

Sex, Work, Law and Sex Work Law: Towards a Transformative Feminist Theory

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Introduction

There has been significant academic debate over whether sex work performed by women is primarily an industrial activity or whether it is a manifestation of male sexual violence towards women. The debate is significant because if sex work is a form of violence against women, then the only appropriate legal and public policy solution is to prohibit it. If, on the other hand, sex work can be theorized as a valid form of waged labour, then its regulation or deregulation becomes an important point of legislative and political contention.

This article attempts to deconstruct the liberal feminist—sex work as work—discourse and the radical feminist—sex work as sexual violence—discourse. While acknowledging that these positions are neither unitary nor conveniently representative of *all* feminist discourse about sex work, the two often dominate feminist theory and pedagogy on the issue. The article demonstrates that the problem for much contemporary Euro-American feminist debate on prostitution is that it disallows the possibility of supporting the rights of those who work in prostitution as workers while remaining ‘critical of the social and political inequalities that underpin market relations in

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general, and prostitution in particular'.¹ However, rather than trying to reconcile these two opposing modes of feminist thought, I offer a transformative feminist theory that emphasizes the polymorphism in prostitution: the multitude of experiences and performances that construct the female sexual services industry. In keeping with the transformative purposes of this article, the terms 'sex work' and 'prostitution' will be interchangeable and are taken to refer to the female sexual services industry.²

Part II of this article explores the social and historical construction of the prostitution stigma. Parts III and IV analyse and compare the dominant radical and liberal feminists sex work discourses in order to identify the discursive space that exists for a transformative feminist theory of sex work. Part V explores the 'prostitute identity' and the identities of prostitutes as they are viewed through the lens of transformative feminist theory. Part VI evaluates the impact of different systems of sex work law on sex workers, with particular focus on the Swedish model and the Victorian regulatory regime. The article concludes that policy frameworks should be guided by an acknowledgement of the differences within the industry and the ways in which prostitution stigmas affect sex workers themselves.

¹ Julia O'Connell Davidson, 'The Rights and Wrongs of Prostitution' (2002) 17 *Hypatia* 84, 85.

² It is important to note that in line with this definition of sex work and the corresponding focus of this article, the arguments that I put forward do not necessarily apply to other members of the sex work industry such as sex slaves or child prostitutes. Complex issues relating to consent and subjugation (to name but a few) have found themselves beyond the scope of this research. In a similar vein, the article's focus on women and on feminist theories of the provision of sexual services by women to men means that the succeeding critique may not apply to the experiences of male, transgender, transvestite, transsexual or gay prostitutes. Finally, by relying for the most part on theories proffered by Westerners and engaging in an analysis of the sex work legal regimes in Western countries, I betray a Westernized perspective that I fully acknowledge compromises the potential applicability of my arguments beyond a Western context.

The prostitution stigma

Prostitution is sometimes described as ‘the oldest profession’,³ demonstrating its potential for cross-historical construction. It is a term with no obvious meaning and one whose characterization may change according to specific social and cultural conditions. Nevertheless, this article focuses on prostitution as it is conceptualized in the West and takes as its practical definition ‘the provision by one person to or for another (whether or not of a different sex) of sexual services in return for payment or reward’.⁴ I recognize the problems inherent in using a legal definition of prostitution. States define sex work in different ways depending on whether sex work has been prohibited, legalized or decriminalized. Further, the way in which prostitution is defined by the law will have an effect on the social construction of its stigma.⁵ It is this ‘prostitution stigma’ that provides the platform from which most critiques of sex work are launched.

Historical constructions of ‘the prostitute’ have been dominated by the image of a ‘whore’ or deviant whose sexual appetite is insatiable.⁶ As Gail Pheterson explains, ‘[t]he prostitute is the prototype of the stigmatized woman’⁷ because she is ‘defined by her unchastity which casts her status as impure’.⁸ She is contrasted with the ideal of pure femininity, the ‘Madonna’, who provides a mirror for ‘the prostitute’, as if to say that it is between these two polarities that

³ Jean D’Cunha, ‘Prostitution Laws: Ideological Dimensions and Enforcement Practices’ (1992) 17 *Economic and Political Weekly* 34, 34.

⁴ *Sex work Act 1994* (Vic).

⁵ For a discussion of the social construction of stigma in and by the law see, for example, Eric A. Posner, *Law and Social Norms* (Harvard University Press, 2002).

⁶ Teela Sanders, Maggie O’Neill and Jane Pitcher, *Prostitution: Sex work, Policy and Politics* (SAGE, 2009) 2.

⁷ Gail Pheterson, *A Vindication of the Rights of Whores* (Seal Press, 1989) 231.

⁸ Sanders, O’Neill and Pitcher, above n 6, 2.

every woman must choose. In contemporary discourse, the classical Madonna/whore binary has been loosely translated into good girl/bad girl. These femininity-defining discourses appear to be self-sustaining and have been part of the representation of women throughout tradition to modernity and continuing into postmodernity.⁹

The 'prostitution stigma' is clearly worthy of the feminist opposition to which it has been subjected. It discounts the possibility of female sexual expression while characterising prostitutes themselves as 'fallen' women.¹⁰ Martha Nussbaum identifies two characteristics that make the 'prostitution stigma' different from other historical stigmas: that prostitution is 'widely held to be immoral' and that it 'is bound up with gender hierarchy'.¹¹ The first of these characteristics is a weak and relativist reason for the stigma attached to prostitution; the second will be explored below. But however it manifests, stigma has traditionally been a difficult thing to challenge. In dealing with this difficulty, Caroline Howarth makes the point that there has been an 'over-emphasis on the perceptions of the stigmatising ... and not enough attention given to the *social psychological* conditions for challenging stigma from insiders' perspectives'.¹² It follows from this that resisting the 'prostitution stigma' must be a 'collective enterprise'¹³ from within and without the sex work community. It is an enterprise that requires a better understanding of the

⁹ M O'Neill, *Prostitution and Feminism* (Polity Press, 2001) 124.

¹⁰ Judith R Walkowitz, *Prostitution and Society: Women, Class and the State* (Cambridge University Press, 1980) 3.

¹¹ Martha Nussbaum, 'Whether From Reason or Prejudice: Taking Money For Bodily Services' (1998) 27 *The Journal of Legal Studies* 693, 707.

¹² Caroline Howarth, 'Race as Stigma: Positioning the Stigmatized as Agents, not Objects' (2006) 16 *Journal of Community and Applied Social Psychology* 442, 450; see also L. Sayce, 'Stigma, Discrimination and Social Exclusion: What's in a Word?' (1998) 7 *Journal of Mental Health* 331.

¹³ *Ibid* 451.

'prostitute identity' and a willingness to engage in transformative theory that crosses feminist lines.

Deconstructing the discursive binary: radical feminism versus liberal feminism

The feminist sex work discourse is often framed in binary terms: liberal opposed to radical; sex work opposed to sexual violence. This 'either/or' approach to the 'problem' of prostitution presumes the universal application of one or the other of these theories and discounts the possibility that neither might be wholly appropriate. In order to move beyond this binary, it is necessary to canvass and ultimately to deconstruct the two different perspectives' theoretical foundations. I approach this task with Joan Scott's conception of deconstruction as a basis, by 'analysing in context the way any binary opposition operates, reversing and displacing its hierarchical construction, rather than accepting it as real or self-evident'.¹⁴

Those perspectives most closely associated with liberal feminism begin their analysis from the premise that there is nothing wrong with prostitution *per se*. Many liberal feminists emphasize the autonomy of sex workers and their clients and explain the exchange of sexual services for money in terms of a mutually beneficial arrangement between consenting adults.¹⁵ As Alison Jaggar argues, the prostitution contract is 'entered into by each individual for

¹⁴ Joan Scott, *Gender and The Politics of History* (Columbia Press, 1999) 41.

¹⁵ Karen Peterson-Iyer, 'Prostitution: A Feminist Ethical Analysis' (1998) 14 *Journal of Feminist Studies in Religion* 19, 25.

her ... own benefit, each striking the best bargain that ... she is able'.¹⁶ Liberal feminism often finds itself aligned with prostitutes' organizations. In Australia for instance, the sex work industry's most vocal advocacy organization is the Scarlet Alliance, which argues that 'prostitution is work' and that prostitution is a legitimate employment 'choice' for women.¹⁷

It follows from these arguments that many of the negative stereotypes associated with prostitution must be irrational reactions to the socially constructed stigma attached to sex workers and to the sex work industry.¹⁸ Martha Nussbaum, in her influential article on female sex work, concludes that many of the problems identified by feminists as inherent in prostitution can be found in all of women's employment choices. In this way prostitution is 'just like' all other forms of employment for women. Nussbaum's argument is most compelling when constructing a continuum of bodily services as wage labour on to which prostitution clearly falls. For Nussbaum, factory workers, lawyers, operas singers, doctors and prostitutes are all alike because they all do things with parts of their bodies for which they receive a wage in return. However, this line of reasoning has been criticized by radical feminists for its 'abstract contractarianism' and failure to place prostitution 'in the social context of the structure of sexual relations between women and men'.¹⁹ Accordingly, Nussbaum's conception of the essential similarity of all female waged labour can be contrasted with Catherine MacKinnon's continuum of the ways in

¹⁶ Alison M. Jaggar, 'Prostitution' in Alan Soble (ed), *The Philosophy of Sex: Contemporary Readings*, 1st ed. (Rowman & Littlefield, 1991) 262.

¹⁷ See generally Linda Banach and Sue Metzenrath, *Principles For Model Sex Industry Legislation* (Scarlet Alliance and the Australian Federation of AIDS Organizations, 2000).

¹⁸ Nussbaum, above n 11, 696.

¹⁹ Carole Pateman, 'Defending Prostitution: Charges Against Ericsson' (1983) 93 *Ethics* 561, 563.

which women engage in sexual intercourse with men. For MacKinnon, female prostitution is symbolically aligned with sexual abuse and rape.²⁰

As with many liberal feminist analyses of sex work, a particular weakness is that Nussbaum's is an 'exclusive' argument: excluding considerations of the structural inequalities that permeate all gender relations and especially women's employment in the sex work industry. And as O'Connell Davidson pithily point out, in reality, sex work is not entirely like other work, for in what other industry will an unhappy customer beat, rape or murder the service provider?²¹ So long as the pervasive social stigma attached to the sex work industry remains, sex work must be differentiated from other forms of work.²² The liberal position that all sex work is simply work compromises feminists' ability to challenge the exploitation and gendered inequalities that exist in the industry and beyond.

Much of the radical feminist discourse approaches prostitution from the opposite perspective: that no matter how it is theorized, the existence of an industry for female sexual services is inimical to the interests of women. For Carole Pateman, 'the central feminist argument is that prostitution remains morally undesirable, no matter what reforms are made, because it is one of the most graphic examples of men's domination of women'.²³ For radical feminists, prostitution is the manifestation of the right of male access to

²⁰ Catherine A. MacKinnon, *Feminism Unmodified* (Harvard University Press, 1987).

²¹ Julia O'Connell Davidson, *Prostitution, Power and Freedom* (Polity Press, 1998) 64.

²² Sanders, O'Neill and Pitcher, above n 6, 11.

²³ Pateman, above n 19, 561.

women's bodies.²⁴ A prostitute can never be a 'sex worker' because in offering her sexual services in exchange for money, a woman is transformed into a 'sex object'.²⁵ More recently, Sheila Jeffreys has gone so far as to suggest that the legalization of prostitution by a State (as in Victoria) is tantamount to the State acting as a pimp in the continuing male domination and commodification of women's bodies.²⁶

The most powerful criticism levelled against radical feminists' attitude towards prostitution is that it has confused the commodification of sex with the objectification of women.²⁷ Radical feminists use prostitution and prostitutes as symbols of male domination and of the top-down hierarchy that perpetuates the exploitation of women.²⁸ As the foregoing discussion demonstrates, it is an attitude that is insulting to both prostitutes and women more generally. I agree with Lisa Maher who argues that taking the position that women who sell sex are victims leaves women 'devoid of choice, responsibility and accountability'.²⁹ For prostitutes, it denies the agency of the individual and ignores the choices (whatever their socio-political context) that such women may have made in entering the industry. Further, it relies on what has been referred to as the 'brainwash theory': the notion that women often make purportedly autonomous and objective decisions out of a false consciousness that has been constructed by – and to reflect the desires of – a

²⁴ See generally Carole Pateman, 'What's Wrong with Prostitution' (1999) 27 *Women's Studies Quarterly* 53; C. Overall, 'What's Wrong with Prostitution? Evaluating Sex Work' (1992) 17 *Signs: Journal of Women in Culture and Society* 705; Sheila Jeffreys, *The Industrial Vagina: The Political Economy of the Global Sex Trade* (Routledge, 2008).

²⁵ Kathleen Barry, *Female Sexual Slavery* (Harper and Row, 1979).

²⁶ Jeffreys, above n 24, 2008.

²⁷ Jane Dickin McGinnis, 'Whores and Worthies: Feminism and Prostitution' (1994) 9 *Canadian Journal of Law and Sociology* 105, 106.

²⁸ Ibid.

²⁹ L. Maher, *Sexed Work: Gender, Race and Resistance in a Brooklyn Drug Market* (Oxford University Press, 2000) 1.

patriarchal society.³⁰ This has led to a feminist emphasis on pimps and johns and has resulted in a focus on controlling and regulating the actions of men, rather than on the feminist mandate of representing women.³¹

Ultimately however, in attempting to construct effective policy frameworks for sex work, criticisms of each school of thought by the other are unconvincing. By criticizing each other, these models 'dichotomize agency'³² and 'ignore the complexity of power and resistance that defines the sex worker's experience'.³³ Forcing anyone with an interest in the industry to choose a side discounts the possibility that neither approach is totally right or totally wrong. Instead, demonstrating a non-judgmental attitude towards those women who do work in the sex work industry is a necessary part of providing practical outcomes for sex workers.³⁴ A non-judgmental approach should not be confused with a value-neutral approach. It is possible to integrate normative convictions into a non-judgmental approach by taking as a starting point an identity politics which 'speaks from the hearts and experiences of those involved in working, managing, and living within the sex industry'.³⁵ As Scoular correctly identifies, a discursive space exists for transformative feminist theory that both incorporates and exists outside of the liberal and radical feminist discourses. It is this discursive space that this article occupies:

³⁰ See Overall, above n 24, 711.

³¹ McGinnis, above n 27, 119.

³² Maher, above n 29, 1.

³³ Sanders, O'Neill and Pitcher, above n 6, 12.

³⁴ R. Harding and P. Hamilton, 'Working Girls: Abuse or Choice in Street-Level Sex Work? A Study of Homeless Women in Nottingham' (2009) 39 *British Journal of Social Work* 1118, 1122.

³⁵ Sanders, O'Neill and Pitchers, above n 6, 14.

one in which the 'disruptive potential of the counter-hegemonic subject' is used to challenge hierarchical relations.³⁶

Equality and difference; sex work and sexual violence

In deconstructing two of the key feminist positions relating to sex work, it is useful to locate them in the historical development of feminist discourse. Two strategies dominated this discourse throughout the second half of the twentieth century: the strategy of asserting substantive equality between the sexes, and the strategy of highlighting the differences between them³⁷.

There are striking similarities between the equality discourse and the 'sex work as work' discourse. The works of Simone de Beauvoir and Martha Nussbaum provide useful examples of these discourses. Their similarities become evident in an analysis of the ways in which Nussbaum's theorization of sex work borrows from de Beauvoir's seminal work on women as the 'Other'. For de Beauvoir, woman's liberation can only come about through an acknowledgement and rejection of her position as 'Other'.³⁸ This 'Other' is 'as primordial as consciousness itself'³⁹ and its subjectivity and relationality is the source of man's transcendence. In this strategy 'Otherness' is antithetical to equality and the struggle to overcome it is an emancipatory mission for women. Couched in similar terms, albeit with a much narrower focus, Nussbaum contends that it is the stigma attached to sex work – its position as

³⁶ J. Scoular, 'The "Subject" of Prostitution: Interpreting the Discursive, Symbolic and Material Position of Sex/Work in Feminist Theory' (2004) 5 *Feminist Theory* 343, 352.

³⁷ Susan J. Hekman, *The Future of Differences: Truth and Method in Feminist Theory* (Polity Press, 1999) 12-13.

³⁸ Simone de Beauvoir, *The Second Sex* (Penguin, 1972).

³⁹ *Ibid* 16.

'Other' – rather than anything wrong with the actual sale of sexual services that has led to its prohibition and moralistic condemnation.⁴⁰ What both authors argue is that so long as the (male) subject and its 'Other' – and for Nussbaum all workers and sex workers – are not recognized as equals, women and sex workers cannot be liberated from the strictures of state-sanctioned patriarchy.

The second strategy emphasizes the differences between men and women and argues that the valorization of the feminine is a positive and necessary step for the feminist movement.⁴¹ Carol Gilligan definitively expounds this strategy and provides a platform for the 'different voice' of women.⁴² It is only through an acknowledgement of difference that feminists can achieve the goal of the emancipation of women. This emphasis on difference is mirrored in many radical feminists' conception of sex work as different to all other work. Prostitution prohibitionist Carole Pateman, for example, argues that the prostitution contract is different to any other contract because it manifests the male right of sexual access to women's bodies.⁴³ The 'difference theory' expounded by Gilligan and Pateman highlights the differences between women and men's experiences and between the prostitution contract and any other contract of labour. Both authors see difference as the framework from which to begin a radical critique of 'patriarchal right'.⁴⁴

⁴⁰ Nussbaum, above n 11, 693.

⁴¹ Hekman, above n 37, 17.

⁴² Carol Gilligan, *In a Different Voice* (Harvard University Press, 1982).

⁴³ Pateman, above n 24, 53.

⁴⁴ *Ibid* 53.

Herein lies the problem: a choice between difference and equality or, as it manifests in the prostitution debate, between defining the sale of sexual services as work or as sexual violence creates yet another dichotomy that divides, rather than unites, feminists. Joan Scott, for example, has argued that '[w]hen equality and difference are paired dichotomously, they structure an impossible choice. If one opts for equality, one is forced to accept the notion that difference is antithetical to it. If one opts for difference, one admits that equality is unattainable'.⁴⁵ Feminist philosopher Susan Hekman takes this problem and demonstrates the significant and problematic epistemological similarity between the two strategies.⁴⁶ Both assume that 'the differences between men and women are monolithic and hierarchical, that qualities are either masculine *or* feminine, either superior *or* inferior'.⁴⁷ To counter this 'impossible choice' further deconstruction of the liberal and radical feminist positions with regard to sex work is necessary.

Equality-versus-difference cannot dictate the feminist debate about prostitution because the oppositional pairing misrepresents the importance and value of both terms.⁴⁸ It allows one side to co-opt 'difference' while the other focuses on 'equality', resulting in a static theoretical duopoly. Whether a radical feminist, a liberal feminist or belonging to a prostitutes' organization, advocates often ascribe particular characteristics to *all* sex workers and argue that as a consequence one approach to the 'problem' of prostitution must be right. These advocates adopt positions that essentialize prostitution rather

⁴⁵ Scott, above n 14, 172.

⁴⁶ Hekman, above n 37, 17.

⁴⁷ Ibid.

⁴⁸ Scott, above n 14, 172

than incorporating into their understanding differences of opinion and of practice from within the industry. These feminisms also fail to incorporate a 'conception of subjectivity that defines differences [within a group] as constitutive rather than marginal'.⁴⁹ Radical feminism ignores this subjectivity by denouncing all sex work as contributing to the normalization of 'patriarchal right'. Liberal feminism ignores it by asserting women's agency without acknowledging the gendered relationality of all sexual acts. In order for the interests of sex workers and of women more generally to be met, we need a positive category that recognizes the women within the sex work industry as a plurality with internal structure whose members 'are differentiated and differentiable', that relate to one another in a variety of ways and as a result 'is coalesced as a distinguishable "something"'.⁵⁰ This category is one that necessarily depends on an understanding of differences.

The approach of acknowledging plurality within a category has been criticized as inducing feminists to abandon generalizations, and with them feminism's unifying force.⁵¹ With regard to sex work in particular, without the galvanizing strength of generalizations that can be applied to all women in the industry, advocating for reform becomes increasingly difficult. However once more we see here the creation of a dichotomy that forces a choice between emphasizing the proliferation of differences within the industry and identifying a homogenous body of female sex workers. Neither of these approaches is desirable. The first begs Susan Bordo's rhetorical question: 'just how many

⁴⁹ Hekman, above n 37, 18.

⁵⁰ Marilyn Frye, 'The Necessity of Differences: Constructing a Positive Category of Women' (1996) 21 *Signs: Journal of Women in Culture and Society* 991, 1002.

⁵¹ Susan Bordo, 'Feminism, Postmodernism and Gender-Scepticism' in Linda J. Nicholson (ed), *Feminism/Postmodernism* (Routledge, 1990) 139

axes [of difference] can one include and still preserve analytic focus or argument?⁵² The second discounts the multitude of experiential possibilities within any group of people.

A better understanding of the heterogeneity of sex workers can be found in an analysis of the effects of 'polymorphism in prostitution'.⁵³ Brewis and Linstead explain this approach by reference to the 'full range of orientations towards or acceptations of the term prostitution in a depoliticized way'.⁵⁴ 'Polymorphism' is a useful term that describes the way in which being a prostitute might mean doing a particular thing for one woman and a completely different thing for another. That is not to say that a sex worker can simply remove herself of her own volition from the socio-political and cultural context in which she offers her services. As Shrage reasons, 'although the prostitute may want the meaning of her actions assessed relative to her own idiosyncratic beliefs and values, the political and social meaning of her actions must be assessed in the political and social context in which they occur'.⁵⁵ However telling a prostitute how her actions 'must' be assessed reflects the kind of intellectual imperialism that feminists have often been guilty of in relation to prostitutes. This is reflected in the top-down approaches of both liberal and radical feminism which describe prostitution in terms that best serve to make a theoretical point. And as Joan Scott tells us, feminist deconstruction requires a reversal of hierarchical constructions⁵⁶ so that in the case of prostitution we should be theorizing from the bottom up rather than from the top down. This

⁵² Ibid.

⁵³ Joanna Brewis and Stephen Linstead, *Sex, Work and Sex Work* (Routledge, 2000) 189.

⁵⁴ Ibid.

⁵⁵ Laurie Shrage, 'Should Feminists Oppose Prostitution' (1989) 99 *Ethics* 347, 357.

⁵⁶ Scott, above n 14, 41.

means using the 'prostitute identity' and the identities of prostitutes as our starting point.

Sexuality and selfhood: the 'prostitute identity' and the identities of prostitutes

Part of the transition from modernity to postmodernity has been the transformation of what defines an individual's identity. Rather than identity being defined by what the individual does or makes, it is suggested that we now live in a world where identity is contingent upon consumption; it is what we consume that defines who we are.⁵⁷ What then, does this mean for the prostitute? Brewis and Linstead propose that 'prostitution is ... an occupation in which what is produced and simultaneously consumed is the body, or at least its parts'.⁵⁸ According to this conception of prostitution the commodification of the sex worker is complete: her work becomes a self-propagating cycle of production and consumption.

The 'prostitute identity' and its production/consumption cycle stems from an understanding of what John Locke called property in the person. Locke wrote that '[e]very man has a property in his own person. This nobody has any right to but himself. The labour of his body, and the work of his hands, we many say, are properly his'.⁵⁹ Properly understood, Locke's dictum allows for the commodification of a person's bodily capacity to labour but not of people themselves. Liberal feminists have tried to fit prostitution into this liberal

⁵⁷ Brewis and Linstead, above n 53, 207.

⁵⁸ Ibid 209.

⁵⁹ John Locke, 'The Second Treatise on Government' (1689) in David Wootton (ed), *John Locke: Political Writings* (Penguin, 1993) 274.

concept of property so that any interventionist strategy can be seen as a violation of the prostitute's natural right to engage in voluntary transfers of her rightful property.⁶⁰ For O'Connell Davidson however, this is a misconstruction of the prostitution contract which is not in fact a voluntary transfer of property, but an agreement by a prostitute '*not to use* her personal desire or erotic interests as the determining criteria for her sexual interaction'.⁶¹ According to O'Connell Davidson then, prostitution is a form of self-Othering, in which a prostitute fixes herself as a transformative object able to satisfy erotic needs on demand.⁶²

However, I would argue that a better way of constructing 'the prostitute identity' in the discursive context of prostitution labour is to use a combination of *both* of these theories. To take the key points from each conception of prostitution, the 'prostitute identity' is self-commodifying *and* transformative. It is not a fixed identity but one that necessarily requires the prostitute to transform herself from client to client while maintaining the commodification (or production) of her bodily capacity to labour. It is an identity constructed by what prostitutes actually do.

The 'prostitute identity' can be distinguished from the identities of prostitutes. How prostitutes understand themselves is at least partly informed by normative attitudes towards sexuality and labour.⁶³ This by no means enables us to make generalizations about how all prostitutes see themselves. The focus instead should be on the operation of the consumer service industry in

⁶⁰ O'Connell Davidson, above n 1, 85

⁶¹ *Ibid* 91

⁶² *Ibid.*

⁶³ Brewis and Linstead, above n 53, 225.

which prostitutes work. It is an industry which has at its core an exchange of value for sexual services. Brewis and Linstead suggest that there might not be anything wrong with this exchange. They argue that 'for prostitutes themselves and for male ... clients ... [prostitution] might represent a way of embracing the transactional and consumptional nature of sex and avoiding the emotional entanglements and moral strictures that might otherwise attend it'.⁶⁴ In terms of constructing a positive identity of prostitutes, this description is a step in the right direction. It is non-judgmental and yet stops short of creating a fictional role for the prostitute as a 'sex therapist' and someone 'respected for her wealth of sexual and emotional knowledge'.⁶⁵ However establishing whether or not it is possible or desirable for prostitutes and clients to engage in this level of emotional detachment is reliant on a close examination of the micro-practices that constitute 'prostitution' and is beyond the scope of this essay.

The preceding idea, that it is possible to separate sex and self, is one that inspires vehement opposition in radical and religious feminist camps. For religious feminist ethicist Karen Peterson-Iyer, sex 'carries an undeniably unique meaning for most people, and certainly for most women'.⁶⁶ Extending this generalization, she argues that there is a universal 'connection between sexuality and selfhood' that is 'broken in prostitution' when a prostitute detaches her identity from her sexual bodily activity.⁶⁷ Pateman similarly holds

⁶⁴ Ibid 195.

⁶⁵ This is the role that Sybil Schwarzenbach envisages for the sex worker once sex work has been normalized and the prostitution stigma destroyed. See Sybil Schwarzenbach, 'Contractarians and Feminists Debate Prostitution' (1990-1991) 18 *New York University Review of Law and Social Change* 103, 125.

⁶⁶ Peterson-Iyer, above n 14, 38.

⁶⁷ Ibid 39.

that 'when sex becomes a commodity in the capitalist market so, necessarily, do bodies and selves'.⁶⁸ I would argue that it is precisely this unwillingness to acknowledge that the 'prostitute identity' might not be fixed in space or time that has compromised liberal and radical feminists' ability to think creatively and proactively about the 'problem' of prostitution.

Constructing sex work law

Given the foregoing deconstruction of the two main feminist prostitution discourses, the question must be asked, 'where to from here?' This article makes clear that the focus in constructing a legal framework should be on practical solutions for the problems currently facing prostitutes on the ground. Jane McGinnis correctly argues that 'it is only by integrating the views of women we see exploited in our society, a group which includes not only whores but housewives, that we will be able to work against ... the sexualisation of subordination'.⁶⁹ In the same vein, we should see feminist proselytising about how women *should* lead their lives as betraying an intellectual triumphalism that undercuts the feminist mandate to represent *all* women.⁷⁰ However the fact remains that the complexity and heterogeneity of the sex work industry has hindered efforts to locate a unified voice from within the sex worker community. It has also made it difficult to identify the best way to deal with the 'problem' of prostitution in a public policy and legal sense.

Four systems of sex work laws dealing with this 'problem' have been enacted in various parts of the world: the prohibitionist system, the tolerationist system,

⁶⁸ Pateman, above n 19, 562.

⁶⁹ McGinnis, above n 27, 108.

⁷⁰ *Ibid* 110.

legalization and decriminalization.⁷¹ Broadly speaking, the prohibitionist system is exemplified by Sweden, where the *buying* of sex is illegal.⁷² It is a system idealized by some radical feminists who believe that it correctly identifies prostitution as a problem about men.⁷³ The tolerationist system does not seek to abolish prostitution *per se* but is intended to target the trafficking in women and girls for prostitution.⁷⁴ Legalization is the system engaged in the Australian state of Victoria and creates a regime that controls and regulates some forms of legal sex work and makes all other forms illegal. The fourth system is decriminalization under which the sex work industry is regulated in the same way as any other.

It should be noted that recent empirical research into the effects of these apparently contrasting legal approaches has produced similar results, even in the case of legalization and decriminalization.⁷⁵ All four systems lead to 'the increased marginalization of more public forms of sex work (street sex work) and its participants, and a relative inattentiveness to many forms of indoor work'.⁷⁶ The Swedish system deserves particularly close attention because it is the one championed by Mary Sullivan in her recent book that describes the Victorian system of legalization as a 'failed experiment'.⁷⁷ The consistent message across a number of evaluations and official sources is that the

⁷¹ D'Cunha, above n 3, 34.

⁷² Arthur Gould, 'The Criminalisation of Buying Sex: the Politics of Prostitution in Sweden' (2001) 30 *Journal of Social Policy* 437, 437.

⁷³ See Mary Sullivan, *Making Sex work: A Failed Experiment With Legalized Prostitution* (Spinifex, 2007).

⁷⁴ D'Cunha, above n 3, 34. The tolerationist system reflects the goals of the United Nations' *Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others*, opened for signature 2 December 1949, 96 UNTS 217 (entered into force 25 July 1951). As at 2 July 2012, 81 countries are parties to the Convention.

⁷⁵ P.J. Hubbard et al., *Regulating the Spaces of Sex Work: Assessing the Impact of Prostitution Law: Full Research Report*. ESRC no. RES-000-22-1001, 2007.

⁷⁶ Scoular, above n 36, 13.

⁷⁷ Sullivan, above n 73.

Swedish law prohibiting the purchase of sexual services⁷⁸ has been selectively enforced and that its most visible outcome has been a temporary reduction in street sex work, 'leading to the displacement of women and men into more hidden forms of sex work'.⁷⁹ In real terms, the Swedish system has led to the marginalization of the already marginalized.

This apparent ineffectiveness has led some authors to suggest that the solution to all of this theorising is to avoid the 'choice' of legal systems at first instance. That, at least, is what Laura Agustín argues in her critique of the role that legal regimes have played in dealing with prostitution.⁸⁰ Agustín sees the notion that the classic prostitution regimes are a rational response to a social problem as a 'pretense'⁸¹ and proves her point by reference to the empirical evidence mentioned above. However Agustín's anti-statist approach does not provide a model for reform. While she is right to state that sex work viewed exclusively through the lens of legal doctrine frames the subject too narrowly, her understanding of 'the law' is limited and monolithic.

The problem with Agustín's schema is that when 'reality' does not 'relate directly to law's pronouncements, [law] is rendered irrelevant'.⁸² Agustín assumes that the relationship between law and its subject has to have direct

⁷⁸ *Svensk författningssamling* (SFS) Lag [The Prohibition of the Purchase of Sexual Services Act] 1998 (Sweden), s 408: 'Den som mot ersättning skaffar sig en tillfällig sexuell förbindelse, döms - om inte gärningen är belagd med straff enligt brottsbalken - för köp av sexuella tjänster till böter eller fängelse i högst sex månader'. s 408 states: 'A person who obtains a casual sexual relation in return for payment will be sentenced – unless the act is punishable under the penal code – for the purchase of sexual services to a fine or term of imprisonment not exceeding six months'. [Jane Scoular trans].

⁷⁹ Scoular, above n 36, 18.

⁸⁰ Laura Agustín, 'Sex and the Limits of Enlightenment: The Irrationality of Legal Regimes to Control Prostitution' (2008) 5 *Sexuality Research & Social Policy* 73.

⁸¹ *Ibid* 83.

⁸² Scoular, above n 36, 25.

and measurable consequences for it to be relevant. Clearly for prostitution this will not always be the case. For instance, it was presumably not the Victorian legislature's intention that a sexually explicit entertainment trade would burgeon alongside the legalization of brothels, however that is precisely what has occurred.⁸³ Arguing however that sex work law is irrelevant reflects a simplistic understanding of prostitution as a single and definable thing. It also fails to recognize that numbers often do not tell the whole story. In the case of apparently contrasting systems of regulation, empirical evidence might suggest that the result is the same for sex workers regardless of which system is in place. But as Jane Scoular explains, we should also look to the 'types of subjectification' that each system encourages.⁸⁴ In all the systems discussed in this essay it is possible to see the encouragement of 'self-governing, rational actors' whether through licensing or industry-exiting strategies.⁸⁵ It is this underlying policy goal that helps to explain why law matters for prostitution. As Scoular goes on to state, '[l]aw operates through freedom as much as through censure; through both the "empowering" system of licensing and welfare inspired interventions designed to liberate women from the oppressive "reality" of commercial sex'.⁸⁶

In Victoria then, where the ideas that construct this article were first formed, does sex work law matter? To answer this question we need to understand how the Victorian system constructs the 'prostitute identity' and how it sometimes unwittingly perpetuates the 'prostitution stigma'.

⁸³ Sullivan, above n 73, 187.

⁸⁴ Scoular, above n 36, 31.

⁸⁵ Ibid.

⁸⁶ Ibid 36.

Victoria's system of regulating prostitution is largely contained in the *Sex work Act 1994* (Vic). It is based on a harm minimization approach that aims to protect both sex workers and the wider community.⁸⁷ It is designed to provide safeguards against the types of exploitation that tend to be at the forefront the radical feminist call for the prohibition of sex work. However the Victorian experience has been that prostitutes do not often seek the types of legal recourse typically available to them even where prostitution has been legalized.⁸⁸ In Victoria especially, where legalization has created a regulatory system that is designed to operate to protect sex workers' legal rights, it is surprising how few sex workers readily resort to protective legal mechanisms. Kristen Murray suggests that this is because '[t]he difference between sex workers' patterns of engagement with paid work and the gendered construction of what "real" work is may ... mean that sex workers, either consciously or unconsciously, view protective legal mechanisms as having little application to the work they engage in'.⁸⁹ Underlying this reasoning is the public/private distinction that permeates all gender relations and has particular force in gendered industries such as sex work.

While there has been a tendency in feminist scholarship to fall back on the public/private distinction to explain gender inequalities, it remains a useful framework. Catherine MacKinnon explains the concept in simple binary terms, that 'public is opposed to private, in parallel with ethics and morality, and factual is opposed to valued determinations ... these distinctions are gender

⁸⁷ Sullivan, above n 73, 4.

⁸⁸ See Chapters 4 and 5 in Kristen Murray, *Sex Work as Work: Labour Regulation in the Legal Sex Industry in Victoria*, (Masters thesis, University of Melbourne) 2001.

⁸⁹ *Ibid* 202.

based: female is private, moral, valued, subjective; male is public, ethical, factual, objective'.⁹⁰ It is a distinction that maintains an 'absolute separation between work and family'⁹¹ so that productive labour is 'performed and rewarded in the market place and reproductive labour is performed (and not financially rewarded) in the home'.⁹² However the reality (or realities) for sex workers – their polymorphic conceptions of prostitution – does not reflect this artificial distinction.

A prostitute's work is both productive (typically a public activity) and symbolically reproductive (notionally a private activity). Put another way, a prostitute performs reproductive labour and is rewarded in the market place. The failure of the Victorian system lies in its characterization of legal sex work as only and exclusively an industrial issue, when it is also an issue about sex. This fundamental misconception of the 'prostitute identity' has had a dehumanizing effect on the identities of prostitutes. It has done nothing to deal with the 'prostitution stigma' as Martha Nussbaum believes the normalization of prostitution should do. This is evidenced by decisions such as the one by the Supreme Court of Victoria in *R v Hakopian*.⁹³ In that case the principle established in *R v Harris*⁹⁴ that a male rapist will be sentenced to a lesser penalty where he rapes a prostitute rather than any other woman was reaffirmed. The decision was based on the dubious notion that the rape of a prostitute with 'greater' sexual experience was somehow less heinous than

⁹⁰ MacKinnon, above n 20, 151.

⁹¹ Rosemary J. Owens, 'Women, "Atypical" Work Relationships and the Law' (1993) 19 *Melbourne University Law Review* 399, 402.

⁹² Murray, above n 88, 203.

⁹³ (Unreported, Supreme Court of Victoria, Court of Criminal Appeal, 11 December 1991).

⁹⁴ (Unreported, Supreme of Victoria, Court of Criminal Appeal, Starke J, 11 August 1981) 6-7.

the rape of a 'chaste woman'.⁹⁵ It is a decision that reflects that conception of the prostitute as a 'fallen woman' not deserving of the full protection of the law.

Clearly then, neither the Swedish nor the Victorian model satisfies the focus here on deconstructing the prostitute stigma. Nor does either model adequately incorporate a transformative understanding of the 'prostitute identity' or the identities of prostitutes. And yet for fear of falling into the trap laid by Agustín, I must emphasize that I do not see sex work law as irrelevant to the 'problem' of sex work. The transformative potential of sex work law lies in its ability to tacitly (rather than officially) acknowledge sex work as a valid form of waged labour. A system of sex work law has the potential to be both appropriate and effective if it treats sex work as the same as, different to and something other than a form of work. There can be no quick fix. However of all the systems mentioned thus far, decriminalization would best allow the myriad identities and experiences in the industry to define what prostitution 'is' in order to reframe problems within the industry as reflections of wider industrial and relational gender inequalities.⁹⁶ Above all, decriminalization avoids an 'imperialist, uncritical[ly] positivist position'⁹⁷ towards the strategic use of sex work law, and better enables the pursuit of a 'deconstructivist

⁹⁵ Jocelynn Scutt, 'Judicial Vision: Rape, Prostitution and the "Chaste Woman"' in *Without Consent: Confronting Adult Sexual Violence* (Australian Institute of Criminology, 1992).

⁹⁶ Although beyond the scope of this article to provide a draft of a comprehensive legal framework that reflects these ideals, the development of sex work law in New Zealand (the first country in the world to decriminalize all forms of non-forced sex work) provides an interesting case study into the paths towards, implementation and consequences of decriminalized sex work. See generally, Gillian Abel, Lisa Fitzgerald, Catherine Healy and Aline Taylor (eds), *Taking the Crime out of Sex Work: New Zealand Sex Workers' Fight for Decriminalization* (The Policy Press, 2010).

⁹⁷ Scoular, above n 35, 39.

agenda *within* legal arenas and discourses'.⁹⁸ Importantly, because the institution of prostitution is rife with sexism, racism and class discrimination,⁹⁹ decriminalization must be accompanied by the implementation of a full array of social reforms.¹⁰⁰ These reforms must take the form of preventive and educative social policies encouraging normative gender equality that operate in tandem with the gradual repeal of sex work specific criminal and labour laws.

Conclusion

As a prostitute interviewed in Laurie Bell's book states, sex workers are 'very hard to politicize as a group, [they are] a bunch of mavericks'.¹⁰¹ This sentiment reflects the problems with contemporary feminist debates about sex work. The strict liberal and radical feminist discourses refuse to recognize that sex work is not just about work nor is it always sexual violence played out on women's bodies. It is many different things to many different people but it must always include the story of *being* a prostitute. As Elizabeth Bounds points out, feminists must be 'self-conscious' in their theory and strategy or else 'risk silencing oppressed women by making them objects rather than subjects and agents of analysis'.¹⁰²

⁹⁸ R. Sandland, 'Between "Truth" and "Difference": Poststructuralism, Law and the Power of Feminism' (1995) 2 *Feminist Legal Studies* 14.

⁹⁹ Francis M. Shaver, 'Prostitution: A Critical Analysis of Three Policy Approaches' (1985) 11 *Canadian Public Policy* 493, 499.

¹⁰⁰ For a discussion of the types of reforms that I envisage, see *ibid* 498-501.

¹⁰¹ L. Bell (ed), *Good Girls/Bad Girls: Sex Trade Workers and Feminists Face to Face* (Women's Press, 1987) 114.

¹⁰² Elizabeth M. Bounds, 'Sexuality and Economic Reality: A First and Third World Comparison' in Susan E. Davies and Eleanor H. Haney (eds), *Redefining Sexual Ethics: A Sourcebook of Essays, Stories, and Poems* (Pilgrim, 1991) 142.

Accordingly, in this article I have engaged in a self-conscious deconstruction of the dominant feminist approaches towards prostitution. A transformative feminist theory has been offered that locates prostitution in the discursive space that exists outside of the radical/liberal and sex work/sexual violence dichotomies. It is a theory that focuses on the 'prostitute identity' and the identities of prostitutes so that the most appropriate and effective legal and policy reform can be identified and implemented. The Swedish model of prohibition and the Victorian model of legalization have been shown to be theoretically and practically deficient. It is therefore concluded that of the limited systems of sex work laws contemplated by lawmakers, decriminalization best attends 'to the concrete lives and self-expressed needs of prostitutes themselves'.¹⁰³

¹⁰³ Peterson-Iyer, above n 14, 36.

Bibliography*Articles/Books/Reports*

Abel, Gillian, Lisa Fitzgerald, Catherine Healy and Aline Taylor (eds). *Taking the Crime out of Sex Work: New Zealand Sex Workers' Fight for Decriminalization* (Policy Press, 2010).

Agustín, Laura. 'Sex and the Limits of Enlightenment: The Irrationality of Legal Regimes to Control Prostitution' (2008) 5 *Sexuality Research & Social Policy* 73-86.

Banach, Linda and Sue Metzenrath. *Principles For Model Sex Industry Legislation*, (Scarlet Alliance and the Australian Federation of AIDS Organizations, 2000).

Barry, Kathleen. *Female Sexual Slavery* (Harper and Row, 1979).

de Beauvoir, Simone. *The Second Sex* (Penguin, 1972).

Bell, L. (ed.). *Good Girls/Bad Girls: Sex Trade Workers and Feminists Face to Face* (Women's Press, 1987).

Bordo, Susan. 'Feminism, Postmodernism and Gender-Scepticism' in Linda J. Nicholson (ed), *Feminism/Postmodernism* (Routledge, 1990), 133-56.

Bounds, Elizabeth M. 'Sexuality and Economic Reality: A First and Third World Comparison' in Susan E. Davies and Eleanor H. Haney (eds.), *Redefining Sexual Ethics: A Sourcebook of Essays, Stories, and Poems* (Pilgrim, 1991), 131-43.

Brewis, Joanna and Stephen Linstead. *Sex, Work and Sex Work* (Routledge, 2000).

Davidson, Julia O'Connell. *Prostitution, Power and Freedom* (Polity Press, 1998).

———, 'The Rights and Wrongs of Prostitution' (2002) 17 *Hypatia* 84-98.

D'Cunha, Jean. 'Prostitution Laws: Ideological Dimensions and Enforcement Practices' (1992) 27 *Economic and Political Weekly* 34-44.

Frye, Marilyn. 'The Necessity of Differences: Constructing a Positive Category of Women' (1996) 21 *Signs: Journal of Women in Culture and Society* 991-1010.

Gilligan, Carol. *In a Different Voice* (Harvard University Press, 1982).

Gould, Arthur. 'The Criminalisation of Buying Sex: the Politics of Prostitution in Sweden' (2001) 30 *Journal of Social Policy* 437-56.

- Harding, R. and P. Hamilton. 'Working Girls: Abuse or Choice in Street-Level Sex Work? A Study of Homeless Women in Nottingham' (2008) 39 *British Journal of Social Work* 1118-37.
- Howarth, Caroline. 'Race as Stigma: Positioning the Stigmatized as Agents, not Objects' (2006) 16 *Journal of Community and Applied Social Psychology* 442-51.
- Hekman, Susan J. *The Future of Differences: Truth and Method in Feminist Theory* (Polity Press, 1999).
- Hubbard, P.J. et al. 'Regulating the Spaces of Sex Work: Assessing the Impact of Prostitution Law: Full Research Report'. ESRC no. RES-000-22-1001 (2007).
- Jaggar, Alison M. 'Prostitution' in Alan Soble (ed.), *The Philosophy of Sex: Contemporary Readings*, 1st ed. (Rowman & Littlefield, 1991), 348-68.
- Jeffreys, Sheila. *The Industrial Vagina: The Political Economy of the Global Sex Trade* (Routledge, 2008).
- Locke, John. 'The Second Treatise of Government' (1689) in David Wootton (ed.), *John Locke: Political Writings* (Penguin, 1993), 261-386.
- MacKinnon, Catherine. *Feminism Unmodified: Discourses on Life and Law* (Harvard University Press, 1987).
- Maher, L. *Sexed Work: Gender, Race and Resistance in a Brooklyn Drug Market* (Oxford University Press, 2000).
- McGinnis, Jane Dickin. 'Whores and Worthies: Feminism and Prostitution' (1994) 9 *Canadian Journal of Law and Sociology* 105-22.
- Murray, Kristen, *Sex Work as Work: Labour Regulation in the Legal Sex Industry in Victoria* (Masters thesis, University of Melbourne, 2001).
- Nussbaum, Martha, 'Whether From Reason or Prejudice: Taking Money For Bodily Services' (1998) 27 *Journal of Legal Studies* 693-724.
- O'Neill, M. *Prostitution and Feminism* (Polity Press, 2001).
- Overall, C. 'What's Wrong with Prostitution? Evaluating Sex Work' (1992) 17 *Signs: Journal of Women in Culture and Society* 705-24.
- Owens, Rosemary J. 'Women, "Atypical" Work Relationships and the Law' (1993) 19 *Melbourne University Law Review* 399-430.
- Pateman, Carole. 'Defending Prostitution: Charges Against Ericsson' (1983) 93 *Ethics* 561-65.

———, 'What's Wrong with Prostitution?' (1999) 27 *Women's Studies Quarterly* 53-64.

Peterson-Iyer, Karen. 'Prostitution: A Feminist Ethical Analysis' (1998) 14 *Journal of Feminist Studies in Religion* 19-44.

Pheterson, G. *A Vindication of the Rights of Whores* (Seal Press, 1989).

Posner, Eric A. *Law and Social Norms* (Harvard University Press, 2002).

Sanders, Teela, Maggie O'Neill and Jane Pitcher. *Prostitution: Sex Work, Policy and Politics* (SAGE, 2009).

Sandland, R. 'Between "Truth" and "Difference": Poststructuralism, Law and the Power of Feminism' (1995) 3 *Feminist Legal Studies* 3-47.

Sayce, L. 'Stigma, Discrimination and Social Exclusion: What's in a Word?' (1998) 7 *Journal of Mental Health* 331-43.

Schwarzenbach, Sybil. 'Contractarians and Feminists Debate Prostitution' (1990-1991) 18 *New York University Review of Law and Social Change* 103-29.

Scott, Joan. *Gender and The Politics of History* (Columbia Press, 1999)

Scoular, J. 'The "Subject" of Prostitution: Interpreting the Discursive, Symbolic and Material Position of Sex/Work in Feminist Theory' (2004) 5 *Feminist Theory* 343-55.

Scutt, Jocelyne. 'Judicial Vision: Rape, Prostitution and the "Chaste Woman"' in *Without Consent: Confronting Adult Sexual Violence* (Australian Institute of Criminology, 1992).

Shaver, Francis M. 'Prostitution: A Critical Analysis of Three Policy Approaches' (1985) 11 *Canadian Public Policy* 493-503.

Shrage, Laurie, 'Should Feminists Oppose Prostitution' (1989) 99 *Ethics* 347-61.

Sullivan, Mary. *Making Sex Work: A Failed Experiment with Legalized Prostitution* (Spinifex, 2007).

Walkowitz, Judith R. *Prostitution and Society: Women, Class and the State* (Cambridge University Press, 1980).

Cases

R v Hakopian (Unreported, Supreme Court of Victoria, Court of Criminal Appeal, 11 December 1991)

R v Harris (Unreported, Supreme Court of Victoria, Court of Criminal Appeal, 11 August 1981)

Legislation

Sex work Act 1994 (Vic)

Svensk författningssamling [The Prohibition of the Purchase of Sexual Services Act] 1998 (Sweden)