

# THE TENSIONS BETWEEN FEMINISM AND LIBERTARIANISM: A FOCUS ON PROSTITUTION

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## INTRODUCTION

This Note explores the tensions between feminism and libertarianism. In practice, feminism and libertarianism align on several issues. Historically, feminists and libertarians fought together to abolish legal barriers to women's participation in the economy and in the political system.<sup>1</sup> Currently, feminists and libertarians align on the issues of abortion and birth control.<sup>2</sup> Any overlap between the two philosophies is, however, shallow. For feminists, patriarchy is the enemy, and it exists today despite the legal equality of women.<sup>3</sup> For libertarians, the state is the enemy, and institutional harm to women only exists in the government-sanctioned oppression of women.<sup>4</sup> Now that there are no legally-sanctioned barriers to women's participation in economic and political life,<sup>5</sup> but still inequality between the genders,<sup>6</sup> the tension between feminism and libertarianism is illuminated. Feminists see the persisting disparities as manifestations of existing patriarchy.<sup>7</sup> Libertarians do not see patriarchy, just women making unhindered decisions in a free market.<sup>8</sup> Libertarians therefore see the persisting disparities as the culmination of individual choices.<sup>9</sup> Since these individual choices are the product of a free system, their

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<sup>1</sup> See *infra* p. 176 for a discussion on the cooperation of feminists and libertarians in the battle to abolish legal barriers to women's participation in the economic and political system.

<sup>2</sup> See Nadine Strossen, *The Convergence of Feminist and Civil Liberties Principles in the Pornography Debate*, 62 N.Y.U. L. REV. 201, 212 (1987). Feminists and libertarians also align on other issues, like gay marriage.

<sup>3</sup> See *infra* pp. 172-73 for a discussion on feminism's view of patriarchy.

<sup>4</sup> See *infra* p. 175 for a discussion on the libertarian view of the state.

<sup>5</sup> Legally-sanctioned barriers mostly took the form of statutes outlawing female participation in society, or in education, and have been invalidated by court decisions.

<sup>6</sup> See *infra* for evidence of persisting inequality between the genders.

<sup>7</sup> See *infra* p. 173.

<sup>8</sup> See *infra* pp. 175-76.

<sup>9</sup> See *infra* pp. 175-76.

culmination is valid and should not be questioned.<sup>10</sup> The feminist focus on patriarchy as an existing institutional force and the libertarian belief that patriarchy cannot exist within a free market, small government system make the two ideologies incompatible.

Part I of this Note offers background on feminist legal theory and the theory of libertarianism. Part II highlights the tensions between the two theories. Part III explores the ideologies espoused by feminist libertarians (“Ifeminists”). Part IV explores the traditional feminist and Ifeminist approach to the issue of prostitution in an effort to illustrate how, in practice as well as theory, the two ideologies are incompatible.

## I. BACKGROUND ON FEMINIST LEGAL THEORY AND THE PRINCIPLES OF LIBERTARIANISM

While individual feminists often embrace elements of different feminist legal theories, six distinct frameworks of feminist legal theory exist: liberal, cultural, dominance, sex-positive, intersectional, and post-structural/post-modern.<sup>11</sup> Liberal, cultural, and dominance feminism developed in the late 1970s and early 1980s.<sup>12</sup> Liberal feminist theory asserts that the main source of gender inequality comes from the ways in which positions of power relate to a person’s gender, rather than to a person’s abilities or preferences.<sup>13</sup> To combat this, liberal feminists challenge the stereotypical linkages of gender to specific social spheres.<sup>14</sup> In the legal realm, liberal feminists challenge the demarcation of certain activities and harms as “private” or “public.”<sup>15</sup> This demarcation

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<sup>10</sup> See *infra* pp. 175-76.

<sup>11</sup> Rosalind Dixon, *Feminist Disagreement (Comparatively) Recast*, 31 HARV. J. L. & GENDER 277, 279-286 (2008). These six frameworks are a delineation of different schools of modern feminist thought. However, each school originates from a distinct contextual time period. Liberal, cultural, and dominance feminism are thought to represent the “first wave” of feminism, and sex-positive, intersectional, and post-structural/post-modern feminism are thought to represent the “second wave” of feminism. For a more historical discussion on the progression of feminism and its “waves,” see, e.g., HILAIRE BARNETT, INTRODUCTION TO FEMINIST JURISPRUDENCE 5-10 (Cavendish Publishing 1998).

<sup>12</sup> Dixon, *supra* note 11, at 280.

<sup>13</sup> *Id.* at 280-1. For an example of classic liberal feminist thought, see, for example, Ruth Bader Ginsberg, *Sex Equality and the Constitution*, 52 TUL. L. REV. 451 (1978).

<sup>14</sup> Dixon, *supra* note 11, at 281. (“Liberal feminists also recognize that they will need to challenge stereotypical linkages [to gender] by directly addressing the linkage of biology with particular social domains or spheres.”)

<sup>15</sup> *Id.*

has the effect of placing many female experiences, like domestic violence or rape, within the “private” realm.<sup>16</sup> The demarcation is artificial, because it is the product of a systematic devaluation of female activities and experiences.<sup>17</sup> The artificial demarcation thus allows women’s concerns to be legitimately hidden from the mainstream political and judicial agenda.<sup>18</sup> Cultural feminists view the problem as a pervasive societal devaluation of the roles and modes of thinking that society identifies with the feminine.<sup>19</sup> Hence, labor traditionally done by women is undervalued by society.<sup>20</sup> In the legal world, this is often seen when types of law majorly practiced by women, like divorce or adoption law, are viewed as low-brow, as opposed to the male-heavy fields of litigation or corporate law.<sup>21</sup>

Dominance feminism drastically differs from liberal and cultural feminism.<sup>22</sup> A dominance feminist asserts that the liberal feminist’s attempt to empower women and the cultural feminist’s attempt to reform society’s valuation of all associated with femininity are misguided.<sup>23</sup> To a dominance feminist, neither feminist critique is a constructive critique, because both are

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<sup>16</sup> *Id.* For a detailed discussion on the role of the private/public demarcation in perpetuating domestic violence, see KRISTIN A. KELLY, *DOMESTIC VIOLENCE AND THE POLITICS OF PRIVACY* (Cornell Univ. Press 2003).

<sup>17</sup> Liberal feminists would obviously agree that some private/public demarcations that place women within the private realm are substantive. However, liberal feminists would argue that many non-trivial matters in a woman’s life are artificially placed in the private sphere. For instance, most liberal feminists would take issue with the idea that domestic discord is a private issue, not suitable for courts or law enforcement to address.

<sup>18</sup> See Dixon, *supra* note 11, at 281.

<sup>19</sup> *Id.* For an example of cultural feminist work, see CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN’S DEVELOPMENT* (1982).

<sup>20</sup> Dixon, *supra* note 11, at 281. Cultural feminists argue that society’s devaluation of all things feminine has two detrimental consequences. First, there are “serious distributional consequences for women when it comes to the value placed on their labor. Second . . . it can lead to a broader loss to society because of its tendency to lead to an under-emphasis on feminine values, especially in contexts where such values—or ways of thinking and interacting—could be extremely valuable.”

<sup>21</sup> See JOHN HAGAN & FIONA KAY, *GENDER IN PRACTICE: A STUDY OF LAWYERS’ LIVES* 56 (Oxford Univ. Press 1995).

<sup>22</sup> For an example of dominance feminist thought, see Catharine MacKinnon, *Feminism, Marxism, Method and the State: An Agenda for Theory*, 7 *SIGNS: J. WOMEN CULTURE & SOC.* 515 (1983). For a detailed description of dominance feminism, see CATHARINE MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* (1983).

<sup>23</sup> See Dixon, *supra* note 11, at 282.

working within an inherently broken system.<sup>24</sup> For a dominance feminist, everything about the female identity has been constructed by men so that the system in which feminists are working is inherently against them.<sup>25</sup>

Sex-positive, intersectional, and post-structural/post-modern feminism developed in the 1980s and early 1990s.<sup>26</sup> Sex-positive feminism challenges the tenants of dominance feminism.<sup>27</sup> A sex-positive feminist sees the potential dangers of rape and sexual violence, but—unlike a dominance feminist—does not believe that heterosexual sex is inherently demeaning to women.<sup>28</sup> Sex-positive feminists see sex as a possible danger to women, but also a possible source of enjoyment, pleasure, and, most importantly, power.<sup>29</sup> Sex-positive feminists see a major injustice in society's view that women should not enjoy sex.<sup>30</sup> Intersectional feminist theory asserts that gender injustice is contextual and thus each woman's experience of gender injustice is different.<sup>31</sup> Gender hierarchies intersect with other hierarchical phenomena, like white privilege,<sup>32</sup> making gender discrimination a unique experience for minority women.<sup>33</sup> Finally, post-structural/post-modern feminists focus on sex-based categories, rather than stereotypes or hierarchies, as the primary source of gender injustice.<sup>34</sup> Post-

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<sup>24</sup> *Id.* “[F]emale identity and the feminine as we know it are pure products of a system of sexual subordination in which men defined themselves as subjects, and women as objects, via pornography and other systematic practices of male-to-female rape, prostitution, battering, and harassment.”

<sup>25</sup> *See id.*

<sup>26</sup> *Id.* at 280.

<sup>27</sup> For an example of sex-positive scholarship, see Sylvia Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 1019 (1984).

<sup>28</sup> Dixon, *supra* note 11, at 282.

<sup>29</sup> *Id.* This view extends beyond merely thinking that the physical act of sex can be empowering to a woman. Sex-positivist feminists may take this a step further to assert that female sexuality is empowering to women; thus, the acts of stripping or prostitution, if free from duress or coercion, may be empowering. *See generally* LILY BURANA, *STRIP CITY: A STRIPPER'S FAREWELL JOURNEY ACROSS AMERICA* (Miramax Books 2001).

<sup>30</sup> Dixon, *supra* note 11, at 282.

<sup>31</sup> *Id.* at 283. For an example of intersectional feminist scholarship, see Martha Minow, *The Supreme Court Term 1986, Forward: Justice Engendered*, 101 HARV. L. REV. 10 (1987).

<sup>32</sup> Intersectional feminists also take into account “other axes such as religion, age, disability, sexual orientation, and immigrant status.” Dixon, *supra* note 11, at 284.

<sup>33</sup> *Id.* at 283-4.

<sup>34</sup> *Id.* at 284. For an example of post-structural/post-modern feminist theory, see JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* (1990).

structural/post-modern feminists argue that all differences between the sexes are produced in order to perpetuate the current sexist and heteronormative system.<sup>35</sup>

There is great difference between all six of the feminist theories. These differences are highlighted when one looks at the ways in which the different theories seek to tackle the problem of gender injustice. The older feminist frameworks<sup>36</sup> primarily seek to tackle gender injustice through legal reforms.<sup>37</sup> Liberal feminism has attempted to combat gender injustice by lobbying for and creating legislation around domestic violence and rape, two women's issues traditionally thought to be within the "private," and not the public, sphere.<sup>38</sup> Cultural feminists have attempted to legally influence the valuation of women's labor and skill.<sup>39</sup> Dominance feminists have attempted to combat gender injustice by legislating to empower female victims of prostitution and pornography, which dominance feminists see as the pinnacle of gender injustice.<sup>40</sup> A dominance feminist is not concerned with achieving equal rights for women, like a liberal feminist, because a dominance feminist believes the system is too fundamentally flawed to fix through equal rights legislation.<sup>41</sup> Dominance feminists instead seek to legislate protections for women caught in this oppressive system.<sup>42</sup> Despite the differences between these three theories, all three focus less on the limitations of legal reforms than the three newer schools of feminism.<sup>43</sup> Sex-positive feminists focus on the ways in which laws aimed to protect women from danger can stifle female sexual autonomy.<sup>44</sup> Intersectional feminists highlight the disparate effects of traditional feminist legal reforms on women of color and/or low-income women as

<sup>35</sup> Dixon, *supra* note 11, at 285, 297. For instance, a post-modern/post-structuralist feminist would argue that gender is structured to perpetuate the heterosexual norm for relationships, not in subordination of women.

<sup>36</sup> Liberal feminism, culture feminism, and dominance feminism are the "older" feminist legal theories. *See supra* p. 108.

<sup>37</sup> *See* Dixon, *supra* note 11, at 280-3.

<sup>38</sup> *See* HEATHER MACLVOR, *WOMEN & POLITICS IN CANADA* 42 (Univ. of Toronto Press 1996) ("Liberal feminist ideas lead naturally to efforts to influence the state.").

<sup>39</sup> *See* MANUEL CASTELLS, *THE POWER OF IDENTITY VOLUME II* 255 (Manuel Castells ed., Wiley-Blackwell 2004).

<sup>40</sup> *See* MACKINNON, *supra* note 22, at 16.

<sup>41</sup> Ashlie Warnick, *2003 Survey of Books Relating to the Law: IFEMINISM*, 101 MICH. L. REV. 1602, 1607 (2003).

<sup>42</sup> Dixon, *supra* note 11, at 280-3.

<sup>43</sup> *See generally id.* at 318.

<sup>44</sup> *See id.* at 282-3.

compared to white and/or middle-class women.<sup>45</sup> Post-structural/post-modern feminists highlight the ways in which traditional feminist legal reforms can reinforce and re-inscribe gender binaries, thus reinforcing hetero-normative and gendered norms.<sup>46</sup>

However, there are similarities between the six theories. These similarities stem from the central tenet of feminism: the persisting existence of patriarchy.<sup>47</sup> True, the meaning of patriarchy can differ for different types of feminists,<sup>48</sup> but it is nonetheless a “core concept within feminist analyses of society and law.”<sup>49</sup> In its most basic definition, patriarchy is a system of pervasive male privilege.<sup>50</sup> The earliest political conceptions of patriarchy are found in theories of Hobbes, Locke, and Mill.<sup>51</sup> Patriarchy was historically present in the law. Women in the nineteenth century lived under the “one flesh” doctrine, where women were the legal property of their husbands and lived under complete legal subjection to the whims of his flesh.<sup>52</sup> Early challenges to this subjection were the fight for judicial divorce, a woman’s right to

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<sup>45</sup> See *id.* at 283-4.

<sup>46</sup> See *id.* at 284-6.

<sup>47</sup> Patriarchy “lies at the heart of . . . feminist critique.” BARNETT, *supra* note 11, at 57.

<sup>48</sup> Note that while it is accepted that the definition of patriarchy is different for different types of feminists, there is no debate within most feminist perspectives that patriarchy exists.

Patriarchy represents one of the most conceptually and analytically complex theoretical constructs and lies at the heart of traditional jurisprudence and the feminist critique. Not only is the concept difficult, but there exist also differing contemporary interpretations of it. Thus liberal feminist, cultural feminists, radical feminist, Marxist-socialist feminists, black feminists lesbian feminists, all have perceptions regarding patriarchy which while often overlapping, by no means converge into a coherent converged definition.

*Id.* at 57. The meaning of patriarchy is especially unique for intersectional feminists, who view patriarchy as being intertwined with racism. “As long as Black women’s subordination within intersecting oppressions of race, class, gender, sexuality, and nation persist, Black feminism as an activist response to that oppression will remain needed.” PATRICIA HILLS COLLINS, *BLACK FEMINIST THOUGHT* 22 (Routledge 2000). For an account of this view of patriarchy, see BARNETT, *supra* note 11, at 57.

<sup>49</sup> BARNETT, *supra* note 11, at 58.

<sup>50</sup> Patriarchy is “a social system that is male-identified, male-controlled, [and] male-centered [that] will inevitably value masculinity and masculine traits over femininity and feminine traits.” Mary Becker, *Patriarchy and Inequality: Towards a Substantive Feminism*, 1999 U. CHI. LEGAL F. 21, 24-5 (1999).

<sup>51</sup> See BARNETT, *supra* note 11, at 58-61.

<sup>52</sup> *Id.* at 61-2.

own and manage property, and a woman's custody right to her children.<sup>53</sup>

Today, there are contemporary manifestations of patriarchy. Though women have gained the right to participate in legal processes and the legal system, women are under-represented in most legislatures.<sup>54</sup> Though women have gained formal equality in the employment sector, women continue to earn less than men, have less professional advancement than men, and are under-represented in the professional upper echelons.<sup>55</sup> These manifestations of patriarchy are referred to as manifestations in the public sphere.<sup>56</sup> Patriarchal manifestations are present in the private sphere as well; indeed, the very existence of a private sphere signals patriarchy.<sup>57</sup> The private sphere exists because patriarchy has historically and systematically confined women to the domestic sphere and been legally unregulated so as to be legally invisible.<sup>58</sup> This is most notably seen in the lack of effective legal ramifications for domestic violence.<sup>59</sup> The different feminist frameworks see different ways of tackling the manifestations of patriarchy. However, the common thread in any feminist framework is an acknowledgment of patriarchy and a desire to combat its manifestations.<sup>60</sup>

While libertarian theory developed throughout the 1900s,<sup>61</sup> the movement in the United States mostly developed in the 1960s.<sup>62</sup>

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<sup>53</sup> *Id.*

<sup>54</sup> See generally Kevin Arceneaux, *The "Gender Gap" in State Legislative Representation: New Data to Tackle an Old Question* 54 POL. RES. Q. 143 (2001).

<sup>55</sup> BARNETT, *supra* note 11, at 64.

<sup>56</sup> See KELLY, *supra* note 16.

<sup>57</sup> See *infra* pp. 168-69 for a discussion on the liberal feminist theory of the artificial demarcation of public/private.

<sup>58</sup> BARNETT, *supra* note 11, at 65.

<sup>59</sup> *Id.* at 65-6.

<sup>60</sup> Some scholars argue that some feminist frameworks, like the liberal or dominance framework, combat manifestations of patriarchy but not the actual system. This is because these frameworks espouse values that are not inconsistent with patriarchal values. See e.g. Becker, *supra* note 50, at 46-50.

<sup>61</sup> For a good recap of libertarian theory's development in the post-war era, see RICK TILMAN, *IDEOLOGY AND UTOPIA IN THE SOCIAL PHILOSOPHY OF THE LIBERTARIAN ECONOMISTS* xvi-xvii (Greenwood Press 2001). Some authors trace libertarian theory back to philosophers writing in the sixth century B.C., Jewish and Greek ideas of "higher law," and seventeenth century philosophers, such as John Locke and John Milton. While such a discussion offers a well-rounded look at libertarian philosophy, this Note is more concerned with modern libertarian theory. For a detailed description of libertarian ideology within political philosophy, see David Boaz, *Introduction to THE LIBERTARIAN READER* xi-xviii (David Boaz ed., The Free Press 1997).

Much of the libertarian movement at that time galvanized on college campuses as a counter to the socially liberal/progressive politics of the time.<sup>63</sup> Libertarians in the 1960s agreed with social liberals on opposing the Vietnam War, but not much else.<sup>64</sup> Libertarians view social liberalism/progressivism as a hindrance to capitalism and individual liberty.<sup>65</sup> The official Libertarian Party in the United States was founded in 1971.<sup>66</sup>

Libertarian philosophy has different strains, just as feminist philosophy does.<sup>67</sup> At its core, however, libertarian philosophy is characterized by the belief that a society thrives when its

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<sup>62</sup> JOHN L. KELLEY, BRINGING THE MARKET BACK IN: THE POLITICAL REVITALIZATION OF MARKET LIBERALISM 81 (New York Univ. Press 1997).

<sup>63</sup> *Id.* Kelley notes that the libertarian movement's growth on college campuses in the 1960s reflected the post-World War II baby-boom. ("[It] added 13,800,000 members to the 14-24 age-cohort between 1960 and 1970.")

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* "Where the New Left indicted liberalism for accommodating itself to capitalism and failing to build participatory democracy and a sense of community, libertarianism indicted liberalism for hamstringing capitalism and infringing on the liberty of the individual." ~~Id.~~

<sup>66</sup> HARRY BROWNE, THE GREAT LIBERTARIAN OFFER 17 (Harry Browne 2000). The National Libertarian Party states, "[t]he Libertarian Party was created in December of 1971 by people who realized that the politicians had strayed from America's original libertarian foundation, with disastrous results. Their vision was the same as that of America's founders -- a world where individuals are free to follow their own dreams in their own ways, a world of peace, harmony, opportunity, and abundance." *The National Libertarian Party: Introduction*, available at <http://www.lp.org/introduction/americas-third-largest-party> (last visited Apr. 28, 2011).

<sup>67</sup> While the National Libertarian Party represents the traditional libertarian ideals, several ideologies have grown out of libertarianism and still credit libertarianism. The most prominent of these are anarcho-capitalism (or libertarian anarchism), Left-Libertarianism, Conservative Libertarianism (or Right-Libertarianism), and Objectivism. For information on anarcho-capitalism, see Daniel C. Burton, *Libertarian Anarchism: Why it is Best for Freedom, Law, the Economy, and the Environment, and Why Direct Action is the Way to Get it* (Libertarian Alliance 2001), available at <http://www.libertarian.co.uk/lapubs/polin/polin168.pdf> (last visited Apr. 28, 2011). For information on Left-Libertarianism, see generally Alliance of the Libertarian Left, <http://all-left.net/>. For information on conservative libertarianism, see generally GEORGE W. CAREY, FREEDOM AND VIRTUE: THE CONSERVATIVE LIBERTARIAN DEBATE (Intercollegiate Studies Institute 1998). For information on Objectivism, see Douglas J. Den Uyl & Douglas B. Rasmussen, *The Philosophical Thought of Ayn Rand*, in THE LIBERTARIAN READER, *supra* note 61, at 169-180. For purposes of this Note, traditional libertarianism and feminist libertarianism are analyzed. This is because the aforementioned strains of libertarianism have perspectives on women's rights and patriarchy that are similar to traditional libertarianism.

individuals are left to make their own social and economic decisions, without much government interference.<sup>68</sup> In a libertarian state, the government's role is minimal.<sup>69</sup> Libertarians recognize that some individual freedoms must be curtailed so that all individuals can live safe lives. To this end, the government may regulate individuals who act to infringe on the natural rights of other individuals to pursue life, liberty, and property with safety and without coercion. Thus, the state can regulate to prevent people from hurting each other, economically or physically.<sup>70</sup> Economically, the state can enforce contracts that private parties make with each other, protect against fraud, and protect against theft.<sup>71</sup> All other economic activity is unregulated, creating a capitalist structure with free competition, little or no taxation, and strong private property rights.<sup>72</sup> Individuals would always be protected from fraud or theft in the libertarian economic market, but never from competition. The state can also protect individuals against physical force from other individuals.<sup>73</sup> Thus, all libertarians believe that today's government is too large, must be dramatically reduced, and is the cause of many of today's societal problems.<sup>74</sup>

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<sup>68</sup> Jonathan Wolff, *Libertarianism, Utility, and Economic Competition*, 92 VA. L. REV. 1605, 1605 (2006). The National Libertarian Party states, "[t]he politicians in Washington and our state capitals have led us away from the principles of individual liberty and personal responsibility which are the only sound foundation for a just, humane, and abundant society." The National Libertarian Party: Why Not Stick to the Establishment, <http://www.lp.org/introduction/why-not-stick-with-the-establishment>.

<sup>69</sup> Wolff, *supra* note 68, at 1605. Some versions of libertarianism allow individuals to contract for more than a minimal state, if they so choose. For a discussion on these variations on libertarianism, see *id.*

<sup>70</sup> The National Libertarian Party states, "We hold that all individuals have the right to exercise sole dominion over their own lives, and have the right to live in whatever manner they choose, so long as they do not forcibly interfere with the equal right of others to live in whatever manner they choose." *National Platform of the Libertarian Party, Statement of Principles*, available at <http://www.lp.org/platform>. The "so long as they do not interfere with the equal right of others to live" allows the government to regulate so as to prohibit individuals from using violence or coercion on other individuals. See generally Wolff, *supra* note 68.

<sup>71</sup> *Id.*

<sup>72</sup> Wolff, *supra* note 68, at 1605.

<sup>73</sup> *Id.*

<sup>74</sup> See generally BROWN, *supra* note 66. Browne notes that all libertarians agree on the following: 1. Government is far too big and must be reduced dramatically; 2. It is wrong—both unfair and harmful—for government to stop a willing buyer and a willing seller from doing business with each other, and it is wrong for government to intervene in your personal life; 3. It is wrong to try to solve social problems by force; and 4. Most of today's social problems were

Libertarians support many of the feminist principles. They believe in the economic and political autonomy of all people, including women.<sup>75</sup> Libertarians supported the early feminist struggles for a woman's right to contract, hold property, and otherwise engage in the market place as an individual.<sup>76</sup> Libertarians supported the early feminist struggles for a woman's right to vote, hold office, and otherwise engage in the political system.<sup>77</sup> There are also current feminist battles that libertarians support—for instance, a woman's right to choose abortion or birth control.<sup>78</sup> However, similarities between libertarians and feminists are not based on alignments of ideology; rather, each similarity is a coincidence wherein what is best for the "individual" also happens to be what is best for women. Libertarians are always looking out for the individual; feminists are always looking out for women. These differing priorities can sometimes lead to the same position on issues. However, feminism and libertarianism are fundamentally incompatible, because prioritizing the individual, rather than women, is incompatible with the goal of eliminating the existing patriarchy.

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caused or worsened by the government's interference, and we can solve those problems by reducing government, not by giving it more power.. *Id.*

<sup>75</sup> Richard Epstein, *Liberty, Patriarchy, and Feminism*, 1999 U. CHI. LEGAL F. 89, 97 (1999). As of the publication of this article, the National Libertarian Party does not address women's issues in any form on their website. The Party does, however, state that "[w]e condemn bigotry as irrational and repugnant. Government should not deny or abridge any individual's rights based on sex, wealth, race, color, creed, age, national origin, personal habits, political preference or sexual orientation." The Party also addresses abortion, stating that "[r]ecognizing that abortion is a sensitive issue and that people can hold good-faith views on all sides, we believe that government should be kept out of the matter, leaving the question to each person for their conscientious consideration." *National Platform of the Libertarian Party: Statement of Principles*, available at <http://www.lp.org/platform> (last visited Apr. 28, 2011).

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> The National Libertarian Party states, "[r]ecognizing that abortion is a sensitive issue and that people can hold good-faith views on all sides, we believe that government should be kept out of the matter, leaving the question to each person for their conscientious consideration." *National Platform of the Libertarian Party: Statement of Principles*, <http://www.lp.org/platform>.

## II. TENSIONS BETWEEN FEMINIST THEORY AND LIBERTARIAN THEORY

Libertarians support formal, legal equality for all individuals, including women.<sup>79</sup> The priority for libertarians, however, is the individual, not women. This is because libertarian ideology thinks the individual's unhindered choices and actions are the path to an ideal society, politically and economically. The state, not patriarchy, is the enemy. For libertarians, patriarchy once existed in the form of state-imposed inequality between the sexes<sup>80</sup> but no longer exists because the state no longer hinders a woman's economic or social decision-making.<sup>81</sup> A libertarian would look at a starving woman in a minimal-state capitalist society as free from *all* constraints, because the state is not formally regulating individuals beyond what is minimally required. A feminist would look at a starving woman in a minimal-state capitalist society and wonder what manifestation of modern patriarchy could have caused and/or heightened this woman's economic hardship and how the state can step in to ameliorate patriarchy's role in her misfortune.

Libertarian and feminist disagreement is clearest in modern times, because the formal, legal inequalities between the sexes have been largely abolished in the United States. Libertarians look at women in society today and do not dispute the persisting lack of economic power held by women. Richard Epstein concedes,

Even though there is great movement, it is easy to show that virtually all CEOs of Fortune 500 companies are male; that occupational skews by sex are quite powerful so that it is not improper to identify some occupations (the caring professions of nursing and counseling, for example) as female and other occupations (the construction trades, for example) as male.<sup>82</sup>

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<sup>79</sup> Speaking of the libertarian support for full equality for women, Epstein notes, "[t]he simple proposition underlying that theory is the Lockean ideal that all individuals are free, equal, and independent in the state of nature. Allowing only some individuals to participate in commerce or politics amounts to a crude restriction on entry that is no more defensible than similar restrictions on entry into specific lines of business and commerce." Epstein, *supra* note 75, at 97-8.

<sup>80</sup> See *supra* p. 176 and accompanying notes for discussion on laws not allowing women to vote or own property that libertarians opposed.

<sup>81</sup> These laws have been abolished.

<sup>82</sup> Epstein, *supra* note 75, at 102.

While libertarians like Epstein applaud the abolishment of laws dictating what professions women may and may not pursue, they fully admit that changing these laws did not produce equality in economic power held by women or the distributions of professions along gender lines.<sup>83</sup> Both feminists and libertarians agree that these disparities are not coincidental. Where all feminists must disagree with libertarians is over the *cause* of these persisting disparities.

For libertarians, no institutional explanation remains for the disparities between men and women, because the “state” is out of the picture.<sup>84</sup> Therefore, libertarians assume personal reasons for the existence of these disparities—for example, the personal choices of women. Libertarians assert that disparities exist because of the individual choices that men and women make about which professions to pursue.<sup>85</sup> In a system with no formal hindrances on decision-making for men and women, both men and women rationally<sup>86</sup> and naturally seek to maximize their utility and happiness by pursuing the life path that best suits their interests and abilities.<sup>87</sup> Disparate outcomes from this voluntary sorting are inevitable in a free system, because men and women have different preferences and abilities.<sup>88</sup> The current economic and social disparities between men and women, a libertarian argues, stem from most women’s preference for professions with less power, earning potential, and social capital.<sup>89</sup> The trend toward the socialization of women for certain professions or roles is a reflection of most women’s natural preference and ability for such roles, because parents do not wish to “guide their own children along the path to self-destruction.”<sup>90</sup>

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<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 105 (“equal opportunities will always yield very different results, all quite unequal . . . these differences are in general a function of powerful, systematic tendencies.”)

<sup>85</sup> *Id.* at 106-7.

<sup>86</sup> The role of rationality in libertarian philosophy is huge, because libertarians believe that individuals always act rationally. This rationality, in a small government society, fosters productivity and ideal market conditions.

<sup>87</sup> Epstein, *supra* note 75, at 106.

<sup>88</sup> *Id.* at 106-7.

<sup>89</sup> *See id.* at 108-9.

<sup>90</sup> *Id.* at 108. Epstein argues that most parents do not encourage their children to pursue endeavors for which they are mismatched in “physical and psychological traits” out of a natural urge to provide the best opportunities and life for their children.

To be fair, the libertarian view may not stem from sexism or misogyny. If you had asked a libertarian one hundred years ago about these disparities, the average libertarian probably would not have responded that women were not voting (or owning property, etc.) because women did not want to and/or were mentally incapable. Instead, since libertarians view state interference as the enemy and there is no longer state interference in the lives of women, libertarians see all current disparities as the product of a free system; individual men and women have made choices to reflect their preferences and abilities. A libertarian's remedy to the disparities is simply to let them be. With the formal barriers against women's participation in the market and politics abolished, the effects of the free system are ideal and should not be altered.

Feminism finds flaws in many points of the preceding libertarian analysis. Feminists, like libertarians, believe that the disparities between women and men are not the product of coincidence. Most feminists will not argue that women are forced per se into making professional decisions that impact their economic and social power. However, a feminist would never accept "clearly predisposed" as an endpoint to the discussion on why certain disparities exist.

A liberal feminist would look at the disparities and posit that some women may be less inclined to enter traditionally male professions, like construction or investment banking, because they suspect, rightfully so,<sup>91</sup> that women are far more likely to be sexually harassed in traditionally male-dominated professions than in traditionally female-dominated professions.<sup>92</sup> A cultural feminist would agree with a libertarian on the idea that the professions that women are drawn to, like teaching or nursing, involve feminine characteristics. A cultural feminist, however, would also argue that these feminine professions involve less economic and social power, because our patriarchal society does not value what it associates with femininity.<sup>93</sup> A dominance feminist would look at the disparities and see symptoms of a system of male dominance throughout the choices that individual women and men make, as

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<sup>91</sup> See EVA WITKOWSKA, GENDER HARASSMENT AND DISCRIMINATION IN MALE DOMINATED WORK AND EDUCATION: OLD PROBLEM, NEW DATA (Nat'l Inst. for Working Life 2004).

<sup>92</sup> Andrew Koppelman, *Feminism and Libertarianism: A Response to Richard Epstein*, 1999 U. CHI. LEGAL F. 155, 123 (1999). For an anecdote of a woman's experience with sexual harassment in a traditionally male-dominated job, see, e.g., *id.* at 120-23.

<sup>93</sup> See *supra* pp. 168-69.

well as the aggregate of these choices.<sup>94</sup> A sex-positive feminist would look at the disparities between professional men and women as a reflection on society's encouragement of women to view motherhood as their primary role in life.<sup>95</sup> An intersectional feminist would see the disparities between men and women as a reflection of pervasive patriarchy in society, but would focus on how specific women are affected by patriarchy because of their race or socio-economic status.<sup>96</sup> Finally, a post-structural/post-modern feminist would see the disparities between men and women as a product of patriarchy's artificial demarcations of what is masculine and what is feminine. Feminism, whatever shape it takes, recognizes the existence of patriarchy, despite the current lack of formal discrimination against women.<sup>97</sup>

The very idea that patriarchy exists today is at odds with libertarianism, which believes that legal reform has abolished patriarchy and any of its manifestations. Libertarianism presupposes that the free market operates as a perfect reflection of rational, individual choices, without friction from outside influences like discrimination or patriarchy.<sup>98</sup> Therefore, libertarians see no place for patriarchy in today's market and no need to remedy disparities between the genders.

### III. LIBERTARIAN FEMINISTS (OR "IFEMINISTS")

Throughout this Note, six theoretical frameworks of feminist jurisprudence have been continually referenced as the basis for an attack on libertarianism. But there is a feminist framework that takes into account the free market, small government ideals of libertarianism and feminist ideals. This framework is known as individualist feminism, or IFeminism.<sup>99</sup> IFeminism dates back to the start of women's empowerment during the abolitionist

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<sup>94</sup> See *supra* pp. 168-69.

<sup>95</sup> See *supra* p. 169.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> Koppelman, *supra* note 92, at 124. Koppelman notes that, "[i]n the world we actually inhabit, people do not respond perfectly to the incentives presented by the market. Employers and supervisors seek competent workers, but their perception of competence is shaped by culture, and specifically by cultural symbols associated with sex." For a greater discussion on the flaws of the libertarian approach to sexual harassment laws, see *id.*

<sup>99</sup> Warnick, *supra* note 41, at 1602. "Ifeminism, or Individualist Feminism, is a branch of feminism based on classical liberal philosophy."

movement.<sup>100</sup> After experiencing barriers to participation in the abolitionist movement, women fighting against slavery began to fight for ownership of themselves as well.<sup>101</sup> After the Civil War, feminists and IFeminists fought for suffrage.<sup>102</sup>

Soon thereafter, the IFeminist movement became a part of the free-love movement, which sought to remove all matters of adult sexuality from government control.<sup>103</sup> At the time, its major aims were marriage reforms to ensure the equality of women in marriages and free access to birth control.<sup>104</sup> Society's sexual repression, was, however, dominant in the nineteenth century, and the IFeminists working towards sexual freedom faced several setbacks.<sup>105</sup> IFeminism additionally remained relatively passive during World War I, as did individualist movements in general.<sup>106</sup> After World War I, IFeminism reemerged as a major ideology with the publication of first book on the subject, Suzanne LaFollette's *Concerning Women*, in 1926.<sup>107</sup> LaFollette crystallized the convergence of feminism with free market economics that is at the center of IFeminism.<sup>108</sup> LaFollette argued that the only path to women's equality and freedom was a laissez faire, free market system that would not intrude on women's lives.<sup>109</sup> The latter half of the nineteenth century saw an emergence of dominance feminism,<sup>110</sup> which stands in stark opposition to IFeminism.

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<sup>100</sup> WENDY MCELROY, *LIBERTY FOR WOMEN: FREEDOM AND FEMINISM IN THE TWENTY-FIRST CENTURY* 6 (Wendy McElroy ed., Chicago Independent Institute 2002).

<sup>101</sup> *Id.* McElroy states that the IFeminist movement began when "[a]bolitionist women began asking themselves 'Do not we-as women-own ourselves as well? Or do we fight only for the rights of male slaves?'"

<sup>102</sup> *Id.* at 7-8. There was some diversification within the feminist and IFeminist movement at this point, since women influenced by Quakerism or anarchism were skeptical of seeking equality through legal reform. For a detailed discussion, see *id.* at 8.

<sup>103</sup> *Id.* at 8. IFeminists do not credit themselves with having established the free love movement. Instead, IFeminists joined the free love movement and found it to be a good vehicle for advancing both individualism and feminism.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* McElroy describes the government's closing of a free love publication and the prosecution of its members. For an indepth explanation of this event and the impact that it, and other government actions, had on the IFeminist movement of the nineteenth century, see *id.* at 8-10.

<sup>106</sup> *Id.* at 10.

<sup>107</sup> See generally SUZANNE LAFOLLETTE, *CONCERNING WOMEN* (Ayer Publishing 1972).

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> See *supra* pp. 169 & 171 for a discussion of dominance feminism.

Ifeminism sees much of feminism, especially dominance feminism, as counter-productive.<sup>111</sup> Ifeminists “vigorously oppose all special protections of women . . . as inherently infantilizing.”<sup>112</sup> Ifeminists start with the libertarian belief that the free market liberates all individuals by allowing them to freely make decisions to best maximize their individual happiness and utility.<sup>113</sup> Thus, any restriction on the free market hinders a woman’s right to control her destiny and, in the case of pornography or prostitution—where many Ifeminists stand in strong opposition to other feminists—the right to control her body.<sup>114</sup> For an Ifeminist, the only legitimate role of the government in gender relations is to treat women the same as men.<sup>115</sup> Ifeminists, like all other feminists, see the disparities that exist between men and women in today’s society. For Ifeminists, like for libertarians, these disparities are not the product of discrimination or patriarchy. Existing disparities between men and women are the product of the choices that individual women make.<sup>116</sup> Legal reforms to tackle these disparities are thus unnecessary and harmful.<sup>117</sup>

Absent in any explanation of Ifeminist theory is a belief in the existence of patriarchy. This is because Ifeminism, like libertarianism, sees the free market, small government system as the great equalizer. In the view of Ifeminists and libertarians, the free market, small government system removes discrimination, in all forms, against all individuals, regardless of race, class, or gender. This is directly and inherently incompatible with the feminist belief that patriarchy exists in our society, whether that society is characterized by formal restrictions on women or a free market, small government system.

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<sup>111</sup> Many Ifeminists believe that dominance feminism undermines the role of individual choice in women’s lives. Warnick, *supra* note 41, at 1608.

<sup>112</sup> MCELROY, *supra* note 100, at 28.

<sup>113</sup> “Ifeminism states: in the absence of coercion, pornography and prostitution are merely choices; the free market liberates women.” *Id.* at 14.

<sup>114</sup> Warnick, *supra* note 41, at 1608.

<sup>115</sup> *Id.*

<sup>116</sup> Warnick, *supra* note 41, at 1609. Ifeminists believe that “[w]omen make choices as individuals, not groups. For example, while women collectively may believe that more women should be CEOs for Fortune 500 companies, individual women choose not to pursue that path. Though the ideal is never achieved, it would be incorrect to assume that any outside dominating force, be it the government or men in general, caused the outcome.”

<sup>117</sup> They are harmful because they intrude on the individual liberty of women and promote the harmful belief that others need to take care of women.

#### IV. THE ISSUE OF PROSTITUTION FOR FEMINISTS, LIBERTARIANS, AND IFEMINISTS

Tensions between feminism, libertarianism, and IFeminism crystallize when one confronts how the theories view modern-day equality between the sexes. Richard Epstein's piece,<sup>118</sup> a response to Mary Becker's *Towards a Substantial Feminism*,<sup>119</sup> is a perfect example of such a crystallization. Epstein's argument, that modern disparities between the sexes are merely the culmination of free choices by individual men and women, is incompatible with feminism. Epstein's argument, when taken to its full extension, argues that prostitution is merely one valid professional choice that a woman can make, and thus prostitution should not be regulated.

This section will show that the libertarian position on prostitution is that it is a valid professional choice that should not be regulated. Next, this section will explore the IFeminist perspective on prostitution and the ways in which it is similar to the libertarian perspective. Finally, this section will compare the libertarian and IFeminist perspectives to the traditional feminist perspectives on prostitution. From this focus on prostitution, it will be clear that libertarian theory, as seen through traditional libertarian theory and IFeminism, is incompatible with feminist theory.

Before the substantive analysis, this section will offer a brief overview of the current legal state of prostitution in the United States.<sup>120</sup> Despite the idea that prostitution is "the oldest profession in the world," prostitution has only fairly recently become recognized as a human rights concern.<sup>121</sup> In the United States, prostitution was tolerated without direct criminal sanction until the twentieth century.<sup>122</sup> Then, the Mann Act was passed by Congress

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<sup>118</sup> Epstein, *supra* note 75.

<sup>119</sup> Becker, *supra* note 50.

<sup>120</sup> For the purposes of this Note, prostitution is confined to the exchange of money for sexual acts. Male prostitution and underage prostitution are not specifically addressed.

<sup>121</sup> The 1949 Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others states that "prostitution and . . . traffic in persons for the purposes of prostitution are incompatible with the dignity and worth of the human person." G.A. Res. 317(IV), Dec. 2, 1949, art. 20. The 1979 Convention on the Elimination of All Forms of Discrimination against Women calls upon all parties to the convention to "take all appropriate measures to suppress all forms of traffic in women and the exploitation of prostitution of women." U.N.G.A. Res. 280, 19 I.L.M. 33 (1980).

<sup>122</sup> Jessica N. Drexler, *Government's Role in Turning Tricks: The World's Oldest Profession in the Netherlands and the United States*, 15 DICK. J. INT'L L.

in 1910.<sup>123</sup> The Mann Act forbade men from taking women across state lines for the purpose of prostitution.<sup>124</sup> States then imposed criminal sanctions prohibiting prostitution between 1900 and 1920.<sup>125</sup> By 1925, every state in the country had passed some kind of law prohibiting prostitution.<sup>126</sup> These laws remained intact through the 1960s and 1970s, when courts invalidated many laws on sodomy, abortion, and birth control.<sup>127</sup> All aspects of prostitution are now illegal in the United States, with the caveat of Nevada's regulatory scheme that make prostitution legal in thirteen Nevada counties.<sup>128</sup>

A 2003 study surveying the sexual and physical well-being of hundreds of prostitutes in nine countries,<sup>129</sup> including the United States, found alarming statistics. After surveying approximately 900 prostitutes, the study found: "71% were physically assaulted in prostitution; 63% were raped; 89% of those respondents wanted to escape prostitution, but did not have other options for survival. A total of 75% had been homeless at some point in their lives; 68% met criteria for PTSD [post-traumatic stress disorder]."<sup>130</sup>

The libertarian stance on prostitution is fairly straightforward. Libertarians oppose government regulation of prostitution, as they oppose any government regulation beyond the minimal regulations against coercion, violence, and force. More specifically, however, libertarians believe that prostitution is a valid choice for women and that its regulation is unnecessary and dangerous.

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201, 204 (1996). Prior to the twentieth century, there were laws that imposed broad restrictions on female sexual activities that implicitly included prostitution as a prohibited activity. For instance, in 1962, single women were prohibited from "street or night walking" under adultery laws. For a detailed description of these laws, see *id.* at 204-205.

<sup>123</sup> *Id.* at 204. The Mann Act was passed as a result of an increased concern over opium dens, which often involved young girls in prostitution.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 205.

<sup>128</sup> *Id.* at 202 and n.6. Laws concerning prostitution are not uniform throughout the states. Thirty-eight states have laws prohibiting payment for sexual acts; forty-four states have enacted laws solely prohibiting solicitation. Some states, however, use loitering and vagrancy laws to regulate prostitution. *Id.* at n.30.

<sup>129</sup> MELISSA FARLEY ET AL., PROSTITUTION AND TRAFFICKING IN NINE COUNTRIES: AN UPDATE ON VIOLENCE AND POST-TRAUMATIC DISORDER, available at <http://www.prostitutionresearch.com/pdf/Prostitutionin9Countries.pdf>. The nine countries represented in the study are: the United States, Canada, Columbia, Germany, Mexico, South Africa, Thailand, Turkey, and Zambia.

<sup>130</sup> *Id.* at 34.

First, libertarians believe that a woman's choice to enter the field of prostitution is a valid, free choice.<sup>131</sup> This comes from the libertarian position that once formal inequality, meaning government-imposed inequality, is eradicated, individuals are equally free.<sup>132</sup> Thus, a woman who chooses prostitution is making a choice that fits her needs, just as any other person would choose a profession that meets his or her needs. As long as this choice is not peppered by coercion or violence, then it is a valid and free choice. For a libertarian, coercion and violence are not present in most women's decisions to pursue prostitution.<sup>133</sup> Also, coercion and violence are not systematically present, since society has eliminated the legal barriers for women. Instead, coercion and violence are only present if someone is directly forcing a woman into prostitution, either with physical or psychological force. Libertarians believe society should avoid this problem through appropriate legislation. Therefore, in most cases, a woman's choice to enter the field of prostitution is a free choice.

Next, libertarians believe that prostitution should not be regulated, because government should not regulate individuals' choices. The beliefs supporting this libertarian view of prostitution also support libertarian views on pornography, flag burning<sup>134</sup>, workplace discrimination laws, etc.. For a libertarian, "[t]he point, of course, is to defend not the behavior itself, but rather the right of adults to make their own decisions."<sup>135</sup> The principle of "equal freedom" for libertarians is at the basis of individuals'

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<sup>131</sup> This perspective is often termed the "Autonomy Position." Berta Hernandez-Truyol & Jane E. Larson, *Sexual Labor and Human Rights*, 37 COLUM. HUM. RTS. L. REV. 391, 402 (2006). Speaking of the libertarian position on prostitution, Hernandez-Truyol and Larson state "[it] holds that respect for self-determination requires a respect for women's choices about sex and survival." *Id.* at 402. It is worth noting that the National Libertarian Party does not address the issue of prostitution in their literature. The Party does state "[c]riminal laws should be limited to violation of the rights of others through force or fraud, or deliberate actions that place others involuntarily at significant risk of harm. Individuals retain the right to voluntarily assume risk of harm to themselves." *Libertarian Party Platform*, available at <http://www.lp.org/platform>.

<sup>132</sup> See *supra* pp. 175-76.

<sup>133</sup> Libertarians do believe that in the cases where prostitutes are coerced or physically forced into the profession, the government should step in to prevent and mitigate this. ("The policy position that flows from this is full legalization and legitimation of prostitution as a job like any others, appropriately subjected to the labor protections offered to all workers but to no other special rules.") Hernandez-Truyol and Larson, *supra* note 131, at 403.

<sup>134</sup> For an analysis of the libertarian view on flag burning, see Roger Pilon, *The Right to Do Wrong*, in THE LIBERTARIAN READER, *supra* note 61, at 197.

<sup>135</sup> *Id.*

constitutional rights to life, liberty, and property, and should be used to define society's position on the many exercises of those rights.<sup>136</sup> “[W]e are born free and equal, with equal moral rights to plan and live our own lives—even, by implication, when doing so offends others.”<sup>137</sup> For libertarians, this fundamental principle applies to First Amendment rights, and to *all* issues pertaining to an individual's relationship with his or her government.<sup>138</sup> For a libertarian, then, living under the rule of law should not be living under what a majority—in today's system the legislature, executive, or judicial branch—sees as our individual rights. Rather, individuals should live under “the rule of men,” which is the principle of equal freedom that the drafters of our Constitution had in mind.<sup>139</sup>

Libertarians view the government's imposition of most modern laws as the majority's curtailing of individual rights.<sup>140</sup> For instance, for libertarians the Civil Rights Act of 1964 was a curtailment of individual rights.<sup>141</sup> And though libertarians agree that the Civil Rights Act of 1964 was correct to address the public, government-created institution of discrimination seen in the Jim Crow laws,<sup>142</sup> the Act was incorrect to create the right for individuals to be free from private discrimination, or discrimination by other individuals or private institutions.<sup>143</sup> Such “rights” for libertarians are fabricated and curtail the real, constitutionally mandated rights of individuals.<sup>144</sup> According to libertarians, our individual rights to live, work, and own property should only be limited where their exercise would unduly infringe

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<sup>136</sup> *Id.* at 199.

<sup>137</sup> *Id.*

<sup>138</sup> Referring to equal rights principle, “[b]ut if that fundamental principle applies not simply to flag-burning, nor even simply to speech, religion, and other First Amendment issues generally, but across the board—to all questions about the relationship between the individual and his government—then we cannot shrink away from that application, however unpleasant or unpopular the results may be.” *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *See id.*

<sup>141</sup> *Id.* at 200. “[T]he authors of the 1964 act created a “right” against private discrimination on certain grounds and in certain contexts, which has been expanded over the years.”

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> For libertarians, these rights are inconsistent with the constitution. Speaking of the right to be free from private discrimination, Pilon states “[t]hat ‘right,’ of course, is nowhere to be found in the Constitution or in its underlying principles. Indeed, its enforcement is inconsistent with that document and with those principles.” *Id.*

the equal rights of others; by contrast, the government should not be allowed to control the decisions we may make, even when those decisions result in discrimination.<sup>145</sup> For libertarians, the right to discriminate must be protected, just as the right to burn flags must be. As such, libertarians are protecting the right to choose, not the choice itself. Thus, the government should not interfere with a woman's choice to enter prostitution.

Finally, libertarians believe that government regulation of prostitution not only infringes on individual liberty, but is counter-productive. First, regulation of prostitution, as with regulation of any free economic activity, improperly interferes with the free market. It is an improper regulation, partly because regulation of prostitution interferes with a prostitute's free pursuit of her economic self-interest.<sup>146</sup> This is not just harmful to the prostitute as an infringement on her economic rights, it is harmful to our entire economic system. Libertarians believe that free market capitalism promotes efficiency and productivity, regardless of what economic activity is at stake.<sup>147</sup> "Whatever one's line of work, a competitive and free market tends to push one toward the achievement of the best one is able to produce within a given context."<sup>148</sup> With each person working at their full potential, the entire system works more efficiently. Thus, regulation of prostitution, as with regulation of any economic activity, hinders the productivity and efficiency associated with a free market.

The libertarian view of prostitution is hence wrapped up in its views of all economic activity. IFeminists address prostitution as its own issue, perhaps because they are viewing libertarianism from a distinctly female perspective. The IFeminist view of prostitution is in line with the libertarian view of prostitution, but inconsistent with the traditional feminist views on the topic.

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<sup>145</sup> *Id.*

<sup>146</sup> Douglas J. Den Uyl & Douglas B. Rasmussen, *The Philosophic Thought of Ayn Rand*, in *THE LIBERTARIAN READER*, *supra* note 61, at 176. The libertarian, or autonomy perspective, asserts that "[S]ex workers are harmed by limits of free to market their resources and urge[s] that women be allowed to use their bodies and labor to greatest personal advantage, especially when women around the globe have few other economic opportunities and their need is great. This economic need argument grows more compelling in a globalizing economy as modernization, urbanization, structural reform, and international trading systems disrupt traditional household and social organizations, diminish governmental investment in social welfare, and drive down wages. A globalized economy presses more women into waged work for the support of themselves and their children, with few other viable economic opportunities and less household and familial support." Drexler, *supra* note 122, at 402.

<sup>147</sup> Den Uyl & Rasmussen, *supra* note 146, at 176.

<sup>148</sup> *Id.*

IFeminists urge all feminists to view prostitution as they view abortion, as a valid choice that should not be interfered with.<sup>149</sup> “It is the right to choice. The right for a woman to control her own sexuality, with whom she will have sex, when, and under what circumstances.”<sup>150</sup> IFeminists use the self-ownership argument to assert that just as a woman has the right to choose to have an abortion, a woman has the right to choose to prostitute herself. “Either an individual has a right to ‘choice,’ defined as the act of ‘deciding,’ which includes any and all options—good, bad, moral, and immoral—available to an individual, or the claim to the right to choice is baseless and therefore meaningless.”<sup>151</sup> IFeminists see the morality argument against prostitution as equally destructive to women’s rights as the morality arguments against abortion.<sup>152</sup> Furthermore, IFeminists do not agree with condemning prostitution on the basis that it can be harmful or degrading to women.

IFeminists concede that some prostitutes are prostitutes against their will.<sup>153</sup> IFeminists also recognize that prostitutes by choice may still face difficulties with their professional choice, like disagreeable clients or pimps.<sup>154</sup> With regard to this latter group, IFeminists see the prostitutes’ difficulties as similar to those faced

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<sup>149</sup> Norma Jean Almodovar, *For Their Own Good: The Results of the Prostitution Laws as Enforced by Cops, Politicians, and Judges*, in *LIBERTY FOR WOMEN*, *supra* note 100, at 75. Speaking of traditional feminists, Almodovar states, “[y]et these same women champion a woman’s right to ‘choice’ as long [as] it is abortion that is being discussed. If indeed a woman has a right to ‘choice,’ there must be some fundamental reason that one can make that claim. Prostitution (and pornography) must be considered the same issue for feminists as abortion. It is the right to choice.”

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at 75-6. Speaking of morality-centered arguments against prostitution, Almodovar states, “[i]f such arguments to prohibit the choices voluntarily made by some women have any validity at all, then anti-abortion activists could assert the same claims regarding the degrading and emotionally deleterious effects that abortion has on women and demand that women be protected from such harm through the prohibition of abortion.” It is worth noting that many other groups of feminists view morality arguments against prostitution as potentially harmful. Sex-positive feminists are particularly leery of such arguments.

<sup>153</sup> *Id.* at 76. “I cannot deny that some women and girls—perhaps even quite a few—are in prostitution against their will.” While Almodovar does not address the IFeminist solution to this problem, it is plausible that IFeminists would follow the autonomy position and urge that these situations should be regulated by the government, because they involve coercion.

<sup>154</sup> *Id.* “Further some prostitutes may find the work emotionally taxing or disagreeable and may have violent confrontations with their clients or pimps.” For information on just how many prostitutes face “disagreeable” conditions, or experience emotional turmoil, see FARLEY ET AL., *supra* note 129.

by women in abusive relationships or marriages, women choosing to work in sweatshops, or women being sexually harassed at a job of their choice. In an essay on prostitution, Almodovar uses these examples, and says, “[n]evertheless it would be imprudent to suggest that society resolve the unpleasantness of any coercive relationship by prohibiting the basic activity such as marriage or relationships, clothing manufacturing, janitorial professions, or the coed workplace.”<sup>155</sup> An IFeminist is not necessarily opposed to laws against coercion, but thinks they are all that is needed to protect prostitutes. Any further laws “do not protect women from anything.”<sup>156</sup> Therefore, IFeminists view regulation of prostitution as unnecessary.

Indeed, IFeminists assert that regulation of prostitution is actually harmful to women. For instance, IFeminists feel that the threat of arrest and the possibility of forced sex with police as a result of arrest or the threat of arrest are unjustified harms for prostitutes.<sup>157</sup> Furthermore, regulation of prostitution allows police to selectively enforce the laws, and this often results in discrimination.<sup>158</sup> Additionally, government regulation of prostitution portrays women as victims and infantilizes them, furthering a negative image for all women.<sup>159</sup> Finally, IFeminists argue that regulation of prostitution by police forces police departments to reallocate money and manpower away from rapes,

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<sup>155</sup> Almodovar, *supra* note 149, at 76.

<sup>156</sup> *Id.*

<sup>157</sup> “The threat of arrest and all that accompanies it, including extortion and forced sex with the police, is more emotionally damaging than the exchange of money for otherwise lawful activity.” *Id.*

<sup>158</sup> *Id.* at 76-7. Interestingly, Almodovar does not note possible discrimination in police punishment of prostitution based on race, age, or class. Instead, she is concerned with police discrimination on the basis of cooperation with the police investigations. Arguing that this discrimination is unfair to prostitutes and illogical, she states,

Why permit some prostitutes to continue to be exploited as long as they cooperate with the police? What possible information gathered from pimps and panderers could be so valuable that law enforcement agents would allow the continued exposure of unsuspecting young women to a lifetime of shame and degradation which robs them of their bodily integrity, personal privacy, self-respect, and reputation? *Id.* at 77.

Almodovar is also concerned with discrimination on the basis of gender, since most prostitution arrests involve women, not men.

<sup>159</sup> *Id.* This prostitute-as-victim theory now so deeply imbedded into law, which is espoused by so-called feminists such as Catharine MacKinnon and Andrea Dworkin, involves the irrational belief that all women except for themselves and their peers are inherently incapable of self-determination and need “big sister” protection. How are women protected by being led to jail in handcuffs and having their freedom taken away?

domestic violence cases, homicides, and various other violent crimes.<sup>160</sup> This, IFeminists urge, harms women and all of society.<sup>161</sup> Next, IFeminists argue that regulation of prostitution is harmful to prostitutes, because the criminalization of prostitution deters prostitutes from seeking help when faced with a dangerous situation.<sup>162</sup> Finally, IFeminists urge that coercion, not an inherent part of prostitution, is actually a by-product of prostitution's criminalization.<sup>163</sup> IFeminists argue that "[j]ust as the drug trade has been made much more violent by the war on drugs[,] the prostitutes' trade has been made more violent by the war on prostitution."<sup>164</sup>

The IFeminist perspective on prostitution aligns with the libertarian position, not the feminist position. Although feminists are not the only group to condemn prostitution, the feminist critique of prostitution is unique, because it condemns the institution of prostitution, not the actual prostitute. The feminist perspective on prostitution is often termed the "abolitionist" perspective.<sup>165</sup> This perspective views prostitution as an institutionalization of gender inequality and sexual violence.<sup>166</sup> Abolitionists are thus skeptical of any legalization of prostitution. Absent from any abolitionist discourse are the words "agency," "entrepreneurship," or even "choice." Instead, they believe that prostitution should be universally and unequivocally condemned as illegitimate.

Most abolitionists advocate for partial decriminalization as a necessity to protect women who are the victims of the institution of prostitution.<sup>167</sup> Partial decriminalization would remove the

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<sup>160</sup> *Id.* at 78.

<sup>161</sup> *See id.*

<sup>162</sup> *Id.* at 80. "Those prostitutes who are truly victims of violence within the work environment are denied access to help because they are outside the law. Furthermore, help is not available because the police department is too busy making prostitution arrests." Traditional feminists are also concerned with the deterrence effect that criminalization has on prostitutes seeking help. That is one basis for the feminist perspective's call for partial decriminalization of prostitution.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* In making this argument, Almodovar also draws a parallel to prohibition. "Manufacturing alcohol was a violent profession during prohibition but is not today when the sale of alcohol is legal."

<sup>165</sup> Hernandez-Truyol & Larson, *supra* note 131, at 400.

<sup>166</sup> *Id.* Speaking of the abolitionist perspective, Hernandez-Truyol and Larson note "[t]heir position is that prostitution must be condemned uncomprisingly like slavery, and never equated with acceptable practices like work or with legitimating ideas like consent or equality." *Id.* at 401.

<sup>167</sup> *Id.*

criminal sanctions affecting the prostitutes and instead only criminally punish those involved in the purchasing or pimping of prostitution.<sup>168</sup> Partial decriminalization is seen as a necessary band-aid to the burdens that prostitution places on women.<sup>169</sup> Thus, the traditional feminist perspective on prostitution does not aim to legalize prostitution or lend any legitimacy to it as a profession. However, the abolitionist perspective does recognize the need for a structure to help individual women currently facing the burdens of prostitution.

IFeminists address the abolitionist proposal of partial decriminalization and argue that it is impractical. First, IFeminist Almodovar claims that the policy does not address whether police would be expected to arrest all customers of prostitutes, or only the customers of “streetwalkers,” thus “leaving alone the vast number of customers who use the services of call girls, escorts, or massage therapists[.]”<sup>170</sup> Since it would be impossible to arrest even all customers of “streetwalkers,” IFeminists worry that partial decriminalization would lead to arbitrary enforcement of the policy, thus leaving room for police discrimination and coercion.<sup>171</sup> IFeminists also argue that partial decriminalization would encourage police to threaten to arrest prostitutes for failure to cooperate if they would not give the police information on their clients.<sup>172</sup> Finally, IFeminists worry that partial decriminalization would exacerbate the problem of resource allocation by taking money and manpower away from the investigation of truly violent crimes.<sup>173</sup>

While the autonomy perspective is the leading feminist perspective on prostitution, different strains of feminism lend different nuances to the approach. In particular, the radical feminist and the sex-positive feminist have unique takes on prostitution. Radical feminists view sexual objectification as the root of all

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<sup>168</sup> It is important to note that partial decriminalization within the feminist perspective does not come from a libertarian place, but from an acknowledgment of the need to help individual women caught in prostitution, as well as tackle the problem as an institution. *Id.*

<sup>169</sup> *Id.* “Thus even those who favor decriminalization may still wish to eradicate commercial sex, and hope to do so by allowing the weight of legal condemnation to fall on patrons/johns, pimps, and the business structure of the sex industry. *Id.* at 401-2.

<sup>170</sup> Almodovar, *supra* note 141, at 78.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

gender inequality,<sup>174</sup> and thus for a radical feminist, prostitution is a symptom of the problem. A radical feminist would not be opposed to partial decriminalization or the abolitionist perspective in general, but would not focus her efforts there. Instead, the radical feminist would focus on empowering women caught within the institutional structure of sexual objectification itself. A sex-positive feminist is skeptical of traditional feminism's views on prostitution, because a sex-positive feminist fears any rhetoric or policy that could undermine a women's sexual expression.<sup>175</sup> Sex-positive feminists would, however, support the abolitionist perspective as long as its efforts are not co-opted to further an agenda of anti-sex morality. Thus, the pure abolitionist perspective poses no problems for sex-positive feminists, but they will be skeptical of any ways in which the abolitionist agenda or rhetoric is used to oppress women's sexuality. Since the abolitionist perspective in its true form does not undermine women's free sexual agency, sex-positive feminists should not ordinarily take issue with the abolitionist perspective; instead, they add a layer to its analysis.

The IFeminist view on prostitution is more aligned with the libertarian view than the feminist view. The IFeminist sees the abolitionist perspective as harmful to women and sees the abolitionist idea of partial decriminalization as illogical. The different solutions IFeminists and feminists propose for dealing with prostitution are reflections of each theory's view of the problem. IFeminists view the problem as the regulation of prostitution; feminists view the problem as the existence and maintenance of prostitution through a patriarchal system.

For IFeminists, prostitution's existence presents no problem, because it is a valid economic choice for women to make. There are no structures present in today's society to prevent women from making any choices they wish to make about their personal and professional lives. IFeminism, just like libertarianism, denies the present existence of patriarchy, which is apparent in their view on prostitution. A belief in the existence of patriarchy and its effect on

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<sup>174</sup> Elizabeth Bernstein, *What's Wrong with Prostitution? What's Right with Sex-Work? Comparing Markets in Female Sexuality*, 10 HASTINGS WOMEN'S L. J. 91, 95-6 (1999). "[S]exual mastery is the major means through which men affirm their manhood. When a man enters into the prostitution contract he is not interested in sexually indifferent, disembodied services; he contracts to buy sexual use of a woman for a given period." CAROLE PATEMAN, *THE SEXUAL CONTRACT* 207 (Stanford Univ. Press 1988).

<sup>175</sup> Bernstein, *supra* note 176, at 98.

the lives of women is paramount to any type of feminism.<sup>176</sup> For this reason, the IFeminist theory seems not to be an extension of traditional feminist values. It seems that IFeminism is an extension of libertarian values to the lives of women.

## V. CONCLUSION

This Note has shown the tensions between libertarian philosophy and feminist philosophy. In doing so, this Note has pointed to core beliefs in the two philosophies that make them inherently incompatible. Now that the government no longer explicitly sanctions discrimination of women or inequality between the sexes, the tensions between libertarianism and feminism are heightened. The debate around prostitution is representative of these modern day tensions.

IFeminist philosophy illustrates these tensions. While it is not this Note's aim to claim that IFeminists are not truly feminists, this Note does suggest that IFeminism is such a break from the core beliefs of traditional feminism that it is not representative of traditional feminism. Women are, and should be, factored into different philosophies. One must ask whether the IFeminist philosophy is merely libertarianism's incorporation or consideration of women and concerns specific to women rather than a mode of feminist thinking. This Note, through its theoretical analyses and application of these theories to the issue of prostitution, suggests the former.

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<sup>176</sup> See *supra* pp. 172-73 and accompanying notes for a discussion on the feminist perspective on patriarchy and its existence in modern times.