they are today.
2. Brothels are subject to State taxes for live entertainment,²⁷⁴ but a quarter of all the taxes received are earmarked for the State Sex-

²⁶⁸ Brents & Hausbeck, *supra* note 4, at 310. The Netherlands' prostitutes union is The Red Thread. Its website, part of which is in English, is <http://www.rodredraad.nl/> (last visited July 14, 2004).

²⁶⁹ See *supra* Parts I.A.-B.

²⁷⁰ Rocha, *supra* note 20; A.B. 199 5th Gen. Assem., Reg. Sess. (Nev. 1871).

²⁷¹ Rocha, *supra* note 20.

²⁷² *Id.*

²⁷³ *Id.*

²⁷⁴ Accord NEV. REV. STAT. § 368A (2003).

Worker Safe Haven fund, which will be formed upon passage of this bill. The Safe Haven is meant to give current and former prostitutes information and educational resources to select another profession if they so choose. The last three quarters of the taxes are designated for enforcement of the State's prostitution laws.

3. Brothel prostitutes have the choice to work as independent contractors or as bona fide salaried employees, replete with a reasonable benefits package. Counties will repeal codes or sheriffs rules that put unrealistic limitations on brothel prostitutes' freedoms. However, for public health reasons, prostitutes who leave the brothel premises during their tenure will continue to be medically tested upon their return and may not resume work until the results come back negative.
4. In addition to getting weekly medical exams (as outlined in the Nevada Administrative Codes), prostitutes shall be given the choice at the doctor's office to speak with a psychologist or social worker about quitting the profession. If these weekly medical exams are conducted at the brothel and not at a medical facility, then a psychologist or social worker shall visit the brothel along with the physician. If during these meetings the prostitute expresses a desire to quit but does not feel comfortable leaving on her own, the psychologist or social worker will make speedy arrangements to transport her to the State Sex-Worker Safe Haven.²⁷⁵ Before a prostitute begins work, the local sheriff's office will supply her with information about Sex Industry Survivor's Anonymous²⁷⁶ or one of the other services that assist sex workers wishing to escape their profession.
5. Brothel parlors will provide one-way mirrors or a video surveillance system so prostitutes can view their customers before doing the lineup, thereby facilitating the prostitute's ability to decline certain customers and lending an added level of privacy.
6. While prostitutes will restrict their commerce to brothels, they may advertise themselves if the brothel rules and county codes allow.
7. The current State laws that prohibit anyone from living off the proceeds of prostitutes²⁷⁷ are amended to exclude children, who may depend on their mothers' salary from prostitution. Prostitutes may choose for this law to extend to their spouses, parents, or siblings.

²⁷⁵ Another inspiration for this idea comes from the Taipei Alliance of Licensed Prostitutes (TALP), a union, which established the Bodhi Fund for various purposes, including helping prostitutes who want to change professions. *Taipei Mayor Ma Ying-jiou Reopens Brothels on March 28, 1999 After 2 Year Struggle by Taipei Prostitutes*, at <http://www.bayswan.org/taipei.html> (Apr. 17, 1999).

²⁷⁶ *Services for Women and Children Escaping Prostitution*, <http://www.prostitutionresearch.com/c-escaping-prostitution.html> (last visited July 14, 2005).

²⁷⁷ NEV. REV. STAT. § 201.320 (2003); see *supra* text accompanying note 217.

8. Men who patronize prostitutes outside the bounds of the brothel system no longer have the option of attending "john school" in lieu of punishment²⁷⁸ but instead will face criminal fines and jail-time. This furnishes men with an incentive to patronize brothels rather than streetwalkers or escort services.
9. The State will periodically review its prostitution statutes as well as each county's brothel codes to ensure they comport with public policy. The State will suggest to the counties ways to update and improve the codes while still catering to the individual county's needs and concerns.

Proponents for prostitution's complete criminalization argue that legalized, regulated prostitution does not in fact serve public policy.²⁷⁹ Traffickers may coach unwilling women to appear as self-employed migrant sex workers, which is reportedly happening in the Netherlands.²⁸⁰ If government reaps tax money from brothels, that would give government "a huge economic stake in the sex industry,"²⁸¹ which is morally questionable. And then there is the notion that "if prostitution is a free choice, why are the women with the fewest choices the ones most often found doing it?"²⁸² The proposed statute addresses all these issues. Weekly opportunities to consult with a social worker would aid an unwilling prostitute to break free. And by funneling the taxes the State receives from brothels directly into the enforcement of prostitution laws, the prostitutes themselves rather than the State become the financial beneficiaries of prostitution, which in turn defeats the moral questionability of State taxes. Meanwhile, the State is given financial resources to regulate prostitution, which is in its public policy interest, and customers remain in the safe and healthy position they do today under the current Nevada brothel system.²⁸³

The meretricious cowboys, railway workers, and miners of the nineteenth century may have given way to the truckers, tourists and traveling businessmen of the twentieth and twenty-first centuries, but the Nevada brothel system and the laws that govern it are in many ways stuck in the nineteenth century boomtown era of "libertarian political cultures."²⁸⁴ Because each county and city has developed its own prostitution policies, Nevada prostitution law has evolved into a hodgepodge of individualized city ordinances, county codes, and unwritten local rules, all strung together by a few dozen prostitution statutes and sections of the Nevada Administrative Code.²⁸⁵ "As the brothels become smaller percentages of the businesses in the rural counties, and as gaming grows in its economic and political power, and as the balance of power shifts

²⁷⁸ See *supra* note 144.

²⁷⁹ See *infra* text accompanying notes 280-82.

²⁸⁰ Raymond, *supra* note 184.

²⁸¹ *Id.*

²⁸² Catharine A. MacKinnon, *Prostitution and Civil Rights*, 1 MICH. J. GENDER & L. 13, 28 (1993).

²⁸³ See *supra* Part II.A.-E.

²⁸⁴ Brents & Hausbeck, *supra* note 14, at 3.

²⁸⁵ See *supra* Parts I-III.C.

from rural to urban areas, the brothels, without further mobilization, may be in trouble."²⁸⁶

For the purpose of advancing police power objectives, it is imperative that brothel prostitution be permitted to thrive.²⁸⁷ For brothel prostitution to be permitted to thrive, the relevant laws require revamping.²⁸⁸ Brothel prostitution implores a unified and centralized infrastructure as well as legalization on a State-wide scale, which will finally give Nevada's most famous city, Las Vegas, the chance to reduce its incidents of illegal prostitution.²⁸⁹ Brothel prostitution needs to be subject to State taxes, which will in turn be used to help former prostitutes and enforce prostitution laws, both of which are in the State's public policy interests.²⁹⁰ And brothel prostitutes must be allowed to become bona fide employees and to unionize so they may enjoy the same rights as well as responsibilities as any other employee.²⁹¹ Although the Nevada brothel system as it exists now advances public policy, the degree and scope of its benefits will be increased substantially by modernization of the relevant laws.²⁹²

IV. CONCLUSION: PROSTITUTION FOR A NEW MILLENNIUM

In 1991, it was estimated that as many as 500,000 prostitutes work in the U.S and that one in six American men has patronized a prostitute in the previous five years.²⁹³ Yet, forty-nine of America's states insist on upholding their anti-prostitution laws,²⁹⁴ thereby fighting a losing battle rather than writing new laws to create a win-win situation. Sociologists Kate Hausbeck and Barbara Brents say, "[brothels] are an anachronistic social institution whose futures will surely be determined by the way in which Old and New West meet, merge, or conflict in legislation, policy, and community culture."²⁹⁵ Indeed, the Nevada brothel system enjoys great potential for serving as a model of regulated prostitution in the New West that not only other states but also other countries may consider emulating. The insular, supervised nature of brothel prostitution functions to protect health, safety, welfare, and morals more effectively than any other form of prostitution, such as streetwalking and escort services.²⁹⁶ Furthermore, brothel prostitution balances police power objectives with the civil liberties of prostitutes and customers more ably than criminalization, which makes it a "crime to sell an act that is perfectly legal to perform for

²⁸⁶ Brents & Hausbeck, *supra* note 46, at 31.

²⁸⁷ See *supra* Parts I-III.D.

²⁸⁸ See *supra* Part III.

²⁸⁹ See *supra* Part III.A.

²⁹⁰ See *supra* Part III.B.

²⁹¹ See *supra* Part III.C.

²⁹² See *supra* Parts I-III.

²⁹³ *Legalised Prostitution*, *supra* note 1.

²⁹⁴ Brents & Hausbeck, *supra* note 4, at 308.

²⁹⁵ Brents & Hausbeck, *supra* note 14, at 3.

²⁹⁶ See *supra* Part II.D.

free[,]”²⁹⁷ and decriminalization, which gives rise to labor unions but potentially compromises the health and safety of prostitutes and their customers.²⁹⁸

During the 1999 Ely town meeting which resulted in brothel prostitution remaining legalized, one of the speakers explained natural law necessitates workable man-made laws to contain it: “And we do recognize in this state, as all states do, that there are such a thing [sic] called vices. We recognize that you cannot legislate them out of existence, and the best you can do is hope to bring them into regulation and control them.”²⁹⁹ As it stands now, the Nevada brothel is a reasonably efficient, policy-advancing form of regulated and controlled prostitution.³⁰⁰ More than any other legal method of prostitution, the Nevada brothel system adeptly reconciles the inevitability of prostitution with the accompanying liabilities.³⁰¹ Now Nevada needs to centralize its laws, institute a brothel tax and amplify prostitutes’ rights before the brothel system’s public policy potential can be truly and fully realized.³⁰²

²⁹⁷ Hausbeck, *supra* note 144.

²⁹⁸ *See supra* Part II.E.

²⁹⁹ Brents & Hausbeck, *supra* note 14, at 5.

³⁰⁰ *See supra* Part II.

³⁰¹ *Id.*

³⁰² *See supra* Part III.