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“A Million Dollars and an Apology”: Prostitution and Public Benefits Claims

*Margaret A. Baldwin**

I stole my title from Jennifer Greenberg, the tireless, inspiring director of the Florida Battered Women's Clemency Project. The Clemency Project represents Florida women who have been convicted of killing their abusers, and who are seeking executive clemency. The context was as follows. Jenny and I were discussing her concerns about one of the Project's clients. The woman had been tortured, raped and battered for years by the man she ultimately killed. The police had ignored her emergency calls until the day she was arrested. She was then prosecuted relentlessly for a crime for which she should not have been charged. The good news was that the Clemency Board seemed favorably inclined toward the woman's petition, and the Project staff was preparing for her release. The bad news was that some state officials were questioning the Project's plans for her “aftercare”: the living, employment and support arrangements she would have available to her after her release from prison.

Jenny was also deeply concerned about the woman's future in a world that had abandoned her so many times in the past. Troubling, though, was the seemingly punitive attitude of the state officials in raising these concerns. As if the fact that the woman had no one to turn to, and nothing to rely on should count as another strike against her. As if the state had not played a key role in destroying her life. As if the state could not, conceivably, owe something to *her*. “Aftercare?” Jenny asked. “A million dollars and an apology, now *that* would be aftercare.” I agree. That is what “economic justice” for Jenny's client would, to my mind, consist of: generous, respectful provision of the material and moral conditions necessary to exercise self-determination, to forge a self-regarding identity, to enjoy belonging among and being cared for by others. To my mind,

* Associate Professor of Law, Florida State University College of Law. I would like to thank Murdina Campbell, April Cherry, Beth Gammie, Jennifer Greenberg, Deborah Hart, Gabriele Plendl, Greg Thompson and Ruth Witherspoon for their insights, experience and friendship. Christina Rexroat provided able research assistance. A research grant from Florida State University College of Law supported the production of this paper.

economic justice for prostituted women—from whom so much has been taken for so long—would look the same.

That is the vision of economic justice informing this paper, and it is a big order. It is hard, these days, to imagine economic justice—for anyone—in any terms but the most withered and capitulated. The gap between rich and poor widens yearly, with job growth in this country largely confined to the “junk job” sector.¹ As many as thirty percent of American workers are “contingent workers”: disposable, part-time and temporary.² Forty-one million Americans now lack health insurance.³ Our entire social welfare system, especially programs benefiting women and children, is under attack.⁴ State health, education and training support functions are increasingly relegated to the nationally booming prison system.⁵ With socialism fatally stigmatized, we little dare to even imagine ideals of economic justice—much less demand concrete legal or legislative progress toward those goals. The economic situation of women generally, or of prostituted women in particular, in these new times is hardly mentioned. But I want to swim against that tide, and offer here specific proposals promoting access to public benefits for prostituted women. I posit, at the outset, that economic justice for prostituted women means, that at a minimum, no woman be *required* to participate in prostitution to meet any of her basic survival needs, and that it is a duty of government to guarantee women's freedom from prostitution in those terms.

My analysis of the treatment of prostituted women under state benefits programs thus differs in significant respects from the approach advanced

1. See, e.g., JAMES K. GALBRAITH, *CREATED UNEQUAL: THE CRISIS IN AMERICAN PAY* (1998). Galbraith summarizes his findings: “[s]ince 1970, the pay gap between good and bad jobs in America has grown. It is now so wide that it threatens, as it did in the Great Depression, the social stability of the country.” James K. Galbraith, *With Economic Inequality for All*, *THE NATION* 24 (Sept. 7/14, 1998). See also WILLIAM JULIUS WILSON, *WHEN WORK DISAPPEARS: THE WORLD OF THE NEW URBAN POOR* (1996) (documenting the elimination of jobs from urban, minority communities).

2. See Jennifer Middleton, *Contingent Workers in a Changing Economy: Endure, Adapt, or Organize?*, 22 N.Y.U. REV. L. & SOC. CHANGE 557, 558 (1996).

3. See ROGERS M. SMITH, *THE NATION* 12 (Sept. 7/14, 1998). Smith, a professor of political science at Yale University, describes the current economic landscape,

Asian economies are imploding, the world's poor are expanding, more than a fifth of our own children are impoverished, American schools are falling apart, a record 41 million of us lack health insurance and the nation is experiencing the widest divergence of income, wealth and opportunity in five decades.

Id.

4. For an analysis of the current attack on welfare from a leading welfare historian, see GWENDOLYN MINK, *WELFARE'S END* (1998).

5. By 1995, the number of incarcerated persons in the United States exceeded one million. Bureau of Justice Statistics, U.S. Dep't. of Justice, *Prison and Jail Inmates, 1995* (NCJ-161132). See generally JOHN IRWIN & JAMES AUSTIN, *IT'S ABOUT TIME: AMERICA'S IMPRISONMENT BINGE* (Brian Gore et al. eds., 1994). Irwin and Austin report that spending for corrections increased 59% between 1980 and 1988, while welfare spending decreased by 27%.

Id. at 17.

by some prostitutes' rights organizations. They claim that prostitutes should receive all employment-based public benefits and legal protections on the same basis as other working women and men. Among these programs and guarantees are Social Security benefits,⁶ worker's compensation protections,⁷ Fair Labor Standards Act regulations,⁸ sexual harassment remedies under Title VII⁹ and collective bargaining rights.¹⁰ In addition, prostitution rights advocates have asserted that these guarantees must be extended to prostitutes' families, including repeal of anti-pimping laws.¹¹ These proposals are typically advanced through an assimilationist argument. On this argument, prostitution should be treated like any other kind of gainful work, and relationships prostituted women have with men and their own children should be treated the same as any other family in the employment benefits system.¹² However, these demands are usually strongly linked with arguments for the decriminalization of all forms of prostitution—for all involved or who benefit from the practice. Indeed, the argument for decriminalization often quickly overshadows any other concrete proposals for benefits entitlements made on women's behalf.

I strongly agree that prostituted women should be entitled to the substantial benefit structure attaching to paid employment and to maternity in this country. I am especially sympathetic to the effort to re-categorize prostitution as "work," and to legally acknowledge prostituted women. However, I do not endorse a "prostitution as work" strategy as a route to economic justice for prostituted women. There are two fundamental reasons for my reluctance, one pragmatic and the other substantive. Both reasons also inform the position I do take on the future and necessity of public benefits programs for women in prostitution.

The pragmatic concern is based on the real-life observation that,

6. See, e.g., Tracy M. Clements, *Prostitution and the American Health Care System: Denying Access to a Group of Women in Need*, BERKELEY WOMEN'S L.J. 48, 68–83 (1996) (analyzing availability of Social Security disability benefits and Medicaid to prostituted women).

7. See, e.g., Carrie Benson Fischer, *Employee Rights in Sex Work: The Struggle for Dancers' Rights as Employees*, 14 LAW & INEQ. J. 521 (1996) (analyzing status of nude dancers as "employees" under worker's compensation protections, and wages and hour regulations).

8. See *id.* (evaluating FLSA eligibility status of women working as dancers in strip clubs). See also cases cited *infra* at note 93 and accompanying text.

9. See Jeannie Sclafani Rhee, *Redressing for Success: The Liability of Hooters Restaurant for Customer Harassment of Waitresses*, 20 HARV. WOMEN'S L.J. 163 (1997) (liability of employers for sexual harassment of women employees required to wear sexually provocative uniforms at work).

10. See Siobhan Brooks, *Dancing Toward Freedom*, in WHORES AND OTHER FEMINISTS 252 (Jill Nagle ed., 1997) [hereinafter WHORES AND OTHER FEMINISTS] (describing events leading up to organization of dancers at the Lusty Lady in San Francisco).

11. See Draft Statement from the 2nd World Whores' Congress (1986), reprinted in SEX WORK: WRITINGS BY WOMEN IN THE SEX INDUSTRY 307, 319–20 (Frederique Delacoste & Priscilla Alexander eds., 1987).

12. See *id.*

twenty-five years after the effective legalization of stripping, live sex performance and pornography, only a handful of job-based reforms of women's working conditions in the sex industry have actually been achieved.¹³ Working conditions in strip clubs have, in the past ten years, apparently worsened for most women.¹⁴ We need to examine why this is true. Of course, labor organizing and effective employee advocacy are always difficult struggles. In addition, municipal and state neglect of women's complaints regarding wages and working conditions against strip clubs and live sex venues dampens the confidence of women who complain, reinforcing the illusion of omnipotence that club operators too often enjoy and use to exploit dancers.¹⁵

Ultimately, an explanation for this lack of real change must also be found in the conditions under which women are recruited, used and retained in the sex industry. The experience and effects of prostitution, stripping and other public sex performance drastically undermine women's efforts at self-protection, collective empowerment and economic mobility. These conditions include serial sexual abuse, beatings, humiliation, drug and alcohol use, grinding despair and depression linked to repeated sexual exploitation.¹⁶ A recent study conducted in Minneapolis/St. Paul by Ruth

13. To my knowledge, in the United States, there has been only one successful unionization campaign, among dancers in a strip club. See Brooks, *supra* note 10, at 255. Other initiatives have been limited to intermittent wages and hour challenges by the U.S. Labor Department. See *infra* note 93.

14. For an informative description of these changes, see Lisa E. Sanchez, *Boundaries of Legitimacy: Sex, Violence, Citizenship, and Community in a Local Sexual Economy*, 22 L. & SOC. INQUIRY 543, 557 (1998). Sanchez reports:

Since the expansion of the strip industry, dancers complain of having less control over their situation and the kinds of performances required to make the money they need. For example, when topless dance clubs went 'fully nude,' dancers reported having to 'do more' to get tips. . . . Because customers can see the exterior of a woman's body from any seat in the club, they no longer pay women to give 'peek shows' or to remove additional articles of clothing. Rather, they pay for increased proximity, for close-up views of the more interior portions of a woman's body, and for touch. Additionally, in the new regime of club dancing, dancers are being pressured or required by management to do booth or lap dances. . . .

And while the degree of physical contact between dancers and customers continues to escalate, the pay scale has progressively eroded. Dancers have gone from making a living wage plus tips in the late 1980's to making no wage at all in 1996—only tips in most clubs. . . . It is not only women in prostitution who have been raped, beaten, or murdered. . . . During the first summer that I conducted research in the city, the body of a woman who had left a shift at a strip club where she had worked for only six days was found burning in a metal dumpster near the club.

Id. at 557–58.

15. See Speech by Johanna Breyer, Exotic Dancers Alliance, delivered at the Hastings Women's Law Journal Symposium, *Economic Justice for Sex Workers* (on file with the Hastings Women's Law Journal).

16. For a review of research studies documenting the incidence of sexual and physical

Parriott substantiates many earlier findings documenting the traumatic psychological and health effects of prostitution. Almost all of the women in the Parriott study categorize themselves as chemically addicted—most frequently to alcohol and crack cocaine.¹⁷ They report high rates of exposure to sexually transmitted disease and resultant pelvic inflammatory disease.¹⁸ One-half had been physically assaulted by johns and two-thirds had been raped by them, often with extreme violence. Ninety percent had also suffered high levels of violence from others, with over half being beaten at least once a month.¹⁹ Sixty-two percent report a sexual assault prior to being prostituted, over half by a family member.²⁰

Long-term traumatic effects are normal among prostituted women. Stress-related effects include sleep disorders, flashbacks, depression, suicide attempts and self-mutilating behaviors.²¹ The growing literature documenting the impact of domestic and sexual violence on health and employment corroborates the trauma findings specific to prostitution. Recent research documents that domestic violence alone

may be the number one drain on the domestic economy through direct medical costs, disability, long-term welfare dependence, child neglect, homelessness, depression and other mental illnesses, chemical dependence, criminal behavior by battered women and their children, truancy, and loss of employment and productivity among women in the workforce.²²

violence, terrorism and murder against prostituted women and girls, see Margaret A. Baldwin, *Split at the Root: Prostitution and Feminist Discourses of Law Reform*, 7 YALE J. L. & FEMINISM 47 (1992).

17. Half the women reported that they were high "all the time" while soliciting and turning tricks; 34% described themselves as high at least half the time. 96% had used crack cocaine, 71% within the previous 6 months. 78% percent began using crack while involved in prostitution. Ruth Parriott, *Health Experience of Twin Cities Women Used in Prostitution: Survey Findings and Recommendations* 15 (1994) (unpublished study on file with author).

18. 85% of the women in the Parriott study had contracted at least one of the STD's most injurious to health: chlamydia, syphilis, gonorrhea, genital warts and genital herpes. Four STD episodes was the average number experienced, most commonly chlamydia and gonorrhea. 31% reported at least one episode of pelvic inflammatory disease. *Id.* at 13.

19. *Id.* at 19.

20. *Id.* at 18–19.

21. *Id.* at 17. The level of stress responses, Parriott found, "did not significantly vary across types of prostitution, levels of exposure to prostitution, or age of initiation," *id.* at 17, but did significantly increase among women who had experienced sexual violence prior to being prostituted. *Id.* These PTSD findings are consistent with research conducted among 130 prostituted women in San Francisco by Dr. Melissa Farley. See Melissa Farley & Howard Barkan, *Prostitution, Violence, and Posttraumatic Stress Disorder*, 27(3) WOMEN & HEALTH 37 (1998). Parriott's subjects further reported suicide attempts at a rate of 46%, with 65% of those who reported at least one attempt reporting multiple attempts. 19% reported self-mutilating behaviors, such as cutting. Parriott, *supra* note 17, at 17.

22. Caroline W. Jacobus, *Legislative Responses to Discrimination in Women's Health Care: A Report Prepared for the Commission to Study Sex Discrimination in the Statutes*, 16 WOMEN'S RTS. L. REP. 153, 207 (Spring 1995), citing AM. MED. ASS'N, *The Billion Dollar*

The combined data on domestic and sexual abuse shows that:

Over the course of protracted sexual and physical abuse, long-term physiological problems often emerge. Somatic complaints are common among battered women as a result of living in a state of fear. Chronic pain, agitation, insomnia and stress are common. A battered woman seeking medical care for an injury is more likely than a nonbattered woman to exhibit signs of depression, anxiety, family, marital, and sexual problems, and vague medical complaints.²³

Finally, Dr. Melissa Farley's recent research on prostituted women reveals that two-thirds of the women interviewed suffered post-traumatic stress disorder at severity levels more intense than Vietnam veterans seeking treatment for the condition.²⁴ To the extent that assimilationist, "prostitution as work" and family advocacy strategies flatten, normalize or marginalize these conditions, they fail both the women they claim to serve and the cause they promote.

My second area of disagreement with the "prostitution as work" position is frankly substantive and normative. I fundamentally reject the basic claim that prostitution is a job. What, after all, does it mean to label an activity a "job," or a relationship system a "family?" I think what we mean when we call an activity a "job," or a group of relationships a "family," is that they further human needs for work and love that even those of us who often argue with Sigmund Freud's work can affirm as basic. The work at a job and the love of a family are the *ways* we seek to meet our individual needs for defining an identity—for achieving a sense of belonging and for the material means to express these drives. Prostitution offers none of the productive or emotional rewards represented by meaningful work and accompanying supportive emotional community. Instead, prostitution damages the integrity of women's identities,²⁵ impedes women's capacities for emotional and sexual intimacy²⁶ and forces women to take on an identity they reject internally.²⁷

Epidemic, AM. MED. NEWS, Jan. 6, 1992.

23. *Id.* at 209, citing Sandra K. Burge, *Violence Against Women as a Health Care Issue*, 21 FAM. MED. 368, 373 (1989); *Public Hearing before the Commission on Sex Discrimination in the Statutes, Sex Discrimination in the Health Field and in the Delivery of Health Care* 174 (1994) (testimony of Barbara Price, Executive Director of the N.J. Coalition for Battered Women).

24. See Farley & Barkan, *supra* note 21, at 45.

25. See *id.*

26. In Ruth Parriot's study, for example, "three-fourths of the women mentioned difficulty establishing an intimate relationship outside prostitution, due to the inability to separate the fear, disgust, and emotionally-distanced attitude developed in prostitution from the dynamics of a loving relationship." Parriot, *supra* note 17, at 4.

27. Thus, the Farley & Barkan study found that 88% of the women said they wanted to get out of prostitution, 78% said they wanted a home or safe place and 73% said they wanted job

In these real terms, prostitution is not a job—and it is a mistake to advocate for prostituted women's interests on the cruel fiction that it is. Instead, public benefits programs should be scrutinized for how their exclusion of prostituted women from coverage *prevents* women from participating in work they value, loving relationships and a self-regarding life.

Moreover, these needs are not only personal and psychological, but define public and social obligations as well. Consequently, as a right of citizenship, social equality and individual dignity, a program of economic justice must afford the means for women to meet those needs—and not only with money, but accompanied by recognition, friendship and authentic concern for women's well-being. Speaking of the needs of trauma survivors for commonality with others, Judith Herman guides us toward these kinds of reconnections between survivors and community that should shape our policies:

Commonality with other people carries with it all the meanings of the word *common*. It means belonging to a society, having a public role, being part of that which is universal. It means having a feeling of familiarity, of being known, of communion. It means taking part in the customary, the commonplace, the ordinary, and the everyday. It also carries with it a feeling of smallness, of insignificance, a sense that one's own troubles are 'as a drop in the sea.' The survivor who has achieved commonality with others can rest from her labors. Her recovery is accomplished; all that remains before her is her life.²⁸

The remainder of this Article explores how well two important public benefits programs perform these obligations. The two programs I address are the state workers' compensation systems and the federal Social Security disability program.²⁹ Both programs define eligibility for benefits in

training. See Farley & Barkan, *supra* note 21, at 44. These women were not identifying prostitution as a job, as a way to have good relationships or as an identity they embraced for themselves. Even activists with a prostitutes' rights perspective acknowledge this but prefer to explain women's resistance to identifying as prostitutes or sex workers as a response to the stigmatized status of sex work, rather than as a form of resistance to the sex work itself. For example, Samantha, co-Director of COYOTE in San Francisco, describes the difficulties she has encountered in sustaining a support group for sex workers: "[I] think its more accurate to talk about a community of sex workers than a 'movement.' A movement has to be public and most prostitutes aren't interested in that. They don't see what they're doing as an identity; it's just a temporary job." WENDY CHAPKIS, *LIVE SEX ACTS: WOMEN PERFORMING EROTIC LABOR* 206–07 (1997).

28. JUDITH LEWIS HERMAN, *TRAUMA AND RECOVERY* 235–36 (1997).

29. Issues relating to government enforcement of minimum wage, overtime, and working conditions regulations, the exercise of collective bargaining rights, the redressability of sexual harassment, racial harassment and other equal rights claims are beyond the scope of this paper. For analysis of these legal protections in the context of prostitution and stripping, see sources cited *supra*, notes 6–10.

relation to the claimant's working life, but from rather different perspectives. The workers' compensation system affords compensation for work-related injuries or disease; the social security disability program affords benefits for persons whose long-term or serious impairments prevent them from working. I examine how adequately each program addresses the survival and recovery needs of women in the sex industry. I especially interrogate how the legal template of each program's definitions of work and disability affect prostituted women's claims. Along the way, I will address the importance of the criminal status of prostitution in determining benefit eligibility under each plan. Again, it is not my aim to rationalize prostitution as work through this analysis, or to argue for the decriminalization of prostitution. My aim is to secure the best possible recovery benefits for prostituted women.

I. WORKERS' COMPENSATION WAGE-REPLACEMENT PROGRAMS.

Patrice Hanson worked as an "exotic dancer" at the Hide-Out Saloon in the state of Idaho. As she was leaving work one night after her shift, she was shot and killed in the parking lot of the bar. Her husband and child, Harold and Jesse Hanson, brought a Workmen's Compensation claim for survivor's benefits available under the Idaho workers' compensation statute.³⁰ Work-related killings of the kind suffered by Patrice Hanson are tragically common among women involved in prostitution and sexual performance,³¹ as are the sexual assaults, batteries, drug and alcohol-related fatalities and suicides already sadly catalogued.³² All of these kinds of injuries have been held within the scope of workers' compensation benefits programs.³³ Other injuries commonly suffered by women in the sex industry, which are often compensable under state workers' compensation systems, are disabilities resulting from emotional stress³⁴ and job-related

30. See *Hanson v. BCB, Inc.*, 754 P.2d 444 (Idaho 1988).

31. For sources on the murder rate among prostituted women, see Baldwin, *supra* note 16, at 88. See also KATHLEEN BARRY, *THE PROSTITUTION OF SEXUALITY* 44-48 (1995).

32. See sources cited *supra* notes 16-26, and accompanying text.

33. For cases involving sexual assault, see Eliot J. Katz, Annotation, *Workers' Compensation: Sexual Assaults as Compensable*, 52 A.L.R. 4th 731 (1987 & Supp. 1997); for suicides, see Rodney R. Nordstrom, *Suicide as a Compensable Injury Under Workers' Compensation Statutes: A Review of Judicial Decisions*, 16 EMP. REL. L. J. 37 (1990); for physical assaults, see 1 ARTHUR LARSON & LEX K. LARSON, *LARSON'S WORKERS' COMPENSATION LAW* § 11.00 (1998) [hereinafter LARSON & LARSON]; for alcohol fatalities, see 2800 Corp. v. Fernandez, 528 N.W.2d 124 (Iowa 1995); Panagos v. Industrial Commission, 524 N.E.2d 1018 (Ill. App. 1988).

34. See Aya Matsumoto, *Reforming the Reform: Mental Stress Claims Under California's Workers' Compensation System*, 27 LOY. L.A. L. REV. 1327 (1994). A mental strain case, with interesting implications for claims brought by women in prostitution or stripping, is *Mapp v. City of Philadelphia*, 317 A.2d 680 (Pa. Commw. 1974). In *Mapp*, the court held that benefits should be paid to a female undercover police officer, for disability resulting from excessive strain experienced while posing as a prostitute for five months. This holding should be helpful precedent for women actually used in prostitution and stripping, not only posing as such, for periods of time much longer than five months.

physical injuries.³⁵ Benefits available for compensable injuries typically include cash payments, medical care to the worker injured on the job, and cash payments for dependent survivors, like Patrice Hanson's family.³⁶

What legal hurdles face sex industry claimants, such as Patrice Hanson's family, in seeking compensation for these injuries? Two basic issues affecting recovery pose special complications for claims brought by sex industry survivors. The first is the requirement that the injury be causally linked to, and arise in the course of, the worker's employment.³⁷ The second is the question of who qualifies as an eligible "employee" under the applicable statute.³⁸ Since workers' compensation programs are intended fundamentally to provide a substitute for wages a worker has lost from a work-related injury or condition, each of these eligibility criteria is aimed at segregating work-related from personal occurrences, and at identifying the person or entity primarily responsible for workplace harms.

For women in prostitution, application of these tests is deeply problematic. Participation in the sex industry has the effect of collapsing boundaries between work and life, and blurs issues of power and responsibility—the very distinctions that these tests are designed to sharpen. The boundary-blurring of work and life takes place on several levels. Prostitution and stripping exhaust, disorient and depress women; the self-medication women do with drugs and alcohol intensify these effects. The daily control exercised over women to keep them enmeshed in making money with sex work leads to the erosion of other relationships and thwarts personal autonomy.³⁹ As a result, women tend to participate in fewer and fewer other life activities—like battered women often do,

35. A case raising such factual issues, but which was ultimately tried in tort, was *Doney v. Tambouratgis*, 587 P.2d 1160, 1161–65 (Cal. 1979) (club owner liable for \$3,945 compensatory, \$12,500 punitive damages for personal injury sustained by dancer from beating by club owner; no bar by virtue of workers' compensation coverage since employer did not plead workers' compensation protections).

36. Since these are state programs, there are local variations in scope of coverage and benefits. For a state-by-state survey of available benefits, see 10 LARSON & LARSON, *supra* note 33, at app. B.

37. See *infra* notes 42-71 and accompanying text.

38. See *infra* notes 73-113 and accompanying text.

39. Pimping is done this way; club owners also use scheduling patterns to control virtually all of a woman's waking hours. Carrie Benson Fischer recounts an example of this practice explained to her by Kelly Holsopple, an advocate for women in stripping and prostitution:

Clubs often structure dancers' hours in a way that uniquely burdens their lives. Holsopple explained that clubs often schedule a dancer to work with several hours off between her working shifts; for example, she might be scheduled to perform between two and four o'clock, and then again from six o'clock until midnight. Rather than leave the club premises during the interim, the dancer will most likely remain there and perhaps mingle with the customers. In this manner the club is able to book longer periods of dancers time without having to compensate them for doing so.

Benson Fischer, *supra* note 7, at 75 and accompanying text (citations omitted).

retreating to sleep and self-protective isolation.⁴⁰ Prostitution and stripping also require women to create an illusion of personal interest in the customer, a dynamic that in and of itself hedges the difference between work and personal life.⁴¹ So too, are power and control arrangements among women, customers and club owners obscured. Consequently, as the following discussion examines, prostituted women may find themselves both over and underdetermined as eligible claimants on these tests.

A. "Arising out of" a "course of employment."

The "course of employment" requirement ordinarily demands proof of two elements. First, a claimant must prove that the injury or condition *arose out of* the course of employment and second, that it was incurred *in* the course of employment. As applied, the "arising out of" test usually requires a showing of a causal connection between the risk of injury and the employment.⁴² The "in the course of employment" test asks whether the injury was inflicted while and where the employee was performing job tasks or related activities.⁴³

In *Hanson*, Patrice Hanson was killed on the property of the bar, apparently by a customer or a stranger. The employer did not contest that the death was employment-related. Nor should claimants typically encounter difficulty proving the requisite link between prostitution-related injuries and the employment setting. The sexual assaults, emotional and psychological injuries, beatings, and alcohol and drug-related injuries that prostituted women commonly experience are demonstrably coextensive with the requirements, conditions and risks of working in clubs and practicing prostitution. Therefore, the "arising out of" causal element should be relatively simple to establish.

Moreover, the "course of employment" standard should also be

40. "My knees, back, and feet hurt. I had to sleep most of the time I wasn't working or working out." Stacy Reed, *All Stripped Off*, in *WHORES AND OTHER FEMINISTS*, *supra* note 10, at 179, 187. "You're sleeping half of the day and then going to work at night. You're just a complete vampire." Benson Fischer, *supra* note 7, at 75 (citing interview with former dancer named Kaylee, on *Dateline: The Naked Truth?* (NBC television broadcast, Nov. 28, 1995)).

41. For an extended and thoughtful exploration of this process as the core sexual demand made on women in prostitution, see BARRY, *supra* note 31, at 28-36. Barry describes the collapse of the self-performance distinction demanded by customers:

In prostitution, what men expect from women is the *semblance* of emotional, sexual involvement, the appearance of pleasure and consent, a *semblance that they can treat as if it is real* in the moment of the commodity exchange.

In this sense, they want prostitutes to behave like non-prostitutes—wives, lovers, and girlfriends.

Id. at 35 (emphasis in original).

42. See 1 LARSON & LARSON, *supra* note 33, § 6.00 (summarizing leading judicial interpretations of "arising out of" requirement; causal link issue the core question).

43. See 1 LARSON & LARSON, *supra* note 33, § 14.00 ("An injury is said to arise in the course of the employment when it takes place within the period of the employment, at a place where the employee reasonably may be, and while the employee is fulfilling work duties or engaged in doing something incidental thereto.").

analyzed in terms of the pervasive and continuous control to which women are subjected by clubs, brothels and pimps, both on and off the job, to ensure that the women keep working and keep coming back.⁴⁴ In addition, the ad hoc customer-defined expectations of women in actual prostitution and stripping transactions should expand the definition of her "course of employment" to the limit of his potential.⁴⁵ For example, an increasing number of women in stripping acknowledge the pressure they continuously experience, from both pimps and club owners, to prostitute in connection with their activities as dancers.⁴⁶ Women injured in those transactions should assert that the prostitution transactions occurred in the course of club employment.⁴⁷ In short, to the extent that a woman's involvement in the sex industry gradually consumes her whole life, as is not uncommon, all of the injuries and effects of that process should conceptually satisfy this job-relatedness standard.

44. For example, the women at the legal Mustang Ranch brothel in Nevada worked under conditions of nearly total surveillance: "A work day was 14 to 16 hours, with 3 weeks on and one off. The women weren't allowed out unless they could hustle a customer who wanted to take them into Reno. Occasionally, they received permission to leave for 2 hours of shopping." BARRY, *supra* note 31, at 232.

45. For a very insightful discussion of how such ambiguity is exploited by johns and clubs as "a procurement technique and a justification for violence," see Sanchez, *supra* note 14, at 263-68.

46. For a description of current strip club practices consistent with this view, see Sanchez, *supra* note 14, at 562-63, 566-68.

47. The reasoning, if not the result, of a claim brought by a procurer/pimp, supports my analysis here. The claimant worked as a bell man at a hotel and "made arrangements" for women to prostitute in the hotel. *Jackson v. Dudley*, 461 P.2d 936 (Okla. 1969). The claimant rented rooms for the women, procured johns and took a cut of the women's money. *Id.* at 937. On the night the bell captain sustained his injury, one of the bellboys told him to check on one of the women, "because she was out of order." *Id.* The bell captain went to the room where the woman was assigned to turn tricks. He found her intoxicated and in "no shape to send anybody up." *Id.* She asked for more liquor, which he refused. As he was leaving the room, she took out a gun she had in her purse and shot him twice. *Id.*

Despite the bell captain's contention that his job duties included investigating any disturbances in the hotel, the court disallowed benefits on the ground that his injuries did not arise out his duties in connection with his work as a bell captain. Instead, "[i]t may be logically deducted from the evidence that at the time of the accident claimant was attempting to sober up one of the girls working for him so she could continue to ply her trade and earn money for both the claimant and herself." *Id.* However, the court's reasoning suggests that had a closer link been established between the claimant's duties to the hotel and his pimping, the result might have been in his favor. *Id.* Unlike the case of the bell man/pimp, an indisputably close nexus exists between a woman's employment as a stripper and an act of prostitution with a customer. *Cf. Upchurch v. Indus. Comm.*, 703 P.2d 628 (Colo. Ct. App. 1985) (allowing claim by injured truck driver who apparently was injured in the course of a prostitution encounter while on the road).

This theory still leaves prostituted women who do not work in strip clubs without recourse because the underlying employment contract may be held to be illegal. *See* notes 75-86 *infra* and accompanying text. Further, even for an injured woman who is employed legally as a stripper, the success of her claim still depends on a court holding that she enjoyed employee status at the club, which the discussion at notes 87-114 *infra* and accompanying text suggests, is far from certain.

Two judicial decisions, both involving alcohol-related traffic fatalities, are consistent with the view offered here regarding the appropriate scope of the "course of employment" rule in the context of sex work. Both cases held that the claimants, one a dancer in a strip club and the other a belly dancer in a supper club, had consumed intoxicants in the course of their employment, and that the ultimate injuries were caused by those working conditions.⁴⁸

In *2800 Corporation v. Fernandez*,⁴⁹ Jacqueline Fernandez sought workers' compensation benefits for injuries she sustained in a car crash that occurred an hour after she left work at the Bottoms Up Lounge in Council Bluffs, Iowa.⁵⁰ The driver of the car was a co-worker named April.⁵¹ Their duties at the club included dancing and interacting with the male customers when not dancing. In addition, a significant job requirement for the dancers was to get the customers to buy them at least two drinks per hour. Dancers ordinarily consumed over six to eight alcoholic drinks during a six-hour shift from 8:00 p.m. to 2:00 in the morning. Dancers had to be seriously intoxicated before they would be reprimanded for excessive drinking.⁵² Based on these practices, the state industrial commission found that the "consumption of alcohol by dancers was condoned if not encouraged by lounge management."⁵³

The Friday night before the accident, Ms. Fernandez and her friends injected crank, or methamphetamine, most of the night after drinking at work. During the day on Saturday, she and another dancer consumed part of a twelve-pack of beer and reported late to the club. Ms. Fernandez got very drunk at work until she could barely walk. At closing time, the manager then told both her and April that they were drunk and thus ordered them to leave the club.⁵⁴ Ms. Fernandez got into April's car, and less than an hour later and a few miles from the club, April smashed the car into a retaining wall. April died as a result of the crash. Medical experts confirmed that April was drunk at the time of the accident.⁵⁵

The employer argued, unsuccessfully, that Ms. Fernandez' injuries were not compensable because her drinking and drug use before work, rather than her drinking at work, caused her intoxication. The employer asserted that the use of illegal substances by the dancers was neither known about nor condoned by the employer.⁵⁶ The agency and the state Supreme Court rejected both assertions, noting that, first, the employer required the

48. See *infra* notes 49-67 and accompanying text.

49. 528 N.W.2d 124 (Iowa 1995).

50. *Id.* at 126.

51. *Id.*

52. *Id.*

53. *Id.* at 127.

54. *Id.*

55. *Id.*

56. *Id.* at 128.

dancers to hustle drinks from customers, and second, because of this requirement, the employer should consequently expect that this would result in the dancers becoming intoxicated.⁵⁷ Further, the court identified two aspects of drink hustling that directly benefited the employer: profit from the sale of drinks and the customer appeal of the atmosphere created by this type of interaction with the women.⁵⁸ Since Ms. Fernandez' intoxication was attributable to her work, and her intoxication impaired her judgment, which resulted in her entering the car of another intoxicated individual, the court affirmed the commission's conclusion that Ms. Fernandez' injuries arose in the course of her employment.⁵⁹

The court also considered the employer's argument based on the usual rule barring claims for injuries occurring off the employer's premises while the employee is on her way to or from work. The employer argued that this rule, known as the "going and coming" rule, should preclude the claim here.⁶⁰ While acknowledging the general rule, the court held that the "zone of danger" exception properly applied in this case. The "zone of danger" exception effectively extends the legal dimensions of the employer's premises to reach any injury "which occurred at a point where the employee was within the range of dangers associated with the employment."⁶¹ As in this case, "[w]hen an employer encourages or condones excessive drinking . . . the employer ought to be held responsible for foreseeable injuries suffered by the employee because of the resulting intoxication."⁶²

In an analogous case, an Illinois appellate court reached a similar conclusion. In *Panagos v. Industrial Commission*,⁶³ claimant Jasmin Durson asserted a claim for total permanent disability for injuries she sustained in a car accident that occurred on the way home from her work as a nightclub belly dancer.⁶⁴ Ms. Durson was employed to dance two-twenty minute shows, spaced within a four-hour shift, from 10:00 p.m. until 2:00 in the morning. In between performances, she was expected to socialize with the employer's customers. Dancers were not prohibited from drinking during these periods. In fact, Ms. Durson testified that she was encouraged to drink by the employer, although the employer denied this. In any event, there was no dispute that the profit made from the drinks went exclusively to the employer.⁶⁵

57. *Id.*

58. *Id.*

59. *Id.* at 129.

60. *Id.*

61. *Id.*, quoting LARSON'S WORKERS' COMP., THE LAW OF WORKMEN'S COMPENSATION § 15.00 (1986). The same rule now appears at 1 LARSON & LARSON, *supra* note 33, § 15.00.

62. *Fernandez*, 528 N.W.2d at 130.

63. 524 N.E.2d 1018 (Ill. App. 1988).

64. *Id.* at 1019

65. *Id.*

Ms. Durson testified that the employer directed her interactions with customers all evening on the night she was injured—introducing her to one table of customers early in the evening, excusing her from her second performance, asking her to sit with several other tables on his instruction and instructing her to sit with the first group to end the evening. She also testified that, as she was getting into her car after her shift at 4:00 a.m., the employer asked her if she needed a ride home. Again, the employer denied directing her contact with customers or offering her a ride.⁶⁶

The appellate court affirmed the industrial commission's conclusion that Ms. Dursun was injured in the course of her employment on two grounds. The court found that "the claimant had been drinking liquor prior to the accident with the tacit approval of her employer," and in addition, "her incidental act of personal comfort (drinking liquor) was not unexpected and resulted in a reasonably foreseeable end result (drunkenness and an auto accident) that occurred within an hour after her leaving work."⁶⁷

The common-sense acknowledgment by these courts that drinking is a job requirement for women in strip clubs—affecting women's lives inside and outside the club—has potentially radical ramifications for women's benefit eligibility. On the same reasoning that drinking is mandatory, courts should also find that rape, battery and chronic post-traumatic stress disorder are risks inevitably borne by women engaged in commercial sex. All of these harms and conditions should be compensable injuries for workers' compensation purposes. Moreover, to the extent that a woman's involvement in prostitution is facilitated or coerced by boyfriends/pimps, injuries inflicted by them should be held within the "zone of danger" created by the woman's employment. However, claimants need to be aware that the success of such claims turns on a court's determination that a woman's employment life is seeping into her personal life and not vice versa. In the context of a prostituted woman's life, the choice may be essentially unstable. A court could instead readily reverse the conceptual paradigm, finding a woman's private life overtaking her employment life and use this as a basis for denying her claim.

A court could frame this analysis under the "personal risk" principle, which excludes from the course of employment those injuries and risks "personal to the claimant."⁶⁸ The Michigan Court of Appeals relied on the personal risk principle in denying a compensation claim brought by a dancer, Debra Morris, who sustained a paralyzing gunshot wound to the neck inflicted by a co-employee, Linda Hill.⁶⁹ Both women were dancers at Bruce's Cocktail Lounge. Hill shot Morris in the neck as Morris was

66. *Id.* at 1019–20.

67. *Id.* at 1021.

68. 1 LARSON & LARSON, *supra* note 33, § 12.00.

69. *See Morris v. Soloway*, 428 N.W.2d 43 (Mich. App. 1988).

walking out of the ladies room. Morris testified that the dispute began with an argument over a dance costume. Since the employer did not provide costumes or make allowances to purchase them, the dispute was held to be purely personal and consequently non-compensable under the states workers' compensation scheme.⁷⁰

This case demonstrates the recovery problems that can arise for claimants when a court takes a view of the merger of work and life contrary to that espoused by the *Fernandez* court. The *Fernandez* court viewed the events of the claimant's day as "all work."⁷¹ In contrast, the *Morris* court framed the claimant's day, even in the club in an encounter with a co-employee regarding work attire, as involving wholly personal and private matters.⁷² Whether or not the specific holding in *Morris* was correct, the important point is that application of a legal standard that turns on a work/life dichotomy is bound to be arbitrary as applied to women's lives—especially where that difference has little practical meaning.

B. "Employee" status.

Another significant limitation on women's recovery prospects under the workers' compensation laws is the requirement that the claimant be an "employee" within the meaning of the applicable state law. There are two common restrictions on the definition of "employee" that most concern potential claimants injured in the course of prostitution and other sex work. The first restriction is the limitation of employee status to those with legal contracts of employment. This restriction bars recovery at the outset for injuries arising from illegal prostitution transactions, at least for the woman involved.⁷³ The second restriction is the exclusion of so-called "independent contractors" from recovery under workers' compensation statutes. Strip club owners, who routinely assert that the dancers who work at their clubs are (ineligible) independent contractors rather than (eligible) employees, have most often exploited this limitation.⁷⁴ These requirements are based on important judgments about relative responsibility and control exercised among people involved in the sex industry. As I suggested earlier, the relevant doctrine does little to clarify or evaluate appropriately.

70. *Id.* at 44. This is a strange story, at least to me. I have never heard of a dispute over a dance costume escalating to violence, much less an ambush-style shooting. It was interesting to me that the court also noted that Linda Hill was a "dangerous drug dealer who carried a gun." *Id.* Hill was killed before she could testify. *Id.* It seems to me that this shooting was likely drug-related, rather than about a costume. If it was drug-related, then the same reasoning relied upon by the court in *Fernandez* could yield a conclusion that drug transactions, like alcohol consumption, were events in the course of and arising out of the dancer's employment.

71. 528 N.W.2d at 128.

72. 428 N.W.2d at 44-45.

73. See cases cited *infra*, at notes 75-86.

74. See cases cited *supra* notes 69-72; *infra* notes 75-82.

1. Illegal Contracts of Employment

The rule extending contracts for illegal acts from the scope of workers' compensation laws was crafted in response to claims brought by injured bootleggers and bartenders during Prohibition.⁷⁵ The exclusion should probably be understood as a narrow one. Employee misconduct in and of itself, even if amounting to criminal behavior, has long been held an insufficient basis for denial of benefits so long as the employee was otherwise acting in the course of employment.⁷⁶ Moreover, an employment contract which is illegal due to the incompetency of the claimant to enter into the agreement (ordinarily because the claimant is a minor) typically will not bar a compensation claim brought by the injured worker.⁷⁷ To bar compensation on the grounds of illegality, it seems that the claimant must

75. Prohibition-era bartenders: *Herbold v. Neff*, 193 N.Y.S. 244 (1922); *Snyder v. Morgan*, 154 A.2d 525 (N.J. 1931); Beer delivery personnel: *Swihura v. Horowitz*, 152 N.E. 411 (N.Y. 1926); *Pepper v. Drenzo*, 46 Pa. D. & C. 118 (Pa. Ct. Common Pleas 1943). All of the cases were apparently decided on the grounds of public policy, rather than by reference to an explicit exclusion of such employments from the definition of covered employees in the state workers' compensation law. In *Snyder*, the court affirmed the principle that "[i]t is only in those cases where the contract of hiring is valid that the Workmen's Compensation Act is applicable. Contracts that are prohibited by express legislative enactments do not come within the cognizance of the Bureau." *Snyder*, 154 A.2d at 526. In *Herbold*, the court was less restrained: "This court cannot lend its aid to the enforcement of any claim growing out of a contract of employment, one of the purposes of which is the violation of a law of the land making the sale of intoxicating liquors a criminal offense." *Herbold*, 193 N.Y.S. at 245. The *Swihura* court summarily affirmed the lower court's denial of benefits where the lower court had found based on the claimant's own testimony that he was engaged in an illegal employment at the time of the accident. *Swihura*, 152 N.E. at 411.

A modern case standing for the same principle is *DePew v. State Accident Insurance Fund*, 703 P.2d 259 (Or. App. 1985) (compensation denied to employee shot in the back while working at an illegal gambling club).

76. A statement of the general principle is offered by Larson:

Misconduct of the employee, whether negligent or wilful, is immaterial in compensation law, unless it takes the form of deviation from the course of employment, or unless it is of a kind specifically made a defense in the jurisdictions containing such a defense in their statutes.

2 LARSON & LARSON, *supra* note 33, §§ 30.00. For cases applying this rule, see e.g. *Kochilas v. Industrial Commission*, 654 N.E.2d 568 (Ill. App. 1995) (holding that violating a law in the course of one's employment does not per se remove the employee from course of employment for workers' compensation purposes); *Boryca v. Marvin Lumber & Cedar*, 487 N.W.2d 876 (Minn. 1992) (claimant's compensation affirmed despite the fact that he was discharged for wilful misconduct, including making threatening phone calls to his co-employees); *Pacific Telephone & Telegraph Co. v. Workers Compensation Appeals Board*, 169 Cal. Rptr. 285 (Cal. Ct. App. 1980) (stating that an employee is not necessarily removed from the course of employment for purposes of the Workers' Compensation Act even if that employee's conduct in the course of employment was illegal or criminal); *Sternbridge Builders, Inc. v. Industrial Commission*, 636 N.E.2d 1088 (Ill. App. 1994) (illegal conduct during a business-related errand that may have contributed to an accident does not remove an employee from the course of his employment for purposes of the Workers' Compensation Act).

77. See, e.g., *Bowers v. General Guaranty Co.*, 430 S.W.2d 871, 872 (1968) (holding that an employee is covered by Workers' Compensation even if the contract for employment is prohibited by statute, or otherwise, as long as the employees duties are legal).

be hired under a contract of employment that is unenforceable and be hired to perform acts which are of themselves violations of penal laws.

I have found no reported cases involving a claim brought by a prostituted woman in her status as a prostitute,⁷⁸ where her eligibility for benefits was challenged on the ground of the contemplated illegality of the underlying employment contract. However, both disqualifying conditions, unenforceability and substantive illegality, are met in a typical contract for prostitution. In addition, a court may invoke public policy grounds for denying a claim brought by a prostituted woman, even if the technical illegality of a contract for prostitution could be overlooked doctrinally. For example, the *DePew* court clearly expressed the view that worker's compensation laws should not be used to benefit workers whose occupations are "[n]ot necessary to the enrichment and economic well-being of our citizens."⁷⁹ Considerations of public morality may also come into play, based on related precedent.

Surviving spouse claims can be denied on the ground that the spouse has been or is involved in a "meretricious relationship" with a third party.⁸⁰ Disqualifying meretricious relationships include engaging in prostitution. Other dependents may also be barred from recovery if the dependency involved immoral conduct.⁸¹ As one Pennsylvania court explained,

78. See *Massachusetts Bonding & Insurance Co. v. Industrial Accident Commission*, 65 P.2d 1349 (Cal. Ct. App. 1937). This case involved a claim brought by Dorothy Cook, who was employed as an entertainer and also earned commissions for encouraging customers to buy drinks while she was not on stage. The court upheld her claim for compensation, despite the fact that the contract under which she was employed was illegal for the employer to offer. State law nowhere expressly criminalized an employee's acceptance of such employment, though, nor forbade accepting payment for performing duties under the contract. Since the prohibition was directed solely at the employer, the employee's compensation claim was held unaffected by the employer's illegal act. *Id.* at 1350-51.

79. *DePew*, 703 P.2d at 260. In particular, the *DePew* court prohibited compensation to workers employed under contracts to perform criminal activities. *Id.*

80. See *Insurance Company of North America v. Jewel*, 164 S.E.2d 846, 847 (Ga. Ct. App. 1968) (holding a claimant is not entitled to compensation even after she participated in a marriage ceremony with the employee and only later learned employee was married to someone else); *Shultz v. Workmen's Compensation Appeal Board*, 621 A.2d 1239 (Pa. Commw. 1993); *McCusker v. Workmen's Compensation Appeal Board*, 603 A.2d 238 (Pa. Commw. 1992) (termination of widower's benefits). However, these rules appear to be eroding. See e.g., *Todd v. Workmen's Compensation Appeal Board*, 692 A.2d 1086 (P.A. 1997) (termination of death benefits not warranted even though the employee's widow was living in a meretricious relationship with third party after the employee's death, where widow married third party prior to the employer filing a petition for termination of benefits); *Campbell v. Workmen's Compensation Appeal Board*, 695 A.2d 976, 979 (Pa. Commw. 1997) (alleged meretricious relationship between claimant and third party does not bar receipt of benefits where sexual relationship between employee and claimant had ceased prior to employer's petitioning for termination of benefits).

81. See, e.g., *Jewel*, 164 S.E.2d at 847. A distinction is drawn between claims where the "dependency itself grew out of, or resulted from the immoral act of the claimant" and "cases where the support had no relation to the immorality." *Id.* As an example of the latter, the *Jewel* court offered the example of a daughter who is a prostitute and is dependent upon a father. "In such a case, where morals have nothing to do with the dependency, she would, upon his death

compensation laws should be construed to foster "good morals by encouraging legally recognized family relationships and discouraging illicit relationships."⁸² These reasons, singly or in combination, could likewise be recited to deny claims for injuries sustained in illegal prostitution transactions.

In my view, neither public morality nor criminal justice goals are promoted by barring compensation claims brought by prostituted women. After all, claimants seeking benefits are attempting to leave prostitution—not to continue participation in the practice. Benefits payments may be the support a woman needs to transition to a life beyond prostitution.⁸³ To deny her benefits is to participate in pimping her further. Indeed, several recent Pennsylvania cases narrowly construing the scope of the "meretriciousness" exclusion appear to acknowledge the unfair and punitive impact of the rule.⁸⁴ Further, denial of claims on the ground of contract illegality has the effect of rewarding johns, pimps, club owners and other people who benefit from prostitution transactions, while the entire burden of harmful impact is carried by the woman. Such unfair windfalls for employers have been recognized and addressed in the majority of state statutes, which bar the use of illegality defenses by employers who seek to resist compensation claims brought by illegally hired minors.⁸⁵ The basic rationale for allowing compensation in those cases is that child labor prohibitions are intended for the protection of minors, and employers should not be able to compound the benefits of their criminal activity by asserting the illegality of the contract as a shield when

under the conditions prescribed in the Workmen's Compensation Act, be entitled to compensation. Under these circumstances, her morals have nothing to do with the matter." *Id.*

82. *Nevius v. Workmen's Compensation Appeals Board*, 416 A.2d 1134, 1137 (P.A. Commw. 1980). As the *Jewel* court put the point: "Nor do we adhere to the view that the Workmen's Compensation Act should, under the guise of liberal construction, be so construed as to provide a statutory reward for immoral conduct." *Jewel*, 164 S.E.2d at 847.

83. The research finding by Farley and Barkan, that 88% of the prostituted women in their study wanted to leave prostitution, supports this conclusion. See Farley & Barkan, *supra* note 21.

84. Recent cases narrow the scope of the rule by a combination of a highly technical construction of the petition requirements, and a practical, need-based approach to determining the validity of technically sufficient challenges. For the technical angle, see *Todd v. Workmen's Compensation Appeal Board*, 692 A.2d 1086 (P.A. 1997) (holding that the date on which the employer files petition challenging widow's benefits is the date the existence of the meretricious relationship is determined; benefits not terminated when widow had married third party by the date petition was filed); *Campbell v. Workmen's Compensation Appeal Board*, 695 A.2d 976 (Pa. Commw. 1997) (termination of benefits unwarranted where meretricious relationship had ceased by the time the employer's petition was filed). For examples of substantive liberality in continuing payment of benefits, see *Bethenergy Mines, Inc. v. Workmen's Compensation Appeal Board (Sadvary)*, 570 A.2d 84 (P.A. 1990) (allowing continued receipt of benefits by widow living meretriciously with a man; basis for the decision was the fact that the widow was completely dependent on the worker's comp. benefits and lived in an economically depressed area). Cf. *Schultz*, 621 A.2d at 1243 (finding that termination of benefits was permissible where claimant had sufficient means to support herself in the relationship with the third party).

85. See 3 LARSON & LARSON, *supra* note 33, § 47.52(a).

a child is injured on the job.⁸⁶ Admittedly, criminal prohibitions against prostitution are generally not intended for the protection of prostituted women. However, courts should look behind the superficial symmetry of status among johns, pimps and prostituted women to the actual dynamics of control, responsibility, and risk, operating in prostitution transactions. By failing to do so, the fact that prostituted women, rather than pimps or johns, are the people who suffer the greatest injuries in prostitution transactions, under conditions that they can little control, remains unaddressed. This only serves to further benefit pimps and johns. This grossly inequitable distribution of benefits and risks is the basic inequity that the workers' compensation laws were intended to remedy, a purpose which the "illegal contract" shield should not continue to thwart.

2. Independent Contractor Status

Many women work in positions within the sex industry that are not illegal, and therefore they do not confront the same "illegal contract" bar facing women engaged in illegal prostitution. Nevertheless, similar issues of power, responsibility and risk confront courts in the context of claims raised in legal sex venues. Most importantly, courts must determine whether women who dance in strip clubs or perform in other live sex settings should be classified as employees (who would be eligible for workers' compensation) or as independent contractors (who would not be eligible).⁸⁷

In a majority of jurisdictions, the question is decided by reference to the common law "right of control" test. This test asks "whether the employer assumes the right to control the time, manner, and method of executing the work of the employee as distinguished from the right merely to require certain definite results in conformity with their agreement."⁸⁸ In

86. See, e.g., *Garnhum's Case*, 202 N.E.2d 255, 253 (Mass. 1964) (asserting that "[r]estrictions upon the freedom of contract imposed in the interests of society in general and for the benefit of minors in particular must be observed by those seeking to avail themselves of the services of those under age"; double compensation claim allowed for underage claimant who had lied about his age); *Lopanic v. Berkeley Cooperative Gin Co.*, 191 So.2d 108 (Miss. 1966) (holding that employer bears the burden of not employing minors under the child labor laws; double compensation recoverable by injured minor who misrepresented his age).

87. See, e.g., FLA. STAT. §§ 440.02 (13)–(15) (defining employee, employer and employment). See generally Michelle M. Lasswell, *Workers' Compensation: Determining the Status of a Worker as an Employee or an Independent Contractor*, 43 DRAKE L. REV. 419 (1994).

88. *Hanson v. BCB Inc.*, 754 P.2d 444, 446 (Idaho 1988), quoting *Burdick v. Thornton*, 712 P.2d 570, 572 (Idaho 1985). The Hansons had also urged the court to adopt an alternative test, the "nature of the work" test, *Hanson* 754 P.2d at 446 n.1, which has been adopted in other jurisdictions. See 3 LARSON & LARSON, *supra* note 33, § 45.10. The "nature of the work" test asks "(1) whether the work being done is an integral part of the regular business of the employer, and (2) whether the worker, relative to the particular employer, furnishes an independent business or professional service." *Hanson* 754 P.2d at 446 n.1. The *Hanson* court declined the Hansons' invitation to adopt this test, both on the ground that the "right to control" test had been reaffirmed in a long line of Idaho case law, and because the two tests are largely

short, if the employer can control both the result and the method of performing the work, the worker is an employee. This determination is made by reference to four factors. The four factors are: "(1) direct evidence of right or exercise of control; (2) method of payment; (3) the furnishing of equipment; and (4) the right to fire."⁸⁹

In a minority of jurisdictions, a test assessing the "nature of the work" is applied, either exclusively or as a default rule when the right to control test yields an ambiguous result. The "nature of the work" test, advocated as the better rule by Professor Larson, looks directly to

the character of the claimant's work or business—how skilled it is, how much of a separate calling or enterprise it is, to what extent it may be expected to carry its own accident burden and so on—and its relation to the employer's business, that is, how much it is a regular part of the employer's regular work, whether it is continuous or intermittent, and whether the duration is sufficient to amount to the hiring of continuing services as distinguished from contracting for the completion of a particular job.⁹⁰

While the "right to control" test examines the employment relationship by examining traditional agency principles, the "nature of the work" test evaluates the relationship from the standpoint of a major purpose of the workers' compensations laws—to distribute the risk of workplace accidents to the consumer of the product, through the entity best able to carry insurance for the accident.⁹¹

The two reported workers' compensation cases, applying the above-discussed factors in the context of sex work, both involve women who worked as dancers in strip clubs.⁹² In both cases, the courts struggled with the appropriate application of the "right to control" factors in evaluating the relationship between the clubs and the dancers who worked there. The courts' uncertainty is understandable, given that the standard itself is designed to identify an employer/employee relationship that is remote from the sexual interactions and economic arrangements typical among dancers,

overlapping in substance. *Id.*

89. See *Hanson*, 754 P.2d at 446, quoting *LARSON*, *supra* note 61, §44.00. The United States Supreme Court recited the common law factors in greater detail in *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318 (1992), holding that the common law test applies in construing the definition of "employee" in ERISA claims. See also *RESTATEMENT (SECOND) OF AGENCY* § 220 (1958) (identifying ten factors to be evaluated in distinguishing an employee from an independent contractor).

90. 3 *LARSON & LARSON*, *supra* note 33, § 43.52.

91. See 3 *LARSON & LARSON*, *supra* note 33, § 43.51. The test for employee status applied in the Federal Fair Labor Standards Act claims, the "economic reality" test should be distinguished as yet another standard. See *Brock v. Mr. W Fireworks, Inc.*, 814 F.2d 1042 (5th Cir. 1987), *cert. denied*, 484 U.S. 924 (1987).

92. *Hanson*, 754 P.2d at 447; *Cy Investment, Inc. v. National Council on Compensation Insurance*, 876 P.2d 805 (Or. 1993).

customers and owners in strip clubs. Fundamentally, the club guarantees the presence of dancers on the premises, while creating the appearance that the women are freely interacting with the patrons on their own initiative, whether on stage or off. As between the dancers and the clubs, a combination of zero or minimal wages, ad hoc scheduling and strong club rules and incentives promoting customer access to the dancers is the norm.⁹³ Under these ambiguous arrangements, club owners enjoy obvious benefits and power over dancers as a group. Because women's pay is dependent on customer tips, without meaningful club regulation of customer behavior, dancers may feel that the non-regulation of their shifts and performances by club management is their only remaining leverage for negotiating relative safety under bad working conditions, including abusive customers. Without fixed schedules and performance requirements, dancers may be able to refuse shifts, types of performances and contact with certain customers who are especially abusive.⁹⁴ However, these arrangements turn the usual independent contractor/employee distinction inside out—*neither* the dancers nor the club owners control either the process or the result of the dancers' efforts. Ultimately, it is the customer who exercises the "right to control" dancers' performances and pay. It is this right of control over women that the club owners are selling as the entertainment. And, it is customers' inclinations that the dancers must

93. Cases examining alleged federal wages and hours violations offer additional examples of the weak/strong model I am suggesting here. In *Reich v. Circle C. Investments, Inc.*, 998 F.2d 324 (5th Cir. 1993), dancers at the Lipstick and Crazy Horse Saloon were paid only in tips from customers, and in fact had to pay a nightly \$20 "tip-out" to the club to perform on the club stage. The club enforced customer access, both by tip rules, and by enforcing scheduling, tardiness and customer "mingling" times. Costume standards and final say on music selections were the only performance-specific rules imposed by the management on the dancers. *Id.* at 327. Dancers working under similar conditions at the Heavenly Bodies club, sued for minimum wage violations in *Reich v. ABC/York-Estes Corp.*, 157 F.R.D. 668 (N.D. Ill. 1994). The dancers paid a larger nightly "tip-out" of \$50-\$60 and the club specified dance movement and table dance procedures. *Id.* at 679. At the Cabaret Royale, sued in *Reich v. Priba Corp.*, 890 F. Supp. 586 (N.D. Tex. 1995) for similar minimum wage violations, dancers only had to sign in on a shift schedule, had no dance rotation shifts, and were not explicitly required to interact with customers. Nor were dancers required to have prior dance experience or conform their dances to any performance standards. They received no wages and the club acknowledged that "the ability to engage in conversation with club patrons and develop continuing relationships could increase an entertainer's revenue." *Id.* at 591.

94. One dancer states: "I directed my lighting and music if I chose to dance on stage at all; decided whether, when, and for whom to perform personal dances; took breaks as I saw fit; and even danced barefoot when I liked." Stacy Reed, *All Stripped Off, in WHORES AND OTHER FEMINISTS*, *supra* note 10, at 179-80. However, the same author, describes the following working conditions as typical:

Strippers in Texas make \$20 for three minutes of undulation. A half hour of seductive behavior and two taxing deadbeats could precede that money. Four-inch heels ruin the back and feet. Few clubs offer health insurance. Every several weeks the drunken asshole turns up. Other strippers, DJs, and managers can all drain a dancer. Suffocating smoke and blaring music are no picnic either.

Id. at 186.

satisfy, to get paid at all.

This displacement of the right to control, from the club owners onto the customers, helps explain the confusion evident in judicial treatment of the issue in the context of stripping. In *Cy Investment*, the Oregon appellate court reviewed an agency determination that twenty-two dancers at Cy's Parkrose Pub were not "workers" under the "right of control" test.⁹⁵ Facts concerning the pub's method of hiring dancers, scheduling and payment practices, and supervision of performances were uncontested. Women who successfully auditioned at the pub could sign up for shifts on a weekly schedule. Many of the women performed at other clubs, with half using "agents" to obtain bookings.⁹⁶ Dancers were paid a fee for every shift worked, averaging \$6.00 an hour. In addition to these wages, dancers earned "substantial tips, which exceeded their wages."⁹⁷ The dancers signed a form contract at the end of each shift, indicating the hours of each woman's shift and compensation received. The form also indicated that the dancer was responsible for her own taxes and workers' compensation; the dancers generally reported their earnings on Schedule C forms, deducting as business expenses the cost of costumes, tanning and professional grooming.⁹⁸ Cy's reported the compensation paid to the dancers to the IRS on Form 1099s, as "non-employee compensation." Supervision of dancing performances was limited to regulation of time spent on and off stage; dancers provided their own costumes and music. Fines were imposed for: "failing to confirm their scheduled appearances, tardiness, failing to complete their shift, and touching the mirrors on the stage."⁹⁹

Similar arrangements were the norm in *Hanson*.¹⁰⁰ In testimony before the state Industrial Commission, the owner of the Hide-Out Saloon and Patrice Hanson's husband detailed the work arrangements between the Hide-Out and the dancers who worked there. As in *Cy Investment*, Hanson had no written employment contract. Scheduling was likewise relatively *ad hoc*, although there was conflicting testimony on the point. Hanson's husband testified that Patrice Hanson danced three to five nights per week,

95. *Cy Investment*, 876 P.2d at 806.

96. *Id.* I put "agents" in quotation marks because I am less convinced than the court evidently was that these persons functioned as ordinary entertainment agents. Lisa Sanchez recounts this exchange between a dancer and herself on the subject of agents:

Heidi: . . . I've been through many of 'em [agents] that, "OK, well, if you do this or this, I'll give you this shift." They would sit there and bribe the girls for money shifts.

L.S.: What did they want from you?

Heidi: Oh, just blow jobs, you know, just under the desk. Take 'em home, whatever. It's a sex business. That's all there is to it.

Sanchez, *supra* note 14, at 567.

97. *Cy Investment*, 876 P.2d at 806.

98. *Id.* at 806.

99. *Id.*

100. *Hanson v. BCB, Inc.*, 754 P.2d 444, 445 (Idaho, 1988).

at the owner's discretion. The owner testified that the dancers scheduled themselves on a sign-up calendar, and that Patrice Hanson often came in later than the 4:00 p.m. starting time and left before the 1:00 a.m. quitting time. As in *Cy Investment*, dancers had to supply their own costumes; although in *Hanson*, the bar provided the music. The Hide-Out paid less than a minimum wage. Hanson's pay, and that of the other dancers, was a split of the cover charges (divided solely and equally among the dancers), the tips each woman received from customers and one free drink a night.

With respect to the first, second and fourth "right to control" factors, the *Cy Investment* court reached ambiguous results. Analyzing the first "right of control" factor, control over the method of performance, the court found the facts divided. The pub evidently exercised some right of control. The employer defined the lengths of the dancers' shifts and fined the dancers for violating shop rules. On the other hand, because the dancers scheduled themselves, the employer did not control when or how frequently the dancers worked. In addition, the court considered relevant the facts that the employer did not restrict the dancers from working at other clubs, nor did the employer specify the dancers' costumes, music or dance routines. The court likewise found the second factor, the "method of payment," ambiguous. Tax behavior by both employer and employees suggest that parties viewed the arrangement as employer/independent contractor. However, the fee structure could suggest an hourly rate rather than a full shift, per-performance payment.¹⁰¹ The fourth factor, the "right to fire" factor, likewise tipped uncertainly between facts suggesting employment and those suggesting independent contractor status. On the one hand, Cy's had never terminated a dancer mid-shift, and never cancelled a previously scheduled shift. However, Cy's could, and did, retain the right not to invite a woman to sign on to the next weekly schedule, effectively exercising a right to fire given the brief duration of the period of contracted work.¹⁰²

However, these facts take on a somewhat different significance if analyzed in the context of customer-dancer interaction. As I suggested earlier, the ambiguities the *Cy Investment* court discern track a sale of control over the dancers, from the club to the customer. The club's minimal scheduling and loosely imposed hire-and-fire practices meet the basic requirement of doing business as a strip club—ensuring that some women will be present and available for full shifts to keep the customers there all night. It is this access that the club is selling to the customer. Once the women are placed in front of the customers, the customers, not the club or the dancers, determine what demands the women must meet. This arrangement is structured via the method of payment: while the club

101. See *Cy Investment*, 876 P.2d at 807.

102. *Id.* at 808.

pays the women a shift fee, tips from customers represent the women's primary income.¹⁰³ As Lisa Sanchez explains,

women were encouraged by club management and coaxed with their only source of income—their tips—to engage in illegal activities, but they were expected to assume all of the risk of those activities. . . . [H]abitual violations of rules, illegal touching, and egregious cases of sexual harassment . . . [are] a routine part of strip-industry culture.¹⁰⁴

The *Cy Investment* court's analysis of the "right of control" factors shields the customer's control from sight, thereby distorting these dynamics beyond recognition. By this move, the court allocates to the *dancer* the autonomy and control actually exercised *over* her by the customer, while also compromising her right of recovery against the club owner.

For me, the courts' treatment of the third "right of control" factor raises the most poignant issues. The third factor asks who furnishes the equipment used for the job. It was the equipment factor that was contested on appeal in *Hanson*,¹⁰⁵ but was the one factor that the *Cy Investment* court weighed unambiguously in favor of independent contractor status.¹⁰⁶ Nor did the courts agree what the relevant equipment is, for the purpose of evaluating this factor. However, both courts evaded the key issue of what the *job* of stripping is, and consequently could not address the equipment question squarely.

Patrice Hanson's body was the item of "equipment" analyzed *Hanson*—both the Industrial Commission and a dissenting judge on appeal treated her as worker-supplied "equipment."¹⁰⁷ The equipment is an "exotic dancer's body when she is engaged in her dancing before the patrons of a saloon."¹⁰⁸ However, the majority of the appellate court rejected this classification.¹⁰⁹ The court reasoned that because in cases involving personal services, both employees and independent contractors

103. The arrangement in *Hanson* with respect to these factors was similar: minimal employer involvement in shift compliance; performance demands enforced by the customers; all forms of payment (cover charges and tips) fixed by immediate customer satisfaction. *Hanson*, 754 P.2d at 445. Unsurprisingly, the Industrial Commission found that all of these factors weighed in favor of independent contractor status. *Id.* See also *supra* note 93.

104. Sanchez, *supra* note 14, at 566.

105. The appellate court did not address the sufficiency of the evidence to support the commission's conclusions respecting the other three factors. As to the first factor, the commission found that the saloon "did not assume the right to exercise direction over the time, manner, method and details of work performed by deceased." *Hanson*, 754 P.2d at 445. As to the second, the commission stated that "the dancers chose their own days and hours of work." *Id.* Finally, as to the fourth factor, "the method of pay was consistent with that of an independent contractor." *Id.*

106. See *Cy Investment*, 876 P.2d at 808.

107. *Hanson*, 754 P.2d at 447.

108. *Id.* at 448 (McFadden, J., dissenting).

109. *Id.* at 447.

typically supply the body doing the work, the test must refer to equipment of a different kind.¹¹⁰ The court treated the dancer's use of her body as equivalent to the uses to which a carpenter's arm or mail carrier's legs are put. The sort of equipment to which the test properly refers, the court stated, "include such things as tools, machinery, special clothing, parts and other similar items necessary for the worker to accomplish the task to be performed," not the worker's body.¹¹¹

In contrast, the *Cy Investment* court did not address the status of the dancers' bodies as equipment. The items of equipment under scrutiny there only included the dancers' costumes, the music and the stage. The dancers provided their own costumes and music (or paid Cy's for the use of its jukebox).¹¹² The equipment arguably provided by the employer (the stage) was not viewed as equipment at all, but simply as the "site" of the performance.¹¹³ On these facts, the trial court held that the dancers were not workers.¹¹⁴

Neither court's analysis is compelling. In *Hanson*, the court denies the basic unavoidable bottom line about stripping and nude dancing that, unlike the use of the body in carpentry or mail delivery, the woman's sexualized body *is* the commodity and access to her body the service. By not honestly confronting how women's bodies are actually used as entertainment commodities in strip clubs, the *Hanson* court normalizes stripping as a regular job in an apparent effort to support the dignity of the women performers. In *Cy Investment*, the court addresses the "equipment" status of the props and trappings of the women's dancing performances—the costumes, the music, and the stage—again without addressing the extent to which the job itself has to do with dancing at all. In short, both courts address the equipment question, without ever engaging directly in the question of *what* job the equipment is used to perform.

Throughout this discussion, I have addressed the legal standards used in workers' compensation systems to define job-relatedness and employee status as applied to prostitution and stripping. These legal standards not only inadequately capture the experience of the women involved, but also undermine the ability of women to recover compensation. Another, more appropriate source of public benefits for women in sex industries, may be disability programs. These programs do not require proof of a connection between a person's benefits claim and an employment relationship. I now turn to one such program, the federal Supplemental Security Income (SSI) benefits program.

110. *Id.*

111. *Id.*

112. *Cy Investment*, 876 P.2d at 808.

113. *Id.*

114. *Id.*

II. SUPPLEMENTAL SECURITY INCOME PROGRAMS

The important role of SSI benefits in the lives of women resisting prostitution is well known, at least anecdotally. So too, is the impact of benefit cuts in pushing women into the practice. As one woman explained after becoming homeless when dropped from the SSI disability program during the Reagan administration's notorious eligibility review, "I tried prostitution. . . . I never in the world would have thought about doing anything like that under normal circumstances. But, I mean, what else could I do? Welfare's not there for me anymore."¹¹⁵ Under the current federal program, benefits are available for persons who are disabled, aged or blind and are intended to guarantee a minimum income level.¹¹⁶ Unlike worker's compensation plans, SSI benefit eligibility is predicated directly on the existence of a disabling condition, without regard to the cause of the impairment or the employment status of the disabled person. The key eligibility provision in the statute defines "disability" as:

[I]nability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months.¹¹⁷

Disabling conditions, which meet the statutory standards and which are common among women in prostitution, include depression-related impairments,¹¹⁸ anxiety disorders,¹¹⁹ problems with concentration associated with anxiety,¹²⁰ organ damage from beatings¹²¹ and foot and back injury from dancing.¹²² A significant restriction on the scope of

115. See ROB ROSENTHAL, *HOMELESS IN PARADISE: A MAP OF THE TERRAIN* 64 (1994).

116. "The basic purpose underlying the supplemental security program is to assure a minimum level of income for persons who are 65 or over, or who are blind or disabled and who do not have sufficient resources to maintain a standard of living at the established Federal minimum income level." 20 C.F.R. § 416.110 (1998).

117. 42 U.S.C. § 423(d)(1)(A) (West 1994).

118. See, e.g., *Woody v. Secretary of Health and Human Services*, 859 F.2d 1156 (3d Cir. 1988) (uncontested evidence that claimant had become unable to do anything for himself, was in a reactive depression and was totally disabled, justified setting aside ALJ's denial of benefits).

119. See, e.g., *Marcotte v. Callahan*, 992 F. Supp. 485 (D.N.H. 1997) (anxiety disorder limiting claimant's tolerance in dealing with the public).

120. See, e.g., *Sheffield v. Callahan*, 9 F. Supp. 2d 75 (D. Mass. 1998) (seems to indicate functional limitations due to anxiety or depression, difficulty maintaining concentration and attention, understanding and remembering detailed instructions and other mental demands may rise to the level of disability).

121. See, e.g., *Kelly v. Celebrezze*, 220 F. Supp. 611 (W.D.S.C. 1963) (dysfunction of the limbs or other organs of the body).

122. See, e.g., *Lopez Diaz v. Secretary of Health, Education and Welfare*, 585 F.2d 1137, 1141 (1st Cir. 1978) (ankle synovitis and calcaneal spurs, rendering employee unable to travel to and from a workplace, relevant to disability determination); *Nettles v. Schweiker*, 714 F.2d 833, 837 (8th Cir. 1983) (ankle injury and resultant pain); *Brown v. Heckler*, 787 F.2d 447, 449 (8th Cir. 1986) (back pain in lower back).

compensable impairments was enacted in 1994, which excluded impairments to which alcoholism or drug addiction would be a "contributing factor material to [agency] determination that the individual is disabled."¹²³ Despite the alcoholism and addiction exclusion, SSI benefits should be pursued on behalf of women with histories in prostitution—especially in light of the severe post-traumatic stress disorder symptoms that often affect women's recovery and employment paths.

A basic issue affecting the availability of SSI benefits for women in prostitution is whether prostitution or stripping may be considered a source of income thus barring eligibility for disability benefits. By statute, a disability claimant must be denied benefits if the claimant is working and engaging in "substantial gainful activity."¹²⁴ If the claimant is so engaged, her claim is rejected without regard to her medical condition.¹²⁵ Here again, the question of whether prostitution is work reenters the discussion, this time as the determinative factor in determining whether a disability is provable. In contrast to the workers' compensation programs, the statute and current case law apparently endorse the status of prostitution as a job. These rules effectively bar disability benefits claims for women in prostitution and force women back to prostitution for their sole source of income.

This result has been reached in two doctrinal steps. The first step was the determination that illegal transactions can be properly considered substantial gainful activity under the law. This issue was first entertained by the courts without explicit guidance from Congress or agency regulation. In the early 1990s, a series of district court and appellate court cases involving claimants engaged in drug dealing, thievery or prostitution, held that income-generating activity need not be lawful to constitute substantial gainful activity. The fact that the claimant's work activity is illegal is irrelevant to the disability determination.¹²⁶ In reaching this conclusion, the courts stressed the unfairness that would result if illegally-obtained earnings were ignored in disability determinations. In one case involving a claimant's drug dealing, the court explained:

123. 42 U.S.C. §§ 423(d)(2)(C) (West 1996). For analysis of the constitutionality and congressional intent of this amendment, see *Stengel v. Callahan*, 983 F. Supp. 1154 (N.D. Ill. 1997). See also Linda G. Mills & Anthony Arjo, *Disability Benefits, Substance Addiction, and the Undeserving Poor: A Critique of the Social Security Independence and Program Improvement Act of 1994*, 3 GEO. J. ON FIGHTING POVERTY 125 (1996).

124. 42 U.S.C. § 423(e)(1) (West 1998) ("No benefit shall be payable . . . to an individual for any month . . . in which he engages in substantial gainful activity. . .").

125. 20 C.F.R. § 416.920(a) (West 1998) ("If you are doing substantial gainful activity, we will determine that you are not disabled."). See *id.* § 416.920(b) (1998) ("If you are working and the work you are doing is substantial gainful activity, we will find that you are not disabled regardless of your medical condition or your age, education, and work experience.").

126. See *Mooney v. Shalala*, 889 F. Supp. 27 (D.N.H. 1994) (drug dealing constitutes substantial gainful activity).

The term 'gainful activity' could be thought to imply lawful work, for it would be incongruous to describe even a very prosperous thief as "gainfully employed." But there would be an even greater incongruity in disregarding earnings from criminal activity. For then as between two people earning the same amount of money, one legally and the other illegally, the former would be disentitled to seek social security disability benefits and the latter would be entitled to seek them. The thief would be qualified, the honest man disqualified.¹²⁷

In 1994, Congress amended the Social Security Act to be consistent with this line of cases by affirming that the legality or illegality of the activities generating income for the claimant was irrelevant to the question of whether the activities constitute substantial work activity.¹²⁸ Thus, it seems clear that the fact that prostitution is illegal will be no bar to disallowing benefits to a woman who, in the factfinder's opinion, is engaged in "substantial gainful activity" by prostitution.

The second doctrinal step was determining whether prostitution falls within the statutory definition of substantial gainful activity. By regulation, substantial gainful activity has been defined as "work activity that is both substantial and gainful."¹²⁹ These elements can be proven by either a factual application of a two-prong test, or by a presumption based on monthly income. Under the first element of the two-prong test, work activity is substantial if it "involves doing significant physical or mental activities."¹³⁰ Here, the factfinder considers the nature of the tasks comprising the claimant's work activity. The relevant inquiry is the extent

127. *Bell v. Commissioner of Social Security*, 105 F.3d 244, 246 (6th Cir. 1996), *quoting* *Jones v. Shalala*, 21 F.3d 191, 192 (7th Cir. 1994). *See also* *Dotson v. Shalala*, 1 F.3d 571 (7th Cir. 1993). The statutory inclusion of illegal activities in the definition of substantial gainful activity did not apply in Ms. Bell's case because she filed her claim prior to the effective date of the new provision. However, The 1994 amendment reflects a congressional position congruent with the rationale expressed in *Jones* and reaffirmed in *Bell*.

128. 1994 U.S.C.A.N. (108 Stat.) 1464, 1499 (amending 42 U.S.C. § 423(d)(4)). This amendment approved a line of cases holding to the same effect, involving disability claims by persons involved in drug dealing, thievery or prostitution. *See* *Dotson v. Shalala*, 1 F.3d 571 (7th Cir. 1993) (theivery); *Jones v. Shalala*, 21 F.3d 191 (7th Cir. 1994) (petty theft); *Corrao v. Shalala*, 20 F.3d 943 (9th Cir. 1994) (drug dealing); *Bell v. Commissioner of Social Security*, 105 F.3d 244 (6th Cir. 1996) (prostitution); *Hardaway v. Arpel*, No. 96-56594, 1998 WL 19540 (9th Cir. Jan. 15, 1998) (drug dealing); *Mooney v. Shalala*, 889 F. Supp. 27 (D.N.H. 1994) (drug dealing constitutes substantial gainful activity); *Speaks v. Sec'y of Health and Human Services*, 855 F. Supp. 1108 (C.D. Cal. 1994) (prostitution); *Bell v. Sullivan*, 817 F. Supp. 719 (N.D. Ill. 1993); *Jones v. Sullivan*, 804 F. Supp. 1045 (N.D. Ill. 1992); *Dugan v. Bowen*, No. 87-3713, 1989 WL 281911 (S.D. Ill. Nov. 8, 1989) (unpublished), *rev'd on other grounds sub nom*; *Dugan v. Sullivan*, 957 F.2d 1384 (7th Cir. 1992); *Hart v. Sullivan*, 824 F. Supp. 903 (N.D. Cal. 1992); *Moore v. Sullivan*, 1992 WL 199257 (N.D. Ill. Aug 4, 1992) (unpublished). *Cf.* *Hammonds v. Celebrezze*, 260 F. Supp. 992 (N.D. Ala. 1965) (claimant's illegal manufacture of whiskey not conclusive evidence of SGA absent evidence of earnings).

129. 20 C.F.R. § 416.972, 416.910.

130. *Id.* at § 416.972 (a) (defining "substantial work activity").

to which the activity requires the use of "expertise, skills, supervision, and responsibilities."¹³¹ In applying this test, the legal status of the claimant's activities may bear indirectly on the substantiality analysis. As the court in *Corrao v. Shalala* concluded, some practices involved in drug dealing may fail to meet the substantiality test where the claimant's activities offer "no indication of initiative, organization, responsibility, or physical or mental exertion."¹³² Under the second, "gainfulness" prong of the test, work activity is gainful if it "is the kind of work usually done for pay or profit."¹³³ In any case, income over \$500 per month creates a rebuttable presumption of substantial gainful activity.¹³⁴ Thus, if prostitution is considered a substantial gainful activity, either under the two-prong test or presumptively, claimants may be denied the means to escape the prostitution—the prostitution that is likely the cause of the alleged disability in the first place.

There is case law which so holds, relying primarily on income presumption as the determinative method of proof. In *Bell v. Commissioner of Social Security*, the Sixth Circuit denied Melinda Bell's SSI claim alleging disability due to chronic cocaine and alcohol dependence.¹³⁵ The court cited evidence that the claimant earned over \$500 a month from prostitution. In *Love v. Sullivan*, Cynthia Love was denied both SSI and SSDI benefits because she was engaged in substantial gainful activity as a prostitute, earning between forty-five and eighty dollars a day.¹³⁶ Finally, in *Speaks v. Secretary of Health and Human*

131. *Id.* at § 416.973(a). See also *id.* at § 416.973(b). Work that is performed inadequately or that is "make-work" is not considered substantial gainful activity:

If you do your work satisfactorily, this may show that you are working at the substantial gainful activity level. If you are unable, because of your impairments, to do ordinary or simple tasks satisfactorily without more supervision or assistance than is usually given to other people doing similar work, this may show that you are not working at the substantial gainful activity level. If you are doing work that involves minimal duties that make little or no demands on you and that are of little or no use to your employer, or to the operation of a business if you are self-employed, this does not show that you are working at the substantial gainful activity level.

Id. at § 416.973(b).

132. *Corrao v. Shalala*, 20 F.3d 943, 949 (9th Cir. 1994). The court based this conclusion on the grounds that Corrao's activities, as a go-between between dealers and buyers in return for drugs, occupied less than an hour a day, most of which was spent riding as a passenger in a car. Further, Corrao's activities "did not require any significant mental or physical exertion," and he "did no planning," "did not use his own money for the transactions" and received his payment in drugs. In addition, the court differentiated Corrao's activities from "traditional employment" or from pursuing a "sole proprietorship." *Id.*

133. See 20 C.F.R. § 416.972(b)(1998) (defining "gainful work activity").

134. *Id.* at § 416.974 (b)(2)(vii) (\$500 in monthly earnings will ordinarily show that the claimant has been engaged in substantial gainful activity). See also *Dugan v. Sullivan*, 957 F.2d 1384, 1390 (7th Cir. 1992).

135. See *Bell v. Commissioner of Social Security*, 105 F.3d 244, 246–47 (6th Cir. 1996).

136. *Love v. Sullivan*, No. 91C7863, 1992 WL 86193 at *3 (N.D. Ill. April 22, 1992) (The focus of the court's analysis in *Love* was on the significance, if any, to be placed on the legal/

Services, claimant Veda Speaks was denied disability benefits on the ground that she had been making at least \$600 a month for over twenty years in the practice of prostitution.¹³⁷

In *Speaks* and *Bell*, the courts further evaluated whether the income presumption had or could have been rebutted by other factors. The relevant statute is silent on what factual showing rebuts the income presumption. In *Bell*, the claimant offered proof that her prostitution was "symptomatic of a serious mental disorder and . . . was driven by her drug addiction."¹³⁸ The court deemed these considerations irrelevant to the disability determination. The claimant's proffer, the court explained, confused the fact of the claimant's earnings with the question of what motivated her. The court reasoned that only the fact of the claimant's earning power is of interest under the statute. "The case law is clear that it does not matter what motivates plaintiff to earn income from illegal prostitution."¹³⁹ Similarly, in *Speaks*, the magistrate treated as rebuttable only those factors relevant to the determination of whether the claimant's activities were substantial and gainful. The magistrate concluded that prostitution is "real world employment" thereby satisfying the substantial-and-gainful test. The court distinguished this case from *Corrao*, in which intermittent and passive drug-dealing activities were found insubstantial.¹⁴⁰ The *Speaks* magistrate went further and rejected as legally irrelevant the claimant's assertion that she was mentally and physically incapable of performing any other work than prostitution.¹⁴¹

The results in these cases are wrong. As the *Speaks* magistrate bluntly pointed out, "the Secretary's denial of plaintiff's claim for SSI—without deciding that the plaintiff is capable of any other activity—is tantamount to telling her that it is expected that in the future she will earn her living through prostitution."¹⁴² This result is wrong, first, because it amounts to state-sponsored pimping. Second, it is wrong because by failing to examine whether in fact a claimant's prostitution activities were "substantial," these holdings are doctrinally incomplete. Tracy Clements, in her thorough examination of these cases, faults the *Speaks* opinion in particular for ignoring the evidence that might have rebutted the relied

illegal activity distinction. As other courts of the period held, the *Love* court concluded that "[t]he illegality of her occupation does not negate the fact that Love has a substantial source of income.").

137. See *Speaks v. Sec'y of Health and Human Services*, 855 F. Supp. 1108, 1112 (C.D. Cal. 1994).

138. *Bell*, 105 F.3d at 246–47.

139. *Id.* at 247 (citing *Corrao v. Shalala*, 20 F.3d 943, 947 (9th Cir. 1994), for the proposition that an addict who is able to function in society, albeit illegally, indicates that she is not disabled for SSI purposes).

140. *Speaks*, 855 F. Supp. at 1113. See *supra* note 132 for a summary of the *Corrao* facts.

141. *Speaks*, 855 F. Supp. at 1113.

142. *Id.* at 1111.

upon income presumption.¹⁴³

These are already significant criticisms, but it is the third error in reasoning that I find most disturbing. Suppose that these were claims brought by combat survivors whose disabilities included post-traumatic stress disorder and physical impairments. It would, I believe, be unthinkable for an administrative law judge to deny the soldiers' benefits claims on grounds that they had earned more than \$500 a month while on active duty (and implying that the answer for them is to re-enlist). Likewise here, the very activities tacitly treated as "substantial" in these opinions are the circumstances causing the claimed disabling condition. Even worse, the symptoms of disabling post-traumatic stress, experienced by prostituted women, which include dissociative illness, insomnia, profound depression and anxiety, are emotional states that enable women to continue to function—albeit self-destructively—in the sex industry. The more a woman shuts down, numbs herself and the more traumatized she is, the more she may feel she can take one more day of it. On the logic of the *Speaks* opinion, the SSI program not only refuses disability benefits to prostituted women, the program professionalizes disability.

III. BEYOND THE WORK-DISABILITY DICHOTOMY: TOWARD PUBLIC BENEFITS FOR SEX-BASED TRAUMA.

As the foregoing analysis has demonstrated, whether prostitution is viewed as a job or as a disabling condition, prostituted women's legal entitlements to public benefits are deeply compromised in either case. A more promising, third alternative may be found in an unlikely text: the 1996 federal welfare reform bill.¹⁴⁴ I refer to that document as an unlikely source of support for women's needs since the measures mandated by the statute eliminate, destabilize and reduce federal benefits for poor mothers generally.¹⁴⁵ However, one provision of that bill, dubbed the Family Violence Option, authorizes state recipients of federal welfare block grants to waive durational and other restrictions on benefit eligibility for certain domestic violence victims. Waivers may be extended if the recipient can demonstrate first, a history of domestic violence, and second, that

143. Clements, *supra* note 6, at 79. Clements observes:

[T]he court made no reference to how often *Speaks* solicits or engages in prostitution, how much she is paid for each service provided, whether her activities require a substantial investment of time, or to what degree her activities are physically exerting.

Id.

144. Pub. L. No. 104-193, 1996 U.S.C.A.N. (110 Stat.) 2105 (codified as amended in scattered sections of 7, 29, 42 U.S.C.).

145. The new law mandates a sixty month, lifetime cap on receipt of benefits. See Personal Responsibility Act, 42 U.S.C. § 608(a)(7)(A) (West 1997) (federal block grants for state-designed welfare programs). See also *id.* at § 603(a)(7)(A) (explicitly declares that no individual is entitled to assistance under any state program funded by these federal block grants).

compliance with ordinary restrictions would "make it more difficult for individuals receiving assistance . . . to escape domestic violence or unfairly penalize such individuals who are or have been victimized by such violence, or individuals who are at risk of further domestic violence."¹⁴⁶ The statute defines domestic violence as "battered or subjected to extreme cruelty," which is defined as:

- (I) physical acts that resulted in, or threatened to result in, physical injury to the individual;
- (II) sexual abuse;
- (III) sexual activity involving a dependent child;
- (IV) being forced as the caretaker relative of a dependent child to engage in nonconsensual sex acts or activities;
- (V) threats of, or attempts at, physical or sexual abuse;
- (VI) mental abuse; or
- (VII) neglect or deprivation of medical care.¹⁴⁷

These provisions were enacted in response to feminist lobbying on behalf of battered women—backed up with research evidence that domestic violence is a significant barrier to many women seeking education and employment.¹⁴⁸

146. Pub. L. No. 104-193 § 103, 1996 U.S.C.C.A.N. (110 Stat.) 2105, 2112 (amending 42 U.S.C. 601 et seq.). A related provision, dubbed the Hardship Exception, authorizes states to exempt recipients from duration limits "by reason of hardship or if the family includes an individual who has been battered or subjected to extreme cruelty." 42 U.S.C. § 608(a)(7)(C)(i) (West Supp. 1997). The statute permits only a limited number of waivers to be granted under the Hardship Exemption. *Id.* at § 608(a)(7)(C)(ii). Whether the same restriction, or others, apply with respect to waivers granted under the Family Violence Option is in some doubt. See Jennifer M. Mason, *Buying Time for Survivors of Domestic Violence: A Proposal for Implementing an Exception to Welfare Time Limits*, 73 N.Y.U. L. REV. 621, 634-37 (1997). For analysis of the needs of domestic violence victims, and policy implications of meeting those needs in welfare legislation, see Jody Raphael, *Domestic Violence and Welfare Receipt: Toward a New Feminist Theory of Welfare Dependency*, 19 HARV. WOMEN'S L.J. 201 (1996).

147. Personal Responsibility Act, 42 U.S.C. § 608(a)(7)(C)(iii).

148. The Family Violence Option provision was drafted by Martha Davis, Legal Director of the NOW Legal Defense and Education Fund, and Joan Meier, Professor at George Washington School of Law. See Felicia Kornbluh, *Feminists and the Welfare Debate: Too Little? Too Late?*, DOLLARS & SENSE, Nov./Dec. 1996, at 24, 39. For a review of research findings supporting domestic violence waivers, see Jody Raphael, *Domestic Violence and Welfare Receipt: Toward a New Feminist Theory of Welfare Dependency*, 19 HARV. WOMEN'S L.J. 201 (1996). See also Mason, *supra* note 146, at 638-52; Maria L. Imperial, *Self-Sufficiency and Safety: Welfare Reforms for Victims of Domestic Violence*, 5 GEO. J. ON FIGHTING POVERTY 3 (1997); Jody Raphael, *Domestic Violence and Welfare Receipt: The Unexplored Barrier to*

Federal and state support for the Family Violence Option offers hope to prostituted women on several levels. First, on its face the statutory waiver option should already be available to women who have been prostituted or have otherwise been used in the sex industry, and who meet the other eligibility criteria for receipt of benefits.¹⁴⁹ The conditions defining "extreme cruelty" under the statute clearly track the routine intimidation, coercion and abuse suffered by prostituted women—abuse that is often inflicted routinely during the important developmental stages in a young woman's life.¹⁵⁰ Second, federal policy choices, favoring the maintenance of the social safety net, at least for victims of sexual and physical violence, could and should represent the beginnings of an economic and medical recovery program tailored to the needs of sexual trauma survivors. Among sexual trauma survivors, prostituted women are among the most deeply affected.

The 1996 Family Violence Option is only one example of such supportive intervention. Congressional and agency endorsement of federal policy measures favoring continued welfare support for sexually victimized women continues to build.¹⁵¹ These initiatives link government policy support for battered women's receipt of public benefits with the commitments underlying existing federal criminal sanctions and civil rights remedies extended to victims of gender-based violence under the Violence Against Women Act.¹⁵² As Jennifer Mason points out, taken together,

Employment, 3 GEO. J. ON FIGHTING POVERTY 29 (1995).

149. The most significant criteria are indigency and caretaking responsibility for a minor child. Many prostituted women meet these criteria.

150. Patricia Murphy reports that domestic violence is especially injurious to young women between the ages of 13 and 26, when young women should be building job skills and developing a work identity. See PATRICIA A. MURPHY, MAKING THE CONNECTIONS: WOMEN, WORK AND ABUSE 191 (1994).

151. The authors of the Family Violence Option in the Senate, Paul Wellstone and Patty Murray, introduced new legislation last year expressing affirmative congressional support for the adoption of state waivers, and harmonizing the Family Violence Option with the Hardship Exemption, providing that no numerical cap be imposed on the waivers authorized under the Family Violence Option and that recipients so waived not be counted in determining state compliance with work participation rates. See A Bill To Clarify The Family Violence Option Under The Temporary Assistance To Needy Families Program, S. 671, 105th Cong. § 1(1) (1997) (expressing congressional intent in enacting Personal Responsibility Act); *Id.* at § 2(a) (proposed amendment to the Personal Responsibility Act, 42 U.S.C. § 602(a)(7) (West Supp. 1997)).

The Department of Health and Human Services proposed a new rule in November, 1997 waiving penalties against states for failure to achieve work participation rates or exceeding the federal cap on exceptions where these defaults are attributable to waivers based on domestic violence. See Temporary Assistance for Needy Families Program (TANF) Proposed Rule, 62 Fed. Reg. 62,124 (1997) (to be codified at 45 C.F.R. pt. 270-275) (proposed Nov. 20, 1997). These initiatives are explained in detail in Mason, *supra* note 146, at 634-37.

152. See 18 U.S.C. §§ 2261-2262 (1994) (creating criminal penalties for crossing state lines with intent to injure or intimidate a spouse or intimate partner, or to violate an order of protection). See also 42 U.S.C. § 3796 (West 1994) (creating a civil cause of action for remedies for violations of right to be free from gender motivated violence).

these measures "indicate[] that Congress believes that survivors of domestic violence have a compelling claim on federal resources, and further suggest[] that Congress wants to encourage states to expend their resources to aid survivors of domestic violence."¹⁵³ The next advocacy step—public benefits for trauma recovery itself—seems both obvious and practicable on the existing political landscape.

Moving toward a model of public benefits for trauma recovery also removes the case of prostitution from the no-win, work-or-disability debate, which freezes women out from eligibility under both benefit programs. By anchoring eligibility criteria in women's trauma recovery needs, women's experience of prostitution emerges *as* a traumatic event, no longer remaining buried under a pile of hush money that labels sexual exploitation as "work" or "substantial gainful activity." An immediate, additional step furthering this acknowledgement process would be to amend existing definitions of "work activity" in current state welfare laws. These definitions fix the rules for mandatory work participation required of welfare recipients for continued receipt of benefits.¹⁵⁴ States should enact exclusion provisions, explicitly excluding prostitution, stripping and any other legal or illegal sexual entertainment from the definition of "work" or "employment" for this statutory purpose. For example, such a provision would bar welfare caseworkers from requiring a woman to take a job at a strip club as a condition for receiving benefits.¹⁵⁵ Prohibiting state mandated sex work in this way is also consistent with commitment to the principle that no woman be required to participate in prostitution or other sex industry practices in an egalitarian, inclusive society.

In offering these proposals, I am sadly mindful of the vicious attacks made on single, young mothers in the course of the last rounds of welfare "reform" in the mid-1990s. These attacks fed on the same stereotypes that

153. Mason, *supra* note 146, at 637.

154. For example, the definition of "work activity" in the Florida law, now called the "Work and Gain Economic Self-sufficiency (WAGES) Act," refers generally to "full-time or part-time employment" in the private sector that may be mandated of welfare recipients. *See* FLA. STAT. ch. § 414.065(1)(a) (1998). No other definition of employment appears in the statute. Similar provisions appear in the new California and New York welfare-to-work statutes. *See* CAL. WELF. & INST. CODE § 11322.6 (a-q) (West Supp. 1997); NEW YORK SOC. SERV. LAW Title 9-B, § 336 (McKinney 1997). A general non-discrimination clause is included in the work participation requirements in these statutes. The Florida version states that "[e]ach participant is subject to the same health, safety, and nondiscrimination standards established under federal, state, or local laws that otherwise apply to other individuals engaged in similar activities who are not participants in the WAGES program." FLA. STAT. § 414.065 (11)(a). *See* CAL. WELF. & INST. CODE § 11322.62 (non-discrimination clause); NEW YORK SOC. SERV. LAW § 331 (3), § 336 (e-f). No substantive exclusions of categories of employment, as I suggest here, exist in the state statutes cited above.

155. Nothing in this proposal should prevent an administrative agency or court from treating prostitution or sex work as an injurious practice for purposes of awarding Social Security or workers' compensation benefits. This proposal would only prohibit *mandated* sexual entertainment practices, imposed as a condition of welfare eligibility.

have always stigmatized prostituted women: that women's destitution and sexual vulnerability can be explained away as products of bad choices or of the "culture of poverty" or as evidence of greedy character. If politicians and policymakers chose to abandon needy young mothers, and forfeit the needs of children for intimate parenting, what hope is there for the claims of prostituted women?

I think that hope lies in the truths about our lives that women have the courage to tell, and in the willingness, however attention-deficit-disordered, of legal decisionmakers to hear those truths. The last moment that truth can be told about women, I think, is the moment just before she is dehumanized and turned into a thing, a stereotype and a pathology. In our society, that transforming moment occurs when a woman is beaten. That is the moment when she is no longer seen as a person, with dignity and personality. That is the moment before the abuser and the system swallow her self, her hopes, prospects, reason and feelings—she is placed outside the circle of human regard. That is the final moment when we can still see the woman, the girl, the human being—during and after which we see only the prostitute, the willing victim, the welfare dependent. A trauma-based public benefits program would tell the history of this moment—all that came before and all that comes after—on behalf of each woman, prostituted or not, seeking assistance. If I am right, histories so told could begin the process of re-humanizing women, all women, including the prostituted, the battered, the raped and the murdered.

Retrieving women economically and mentally from the diaspora of sexual dehumanization is a political and civil obligation in any society that claims to extend full citizenship to women.¹⁵⁶ The full reintegration of

156. This position is consistent with that taken in the Proposed Convention Against Sexual Exploitation, drafted principally by an expert working group convened by the Coalition Against Trafficking in Women in collaboration with UNESCO (the United Nations Economic and Social Council). See BARRY, *supra* note 31, at 304–09 (detailing the drafting process and substantive guarantees contained in the proposal). Among the state obligations listed in the convention are:

Article 12

State Parties agree to take appropriate measures to provide:

(a) Restitution to victims of sexual exploitation, and to insure that, notwithstanding the victims' immigration status, their reports of sexual exploitation receive a fair hearing.

(b) Women with educational programs and work in order to increase women's economic opportunities and enhance women's worth and status, thereby diminishing the necessity for women to turn to prostitution, notwithstanding the victims' immigration status.

Article 13

State parties shall create and establish services for victims of sexual exploitation, including prostitution, such as shelters and other social services, and shall fund specialized health services and centers for prostitution alternatives that are voluntary and confidential and would provide the following:

(a) Prevention, treatment of, and testing for STDs and HIV.

women into the life of their communities also constitutes a final stage of healing and recovery from traumatic experience for sufferers.¹⁵⁷ A publicly supported benefits program for trauma victims serves both of those aims: expressing deeply democratic political values in material and programmatic form and extending human acceptance and care that victims need for authentic participation in their own lives. As Judith Herman explains:

Traumatic events destroy the sustaining bonds between individual and community. Those who have survived learn that their sense of self, of worth, of humanity, depends upon a feeling of connection to others. The solidarity of a group provides the strongest protection against terror and despair, and the strongest antidote to traumatic experience. Trauma isolates; the group recreates a sense of belonging. Trauma shames and stigmatizes; the group bears witness and affirms. Trauma degrades the victim; the group exalts her. Trauma dehumanizes the victim; the group restores her humanity.¹⁵⁸

These are the first steps to the million dollars and the apology. We should take them.

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- (b) Substance-abuse rehabilitation programs.
 - (c) Training of medical staff
 - (d) Free and elective counseling and education services.
 - (e) Child care facilities and housing assistance.
 - (f) Income support.
 - (g) Preferential access to credit and loans to begin small-scale business.
 - (h) Non-sexist skills training programs.

Id. at 332-33.

157. HERMAN, *supra* note 28, at 214-36.

158. *Id.* at 214.