

# SEX AND THE CONTRACT

*From infamous commerce to  
the market for sexual goods and services*

VINCENZO ZENO-ZENCOVICH

# Sex and the Contract

From infamous commerce to the market  
for sexual goods and services

*By*

Vincenzo Zeno-Zencovich



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## CHAPTER ONE

### AN INTRODUCTION TO SEX MARKETS

We live in a society in which we are assailed from all sides by invitations to sexual stimulation, whether explicitly or more indirectly. On sidewalks at night, at newsstands, on web pages, on TV programmes, on advertising hoardings, leaflets and stickers sexual services and sexual goods are offered to us. One only has to pay and one receives – more or less – what has been asked for.

At the same time we are encouraged to improve our sexual appearance through perfumes and beauty creams, beauticians and cosmetic surgeons, intimate lingerie and gymnasiums, and exhibit it into practice in bars, discotheques, holiday resorts and the like.<sup>1</sup> More often than not advertising, even if it is not selling sex, has a sexual innuendo.<sup>2</sup>

Although difficult to define, there are sex markets and sex industries, which over the last two decades have been attracting increasing attention from economists and sociologists.

Lawyers, on the whole, and especially in Europe, have been much less interested in the topic of sex markets<sup>3</sup> and have mostly concentrated their analysis on specific aspects, generally of criminal law, such as human trafficking and child pornography.

The purpose of this book is to try to offer a comprehensive view of the legal aspects of the sex industry, considered outside of the shadow of criminal activities. And this, historically, is the field of contract law.

This is not at all an easy task not only because of the necessarily variable (in time and in space) enforcement of penal laws by the authorities to whom this task is entrusted, and their interpretation by the courts. The answer to what is legal in the sex market – and therefore can be the object of a contractual

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<sup>1</sup> See Sanders, *Paying for Pleasure. Men who Buy Sex*, Willan Pub., Cullompton, 2008: “The sex industry is bound to interrelated systems of other institutions, specifically the interplay between the labour market and the leisure economy” (at p. 191). See also the prologue “The Sexual Landscape of the New Millennium”, in Hawkes, *Sex & Pleasure in Western Culture*, Polity, Cambridge 2004, p. 5 ff.

<sup>2</sup> The phenomenon has increased through the years: compare Courtney, Whipple, *Sex Stereotyping in Advertising*, Lexington Books, Lexington, Mass. 1983, with Reichert, Lambiase (eds.), *Sex in Advertising: Perspectives on the Erotic Appeal*, Lawrence Erlbaum Ass., Mahwah, N.J., 2002, and Reichert, *The Erotic History of Advertising*, Prometheus, Amherst, N.Y., 2003.

<sup>3</sup> I have anticipated a few of the topics examined in this book in the article “*Sex and the contract*”: *dal mercimonio al mercato*, in *Riv. trim. dir. proc. civ.* 2007, 1191. In a feminist but not prohibitionist perspective see Marella, *Bocca di Rosa, Roxanne e le altre: considerazioni in tema di sesso, mercato e autonomia privata*, in *2 Polemos*, issue 2/2008, p. 35.

relationship – depends on a vast amount of specific elements which have to be taken into account and on the deliberate penumbra in which these activities are left. The less spoken, the better, it would seem, and silence comes not only from academic scholars but also from legislators and governmental authorities – at a national or a local level – who prefer not to tackle, unless under strong public pressure and in a restrictive direction, the thorny question.

The lack of a systematic non-penal approach is even more noticeable in European civil law jurisdictions where private lawyers appear to be comfortably resting on century-old Latin maxims (whose present day actual effectiveness will be discussed further on). If one looks at traditional handbooks or treatises, when confronted with dealings that are “contrary to morality”, mainstream writings cling, as if to a lifeline, to the notion that such dealings do not exclusively comprise those offensive to “sexual morality” and confine their attention to those that are not. Scholars thus avoid having to write about sex in case they would sully their pens with a disreputable topic.<sup>4</sup> And yet, wherever the subject is discrimination between male and female employees, workplace harassment, breach of the duty of conjugal fidelity, impairment of the ability to enjoy married life, what is being discussed, directly or indirectly, if not questions of sex? Common modesty should not be allowed to inhibit debate, and in any case, *honni soit qui mal y pense*.

#### a. What are “sex markets”?

Criticism of the current state of legal debate is, however, sterile if one does not try to offer a different starting point. Rather than embarking on the slippery task of establishing that today’s moral standards are different from those of the past and therefore require different rules, the attempt that will be made in this work is to offer some extra-legal elements drawn from other social studies – mainly economics and sociology – and to show how the reality of sex markets is perceived by other scholars. This obviously does not automatically mean that things *are* how they are described, but at any rate presents a different perspective which should be taken into account.

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<sup>4</sup> If the phenomenon is, as we shall see, so widespread, it is fairly unlikely that lawyers as a social category (particularly the males among them) have been excluded from it and that none of them has ever – to take just a few of the most trivial examples – bought a pornographic magazine, visited an erotic chat-room or used a sex aid. It would seem that hypocrisy even more than morality is the reason that the topic remains hidden from their view. On the double (sexual) life of a great jurist such as Oliver Wendell Holmes, see Markesinis, *The Duality of Genius*, Jan Sramek Verlag, Vienna, 2008, at p. 269 (“Holmes the public man was not the same as Holmes the private one”. Incidentally Holmes, in *The Path of the Law* (reprinted in *The Collected Works of Justice Holmes*, U. Chicago Press, 1994 vol. 3, at p. 391) expressed the view that “it would be a gain if every word of moral significance could be banished from the law altogether”.

If we are to apply the criteria commonly used by the abundant literature of economic theory and wish to treat the 'sex market' as a market like any other,<sup>5</sup> we are interested in knowing the figures on businesses, workers, clients, and turnover; types of goods and services on offer; collateral activities, whether upstream or downstream, the number of economic operations; and the mean *per capita* spend.

At the same time one should identify the relevant markets; see to what extent the "sex market" can be subdivided into component markets; to what extent goods and services are substitutable; what (if any) the barriers to entry are; the price dynamics; and the (certainly not negligible) influence of regulation.<sup>6</sup>

This approach, it should be noted, is only gradual (as it is also among scholars of social sciences) and is still far from reaching consolidated and widely accepted results. One can group three lines of research.

*i.* The first line of research, chronologically is statistical research into sexual behaviour and deviation, prompted mainly by the flourishing criminological studies which had already started towards the end of the 19th century.<sup>7</sup> Clearly those researches were interested mostly in aspects related to prostitution and were aimed – following the intellectual fashion of the time – at outlining the character of the "delinquent woman" *par excellence*, the prostitute. However, looked at over a century's distance, we have an impressive amount of data and of methodological indications, which were meant to be used, or at least should have been used, in regulating the market (in those many jurisdictions where brothels were legal and public authorities controlled the health of prostitutes), or in curbing it, promoting policies of social "redemption" of both *filles de joie* and their clients. This wealth in statistical and social data was lost when – principally after World War II – brothels were closed and prostitution became or an individual "business" or, later on, one of the main activities of powerful and difficult to eradicate criminal organizations specialized in the trafficking of women to be used as a low cost labour force in the prostitution market.

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<sup>5</sup> According to Posner, *Sex and Reason*, Harvard U.P., Cambridge, Ma., 1992, p. 335 "If the Constitution itself distinguished between sexual markets and other markets, this would be answer enough to a proposal to equate the two types of market. But it does not – or rather it gives *more* protection to property than to liberty" [italics in original]. It is however not altogether clear why matters which concern the sale and purchase of sexual services and goods should be more a question of "liberty" rather than a question of "property".

<sup>6</sup> Anticipating current trends see already Reynolds *The Economics of Prostitution*, C.C. Thomas, Springfield, Ill., 1986: "Someone contemplating the business of prostitution would likely form some concept of the legal environment in different locations in evaluating money-making possibilities" (at p. 51)

<sup>7</sup> For a good example see Kneeland, *Commercialized Prostitution in New York City*, Grant Richards, London, 1913 which contains a vast amount of empirical data.

More or less at the same time as the prostitution market enters a grey zone, which is difficult to control and quite impossible to monitor through the classical economic indicators which have been listed above, other sexual industries come to the forefront.<sup>8</sup> The most important of these is pornography, mostly thanks to the widespread use at low cost, of coloured print and the production of electronic apparatuses, which can be bought at consumer prices and boost the market for porn videos. This market will grow at an impressive rate when digital techniques are introduced and telecommunication networks open what is commonly called the Internet age. From an economic point of view this is not only a different product/service, but also one that requires a more skilled labour force, including technical staff to direct, film and produce the videos. Technical equipment is required and marketing policies and distribution channels must be put into action. One can easily detect all the typical elements of a firm. Although even here data are difficult to collect,<sup>9</sup> it is very clear that one is faced with a different market and that the prostitution model is no longer the most important and cannot any longer be used as the yardstick for sexual enterprises.

Alongside pornography, other sex industries started to develop thanks to increased mobility and more relaxed mores, mostly related to the entertainment industry. Here again we have different features, different forms of organization, and a different mix of the various factors of production.

One of the main difficulties researchers of statistical data encounter is that although most of these activities are legal – in the sense that there is no prohibition, criminal or administrative, on their undertaking – those who run them prefer on the whole to remain in the penumbra.<sup>10</sup> What would be typical in other new and growing sectors – *i.e.* an association grouping the different businesses and promoting their interests towards decision-makers and their image towards the public – is completely absent. From an economic research point of view this means that all the data that generally industry and trade associations collect from their members and disseminate through the public are lacking.<sup>11</sup>

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<sup>8</sup> But they are not always detected: see *e.g.* Poulin, *La mondialisation des industries du sexe. Prostitution, pornographie, traite des femmes et des enfants*, Interligne, Ottawa 2004 who gives (at p. 48) an extremely vague definition of sex industries.

<sup>9</sup> For an attempt see Ropelato, *Pornography statistics 2007*, available at: [www.internet-filter-review.toptenreviews.com](http://www.internet-filter-review.toptenreviews.com) with tables annexed that refer not only to the USA but to other countries as well. The data are copious and interesting. However, the author takes care to warn that “Statistics are compiled from the credible sources mentioned. In reality, statistics are hard to ascertain”. For further economic data see Halavais (ed.), *Cyberporn and Society*, Kendall/Hunt, Dubuque, 2006.

<sup>10</sup> “Statistical evidence on the influence of various factors on the demand for prostitution services is rare due to the lack of fully tolerant legality and the presence of stigma” (Cameron, *The Economics of Sin. Rational Choice or No Choice At All?*, Edward Elgar, Cheltenham 2002, at p. 191).

<sup>11</sup> Posner, *Sex and Reason*, Harvard U.P., Cambridge, Ma., 1992, at p. 438 notes the “relative paucity of *reliable* data on sex” [*italics in original*].

One therefore has to use rough estimates that do not allow one to compare and rank sex markets with others that are somehow related (the entertainment sector, the publishing sector, *et caetera*). Although this information may not be essential in order to establish the applicable (private) law, it is extremely relevant in a regulatory perspective, for which dimensions, social impact, forecasts are the points of departure and of guidance.

The scarcity of general and uniform statistical data has one very important consequence on the construction of a legal framework within which sexual transactions can fit: the arguments used – in favour of one solution rather than its opposite – can easily ignore the facts, or be founded upon some scarce and non-significant facts. Passion and ideology – whether in favour of prohibitionist, feminist or *laissez-faire* theories – prevail over reasonable law-making, which is a long way from perfection but surely better than deciding through prejudice.

ii. The second line of research is the very wide-ranging sociological investigation on the different aspects that surround sex life, including what is not considered “regular” sex (*i.e.* between spouses). There is here an apparent paradox: the information on sexual habits was much richer as regards what happened outside the married couple’s bedroom and was mostly retrieved by interviewing prostitutes. Only later when the ground-breaking researches by Kinsey and by Masters and Johnson were published, was the gap filled. What is important to note here is that, quite properly from a sociological point of view, sex is sex,<sup>12</sup> and the fact that it is satisfied outside a “market” or thanks to “market procedures” is only an aspect of a biological and physiological need.<sup>13</sup>

Sociological research therefore has had an extremely important role in keeping together “market” and “non-market” sex, which previously were kept far apart and unrelated.<sup>14</sup> The latter fell under the shroud of the sanctity of marriage which could not be investigated without infringing the deepest secrets of a family. The former, instead, was the land of lewdness, debauchery and crime inhabited by pimps, prostitutes and men with no moral values.

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<sup>12</sup> Sanders, *Paying for Pleasure. Men who Buy Sex*, Willan Pub., Cullompton, 2008: “The pull factors of the sex industry obviously revolve around the constructions of female sexuality that permeate everyday life” (at p. 196).

<sup>13</sup> For a recent survey containing a great deal of data on the sexual behaviour of Italians see Vaccaro, *I comportamenti sessuali degli italiani. Falsi miti e nuove normalità*, Franco Angeli, Milan, 2003.

<sup>14</sup> This contiguity may have its drawbacks: The “conceptual ambiguity over what actually constitutes a *sex market* or a *marriage market* currently hinders the study of the formation, organization and dissolution of partnerships” [*italics in original*] (Laumann, Ellinson, Mahay, Paik, Youm, *The Sexual Organization of the City*, U. Chicago Press, Chicago, 2004, at p. 10f.).



We now know that clients of a sex market are ordinary people – both male and female – who conduct normal lives and who for various reasons – the most important and common being pleasure – buy sexual goods and services.<sup>15</sup> Their going to the market does not in any way imply that they do not have a stable sexual relationship and, apart from issues relating to conjugal fidelity, that they are “perverted”.<sup>16</sup>

This research offer us a precious insight into the demand-side of the market, enabling us to understand what people expect from sexual experience,<sup>17</sup> how they satisfy their needs,<sup>18</sup> and to what extent the market supplements “ordinary”, non-market sex life.<sup>19</sup>

Moreover, the supply-side is also investigated: starting with the reasons that bring a person to prostitute his or her body,<sup>20</sup> the motivation that keeps them in the “trade”; apprenticeship and careers in the “porn-star” system; to what brings a dancer or a ballerina to cross the line and enter into the nude entertainment business.

Although this research is typically sociological, and therefore follows the extremeley diversified methodologies of this kind of study, it offers precious elements for what today is one of the leading theories in economics, so-called behavioural economics. It is quite understandable that applying a classic

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<sup>15</sup> For the most important and recent research on the point see Sanders, *Paying for Pleasure. Men who Buy Sex*, Willan Pub., Cullompton, 2008: “Men who buy sex are ordinary citizens who are upstanding members of the community in terms of employment, obeying the law and fulfilling family obligations. Yet it is this ‘type’ of man that is clearly in the firing line for their corrupt sexual habits and ‘using’ women” (at p. 143) And at p. 34ff. see the rich sociological data on sex buyers. See also, for an Australian survey, Pitts, Smith, Grierson, O’Brien, Misson, *Who Pays for Sex and Why? An Analysis of Social and Motivational Factors Associated with Male Clients of Sex Workers*, 33 *Archives of Sexual Behavior* 353 (2004) (In a setting where commercial sex is legally available from brothels, it would appear that clients are unremarkable in their social characteristics and are motivated mainly by the ease of the commercial sex encounter, the absence of engagement with another, and because they feel in need of sexual relief).

<sup>16</sup> Sanders, *Paying for Pleasure. Men who Buy Sex*, Willan Pub., Cullompton, 2008: “Where all men who buy sex are considered dangerous and all sex workers as dishevelled victims or rational, calculating criminals, a discourse is produced (some would call this propaganda) that is barely short of man-hating” (at p. 10.)

<sup>17</sup> Monto, *Why Men Seek out Prostitutes*, in Weitzer (ed.) *Sex for Sale: Prostitution, Pornography, and the Sex Industry*, Routledge, New York, 2000, p. 67ff.

<sup>18</sup> Lever, Dolnick, *Clients and Call Girls: Seeking Sex and Intimacy*, in Weitzer (ed.) *Sex for Sale: Prostitution, Pornography, and the Sex Industry*, Routledge, New York, 2000, p. 85ff.

<sup>19</sup> See e.g. Laumann, Ellinson, Mahay, Paik, Youm, *The Sexual Organization of the City*, U. Chicago Press, Chicago, 2004 (at p. 18) who distinguish “Direct sexual marketplaces: bars and dance clubs, bathhouses, personal ads, and such informal settings as private parties and public parks” from “mediated sexual marketplaces (blind dates, singles nights)” [italics in original]. And Sanders, *Paying for Pleasure. Men who Buy Sex*, Willan Pub. Pub., Cullompton, 2008: “Men, particularly heterosexual men, are often not explored as subjects in their own right, as sexual beings with legitimate desires, attractions and pleasures” (at p. 11).

<sup>20</sup> See Lemoncheck, *Loose Women, Lecherous Men*, Oxford U.P., New York 1997 (in particular Ch. 4, at p. 110ff, entitled “I Only Do It for the Money”). Can one prostitute one’s voice? See Rich, Guidroz, *Smart Girls Who Like Sex: Telephone Sex Workers*, in Weitzer (ed.) *Sex for Sale: Prostitution, Pornography, and the Sex Industry*, Routledge, New York, 2000, p. 35ff.