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ALWD 7th ed.

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APA 7th ed.

Guzman, Adrian. (2010). Making the grade: an analysis of rights- and due process-based concerns related to john school diversion programs. Boston University Public Interest Law Journal, 20(1), 79-104.

Chicago 17th ed.

Adrian Guzman, "Making the Grade: An Analysis of Rights- and Due Process-Based Concerns Related to John School Diversion Programs," Boston University Public Interest Law Journal 20, no. 1 (Fall 2010): 79-104

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Adrian Guzman, "Making the Grade: An Analysis of Rights- and Due Process-Based Concerns Related to John School Diversion Programs" (2010) 20:1 BU Pub Int LJ 79.

AGLC 4th ed.

Adrian Guzman, 'Making the Grade: An Analysis of Rights- and Due Process-Based Concerns Related to John School Diversion Programs' (2010) 20(1) Boston University Public Interest Law Journal 79

MLA 9th ed.

Guzman, Adrian. "Making the Grade: An Analysis of Rights- and Due Process-Based Concerns Related to John School Diversion Programs." Boston University Public Interest Law Journal, vol. 20, no. 1, Fall 2010, pp. 79-104. HeinOnline.

OSCOLA 4th ed.

Adrian Guzman, 'Making the Grade: An Analysis of Rights- and Due Process-Based Concerns Related to John School Diversion Programs' (2010) 20 BU Pub Int LJ 79
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NOTES

MAKING THE GRADE?: AN ANALYSIS OF RIGHTS- AND DUE PROCESS-BASED CONCERNS RELATED TO JOHN SCHOOL DIVERSION PROGRAMS

ADRIAN GUZMAN*

I. INTRODUCTION

Commercial sex work¹ is often viewed through a number of academic lenses, including feminist theory, public health, theology, and labor politics, each with varying degrees of insight and efficacy. Regardless of sociopolitical perspective, the rich, valuable body of knowledge resulting from this discourse should compel a harm reduction approach to sex work to improve the health and safety of sex workers.² In practice, however, sex work receives attention primarily

* Adrian Guzman is a third-year student at Boston University School of Law, where he serves as Executive Editor of Public Interest Law Journal. He completed his undergraduate work at Stanford University, and received his Master of Public Health from Columbia University's Mailman School of Public Health. He wishes to thank Lauren Turner, Gina Reppucci, William Davison, Celeste Morán, Kristie-Anne Padrón, and the 2010-2011 staff of the Public Interest Law Journal for their editorial assistance.

¹ *Commercial sex work* refers to the trading of sexual services “for money or goods” of value, and *sex worker* refers to male, female, and transgender individuals who actually provide these services, as opposed to those that manage and staff these industries. *The Public Health Rationale for HIV Interventions in Sex Work*, WORLD HEALTH ORG., http://www.who.int/hiv/topics/vct/sw_toolkit/context/en/index.html (last visited Nov. 24, 2009). Commercial sex work takes place in marketplaces as varied as street-side areas, bars, clubs, brothels, massage parlors, red light districts, and pornographic media (e.g. magazines, films, theaters, etc.). These terms are drawn from sources that are both diverse and widely-accepted, and function to reduce the stigma associated with more commonly utilized terms such as *prostitute* and *prostitution*. Ronald Weitzer, *Sociology of Sex Work*, 35 ANN. REV. SOC. 213, 214 (2009); UNAIDS, *SEX WORK AND HIV/AIDS: UNAIDS TECHNICAL UPDATE*, 4 (2002); *The Public Health Rationale for HIV Interventions in Sex Work*, *supra* note 1; *see generally* OXFORD ENGLISH DICTIONARY (2d ed. 1989); SHORTER OXFORD ENGLISH DICTIONARY (5th ed. 2002). For the purposes of this note, *sex work* and *sex worker* refer to female street-based sex workers (commonly known as *prostitutes*) who engage in commercial sex work with male customers (commonly known as *prostitution*).

² *See* Michael L. Rekart, *Sex-work Harm Reduction*, 366 LANCET 2123, 2131 (2005) (examining peer- and non-peer-reviewed medical, psychological, social science, social work, and other publications, and recommending that “[s]ex-work harm reduction should be

from the criminal justice system, which almost always focuses on the criminalization of sex workers in order to reduce the visibility of their activity.

The general public has appeared largely dissatisfied with traditional law enforcement methods' ability to control sex work.³ Tactics such as street patrol and "sting operations" by police are too expensive for the minimal benefit they produce.⁴ As a result, criminal justice systems have started utilizing market theories of supply and demand to address sex work.⁵ Any effective market analysis must simultaneously address supply and demand.⁶ In addition to focusing primarily on sex workers, pimps, and individuals transporting sex workers and their clients—the "supply"—interventions have started to focus on individuals who purchase sex and other sexual services—the "demand."⁷ This shift is particularly evident in the context of street-based prostitution, as several local law enforcement agencies have moved towards community policing models where police officers engage with their communities to improve the quality of life therein.⁸

An example of this shift towards community policing models is municipalities' establishment of "John Schools"—diversion programs for first-time (mostly male) offenders arrested for attempting to purchase sex from (mostly female) street-based sex workers.⁹ After these men, termed "Johns," plead guilty, a municipality's criminal justice system can offer them the opportunity to participate in typically day-long, purportedly educational and rehabilitative programs, as an alternative to conventional criminal justice proceedings.¹⁰

Part II presents case studies of the San Francisco and Toronto John Schools, and explores the origin of the John School model, its substantive components, and the local laws governing sex work on which they are predicated. Part II also identifies the rights-based concerns prompted by socioeconomic disparities

viewed as a new paradigm to improve the lives of sex workers through debate, discussion, and action . . .").

³ Scot Wortley et al., *Vice Lessons: A Survey of Prostitution Offenders Enrolled in the Toronto John School Diversion Program*, 44 CANADIAN J. CRIMINOLOGY 369, 370-71 (2002).

⁴ Benedikt Fischer et al., *The Socio-legal Dynamics and Implications of 'Diversion: The Case Study of the Toronto 'John School' Diversion Programme for Prostitution Offenders*, 2 CRIMINOLOGY & CRIM. JUST. 385, 386 (2002).

⁵ See Emilia Casella et al., *Critique of Focus on Demand in the Context of Trafficking In Persons: A Position Paper of the Sex Workers Project at the Urban Justice Center*, 2 (Stephan Sastrawidjaja & Melissa Sontag eds., 2007) (on file with the Sex Workers Project at the Urban Justice Center).

⁶ *Id.*

⁷ *Id.* at 2-3.

⁸ Erin Gibbs Van Brunschot, *Community Policing and 'John Schools'*, 40 CANADIAN REV. OF SOC. & ANTHROPOLOGY 215, 216 (2003).

⁹ Fischer et al., *supra* note 4, at 388, 390; Wortley et al., *supra* note 3, at 371.

¹⁰ Fischer et al., *supra* note 4, at 390; Wortley et al., *supra* note 3, at 371-72.

between the target John demographic and those not eligible for participation, as well as the ambiguity of program objectives within and across participating municipalities. Finally, Part II identifies the procedural due process violations inherent in the John School model.

Part III argues that the John School model is an untenable, ineffective, and potentially harmful approach to reducing commercial street-based sex work. Part III urges a shift from the current John School model aimed at sex work and sex worker elimination to one committed to harm reduction. Part III argues for significant reform of the John School model, including the redistribution of its resources towards a more comprehensive, rights-based approach. Part IV concludes by recommending future points of discussion and inquiry, namely increased rights- and due process-based evaluations of the theoretical foundations, procedures, and impacts of the John School diversion programs.

II. LEGAL BACKGROUND

Until the late twentieth century, most conventional American and Canadian criminal justice approaches to sex work focused on law enforcement street patrol and sting operations, and overwhelmingly targeted female sex workers.¹¹ In the United States, many jurisdictions have since revised their statutes to criminalize both the selling and the buying of sex.¹² However, issues of inequality persist; women are still disproportionately targeted in the “enforcement, prosecution, and sentencing” of sex workers under these statutes.¹³

Canada’s first prostitution-related act, which targeted only women, was “eventually found to be inconsistent with common law privileges as well as fundamental principles under the Canadian *Bill of Rights*.”¹⁴ After a series of legislative revisions, the Canadian Parliament established the “communicating law” in 1985, making it illegal for *both* males and females “to communicate with any person in a public place . . . for the purposes of prostitution.”¹⁵ In 1985, Canadian police made 1,225 prostitution-related arrests; in 1995, they

¹¹ Fischer et al., *supra* note 4, at 387-88; Julie Lefler, *Shining the Spotlight on Johns: Moving Towards Equal Treatment of Male Customers and Female Prostitutes*, 10 HASTINGS WOMEN’S L.J. 11, 16 (1999).

¹² Alexandra Bongard Stremler, *Sex for Money and the Morning After: Listening to Women and the Feminist Voice in Prostitution Discourse*, 7 U. FLA. J.L. & PUB. POL’Y 189, 194 (1995); *see also, e.g.*, Conn. Gen. Stat. Ann. § 53a-83 (LEXIS through 1997 legislation); Haw. Rev. Stat. § 712-1200 (LEXIS through 1985 legislation); Idaho Code § 185614 (LEXIS through 1997 legislation); Ind. Code Ann. § 35-45-4-3 (LEXIS through 1997 legislation); Mass. Ann. Laws ch. 272, § 53A (LEXIS through 1997 legislation); Tex. Penal Code Ann. § 43.02 (LEXIS through 1994 legislation).

¹³ Stremler, *supra* note 12, at 194 (citing Belinda Cooper, *Prostitution: A Feminist Analysis*, 11 WOMEN’S RTS. L. REP. 99 (1989)).

¹⁴ Fischer et al., *supra* note 4, at 387-88.

¹⁵ *Id.* at 388 (citing J.R. Robertson & C. Morris, PROSTITUTION, CURRENT ISSUE REVIEW (1991)).

made 7,165, with more than ninety percent made under the communicating law.¹⁶ Of those communicating law-related arrests, fifty percent were male customers of female sex workers.¹⁷ However, popular criticism of the criminal justice system persisted, with citizens claiming that the law was ineffective in reducing the general presence and visibility of street-based sex work.¹⁸

In response to these concerns, Toronto continued to seek out more effective methods to address sex work.¹⁹ In the mid-1990s, it looked to San Francisco's model and founded one of the first diversion programs for male customers of sex work.²⁰ Established in 1995 and 1996, respectively, San Francisco's First Offenders of Prostitution Program ("FOPP") and Toronto's John School Diversion Program divert individuals arrested for attempting to purchase sex from conventional criminal justice pathways towards purportedly rehabilitative and educational programs focused on the risks and harms of street-based sex work.²¹ Both programs are useful case studies in evaluating the John School model.²²

Both the San Francisco and Toronto case study descriptions below include a summary of the applicable city, state, and federal laws governing sex work, the historical context surrounding the establishment of the John School program, the procedures used to divert offenders towards the programs, and a description of program curricula.

¹⁶ *Id.* (citing D. Duchesne, *Street Prostitution in Canada*, 17 JURISTAT—CANADIAN CENTRE FOR JUSTICE STATISTICS 1, 1-12 (1997)).

¹⁷ *Id.*

¹⁸ The communicating law's "main effects have been described as 'systemic displacement of street prostitution in public spaces,' (Larsen, 1996: 45; Hubbard, 1998; Fischer, 2001). Its enforcement has 'failed to significantly affect the prostitution trade' (Todd, 1986: A8)." Fischer et al., *supra* note 4, at 389.

¹⁹ *Id.*

²⁰ Wortley et al., *supra* note 3, at 371.

²¹ See Fischer et al., *supra* note 4, at 390; Wortley et al., *supra* note 3, at 371; see generally Michael Shively et al., FINAL REPORT ON THE EVALUATION OF THE FIRST OFFENDER PROSTITUTION Program, Nat'l Inst. Of Just. (2008), available at http://www.abtassociates.com/reports/FOPP_Evaluation_FULL_REPORT.pdf.

²² Before 1995, only two cities—Grand Rapids, Michigan and St. Paul, Minnesota—had introduced some educational and treatment components for males arrested for the solicitation of sex workers. But, San Francisco was the first municipality to establish an expansive day-long educational program funded in part by participant fees. See Shively et al., *supra* note 21, at 1. "San Francisco's program appears to be the benchmark of this approach [to sex work], as a number of municipalities preceded their initiation of such measures by first visiting and observing San Francisco's program." Gibbs Van Brunschot, *supra* note 8, at 221 n.10. Toronto is among those municipalities, and there are extensive evaluations of the Toronto program. See generally, e.g., Fischer et al., *supra* note 4; Wortley et al., *supra* note 3.

A. *San Francisco's "First Offenders of Prostitution Program"*

In the United States, determinations as to how to approach sex work are mostly left up to individual states.²³ Therefore, the California state legislature has established most of the laws governing sex work in San Francisco, and the city itself does not have jurisdiction to alter the laws.²⁴ San Francisco has introduced various city ordinances relating to sex work, but city attorneys have declared most of them unconstitutional.²⁵ Those remaining in effect include City and County of San Francisco Police Code, Article 2, sections 220,²⁶ 221,²⁷ 225,²⁸ 226,²⁹ 236,³⁰ and 240,³¹ which together prohibit prostitution and various prostitution-related activities, and detail penalties for prohibited activities. However, arrests under these ordinances are infrequent, and the District Attorney's Office usually drops the charges under these laws.³²

Penal Code of California, Part 1, Title 15, Chapter 2, section 647(b) is the primary statute that enforces, charges, and prosecutes the criminalization of sex work.³³ Section 647(b) targets any person "who solicits or who agrees to engage in or who engages in any act of prostitution."³⁴ The statute clarifies the

²³ THE SAN FRANCISCO TASK FORCE ON PROSTITUTION, FINAL REPORT 7 (1996), available at http://www.aplehawaii.org/Resources_For_Prost_Law/Additional_Materials/SFTask_Force_Prost.pdf.

²⁴ *Id.*

²⁵ *Id.*

²⁶ S.F., CAL., POLICE CODE art. 2, § 220 (2006), available at http://ia311233.us.archive.org/0/items/gov.ca.sf.police/ca_sf_police.pdf (prohibiting "visit[ing] any disorderly house or house of ill fame for the purpose of engaging in or observing any lewd, indecent or obscene act or conduct").

²⁷ S.F., CAL., POLICE CODE art. 2, § 221 (2006), available at http://ia311233.us.archive.org/0/items/gov.ca.sf.police/ca_sf_police.pdf. (making it "unlawful for any person knowingly to become an inmate of, or contribute to the support of, any disorderly house or house of ill fame").

²⁸ S.F., CAL., POLICE CODE art. 2, § 225 (2006), available at http://library.municode.com/HTML/14140/level1/ART2DICO.html#ART2DICO_S225SOPRPR (prohibiting "soliciting prostitution").

²⁹ S.F., CAL., POLICE CODE art. 2, § 226 (2006), available at http://library.municode.com/HTML/14140/level1/ART2DICO.html#ART2DICO_S226PE ("penalty," regarding violations of art. 2, § 225).

³⁰ S.F., CAL., POLICE CODE art. 2, § 236 (2006), available at http://library.municode.com/HTML/14140/level1/ART2DICO.html#ART2DICO_S236USBUPRPR (prohibiting "use of buildings for prostitution").

³¹ S.F., CAL., POLICE CODE art. 2, § 240 (2006), available at http://library.municode.com/HTML/14140/level1/ART2DICO.html#ART2DICO_S240UNOFAGCOPRET (making it "unlawful to offer or agree to commit prostitution, etc").

³² FINAL REPORT, THE SAN FRANCISCO TASK FORCE ON PROSTITUTION, *supra* note 23, at 7.

³³ CAL. PENAL CODE § 647(b) (West 2010).

³⁴ *Id.*

type of behavior that constitutes agreement to engage in prostitution, and defines prostitution as “any lewd act between persons for money or other considerations.”³⁵ Law enforcement officials also arrest and prosecute persons under other sections, including but not limited to: a loiterer “with the intent to commit prostitution”³⁶; a person who “direct[s], supervise[s], recruit[s], or otherwise aid[s]” another in the solicitation of prostitution³⁷; and, a person who “inveigles or entices any unmarried female . . . for the purpose of prostitution.”³⁸

FOPP³⁹ emerged from this complicated statutory framework. In 1992, Norma Hotaling—a former San Francisco sex worker—founded Standing Against Global Exploitation (“SAGE”), a non-profit organization with the primary aim of “bringing an end to the commercial sexual exploitation of children and adults.”⁴⁰ Having once struggled with homelessness and drug addiction, Hotaling identified a need for raising awareness and building community alliances to end this exploitation.⁴¹ Hotaling recalls, “[i]n the beginning, . . . I only wanted the women to have a venue to speak. I thought it would be powerful for them to confront another layer of their history, to actually confront men and finally tell them the truth about prostitution.”⁴²

In early 1995, Hotaling contacted Joe Dutto, a police lieutenant with the San Francisco Police Department (“SFPD”). The two collaborated with law enforcement officials, the San Francisco District Attorney’s Office (“SFDA”), the San Francisco Department of Public Health (“SFDH”), and various other members of the community to establish what would become the first John School of its kind in the United States.⁴³ All parties involved in the project agreed that “the most promising direction for the program would be a focus on reducing the demand for commercial sex, and that the best way to accomplish demand reduction was education rather than trying to punish the problem away.”⁴⁴ During the development process, Hotaling’s plan for the program shifted from creating a forum for female sex workers to share their experiences to creating a forum that focused more on restorative justice targeting sex workers’ customers

³⁵ *Id.*

³⁶ CAL. PENAL CODE § 653.22 (West 2010).

³⁷ CAL. PENAL CODE § 653.23 (West 2010).

³⁸ CAL. PENAL CODE § 266 (West 2010).

³⁹ FOPP contains several programmatic elements, the John school diversion program being only one. For the purpose of this note, FOPP will refer only to the John school diversion program.

⁴⁰ *About SAGE*, THE SAGE PROJECT, http://www.sagesf.org/html/about_main.htm (last visited March 19, 2010).

⁴¹ *History*, THE SAGE PROJECT, http://www.sagesf.org/html/about_history.htm (last visited Nov. 24, 2009).

⁴² Virginia Vitzthum, *Reform School*, SALON, (Oct. 17, 2000), <http://www.salon.com/sex/col/vitz/2000/10/17/johns/index.html>.

⁴³ *Id.*; Shively et al., *supra* note 21, at 11.

⁴⁴ Shively et al., *supra* note 21, at 11.

through restitution and education.⁴⁵ By November 1995, SAGE, Inc. was incorporated and the John School launched with thirteen participants,⁴⁶ presumably all males arrested for attempting to purchase sex.⁴⁷

SAGE, Inc. has since established numerous sex work-related programs, including the Early Intervention Prostitution Program, the Satellite Sexual Trauma Counseling Program supported by the SFDH, and various other social support and legal services programs.⁴⁸ Hotaling discussed SAGE, Inc.'s accomplishments at the 2001 Annual Conference on Criminal Justice Research and Evaluation, and reported that the program had diverted "thousands of customers of prostitutes" from conventional criminal justice proceedings to what was termed "an educational and rehabilitation experience."⁴⁹

In San Francisco, an individual arrested for the first time under section 647(b) for the solicitation of prostitution⁵⁰ is screened by the SFDA and, if deemed eligible for the program, is offered the opportunity to participate in FOPP's diversion program in lieu of continuing through conventional criminal justice proceedings.⁵¹ If the individual chooses the FOPP option, he must pay a

⁴⁵ Compare Vitzhum, *supra* note 42 (outlining Hotaling's original vision of a forum), with Shively et al., *supra* note 21, at 11 (describing the change in purpose to one of education).

⁴⁶ *Services*, THE SAGE PROJECT, http://www.sagesf.org/html/about_history_main.htm (last visited Nov. 24, 2009).

⁴⁷ No information regarding the participants' backgrounds, what offenses led them to participate in the program, or why they were chosen for the John school pilot is available on The SAGE Project website or in the reports and evaluations discussing FOPP. See *Welcome to SAGE's CSE Information Center*, THE SAGE PROJECT, <http://www.sagesf.org/> (last visited April 15, 2010); see generally Shively et al., *supra* note 21; END CHILD PROSTITUTION, CHILD PORNOGRAPHY, AND TRAFFICKING OF CHILDREN FOR SEXUAL PURPOSES—USA, SCHOOLS FOR JOHNS: ADDRESSING THE DEMAND FOR COMMERCIAL SEX (2006).

⁴⁸ THE SAGE PROJECT, *supra* note 40.

⁴⁹ Norma Hotaling & Leslie Levitas-Martin, *Increased Demand Resulting in the Flourishing Recruitment and Trafficking of Women and Girls: Related Child Sexual Abuse and Violence Against Women*, 13 HASTINGS WOMEN'S L.J. 117, 120-21 (2002). This article is based on a speech Ms. Hotaling gave at the Annual Conference on Criminal Justice Research and Evaluation, July 25, 2001.

⁵⁰ Presumably, individuals arrested for other offenses related to the attempted purchase of sex also may be diverted to the John school program. The relationship between specific statutory offenses related to sex work and FOPP is unclear. As this note will discuss in greater detail below, neither SAGE, Inc., the SFPD, nor the SFDA's office make the statutory eligibility requirements readily available to the public. Authors of a 2008 United States Department of Justice report indicate having been provided with written information regarding eligibility guidelines, namely "no criminal record" and "no prior contacts with the criminal justice system," with some case-by-case exceptions. Shively et al., *supra* note 21, at 27-28. However, even these do not specify statutory offenses. *Id.*

⁵¹ Shively et al., *supra* note 21, at 14-15.

fine on a sliding scale of up to \$1,000,⁵² which is then equally distributed across SAGE, Inc., the SFPD, and the SFDA.⁵³ These funds support: the John School program; administrative costs sustained by SAGE, Inc., the SFPD, and the SFDA; SFPD vice operations; arrestees' screening and processing costs incurred by the SFDA; and, recovery programs for females in the sex work industry.⁵⁴ The individual also receives a solicitation citation that remains on his record for one year and is then expunged provided he is not re-arrested for a similar offense during this time.⁵⁵

The SAGE Project describes FOPP's John School as "an educational program for first offenders that takes a real-world, confrontation-style look at the legal, health, and other risks and effects of prostitution."⁵⁶ Specific details of FOPP's design and curriculum are not listed on the SAGE Project,⁵⁷ the SFPD,⁵⁸ or the SFDA⁵⁹ websites. However, a 2008 report, prepared on behalf of the Office of Research and Evaluation of the National Institute of Justice, evaluates the program, and lists the curriculum's six primary components:

Prostitution Law and Street Facts, focusing on the legal consequences of subsequent offenses and addressing Johns' vulnerability to being robbed or assaulted while involved in prostitution.

Health Education, describing the elevated risk of HIV and STD infection associated with prostitution, and stressing that many STDs are asymptomatic and/or difficult to detect and have long term negative impacts on health.

Effect of Prostitution on Prostitutes, focusing on numerous negative consequences for women serving as prostitutes, such as vulnerability to rape and assault, health problems, drug addiction, and various forms of exploitation.

Dynamics of Pimping, Recruiting, and Trafficking, featuring discussions of how pimps and traffickers recruit, control, and exploit women and girls for profit, and the links between local street prostitution and larger systems of human trafficking.

Effect of Prostitution on the Community, describing the drug use, violence,

⁵² *Id.* at 15.

⁵³ *Id.*

⁵⁴ *Id.* at v.

⁵⁵ Myra Snow, *Prop. K and Its Call to End John School*, YES ON PROP K, <http://www.yesonpropk.org/FOPP.html> (last visited Nov. 24, 2009).

⁵⁶ *First Offender Prostitution Program*, THE SAGE PROJECT, http://www.sagesf.org/html/about_services_fopp.htm (last visited Dec. 24, 2010).

⁵⁷ *Id.*

⁵⁸ SAN FRANCISCO POLICE DEP'T, <http://sf-police.org/> (last visited Dec. 24, 2010).

⁵⁹ SAN FRANCISCO DIST. ATT'Y, <http://www.sfdistrictattorney.org/> (last visited Dec. 24, 2010).

health hazards, and other adverse consequences that co-occur with street prostitution.

Sexual Addiction, focusing on how involvement in commercial sex may be driven by sexual addiction, and where help for this condition may be sought.⁶⁰

The report also states that FOPP's John School program lasts one day for eight hours, five of which include the above curricula.⁶¹ The longest component of the day is the third curriculum component listed above, Effect of Prostitution on Prostitutes, followed by Prostitution Law and Street Facts, Dynamics of Pimping, Recruiting, and Trafficking, and Health Education.⁶²

FOPP rarely provides take-home materials for participants, and no aftercare exists.⁶³ While participants complete course evaluations at the end of the program, FOPP does not test whether or not participants grasped the material covered.⁶⁴ Finally, "[v]irtually all of the attention in the classes [is] given to presenting reasons to avoid sex with prostitutes, but there [is] very little guidance provided about alternative means of meeting the participants' demonstrated needs."⁶⁵

In 2005, the Office of the Legislative Analyst for the City and County of San Francisco evaluated FOPP as part of a report on the jurisdiction's restorative justice programs.⁶⁶ The report observed that the program included, "surrogate victim-offender conferencing with johns and ex-prostitutes" and "community panels that talk to offenders about the effects of prostitution on the quality-of-life in their neighborhoods."⁶⁷ In 2006, End Child Prostitution, Child Pornography, and Trafficking of Children for Sexual Purposes—USA ("ECPAT") released an overview of various John Schools drawn from newspaper articles and other secondary sources.⁶⁸ In its description of FOPP, ECPAT lists the types of speakers featured, including representatives from the SFDA and the SFDH, social workers, and former victims of sexual exploitation.⁶⁹ It observes that "[w]omen who have been involved in the trade . . . speak of the abuse they've

⁶⁰ Shively et al., *supra* note 21, at iii.

⁶¹ *Id.* at iv.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* (The Final Report does not specify the types of needs (e.g. educational, mental health, emotional, confidentiality, etc.) to which it refers).

⁶⁶ Gabe Cabrera & Carolyn Huynh, LEGISLATIVE ANALYST REPORT RE: RESTORATIVE JUSTICE (BOS FILE NO. 050455) (OLA NO. 29-05), CITY AND COUNTY OF SAN FRANCISCO, OFF. OF THE LEGIS. ANALYST 6 (2005).

⁶⁷ *Id.*

⁶⁸ END CHILD PROSTITUTION, CHILD PORNOGRAPHY, AND TRAFFICKING OF CHILDREN FOR SEXUAL PURPOSES – USA, *supra* note 47.

⁶⁹ *Id.* at 4.

endured from society, clients, pimps, and the police force. The Johns are made aware that their participation in the sex market fosters the endless cycle of commercial sex exploitation.”⁷⁰

B. *Toronto's John School Diversion Program*

In Canada, the federal Criminal Code determines criminal justice approaches to sex work.⁷¹ Since Canada's first sex work legislation in 1892—a vagrancy offense of street solicitation for women “unable to provide a ‘good account’ of themselves”—Canada has struggled to find a fairer, more effective approach.⁷² In 1972, the federal government introduced a new law prohibiting “solicitation in public places for the purposes of prostitution,” and eventually refined the definition of solicitation to require that the solicitation be “pressing or persistent.”⁷³ The Canadian Supreme Court later specified that pressing or persistent solicitation has to be “directed toward a single potential customer and [can]not consist of an accumulation of advances toward different potential customers.”⁷⁴ The subsequent reduction in enforcement and increase in sex work prevalence⁷⁵ prompted many cities to enact municipal statutes attempting to curb street-based sex work, though the Canadian Supreme Court deemed them unconstitutional.⁷⁶ In 1985, the Fraser Committee issued a report recommending revisions to the law based on socioeconomic research and public hearings on sex work.⁷⁷ Though the government did not agree with everything contained in the report, it followed the Committee's recommendation for Criminal Code reform, which led to the development of the “communicating law” later that year.⁷⁸ The law, which appears as section 213 in the Canadian Criminal Code, reads as follows:

⁷⁰ *Id.*

⁷¹ STANDING COMMITTEE ON JUSTICE & HUMAN RIGHTS & SUBCOMMITTEE ON SOLICITATION LAWS, HOUSE OF COMMONS, THE CHALLENGE OF CHANGE: A STUDY OF CANADA'S CRIMINAL PROSTITUTION LAWS 44-45 (2006) (Can.).

⁷² Fischer et al., *supra* note 4, at 387-88.

⁷³ *Id.* at 388.

⁷⁴ STANDING COMMITTEE ON JUSTICE & HUMAN RIGHTS & SUBCOMMITTEE ON SOLICITATION LAWS, *supra* note 71, at 39 (citing to FEDERAL-PROVINCIAL-TERRITORIAL WORKING GROUP ON PROSTITUTION, REPORT AND RECOMMENDATIONS IN RESPECT OF LEGISLATION, POLICY AND PRACTICES CONCERNING PROSTITUTION-RELATED ACTIVITIES 5 (Dec. 1998), available at <http://www.walnet.org/csis/reports/index.html>).

⁷⁵ *Id.* (stating that “[b]y refraining from persistent behaviour, prostitutes could remain on the streets with little fear of criminal sanction. Perhaps as a consequence, street prostitution in Canada grew appreciably in the 1980s . . .”).

⁷⁶ Fischer et al., *supra* note 4, at 388.

⁷⁷ STANDING COMMITTEE ON JUSTICE & HUMAN RIGHTS & SUBCOMMITTEE ON SOLICITATION LAWS, *supra* note 71, at 40-41.

⁷⁸ *Id.* at 41-42.

Offence in relation to prostitution

(1) Every person who in a public place or in any place open to public view (a) stops or attempts to stop any motor vehicle, (b) impedes the free flow of pedestrian or vehicular traffic or ingress to or egress from premises adjacent to that place, or (c) stops or attempts to stop any person or in any manner communicates or attempts to communicate with any person for the purpose of engaging in prostitution or of obtaining the sexual services of a prostitute is guilty of an offence punishable on summary conviction.

Definition of “public place”

(2) In this section, “public place” includes any place to which the public have access as of right or by invitation, express or implied, and any motor vehicle located in a public place or in any place open to public view.⁷⁹

This statute accompanies sections 210,⁸⁰ 211,⁸¹ and 212⁸² of the Canadian Criminal Code, which also relate to prostitution offenses. Under these sections, the actual buying and selling of sex is legal, but many activities arranging the sexual exchange are criminalized for both the sex worker and her customer.⁸³

In 1990, the communicating law was challenged under Canada’s Charter of Rights and Freedoms on violations of freedom of expression and association grounds.⁸⁴ The lower court found that the law violated the Charter in part, but the Canadian Supreme Court held that the communicating law’s public nuisance objective was important enough to uphold the law at the expense of individuals’ freedom of expression.⁸⁵ Although the communicating law resulted in increased arrests, criticism persists that the law has not done enough to reduce sex work.⁸⁶

Toronto citizens and neighborhood organizations rallied government offi-

⁷⁹ Criminal Code, R.S.C. 1985, c. C-46, § 213 (Can.).

⁸⁰ *Id.* § 210 (prohibiting the maintaining, owning, or being an inmate of a bawdy-house, etc.).

⁸¹ *Id.* § 211 (prohibiting the taking, transporting, or directing of a person to a bawdy-house knowingly, as well as offering to do so, etc.).

⁸² *Id.* § 212 (prohibiting the procurement, attempted procurement, or solicitation of a person to have illicit sexual intercourse with another; inveigling or enticing a person to a bawdy-house for prostitution; knowingly concealing a person in a bawdy-house; living wholly or partly on the avails of another person’s prostitution, etc.).

⁸³ STANDING COMMITTEE ON JUSTICE & HUMAN RIGHTS & SUBCOMMITTEE ON SOLICITATION LAWS, *supra* note 71, at 37-38.

⁸⁴ Fischer et al., *supra* note 4, at 388.

⁸⁵ *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code*, [1990] 1 S.C.R. 1123, 1191 (Can.); *BCCLA Updated Position on Sex Work Laws*, British Columbia Civil Liberties Association (Jan. 2005), http://www.bccla.org/positions/privateoff/05sex%20work.htm#_ftn3.

⁸⁶ Fischer et al., *supra* note 4, at 388-89.

cial to more effectively address the issue of street-based sex work.⁸⁷ In 1995, Toronto city councillors, representatives from the Toronto Attorney General's ("TAG") office, Toronto Police Service ("TPS"), the Salvation Army, and other social support agencies formed a committee labeled the MSPT for short to address these issues.⁸⁸ Former sex workers who wanted to "assist those who wanted to get out of the trade" joined, as well.⁸⁹ MSPT helped establish the John School Diversion Program ("Program"). Streetlight Support Services ("Streetlight"), a "community based non-profit organization created to provide alternatives for individuals involved in Sex Trade activities," took on an administrative support role for the Program.⁹⁰

Like FOPP, Streetlight has since developed a number of programs directed at individuals involved in the sex work industry.⁹¹ These include: Choices, a program comprised of various self-empowerment workshops on coping skills, anger management, responsible choices, etc.; the provision of social support services; a computer access center; and, counseling services.⁹² In a 2001 evaluation prepared by the University of Toronto for the National Crime Prevention Council and Department of Justice, Streetlight claimed that "some 2,700 offenders had gone through the program between its inception in 1996 and the spring of 2001."⁹³

Under section 213 of the Canadian Criminal Code, an individual accused of violating the communicating law is usually "given a court date by the arresting officer and released at the scene."⁹⁴ At the first hearing, the court "determines whether the accused is eligible for the diversion program" and, if so, offers him the opportunity to participate.⁹⁵ Should the offender accept, he must enter a guilty plea and sign a "diversion agreement," stipulating that only the court has

⁸⁷ *Id.* at 389.

⁸⁸ *Id.*

⁸⁹ *About Streetlight*, STREETLIGHT SUPPORT SERVICES, http://www.streetlightsupportservices.ca/Site/About_Streetlight.html (last visited Nov. 24, 2009); Fischer et al., *supra* note 4, at 389.

⁹⁰ *Welcome*, STREETLIGHT SUPPORT SERVICES, <http://www.streetlightsupportservices.ca/Site/Welcome.html> (last visited Nov. 24, 2009); Wortley et al., *supra* note 3, at 372.

⁹¹ *Programs*, STREETLIGHT SUPPORT SERVICES, <http://www.streetlightsupportservices.ca/Site/Programs.html> (last visited Nov. 24, 2009).

⁹² *Id.*

⁹³ Fischer et al., *supra* note 4, at 391.

⁹⁴ Wortley et al., *supra* note 3, at 372.

⁹⁵ Like San Francisco's FOPP program, the eligibility criteria for participation in Toronto's John School Diversion Program are not made readily available to the public. *See supra* note 47. However, the authors of a 2002 survey of the Toronto program indicate that the Attorney General's Office provided them with this information and report that the eligibility criteria are "no criminal record and the offender's complete lack of criminal antecedence." Wortley et al., *supra* note 3, at 372 (citing to ATT'Y GENERAL OF ONTARIO. THE 'JOHN SCHOOL' DIVERSION PROGRAM: A CRIMINAL COURT DIVERSION PROGRAM APPROVED FOR IMPLEMENTATION IN METROPOLITAN TORONTO BY THE ATTORNEY GENERAL OF ONTARIO

the discretion to withdraw his charge after he completes the Program.⁹⁶ The participating offender must then register with Streetlight, pay a “\$400 ‘programme fee’,” and enroll in one day-long John School class held approximately once a month on Saturdays.⁹⁷

Streetlight describes the Program as “personal counseling and group workshops” discussing “the impact of prostitution on local communities, health-related issues, and social issues that affect individuals and their families.”⁹⁸ Like FOPP, the Streetlight, TSP, and TAG websites list no details of the Program’s design or execution; Streetlight only lists the general speakers on its website.⁹⁹ However, a 2002 independent, non-governmental case study of the Program lists the curriculum’s six primary components:

[A] crown attorney who discusses the criminal offence of prostitution and its legal ramifications;

[A] vice-squad officer who talks about crime, violence and victimization related to prostitution;

[P]ublic health nurses who address issues surrounding the dangers and prevention of sexually transmitted diseases;

‘[C]ommunity’ representatives who speak about the harmful impact of street prostitution on residential life;

[A]n ex-prostitute who discusses the myths and harms related to street prostitution work; and,

[A] representative from ‘Sex and Love Addicts Anonymous’ (SLAA) who talks about ‘sex addiction.’¹⁰⁰

Discussing “drug addicted prostitutes who have stabbed their clients with AIDS infected needles, . . . prostitutes who have drugged their clients and stolen their money, and . . . Johns who have been beaten, robbed, or even murdered by pimps,” a Toronto Police Service detective states that “by using prostitutes, [Johns] are supporting biker gangs, pimps, drug dealers, and organized crime.”¹⁰¹ Community speakers also discuss the “increased traffic, garbage (dirty needles and used condoms), and drug dealers” in neighborhoods where sex work takes place.¹⁰² Additionally, a former prostitute shares her experiences, which typically involve “a cycle of poverty, childhood sexual abuse,

FOR FIRST OFFENDERS AS CUSTOMERS OF STREET PROSTITUTES UNDER SECTION 213 OF THE CRIMINAL CODE (1996)).

⁹⁶ Wortley et al., *supra* note 3, at 372.

⁹⁷ Fischer et al., *supra* note 4, at 390.

⁹⁸ *John School*, STREETLIGHT SUPPORT SERVICES, http://www.streetlightsupportservices.ca/Site/john_school.html (last visited Nov. 24, 2009).

⁹⁹ *Id.*

¹⁰⁰ Fischer et al., *supra* note 4, at 390 (emphasis added).

¹⁰¹ Wortley et al., *supra* note 3, at 373.

¹⁰² *Id.* at 374.

alcoholism, drug addiction, and violence at the hands of both pimps and clients.”¹⁰³ Most of these prostitutes claim to have been forced into sex work.¹⁰⁴ Finally, members of Sex and Love Addicts Anonymous present their past experiences as frequent customers of sex workers, and “implor[e] the men . . . [to] stop engaging in self-destructive behaviour.”¹⁰⁵ While facilitators lead discussions at the end of the day regarding the Program’s content, the case study found no evidence that participants are tested on their understanding of the material covered.¹⁰⁶

C. *Rights-Based Concerns with San Francisco’s First Offenders of Prostitution Program and Toronto’s John School Diversion Program*

San Francisco’s FOPP and Toronto’s John School Diversion Program stem from relatively similar statutory, environmental, and socioeconomic circumstances. Since FOPP influenced the development of Toronto’s Program, it is unsurprising that the two programs share more than just the intent to divert male customers of sex workers from conventional criminal justice pathways.¹⁰⁷ Two similarities, in particular, are of serious concern when viewing the John School model from a rights-based perspective: (1) the socioeconomic disparities in John School participants, and (2) the ambiguity of program objectives within and across municipalities.

1. Socioeconomic Disparities in John Schools

Though only a limited number of program evaluations exist for both the San Francisco and Toronto John School programs, participant attendance records, survey data, and interviews identify socioeconomic disparities among participants.¹⁰⁸ For example, the 2002 Toronto Program case study found that of all surveyed participants enrolled between January 1998 and April 2001, sixty-six percent were “foreign (non-Canadian) born or first generation immigrants”,¹⁰⁹ only half spoke “English as their first language”,¹¹⁰ fifty-two percent indicated their highest level of education as “high school or less”,¹¹¹ and, sixty percent

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 375.

¹⁰⁷ Shiveley et al., *supra* note 21.

¹⁰⁸ Fischer et al., *supra* note 4, at 391, 401.

¹⁰⁹ *Id.* at 401.

¹¹⁰ *Id.* Another survey of Toronto’s Program sampling participants between March 2000 and March 2001 reports an inability to interview approximately nine percent of the enrollees due to “severe English language difficulties.” *Id.* at 395.

¹¹¹ *Id.* at 401.

reported “\$40,000 or less” as their annual income.¹¹²

The surveyed John School participants’ lower socioeconomic status shows that they are not representative of Toronto’s male population as a whole, nor is there any indication that the participants are a representative sample of male customers of sex workers.¹¹³ This is likely because the Program targets those arrested for attempting to purchase sex from street-based prostitutes.¹¹⁴ This type of exchange typically occurs in metropolitan urban areas and almost always involves poor, less educated, non-white individuals, many for whom English is a second language.¹¹⁵ The Program makes no effort to target those who patronize more exclusive, expensive practices, and institutions (e.g. massage parlors, indoor prostitution services, upscale escort services, etc.), which are less accessible to law enforcement.¹¹⁶

Additionally, more highly-educated, upper-class, English-speaking individuals arrested for attempting to purchase sex might be more likely to fight their charges successfully at the time of arrest or in court based on knowledge of the law, ability to afford legal counsel, and heightened awareness of the implications of a criminal conviction.¹¹⁷ Such offenders may veritably “buy them-

¹¹² *Id.*

¹¹³ *Id.*; 2006 Toronto census data indicates that half of Toronto’s population was born outside of Canada, with the overall share of immigrants arriving in Canada and settling in Toronto declining; less than half of the total population (47%) are visible minorities (defined by The Employment Equity Act as “persons, other than Aboriginal peoples, who are non-Caucasian in race or non-white in colour”); less than half of the total population (47%) have a mother tongue in a language other than English or French, while only five percent have no knowledge of either language; over a third of the total population (37.4%) have a bachelor’s degree or higher; and the average personal income for male Toronto residents is \$49,387. See *Release of the 2006 Census on Language, Immigration, Citizenship, Mobility/Migration*, STATISTICS CANADA (Soc. Policy Analysis & Research Section, Policy & Research Section, Toronto Public Health, Toronto, Ont., Can.), Dec. 7, 2007, at 1-3, available at <http://www.toronto.ca/demographics/reports.htm>; *Release of the 2006 Census on Ethnic Origin & Visible Minorities*, STATISTICS CANADA (Soc. Policy Analysis & Research Section, Policy & Research Section, Toronto Public Health, Toronto, Ont., Can.), Apr. 2, 2008, at 1-3, available at <http://www.toronto.ca/demographics/reports.htm>; *Release of the 2006 Census on Labour Force, Educ., Place of Work and Mode of Transp.*, STATISTICS CANADA (Soc. Policy Analysis & Research Section, Policy & Research Section, Toronto Public Health, Toronto, Ont., Can.), Apr. 2, 2008, at 3-4, available at <http://www.toronto.ca/demographics/reports.htm>; *Release of the 2006 Census on Income and Shelter Costs*, STATISTICS CANADA (Soc. Policy Analysis & Research Section, Policy & Research Section, Toronto Public Health, Toronto, Ont., Can.), May 1, 2008, at 2, available at <http://www.toronto.ca/demographics/reports.htm>.

¹¹⁴ Fischer et al., *supra* note 4, at 401.

¹¹⁵ *Id.*

¹¹⁶ Wortley et al., *supra* note 3, at 395 (citing Fischer et al., *supra* note 4).

¹¹⁷ Fischer et al., *supra* note 4, at 401-02.

selves out of prosecution.”¹¹⁸ In other words:

[T]he choice people are making [regarding diversion] depends on their status and background. . . . [The John school] is not a good compromise for the middle-class dentist, but it’s a great compromise for the immigrant who knows that if he gets convicted neither he nor his family are ever going to get into the country. So if you are a person who is charged and wants to avoid a criminal record, the John School is an automatic safe choice. It does more for that person and the system at the end of the day.¹¹⁹

John Schools not only ignore the socioeconomic and power disparities inherent in the arrests of individuals attempting to purchase sex, but propagate them by tacit diversion to their programs.¹²⁰ They take advantage of these offenders’ limited means, inability to navigate the criminal justice system, and hesitance to fight their arrests through conventional methods due to the significant risks associated with conviction (e.g. financial costs, risk of loss of employment, risk of deportation, etc.).¹²¹ This is particularly disconcerting given that most John Schools operate in socioeconomically diverse urban areas with large immigrant, non-white, non-English speaking, undereducated, and low-income populations, all of which are especially vulnerable to this prejudice.¹²²

2. Ambiguity of Program Objectives

Both the San Francisco and Toronto John School programs developed as a result of collaborations of very diverse individuals, organizations, and government entities.¹²³ The objectives, design, and implementation of each program incorporated local, state, and federal laws governing sex work, local community perspectives, and collaborating founders’ agendas.¹²⁴ The vastly dissimilar components of each program’s curriculum reflect the competing interests of program founders and administrators.¹²⁵

¹¹⁸ *Id.* at 401 (quoting Andrew Sanders, *The Limits to Diversion from Prosecution*, 28 BRIT. J. CRIMINOLOGY 513, 528 (1988)).

¹¹⁹ Fischer et al., *supra* note 4, at 401 (quoting from key informant subject; informant subjects include stakeholders and participants in the John School Diversion Program).

¹²⁰ *Id.* at 402.

¹²¹ *See id.*

¹²² *See e.g.*, END CHILD PROSTITUTION, CHILD PORNOGRAPHY, AND TRAFFICKING OF CHILDREN FOR SEXUAL PURPOSES—USA, *supra* note 47, at 4-7 (listing and briefly describing American models of John school programs, including those in San Francisco, Portland, Brooklyn, Phoenix, and West Palm Beach); Shively et al., *supra* note 21, at 20 (listing American models of John school programs, including those in Grand Rapids and St. Paul).

¹²³ *See generally* Fisher et al., *supra* note 4; Gibbs Van Brunschot, *supra* note 8; Wortley et al., *supra* note 3.

¹²⁴ *See* Wortley et al., *supra* note 3, at 394-95; Fischer et al., *supra* note 4, at 395-96.

¹²⁵ *See* Wortley et al., *supra* note 3, at 394-95; Fischer et al., *supra* note 4, at 395-96.

FOPP's rather sharp shift from Hotaling's original vision of developing a forum for female sex workers to share their industry experiences to a structured curriculum-based program for men arrested for attempting to purchase sex is a prime example of these competing interests.¹²⁶ It is possible that the program would be much different had Hotaling pursued her vision without collaborating with the SFPD and the SFDA.

Toronto's John School Diversion Program also demonstrates the impact of differing stakeholder views.¹²⁷ The 2002 Toronto Program case study reports that some stakeholders felt the program should work to stop all participants from involvement in all types of prostitution, while others preferred to focus on preventing involvement with only street prostitutes.¹²⁸ Some wanted to focus on behavior change, and still others on the public health benefits of safe sex.¹²⁹ As a result, the program contains a "confusing mix of educational, information, attitudinal, and behavioral goals."¹³⁰

This conflict is illustrated in four divergent views of key stakeholders involved in the Toronto John School Program:

[The] objective [of the John School] is to give people a significant emotional experience that they need to make a change in their behavior. . . . We are trying to heal people. . . . Should we destroy marriages for an offence that in the criminal justice system would accrue a suspended sentence? I don't think so. . . . [The John School is an educational environment . . . just like taking a night school course. They're coming to learn about prostitution. It isn't really about what they've done wrong, it's about the nature of prostitution and how we can work to correct it.]¹³¹

The main objective [of the programme] has to be educating the people . . . so that they are not going to commit an offence again. You are also hoping it's going to be a deterrent but also that it's a rehabilitative kind of thing that's going to change the mindset . . . so they're not repeating. [But] I don't think the John School is a lenient option. There is the embarrassment factor, the financial factor, the commitment of time. So it's fairly onerous.¹³²

[The John School] is . . . too lenient. . . . It . . . [should] be less convenient for them—give up a day's work or whatever. If it's going to be that leni-

¹²⁶ See Vitzhum, *supra* note 42 (explaining how Hotaling's initial forum changed into an organized program); Shively et al., *supra* note 21, at 11 (describing the foundation of the educational program and the framing as a restorative justice program).

¹²⁷ Wortley et al., *supra* note 3, at 394-95.

¹²⁸ *Id.*

¹²⁹ *Id.* at 394.

¹³⁰ *Id.* at 394-95.

¹³¹ Fischer et al., *supra* note 4, at 396 (quoting a police facilitator in Toronto).

¹³² *Id.* (quoting a Duty Council's explanation of the Toronto John School Program objectives).

ent, they should be paying through their balls . . . so pay \$1000 or \$1500—even if you have to make payments, you pay. . . . The onus really needs to be where the onus belongs. . . . [Sending] them to jail would probably impact more than the John School.¹³³

[The John School is] too easy In an ideal world, you would want the offenders to do a trial, be found guilty and then do a . . . diversion programme; you would want them to do both of it.¹³⁴

These divergent views on the objectives, leniency, educational value, and deterrence value of the program are problematic. If founders and administrators are confused about the Program's goals and the way to achieve them, participants can hardly be expected to fare any better.

D. *Procedural Due Process Violations Evident in San Francisco's First Offenders of Prostitution Program and Toronto's John School Diversion Program*

Many criminal justice systems have explored alternative punitive methods as deterrents for offenders, including car forfeiture, driver's license revocation, publication of offenders' names in newspapers, on billboards, and on television, and even sending letters to offenders' homes with the intent of informing their families of what has occurred.¹³⁵ For an individual arrested for a prostitution-related offense, diversion to a John School program is no doubt a more tolerable, less disruptive option, especially given the societal shame-based nature of his alleged crime. For this reason, an individual who is—or at least believes himself to be—innocent may admit to committing the offense in question in order to be diverted from conventional criminal proceedings, including a damaged criminal record, possible jail time, possible deportation, and the accompanying social stigma.¹³⁶ Diversion to a John School program may be a convenient way to punish an individual against whom the police have a weak or legally questionable case (e.g. those that go “slightly ‘over the top’”).¹³⁷ Given the complicated statutory framework of most prostitution-related offenses, the circumstances of many cases may be legally tenuous at best.¹³⁸

Regardless of actual guilt or innocence, diversion to a John School occurs “paradoxically ‘conditioned upon a formal admission of guilt’—usually without or ‘before any formal determination of guilt has been made.’”¹³⁹ An indi-

¹³³ *Id.* at 397 (quoting an ex-sex worker from Toronto).

¹³⁴ *Id.* (quoting a Crown Attorney in Toronto).

¹³⁵ Lefler, *supra* note 11, at 27-31.

¹³⁶ Fischer et al., *supra* note 4, at 402-03.

¹³⁷ Andrew Sanders, *The Limits to Diversion from Prosecution*, 28 BRIT. J. CRIMINOLOGY 513, 515 (1988).

¹³⁸ See CAL. PENAL CODE §§ 647(b), 653.22, 653.23 (West 2010); CAL. PENAL CODE § 266 (West 2008); CANADA CRIM. CODE, R.S.C., c. C-46, s. 210-13.

¹³⁹ Fischer et al., *supra* note 4, at 402 (citing J. Austin & B. Krisberg, *Wider, Stronger*

vidual who is successfully diverted relinquishes the presumption of innocence and opts for a legal finding of guilt. However, when offered participation in the John School program, the offender might not know the full array of legal options and outcomes available to him, including conditional discharge, community service sentences, or the ability to appeal should he be convicted.¹⁴⁰ He may not know the strengths of his case, or rather the weaknesses of the prosecution's case, and may underestimate the likelihood of acquittal by jury, judge, or other legal process.¹⁴¹

Furthermore, traditional criminal justice proceedings allow for and even invite the provision of legal advice or counsel. Diversion programs, such as the John School, however, may substitute legal counsel with a front-line criminal justice staff member whose advice may "actively contribut[e] to and shap[e] the 'order [of] justice' according to [her] own interests and views."¹⁴² These staff members and arresting police officers are not the best judges of whether a diversion program is a better, more practical option for an individual, given the possible lack of information regarding the offense itself and the available legal defenses that might result in exoneration.¹⁴³ This is especially problematic since an individual may be faced with the decision to enter a John School program before either an attorney or a judge discusses the legal implications of conventional criminal proceedings with him.¹⁴⁴

In the United States, accepting a John School diversion program means that individuals must relinquish Fourteenth Amendment procedural due process rights, including the presumption of innocence, and the right to a trial and legal counsel.¹⁴⁵ In Canadian jurisdictions, opting for a John School program similarly results in losing fundamental justice rights afforded to individuals under the Canadian Charter of Rights and Freedoms.¹⁴⁶

To state a claim for a violation of Fourteenth Amendment procedural due process in the United States, an individual facing criminal charges must show a deprivation of life, liberty, or property that prevents adequate notice, hearing, or neutral judgment.¹⁴⁷ The Supreme Court set forth a balancing test to deter-

and Different Nets: The Dialectics of Criminal Justice Reform, 18 *J. Research Crime & Delinquency* 165, 171 (1981)); K. Roach, *Changing Punishment at the Turn of the Century: Restorative Justice on the Rise*, 42 *CANADIAN J. CRIMINOLOGY* 249 (2000).

¹⁴⁰ Fischer et al., *supra* note 4, at 402-03; Sanders, *supra* note 137, at 516-17.

¹⁴¹ Sanders, *supra* note 137, at 516-17.

¹⁴² Fischer et al., *supra* note 4, at 404 (citing R.V. ERICSON & P.M. BARANEK, *THE ORDERING OF JUSTICE: A STUDY OF ACCUSED PERSONS AS DEPENDENTS IN THE CRIMINAL PROCESS* (1982)).

¹⁴³ See Sanders, *supra* note 137, at 516.

¹⁴⁴ See *id.*; Fischer et al., *supra* note 4, at 404.

¹⁴⁵ U.S. CONST. amend. XIV, § 1.

¹⁴⁶ Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act 1982, c. 11 (U.K.).

¹⁴⁷ U.S. CONST. amend. XIV, § 1.

mine the procedural elements that constitute due process with regard to a given deprivation:

[I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and, finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.¹⁴⁸

Applying this balancing test to FOPP shows that procedures within the program and procedures regarding entry to it both violate participants' due process rights by negatively implicating private interests (e.g. the right to liberty, the ability to make informed choices with the assistance of legal counsel, the avoidance of social stigma, the right to privacy, etc.).¹⁴⁹ Additional and substitute procedural safeguards, such as provisions requiring legal counsel before participants are offered the opportunity to enter diversion programs, would help ensure that participants' due process rights are honored. There are too few fiscal and administrative burdens associated with improving procedures to justify a legitimate state interest in maintaining the status quo.

Granted, statements regarding guilt and innocence made by individuals arrested for any given offense should receive cautious consideration.¹⁵⁰ However, these statements may indicate "crime making" and "crime control" strategies—apparatuses by which an individual diverted from conventional criminal proceedings is "constructed and processed according to the interests of efficiency, superiority and output of 'successfully diverted offenders.'"¹⁵¹ Almost half of surveyed participants in the Toronto John School Program reported they were "not guilty" of violating the communicating law.¹⁵² Thirty percent stated "they were framed or entrapped," twenty-three percent stated "there had been a misunderstanding," and twenty-one percent stated "they had been 'just joking' in the alleged 'communication' act."¹⁵³

III. LEGAL ARGUMENT

The violations of participants' civil and procedural due process rights indi-

¹⁴⁸ *Mathews v. Eldridge*, 424 U.S. 319, 335 (1975).

¹⁴⁹ *See* Fischer et al., *supra* note 4, at 397.

¹⁵⁰ *Id.* at 403.

¹⁵¹ *Id.* at 401-03 (citing D.J. MCBARNET, *CONVICTION: LAW, THE STATE AND THE CONSTRUCTION OF JUSTICE* (1981)).

¹⁵² *Id.* at 403.

¹⁵³ *Id.* (citing SCOTT WORTLEY & BENEDIKT FISCHER, *AN EVALUATION OF THE TORONTO JOHN SCHOOL DIVERSION PROGRAM: A REPORT PREPARED FOR THE NATIONAL CRIME PREVENTION COUNCIL AND THE DEPARTMENT OF JUSTICE* (2001)).

cate that the current John School diversion program model is not an appropriate method to curb commercial sex work in any jurisdiction. Moreover, the model has not produced quantifiable results to justify its continued operation. The dismantling of these programs and the return to conventional criminal justice proceedings is equally untenable; indeed, the John School model emerged to compensate for the ineffective policing, arrest, and punishment of sex work-related offenders.¹⁵⁴

As such, an appropriate next step is the careful, programmatic overhaul of the John School model. This should encompass: (1) the inclusion of a wider array of sex work practices and institutions; (2) the adoption of diversion entry procedures that respect participants' procedural due process rights; (3) a redesign of the curricula to reflect information that is accurate, unbiased, and accessible to all participants regardless of cognitive and language abilities; and, (4) the closer regulation of John Schools' procedural and substantive components in order to ensure uniformity and optimal results.

First, the law enforcement approach to sex work-related activity should include all jurisdictions, neighborhoods, and institutions. The models that currently exist in most municipalities target street-based prostitution occurring in inner-city, low-income areas, and, as a result, yield disproportionate arrests of immigrant, person of color, non-English speaking, undereducated, and low-income populations.¹⁵⁵ This trend reflects the skewed demographics of John School participants.¹⁵⁶

These phenomena are nothing short of violations of individuals' civil rights substantively protected by a number of doctrines. In American jurisdictions, such doctrines include the Fifth Amendment's right to a speedy trial;¹⁵⁷ the Eighth Amendment's right against cruel and unusual punishment;¹⁵⁸ the Fourteenth Amendment's right to procedural due process;¹⁵⁹ and, various statutes

¹⁵⁴ *Id.* at 386.

¹⁵⁵ Shively et al., *supra* note 21, at 1 (listing American models of John school programs, including those in Grand Rapids and St. Paul); END CHILD PROSTITUTION, CHILD PORNOGRAPHY, AND TRAFFICKING OF CHILDREN FOR SEXUAL PURPOSES – USA, *supra* note 47, at 4 (listing and briefly describing American models of John school programs, including those in San Francisco, Portland, Brooklyn, Phoenix, and West Palm Beach).

¹⁵⁶ See Fischer et al., *supra* note 4, at 391, 340.

¹⁵⁷ U.S. CONST. amend. V. An offender's diversion from a trial and towards a John school program without fully informed knowledge of the implications thereof may violate his right to speedy trial. Low socioeconomic status populations and/or those with a language barrier may have particular difficulty gaining this knowledge. See Fischer et al., *supra* note 4, at 401-03.

¹⁵⁸ U.S. CONST. amend. VIII. The requirement that a John school participant pay fines—in San Francisco, up to \$1000—may violate his right to avoid excessive fines. See, Shively et al., *supra* note 21, at 15.

¹⁵⁹ U.S. CONST. amend. XIV. The disproportionately high numbers of immigrants, persons of color, non-English speakers, and undereducated and low-income individuals arrested

that prohibit state actors from discriminating.¹⁶⁰ In Canadian jurisdictions, the Canadian Charter of Rights and Freedoms;¹⁶¹ the Canadian Human Rights Act;¹⁶² and, various other provincial anti-discrimination statutes.¹⁶³ Internationally, though to varying extents, the Universal Declaration of Human Rights protects individuals from discrimination.¹⁶⁴ These statutes and constitutive documents may serve as a legal framework in challenging the rights-based violations evident in the John School theory and practice.

Second, John School program founders, administrators, and other key stakeholders should more carefully evaluate program objectives, not only at the onset of the program, but throughout its operation, to avoid ambiguity. For example, the “interventionist mechanisms” that Toronto’s Program actually utilizes contrast sharply with the “widely promoted ‘educational’ and non-punitive objectives” that it purports to use.¹⁶⁵ The moral-based shaming and blaming

for sex work-related violations and participating in John school programs may indicate a violation of these individuals’ right to equal protection of the laws. See Fischer et al., *supra* note 4, at 401,

¹⁶⁰ See, e.g., 42 U.S.C. § 1983 (2006). If the state deprives an individual of any federal rights or privileges—here, the right to avoid discrimination based on socioeconomic status or language barrier—that individual has a private right of action. Although Section 1983 does not create any substantive legal rights, it can be used to ensure that Constitutional protections against discrimination are upheld.

¹⁶¹ Canadian Charter of Rights and Freedoms, *supra* note 146. Section 15 guarantees equality to every individual “before and under the law,” as well as “equal protection and equal benefit of the law.” The disproportionately high numbers of immigrants, persons of color, non-English speakers, and undereducated and low-income individuals arrested for sex work-related violations and participating in John school programs may indicate a violation of these individuals’ equality rights. See Fischer et al., *supra* note 4, at 401.

¹⁶² Canadian Human Rights Act, R.S.C. 1985, ch. . H-6, pt. 1, § 2. The Purpose of the Act states that “all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated . . . without being hindered in or prevented from doing so by discriminatory practices based on race, national or ethnic origin, color, religion, age, sex, sexual orientation, marital status, family status, disability or conviction for an offence for which a pardon has been granted.” *Id.* The disproportionately high numbers of immigrants, persons of color, non-English speakers, and undereducated and low-income individuals arrested for sex work-related violations and participating in John school programs may also indicate a violation of this principle. See, Fischer et al., *supra* note 4, at 391, 401.

¹⁶³ See e.g., Human Rights Code, R.S.O. 1990, ch. H-19, pt. 1, § 1. The Code states that every individual “has a right to equal treatment with respect to services, goods and facilities, without discrimination.” *Id.* The disproportionately high numbers of immigrants, persons of color, non-English speakers, and undereducated and low-income individuals arrested for sex work-related violations and participating in John school programs may indicate a violation of this principle. See, Fischer et al., *supra* note 4, at 391, 401.

¹⁶⁴ Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948).

¹⁶⁵ Fischer et al., *supra* note 4, at 396.

elements of the Program's curriculum are obvious.¹⁶⁶ It is difficult to conclude that the goals of the John School model are anything but punitive. After all, participants are lectured for a full day on their fundamental responsibility for the victimization of and harm to sex workers, the social ills associated with sex work (e.g. drugs, violence, sexually transmitted infections, neighborhood destruction, etc.), and how the participants are fundamentally responsible for all of it.¹⁶⁷ This punitive theme is further reinforced by "the often-repeated reminder that [the participants] are being given a merciful 'second chance.'"¹⁶⁸ Program fees are yet another example of this punitive restitution quality. A Toronto community representative "stated that the fee is a 'tremendous hardship for people but you know what—that's too bad [because if] you screw up you've got to pay up.'"¹⁶⁹

These factors indicate that even under the guise of having reparative and educational value, as per most promotional descriptions, John School programs are inherently punitive and simply reliable conventional punishment through moral discourse and monetary requirements.¹⁷⁰ Within and across John School programs, participants receive mixed messages, both in the substance and presentation of the programs' goals. Ambiguous program objectives lessen the overall efficacy of John Schools, and make it nearly impossible to conduct outcome assessments, including knowledge, attitude, and practice ("KAP") studies; curricula evaluations; and, recidivism rate tracking.

Third, the criminal justice system must reform the procedures used to divert offenders to John School programs. The procedures that currently exist in most municipalities deny individuals a number of procedural due process rights. Immediate legal counsel after an arrest is essential to making an unbiased and informed decision about pursuing either conventional criminal justice proceedings or the John School diversion program. Legal counsel or a neutral judge in a courtroom setting should provide the defendant with all of the information regarding participation in a John School program. Less credentialed criminal justice staff should not disseminate crucial information regarding, for example, entry procedures or curriculum content. The same standard should be followed for participation's legal implications, including charge dismissal, statutes of limitation regarding damaged records, and confidentiality. An individual and the court should enter into a written agreement stating that an individual's decision to participate in a John School program does not constitute an admission of guilt regarding the sex-work related charge.

Fourth, John School programs should be redesigned so that the information disseminated is accurate and unbiased. Currently, many John Schools' curricu-

¹⁶⁶ *Id.* at 397.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

la are built around shaming and scare tactics—a strategy that has proven ineffective and potentially harmful in the public health setting. Focus on sex work's victimizing effects, the prostitute-pimp relationship, and the community ills purportedly caused by sex work should be removed. There is no compelling reason to force an individual to learn about the implications of his crime on alleged victims, third parties, other unrelated parties, or the community. Curricula that incorporate speakers from various love and sex addicts anonymous organizations should be removed. In these cases the criminal justice system makes broad presumptions about individuals' personal lives based on allegedly attempting to purchase sex one time.

Public health curricula must be maintained, but should include only the most accurate, updated information from state agencies (e.g. Center for Disease Control, local public health departments, etc.), and not anecdotes from individuals, with or without ties to the sex work industry. Curricula should focus on the presentation of health information and on harm reduction (e.g. tips on practicing safe sex). Curricula incorporating information on civil and criminal statutes related to sex work should be maintained, but refocused. It should include detailed explanations of the specific statutes used for arrests, policing policies, the necessary element of criminal intent (where applicable), the implications of guilty and not guilty pleas when participating in John School programs, and the various ways an individual's record may be affected. Disseminating this information may decrease recidivism rates.¹⁷¹

John School curricula should also be presented in a manner understood by individuals at all cognitive levels. Information should be culturally sensitive and available to participants in a variety of languages, depending on geographic location. While making these changes may be costly, jurisdictions will not continue to incur costs. Much of the curricula will likely remain the same, and may be reused for a number of years. Culturally sensitive resources are also common and law enforcement and court-related materials and trainings are already available in multiple languages and for various cognitive levels.¹⁷² These requirements should govern all oral presentations, media utilized, and the dissemination of written materials during a John School program, particularly if law enforcement continues to target individuals and neighborhoods of low socioeconomic status.

Fifth, the policies establishing and regulating the reformed John School model should be codified across jurisdictions to ensure uniformity, adherence, and accountability. Uniformity is necessary to successfully achieve program

¹⁷¹ See Shively et al., *supra* note 21, at 72-87 (reviewing whether FOPP participation reduced recidivism rates for offenders).

¹⁷² See, e.g., David E. Barlow et al., *Cultural Diversity Training in Criminal Justice: A Progressive or Conservative Reform?*, 20:3-4 SOCIAL JUSTICE 69 (1993); California Commission on Peace Officer Standards & Training, CULTURAL DIVERSITY PROGRAM, <http://www.post.ca.gov/cultural-diversity.aspx> (last visited Apr. 14, 2010).

goals (e.g. public health and legal education, reduced recidivism rates, general reduction of sex work-related offenses, etc.) and for comparative studies to assess program effectiveness within and across jurisdiction. Uniform policies will make program supervision and regulation easier, and will more efficiently identify instances of violations. This uniformity will in turn incentivize adherence to established policies and increase accountability for program administrators.

IV. CONCLUSION

The current John School diversion program model is not an appropriate method of addressing municipalities' concerns with commercial sex work, as evidenced by the San Francisco and Toronto John School case studies. While perhaps improving upon the conventional criminal justice model of policing, arrest, punishment, and rehabilitation, the John School in its current form remains an unacceptable solution. Feminists, public health officials, religious leaders, labor politicians, and criminal justice advocates continue to work with and against each other to develop a more appropriate approach to commercial sex work. In the interim, a solution is to significantly reform the current John School model by identifying a way to improve public health and safety, while simultaneously respecting the civil and due process rights afforded to all individuals.

Fairer consideration of commercial sex work; maintaining individuals' procedural due process rights in the diversion process; providing accurate, unbiased, and accessible curricula; and, creating a uniform regulatory framework to ensure that John Schools operate effectively and efficiently are suitable next steps. Throughout and after this transition, feminist, public health, theology, labor politics, and criminal justice scholars must persist in evaluating the models' theoretical foundations, procedures, and substantive curriculum components. They must continue to assess the impact of John School diversion programs in order to improve the health and safety of everyone involved in commercial sex work, without compromising civil and due process rights.

