

**Prostitution and Women's Agency:  
A Feminist Argument for Decriminalization**

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Most simply, prostitution is the taking of money for the provision of sexual services. Though it has been defined in a number of other ways that include the selling of self or the selling of bodily parts, definitions of this sort are more metaphorical than empirical and rely on religious and patriarchal views of women and their worth that contravene the purposes of a secular feminist analysis.<sup>1</sup> One goal of feminist theory is to undermine essentialist arguments about women's "nature" and their sexuality; by exposing the social construction of femininity that has been used to limit women's life options, feminist theory can help women (and men) find ways of reconstructing the meaning and possibility of inhabiting sexed and gendered bodies. In this paper, I consider different meanings and experiences of prostitution in order to think about how profitably to reconfigure the conditions of prostitution, offering a defense of decriminalization as the first of what will need to be many steps in the process of producing a more open sexual discipline within which women and men can operate. The point of doing so is—ultimately—both to make prostitution less exploitative and to socially reconstruct the limits on and meanings of female sexuality. As part of this argument, I contend that sexuality should be seen as vital to women's agency; that is, sexuality is important in and of itself, but sexuality and sexual ideology also have a productive influence on economic and political configurations of power.

To this end, my paper proceeds in four parts. First I set out the three main competing views of prostitution within feminism, ignoring here non-feminist accounts of both prostitution and women's sexuality. Second, I draw on the work of Michel Foucault to explain why sexuality needs to be seen as central to feminist analyses and why the abolitionist perspective on prostitution that dominates U.S. public policy and feminist analyses is ultimately detrimental to

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<sup>1</sup> See discussion in Kuo (2002, 42-43).

women's agency. I argue here that, with many emendations, prostitution could be part of a more open sexual discipline producing both male and female desire.<sup>2</sup> Third, I compare prostitution to pornography, which is legal, while prostitution mostly is not. Through this comparison I try to assess whether pornography's phenomenological distinction from prostitution can explain or justify its legal distinction from prostitution, and how this legal distinction serves the hegemonic gender order far more than women's agency interests. Finally, I look briefly at two models of legalized prostitution, one in rural Nevada, the other in the Netherlands in order to assess the benefits of legalization versus decriminalization. Based on these policy models, I argue that decriminalization of prostitution is an imperfect but necessary step in the long road to producing a less-misogynistic discourse and material practice of female sexuality.

### I. Three models of prostitution:

#### *Sex-as-Violence (Abolitionist Feminism)*

Abolitionist, or radical, feminists argue that all sex work is inherently violence against women. In prostitution (and pornography) women are selling themselves; this is so because the act of sex is a fundamental form of self-expression and self-knowledge. As sociologist Elizabeth Bernstein explains, "it is both the inextricability of sexuality and self-identity as well as prostitution's stake in maintaining systemic gender inequality that have led [radical] feminists to argue for its 'market inalienability'" (1999, 96). For example, Carole Pateman argues that "[Like

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<sup>2</sup> This discussion does not apply to women who are trafficked into prostitution, and it assumes that while some women are trafficked for purposes of prostitution, trafficking and prostitution are not the same thing. For a feminist argument for decoupling trafficking and prostitution as political issues, see Brooks-Gordon (2006), Ditmore (2005), Kempadoo (2005), and Sanghera (2005). Arguments for collapsing trafficking and prostitution are offered by Hynes and Raymond (2002). On legislation regarding trafficking and prostitution in the United States, see Stetson (2004).

manhood] womanhood, too, is confirmed in sexual activity, and when a prostitute contracts out use of her body she is thus selling herself in a very real sense.... When women's bodies are on sale as commodities in the capitalist market, the terms of the original contract cannot be forgotten; the law of male sex-right is publicly affirmed, and men gain public acknowledgement as women's sexual masters—that is what's wrong with prostitution" (Pateman 1988, 207-208).

Similarly, Catharine MacKinnon argues that

what is called sexuality is the dynamic of control by which male dominance—in forms that range from intimate to institutional, from a look to a rape—eroticizes and thus defines man and woman, gender identity and sexual pleasure. It is also that which maintains and defines male supremacy as a political system. Male sexual desire is thereby simultaneously created and serviced, never satisfied once and for all, while male force is romanticized, even sacralized, potentiated and naturalized, by being submerged into sex itself. (MacKinnon 1989, 137)

So for Pateman, women become women through sexual activity with men. For MacKinnon, “man fucks woman; Subject verb object” (1989, 124). This relationship structures all other social relations. When men command sex through prostitution—which becomes then the sale of control over women's saying “no” to sex acts that are demanded in a specific period of time—then men become women's masters. On this account, prostitution is domination, not representation or sexual negotiation; it's a way for men to exercise power over women's bodies and minds.

In the abolitionist framework the harm of prostitution is not just to the individual prostitute, but to women as a class because its existence promotes and enforces “the belief that all women are whores by nature” (Stark 2006, 47). That is, sex work is part of the process of social construction, and what prostitutes are helping to construct and reinforce is the view of women as always available to service men. Even if some women freely choose to engage in sex work, their actions limit the autonomy of others, limit their ability to challenge the sexualized

view of women that permeates our pornographic culture.<sup>3</sup> When radical feminists think about how to increase women's sexual agency, they argue that the only approach that makes sense is the abolition of prostitution because it is a system that perpetuates and reinforces women's subservience to men and the definition of women as sexual beings for men. To intervene effectively in the social construction of desire, it is appropriate to use the constraining effect of the law in addition to cultural interventions both to make sex pleasurable only under very different—non-hierarchical and non-gender-role-differentiated—terms and to remove all sex (acts) from economic life. Sex is special, never to be instrumental.

Finally, to call prostitution labor is wrong because sexual labor has no inherent value in that it doesn't produce anything of value and it doesn't meet any social need. Sociologist Julia O'Connell Davidson argues that prostitution is not labor because no one needs sex and no one has a right to sex.<sup>4</sup> Because humans don't have sexual needs, rather they only have socially constructed desires—and the enactment of these desires through prostitution physically and emotionally harms women—there should not be a service that caters to sexual desires.<sup>5</sup> As prominent abolitionists H. Patricia Hynes and Janice Raymond write, “an economic analysis is necessary but insufficient for explaining the business and the buyers of prostituted women. It leaves unaddressed the tolerated and/or accepted ‘natural law’ of male sexuality—that men's alleged innate sexual needs must be satisfied and, therefore, that prostitution is inevitable” (2002, 206). Thus the institution of prostitution should be abolished in part through changing the predominant understanding of—or the actual content of—male sexuality.<sup>6</sup>

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<sup>3</sup> See Brison (2006, 195-197) and Whisnant (2004, 23-24).

<sup>4</sup> O'Connell Davidson (2002, 92).

<sup>5</sup> O'Connell Davidson (2002, 92-93).

<sup>6</sup> Similarly Heike Schotten (2005) argues that feminists need to focus on reconstructing male sexuality rather than pursuing the question of why women go into sex work.

But if labor is only valuable if it caters to needs rather than wants, it is unclear if most labor that humans engage in would pass this test. Further, all of our desires are socially constructed. If the argument is that the current social construction of sex needs to be altered—and I think that is O’Connell Davidson’s argument given that she argues for a new model of sexuality that places masturbation at the highest level of sexual fulfillment<sup>7</sup>—then this is, I think, a different argument than that sex work has no worth. It clearly has a high value in the current sexual economic system given the upwards of \$40 million spent daily on prostitution in the United States, and it bears a heavy ideological load in perpetuating a falsely naturalized version of male and female sexuality in the patriarchal system of gender relations we currently have.<sup>8</sup> Thus the problem with prostitution is not that it has no value, but that it often has the wrong symbolic value and most of the many meanings of prostitution—and sex—need to be recoded. The problem with abolitionism, as legal scholar Noah Zatz has pointed out, is that radical feminists like MacKinnon, Pateman, and O’Connell Davidson focus “attention on the dangers of transgression rather than on creating spaces in which it is less dangerous” (1997, 289), but clearly transgression is what is required if the current state of heterosexuality is as dire as MacKinnon and Pateman claim it to be—and it does seem clear that at least some of the sex in heterosexual relations is dangerous to women: it is sometimes violent and too frequently non-consensual. If this is the case, then it is unclear why sexual labor is singled out for abolition—unless one relies on a labor critique, rather than the sex critique that abolitionists offer.

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<sup>7</sup> O’Connell Davidson (2002, 95-96).

<sup>8</sup> Spector (2006, 1).

*Sex Radicalism:*

The sex radical position is promoted primarily by a subset of relatively privileged sex workers. These workers thus have some bargaining power and can choose to work in the “best” sites: indoors and in situations where they have more control over which clients they see, what they will do with and for clients, and how much to charge each client.<sup>9</sup> (Indoor sex workers still face risks, but fewer risks the more privileged the sex worker, and the privileged sex workers are almost exclusively indoor workers.) Not surprisingly, those who inhabit the higher echelons of prostitution start out with a number of structural advantages. Lever and Dolnick’s large-scale study comparing street walkers to indoor prostitutes found that “nearly 70% of the street sample was African-American, whereas nearly 80 percent of the off-street sample was white. The average educational [sic] was 11.6 years in the street sample, a little less than required for a high school diploma, and 13.5 years, or some college, in the off-street sample. Median age, on the other hand, was the same, between twenty-nine and thirty years old in both samples” (Lever and Dolnick 2000, 88). There is a clear difference in the clients, too: nearly all of the call girls’ clients were white (82%), then Asian (7%). The street prostitutes “host a more democratic array of clients of different races and ethnicities” (Lever and Dolnick 2000, 89). Money paid is also starkly different: the median amount for call girls was \$200; for street prostitutes, \$30.<sup>10</sup>

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<sup>9</sup> See Thukral, Ditmore, and Murphy (2005, 32). Many authors, both sympathetic and not to the sex radical position, point out the economic privilege of sex radicals, and that their privilege buys them better working conditions than streetwalkers as they rarely have to deal with police harassment, bad weather, or johns who refuse to pay. In addition to starting from a position of privilege, they make more money as masseuses, fetish specialists, call girls, escorts, and exotic dancers than do street walkers. They also are much less likely to experience violence on the job, either from clients or from pimps (as they are much less likely to work for a pimp). On working conditions see Bernstein (1999, 110-114) and Lever and Dolnick (2000). On differing levels of violence in different prostitution venues, see Brooks-Gordon (2006, 189-190).

<sup>10</sup> Lever and Dolnick’s study had an N of 998, which is quite large for a sex work study. Bernstein’s work corroborates this and similar studies, noting that street prostitutes are further

From this relatively privileged position, sex radicals argue that sex work is a site of multiple meanings and structural inequalities that need to be engaged directly rather than refused (through attempts to abolish prostitution). Sex radicals further argue that sex is

a cultural tactic which can be used both to destabilize male power as well as to reinforce it... Practices of prostitution, like other forms of commodification and consumption, can be read in more complex ways than simply as a confirmation of male domination. They may also be seen as sites of ingenious resistance and cultural subversion... the position of the prostitute cannot be reduced to one of a passive object used in a male sexual practice, but instead can be understood as a place of agency where the sex worker makes active use of the existing sexual order. (Chapkis 1997, 29-30)

By embracing rather than being shamed by their sexuality and displaying and “practicing” it in ways not rewarded or approved by dominant cultural norms, sex radicals argue that they are challenging views of who women are and what women want. I will unpack this argument a bit.

First, sex radicals argue that sex work serves a therapeutic function in society, serving sexual needs for clients that otherwise might not be met, and engaging in sexual healing and sexual openness, allowing people to grow in their self-knowledge and to approach sex in a healthier way.<sup>11</sup> This healthier approach to sexuality is about lack of shame, but it is also aimed at teaching men how to be more in tune with and better caregivers of women’s bodies.<sup>12</sup> Those who argue the therapeutic point contend that sexuality is not some natural state or set of acts needing to be liberated, but that sexuality is socially constructed and, as it currently exists, needs

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divided into classes based not on economics but on lightness or darkness of skin tone. Despite sharing the same education level, lighter-skinned women “command the most money and take the fewest risks” (Bernstein 1999, 102-103). See Weitzer (2000, 4-5) for a discussion of several important distinctions between the working conditions and experiences of indoor workers versus street prostitutes.

<sup>11</sup> This is particularly true of high-end workers: “studies of masseuses and escorts have found that they took pride in their work, felt the job had a positive effect on their lives, and believed that they were providing a valuable service. Streetwalkers seldom make these claims, except to sometimes assert that they provide a needed service” (Weitzer 2000, 4-5).

<sup>12</sup> See Hartley (1997, 63); Queen (1997); Metal (1998).

to be reconstructed. Sex radicals do not argue that no women are harmed by sex work, but rather that there are women who can and do choose this kind of labor for the positive benefits it brings them and society and that women are harmed by current configurations of sexual power in “private,” too. Where prostitution can be chosen, allowing it to be so is to permit women sexual autonomy and sexual experimentation while acknowledging that “dominant male sexual practice is...in dire need of therapy” (Schwarzenbach 2006, 237).<sup>13</sup> One goal of such therapy is a reduction in the levels of sexual violence against women. This therapeutic argument is related to the second good that sex radicals argue their work brings to society: a new kind of sexuality, where sexuality.

Sex radicals argue that “whore sexuality” can help to liberate women and men from the repressive effects of a Puritanical heritage, specifically patriarchal notions about women as “good” only when they inhabit the narrow space that is the “Madonna” side of the Madonna/whore dichotomy defining women as pure and deserving of male protection. They argue that this protection comes at a high cost: women are expected to sublimate their own sexual needs and desires to those of a husband, and they are confronted with sexual harassment as part of their “respectable” jobs, as part of reminding them of the dangers of transgressing the boundaries of femininity. The whore sexuality that sex radicals promote tries to erase the distinction between good women and bad women based on sexual behavior. They argue that women who are sexually free to engage in the sex acts that they find pleasurable with whomever

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<sup>13</sup> Contributors to Delacoste and Alexander’s seminal collection of essays Sex Work—including Phyllis Lumen Metal, Carole Leigh, Aline, and Nina Hartley—explain that they got into and stayed in the sex professions because they were personally empowered by the work and see themselves as therapists and healers.

they choose are truly valued as autonomous agents.<sup>14</sup> Requiring women to be sexual only with men that they are related to in legally and culturally sanctioned ways (husbands or boyfriends) is no less a denial of agency or instrumental view of women than stripping or prostitution, it's simply less honest about the economic and power dynamics that are being enforced between men and women.<sup>15</sup> Further, they frequently point out, many of those state-sanctioned relationships fail to protect women, but the harm marriage, for example, inflicts on victims of domestic violence has yet to serve as a call to end marriage for women's health and well-being. Hence, calls to end prostitution for women's own good are really about trying to control women's sexuality, not protect it.

Finally, sex radicals agree with their critics that much sex work as currently practiced is abusive, but insist that abuse is not inherent in sex work itself but is instead a function of how power currently works in a patriarchal culture.<sup>16</sup> Part of the role of the sex worker is to challenge that configuration of power both within and outside sexual relations. That is, sex is not the only arena in which men exercise the power to abuse women. And it's the power to abuse, rather than sex or sex work, that needs to be criminalized and eradicated. As Women's Studies professor

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<sup>14</sup> See Chapkis (1997, 29-30). Similarly, Merri Lisa Johnson argues that “stripper sexuality” could be considered as something akin to other nonnormative sexual preferences or orientations such as homosexual, bisexual, or polyamorous” (2006, 163). Where “whore sexuality” is developed as a constructed alternative to heterosexual norms, it can be productive of greater subjective possibilities. Where “whore sexuality” is naturalized as in the arguments of some “sexual libertarians,” its potential is limiting. I pick up and develop this point further below.

<sup>15</sup> See Kuo (2002, 53-57).

<sup>16</sup> Lewis, et. al. argue that “it is external social and organizational factors that create risk and safety. Risks, especially those related to violence, are highest on the streets. Working independently [without a pimp] can enhance safety, regardless of the sector” (2005, 150). This finding was confirmed by Wendy Chapkis whose work illuminates how, whether a sex worker says her experience is that of “happy hooker” or “sex work survivor” or somewhere in between, the source of the difference in experiences is usually less about the “nature” of erotic labor and more about the social location of the worker performing it and the conditions under which it is performed. One of the most significant factors is whether the sex worker controls which clients she accepts and services she performs or if a third party does (Chapkis 1997, 98).

(and former sex worker) Merri Lisa Johnson writes, “The persistent link between sex work and danger comes across as natural, but this expectation mystifies the ideological work of the link. It is a load-bearing wall in the social construction of proper femininity” (2006, 177-178). Because “feminine” has been coded to mean “weak” in relation to masculine, sex work is seen as dangerous.<sup>17</sup> But by changing the law and engaging in cultural protest, sex workers hope to normalize and refigure women’s many desires. The desired long-term effect of such challenges is to change what it means to be female in relation to male and challenge feminine sexuality as submissive or imperiled. This would then focus attention on abuse rather than on sex—on the aberrations as such, rather than assuming or naturalizing the violence as normal.

Sex radicals are clear (and here are united with the sex-as-work position) that the illegal nature of prostitution contributes to its stigma and restricts women’s sexual freedom and property in their persons. Sex radicals argue that sex has multiple meanings depending upon the context in which it is engaged, and the restricting force of the law tries to impose one meaning on all citizens’ sexuality. And it is true, I would argue, that sex acts can have multiple meanings, although they cannot mean just anything given the historically and culturally specific contexts in which they take place. In this vein, we need to take seriously the sex radical critique of the juridical limits on sex and the cultural norms of “good womanhood,” but also remember, as legal

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<sup>17</sup> As Lenore Kuo makes clear, streetwalking is dangerous, but sex work writ large is not nearly as dangerous as television and movies would have us believe. “In all of my interviews, prostitutes appeared more concerned with possible assaults or abuse by facilitators than by customers. When pressed, however, the women I interviewed acknowledged that they occasionally encountered customers who were overly rough but that they shared techniques to prevent such instances or to deal with them if they arose. Overall, with women in all forms and legal statuses of prostitution except for streetwalking, I consistently found that concern about customer assault was significantly less than I had expected” (Kuo 84-85, emphasis added). Chun noted a similar phenomenon with exotic dancers; her interviewees felt more exploited by the club owners than by the customers; they were exploited as laborers at least as much, if not more, than they were as sexualized beings (1999, 233).

scholar Jane Scoular writes, that sex work should be viewed with ambivalence. “It is an activity which challenges the boundaries of heterosexist, married, monogamy but may also be an activity which reinforces the dominant norms of heterosexuality and femininity” (Scoular 2004, 348). Because sex and sex work have many meanings, but those meanings and the ability to deploy them are restricted by the material conditions under which prostitutes labor (and clients and outsiders come to understand sexuality), the sex radicalism perspective is best used in conjunction with the socialist sex-as-work analyses.

### *Sex-as-work*

While sex radicals define sex work as a therapeutic service, a distinct sexuality, and/or an empowering intervention in the production of gender relations, abolitionist feminists define prostitution as violence against women and the production of female subordination. But the sex-as-work, or socialist, position stakes out a different set of claims about the ontological and political status of prostitution. Sex worker feminists argue that sex work is defined by its social relations and its illegal status and not by some inherent relationship between sexual acts and one’s essential self. The sex-as-work argument also claims that most labor is exploitative, and that for sex workers, poverty and the low-paying jobs that they can obtain are more alienating than providing sex to strangers. Why, they ask, should poor women not be able to make a living wage? Taken together, these two arguments lead sex-as-work feminists to argue that what needs to be challenged are the conditions under which sex workers labor, not the legitimacy of sex work or sex workers themselves. Those like abolitionist feminists and conservatives who would rather attempt to eradicate prostitution than improve women’s existing working conditions through proposals like decriminalization misunderstand the problems with the job and are

making the perfect (gender equality) the enemy of the good (job protections). I will explain each of these arguments briefly.

If asked, most prostitutes will say they entered prostitution for the money.<sup>18</sup> Former prostitute and current activist Gloria Lockett's comments in a recent interview summarize the vast majority of first-person accounts from sex worker feminists: "I and most African-Americans who get into prostitution are in it because of the money. If we had another way that would make us \$50,000 and \$60,000 a year, then that's what we would be doing" (Brooks 2007, 154-155). Sex work then isn't just a means to an end, it is, as sex worker Janelle Galazia writes, "a means to a different end" (2007, 87), an end that isn't abject poverty and the different forms of indignity that attend to underpaid menial labor.<sup>19</sup> Sex-as-work feminists see economic exploitation as a greater concern than changing men's conception of sex—thereby altering the demand side of prostitution—which is a goal more in line with abolitionist feminists, and to a lesser degree sex radical feminists. Sex-as-work activists see economic oppression and poverty as more sexist and as more "primary" than sexualized practices of normative femininity.<sup>20</sup> With this understanding

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<sup>18</sup> See, e.g., Thukral, Ditmore, and Murphy (2005, 33-36). There is some overlap here with other forms of sex work. For example, Sharon Abbott found that there are five main reasons that women and men go into pornography work, including money. But for pornography actors, fame and sociability are other significant motivators, which is good, because the money in most pornography work is not very lucrative. Those who stay in the industry are motivated by success and fame, not money (Abbott 2000, 20-28). Wesely (2003, 490-493) and Pasko (2002, 51-61) discuss the financial motives of exotic dancers.

<sup>19</sup> This point is repeated by a number of contributors to Annie Oakley's *Working Sex*. In addition to Galazia, see Brooks, Vasquez, and Blowdryer. In Delacoste's and Alexander's *Sex Work* see Morgan, Everts, Edelstein, Helfand, "Debra," "Barbara," Niles, and West. See also Funari (1997); Kuo (2002, 69); Bremer (2006, 52); and Wesely (2003).

<sup>20</sup> Kuo (2002, 142), Galazia (2007, 89).

of social relations and motives for entering the business, these women view their jobs as work and not, primarily, as sex.<sup>21</sup>

On this view, women's agency would be greatly facilitated by changing the laws that turn prostitutes into criminals and that help maintain the stigma of prostitutes as dirty women undeserving of legal protection or personal respect. Laws against prostitution not only make women's working conditions more dangerous—by subjecting them to police harassment, feeding clients' beliefs that whores are appropriate targets of violence, impeding their survival strategies (taking time to assess a client before getting in a car with him, traveling in groups, etc.)—but they also make it more difficult for women to leave prostitution and enter the “legitimate” professions.<sup>22</sup> Further, “by denying prostitution the status of legitimate work, criminalization helps patrol the boundary between the sex/affective labor routinely assigned to and expected of women and practices deserving of the financial and status rewards of ‘work’” (Zatz 1997, 287). Thus, while abolitionist feminists argue that the legalization question is separate from the politically relevant features of sex work, sex workers see the criminalization of sex work as one of, if not the, primary features constructing what prostitution is and how it is experienced. Its illegality creates it as the stigmatized, violent, and “othering” phenomenon we know today. Illegality keeps sex workers from articulating what they do as a form of work, forcing it into the realm of sexual act and denying it the status of labor all while reifying women's care-taking work. “Sex worker” then is the term preferred by most prostitutes (and pornography actresses) because it makes clear that there are women who earn their living through sex and that the sex

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<sup>21</sup> Rachel West of the United States Prostitutes Collective writes, “prostitution is about money, not about sex. If women's basic economic situation does not change, then women will continue to work as prostitutes” (1998, 283).

<sup>22</sup> Alexander (1998, 185). Chapkis (1997, 102-103) discuss the way that this lack of respect becomes more profound the less class privilege women have and the lower down they work on the rung of the sex work hierarchy between off-street and on-street workers.

work that women do—like the cleaning and care work that they do—is work and not some natural, essential capacity. It takes skill and effort to do it well, and it involves a number of risks—not just violence, but repetitive stress injuries, allergic flare-ups, infections, and emotional burnout.<sup>23</sup>

Many sex workers argue that all jobs sexualize women, so for them the choice was between low-paying jobs where they were harassed but were expected to pretend it was okay or ignore it and jobs where any sexualized treatment was remunerated and not a “freebie.”<sup>24</sup> The argument here is that in the “straight” labor market women are controlled via their sexuality as they are in the home. At work women are kept in their place through inappropriate objectification and sexual threats. At home, they provide sex for one man who protects them from the rest. The prostitute threatens this control of female sexuality, control aimed at promoting and protecting gender hierarchy.<sup>25</sup> Prostitutes, in fact, insist that they are in control of the transaction, not the clients. As Bernstein found when she went on the stroll with different groups of prostitutes, “they can and often do refuse to perform sex, or indeed, to even talk to men they are not interested in” (1999, 105-106).

There is no one meaning of sex, whether in public or in private. The context within which the sex takes place helps to create the meanings of sex—love, intimacy, exchange, etc. A single sexual act can even have different meanings for the participants in it. The most radical, subversive thing about prostitution and the sex-as-work position is then “its open challenge both to the identification of sex acts with acts of desire and to the opposition between erotic/affective

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<sup>23</sup> McIntosh (1996, 201); Alexander (1998, 211-215).

<sup>24</sup> See Morgan (1998, 25), as well as “Debra” and “Barbara,” both interviewed by Carole in Delacoste and Alexander, ed. (1998, 93 and 174).

<sup>25</sup> Nussbaum (1999, 286-287).

activity and economic life” (Zatz 1997, 279).<sup>26</sup> Because of this conceptual and contextual multiplicity, sex-as-work proponents talk about the labor, but don’t necessarily engage in debates about what the sex itself actually means. The abolitionists argue that the sex is violence; the sex radicals argue that the sex is empowering and transgressive. But the social meaning of the sex acts are outside the scope of the sex-as-work framework. As political theorist Heike Schotten observes, “prostitution may in some cases be exploitive, and may in some cases challenge the gender or sexual status quo, but neither of these is due to anything about sex work itself as sex work. As labor, prostitution may be exploited or it may be unionized, and workers may have more or less bargaining power, freedom of movement, and desirable working conditions. But sex workers do not, as sex workers, carry the burden of determining the meaning of sex and gender relations on their shoulders” (2005, 223). This determination comes through the status of marriage and the economy, the law of sexual relations and religious norms at play in public life, among other things. Differently situated people will bring their experiences to interpreting or participating in sexual labor and see sex as many different things in different contexts.<sup>27</sup> The commodified context can help to denaturalize sex acts and desires, but this will come only through resistance to dominant norms in many realms structured by sexual discourses.

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<sup>26</sup> As sex worker Jo Doezma remarks, this is not going to be the end of the world, either: “Look, we’ve already survived sex outside of marriage and sex without love so it’s likely we can survive sex outside of desire, too” (quoted in Chapkis 1997, 121).

<sup>27</sup> Many sex workers are themselves ambivalent about the meanings of sex work and the degree of agency they have as sexual subjects and as workers. (See Egan, Frank, and Johnson 2006, xiv and Thukral, Ditmore, and Murphy 2005, 35.) The ambivalence of sex workers mirrors the ambiguity of contraposed social meanings about sex and the sexual. “American culture is characterized by rigid sexual boundaries and widespread sexual spectacles (found in advertising, sex manuals, popular music lyrics, music videos, talk shows, films, and a booming sex industry). Our cultural imagination is thus simultaneously hypersexual (wanting sex, selling sex, and making sex a spectacle) and sexually repressive for certain groups of people (claiming that sex is sacred, private, and something to be shared only within monogamous heterosexual relations)” (Egan, Frank, and Johnson 2006, xxvi-xxvii). Thus it is unlikely that sex work would have a singular meaning give that sex itself is so fraught with contradiction.

I think that one thing the abolitionists overlook is that the act of paying for a sexual service is a form of separation—a mediating step—in the creation of the meaning of a sexual act. In the negotiating of what is being paid for, women can help to define what the sex is going to be for them—for example, work and not desire—even if they cannot define it for the men involved. If Pateman and MacKinnon truly believe that what women are is determined through the sex act, then we should give women more control over areas where they can and are expected to negotiate the sexual acts involved rather than less control. If we deny prostitution the status of labor and insist that it defines the self of women—and that women’s selves are being sold in prostitution—then the feminist argument is as essentialist and totalizing as the misogynist one. This is not to say that some women aren’t horrifically abused within the system of prostitution or that prostitution as currently practiced by many prostitutes is the idealized version of femininity, but it is to deny that such horrific abuses are all that prostitution is. Prostitution is about both sex (as the abolitionists and sex radicals would have it) and economics (as the sex-as-work prostitutes would have it).

In order to see the agency sex workers currently enact and to increase all women’s sexual agency, sex radical and sex-as-work analyses both need to be used as the bases of interpretation and footholds for political intervention into increasing women’s agency. The sex radical position on prostitution offers promise for helping to refigure the meaning of sexual interactions and women’s sexuality by questioning the necessity of the connection of sex with intimacy, by providing spaces where non-normative sexual desires can be enacted or negotiated, and potentially by positioning women on equal or more powerful footing with their sexual partners in determining exactly what acts will, and will not, be engaged. Sexual desire is denaturalized and social construction is not only recognized but potentially positively, consciously engaged.

However, the sex radical position simply ignores the reality that most prostitutes enter the profession out of economic necessity, not because they desire to engage in or develop alternative sexualities.<sup>28</sup> Most prostitutes view the sex they engage in as work separate from their private sex lives and sexual desires, with working conditions that suffer because of its stigmatized and illegal status. As Noah Zatz has pointed out, the sex radical position can undermine the efforts of many sex workers to get respect for their work as labor deserving of respect and the protections provided to other laborers. The demand for worker's rights is diminished—as is the potential for resistance to sexualizing identity norms—if prostitution is just another form of (private) sexuality.<sup>29</sup>

The idea of (private) “whore sexuality” carries two additional risks. First, normative femininity remains unchallenged and prostitutes remain marginalized if there is “normal” female sexuality and “whore sexuality” as two separate and distinct categories of self-expression. Second, arguing for the acceptance of sex work because it is central to women's identity or subjectivity risks turning sex radicalism into the mirror of abolitionism: either sexuality is so central to women's identity as women that it cannot be commodified without existential harm or whore sexuality is so central to some women's identity that it cannot be criminalized without existential harm. Here the sex-as-work view of prostitution and pornography is superior as well: sexuality is an important component of one's subjective sense of self, but the ways in which that sexuality gets expressed, is experienced, and holds meaning for individual women varies widely. Commodification (a market in sexual acts) is then neither simply the problem nor the solution, but lack of control over when, with whom, and under what circumstances one expresses one's sexuality is the problem. That some women are harmed by sex work is not a reason to abolish

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<sup>28</sup> See Delacoste and Alexander (1998).

<sup>29</sup> Zatz (1997, 293-294).

sex work, it is a reason to punish the harm. Where women can develop and share (or not) their sexual selves without fear of arrest or rape or other physical assault, then they will be sexual agents. Thus, if the sex radical position is to be helpful to the majority of prostitutes, the analytical focus must also include the labor analysis of the sex-as-work position.

## II. The Ambiguity of Becoming a Sexual Agent

I want briefly to turn to the work of Michel Foucault in order to think through how to achieve the shared goal of the above three approaches: increasing women's agency and improving women's options. In one of his later interviews, "Friendship as a Way of Life," Foucault talked about the question or problem of homosexuality as one of becoming homosexual, not being homosexual and he argued that in that "becoming" is the quest to develop certain forms of social relations. For homosexuals these relations are ones of friendship.<sup>30</sup> That is, the problem of sexuality is one of creating relationships, not identities. Because homosexuality is a non-normative relationship, Foucault's language here also helps to highlight that becoming a homosexual can be done—constructed—in a number of different ways. There is no (or at least there is not yet a) naturalized mode of relating as homosexuals. Whether or not friendship is the relationship "toward which the problem of" heterosexuality tends as well, it seems true that heterosexuality as much as homosexuality needs to be understood as a practice, as becoming, rather than being. That is, Foucault reminds us to focus on how heterosexuality, while overdetermined in the current sex/gender lexicon, is still deeply socially constructed, as various forms of power work together to create sexuality.<sup>31</sup>

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<sup>30</sup> Foucault 1994 [1981], 135-136.

<sup>31</sup> These forms of power include marriage and property laws, for example, or, in the cultural domain, nearly every mainstream television show and movie ever made.

It is imperative to focus on the social construction of heterosexual practices because they configure so much of social relations. As Foucault says in the “Friendship” interview, the question we must ask is ““What relations, through homosexuality, can be established, invented, multiplied, and modulated?” The problem is not to discover in oneself the truth of one’s sex, but, rather, to use one’s sexuality henceforth to arrive at a multiplicity of relationships” (Foucault 1994 [1981], 135). So, too, with heterosexuality. Where prostitution mimics the abuses and violence of too much non-commodified heterosexuality, it helps not at all in this project. But to the degree that prostitution makes us rethink the relationship of sex acts to sexual desire, and of the erotic to the economic, then it is one component of this much larger project of redefinition and reordering of social relations. Further, thinking about sexuality as the construction of relations helps illuminate the weakness of both abolitionist views of sex work as selling of the self and the aspect of sex radicalism—specifically libertarianism—that posits sex work as “liberating” an extant, repressed sexuality.

Sexual identities and sexual practices are normalized and produced through processes of marginalizing and medicalizing some behaviors and not others. As Jana Sawicki explains “Foucault claims that deviancy is controlled and norms are established through the very process of identifying the deviant as such, then observing it, further classifying it, monitoring and ‘treating’ it” (1991, 39). In the context of the discussion in this paper, the “deviant” in question is the prostitute who sells sexual services rather than uses her sexuality only in private and romantic relationships with individual men. Feminists should be suspicious of aligning themselves with juridical projects that continue to marginalize (through stigma and criminalization) and medicalize (through the treatment of whores as vectors of disease) prostitutes. What is at stake for patriarchal power structures is the continued power to dominate

and produce submissive and “controllable” female sexuality and the need for women to align themselves with individual men for sexual respectability. What is at stake for feminism in the “politics of refusal” is an effort to rid sex of domination and objectification. But it is unclear if ending all forms of objectification is a desired end among many women, or if criminalization is an effective means to this end if it is desirable.<sup>32</sup> Support of criminalization means supporting the juridical domination of women’s sexuality. This doesn’t mean that feminists have to support violent prostitution practices to avoid supporting juridical domination, but that these violent practices should be fought through means other than state domination, that women’s political possibilities need to be opened up rather than closed off.

The problem with venerating prostitution as a practice of freedom—as an act of resistance aimed at insisting upon seeing of the economics of the erotic—is that much prostitution is engaged under conditions closer to domination than of power relations producing ruptures of resistance. Foucault was clear about this possibility too, as he remarked in another later interview “The Ethics of the Concern of the Self as a Practice of Freedom”: “Of course, states of domination do indeed exist. In a great many cases, power relations are fixed in such a way that they are perpetually asymmetrical and allow an extremely limited margin of freedom” (Foucault 1994 [1984], 292). This is the case with prostitutes whose pimps abuse them and take 80% of their money; with brothel prostitutes who have to pay 50% of their earnings to the house in addition to tipping the staff; and with streetwalkers who begin hooking at age fourteen because they have had to leave abusive homes and have no other way to survive. Prostitution under these conditions can tell us little, if anything, about creating a new gender order. Power

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<sup>32</sup> Martha Nussbaum’s analysis of this point is instructive. Where objectification does not deny the autonomy of others, it is not necessarily a violation of the Kantian imperative to treat others as ends (1999, 220-223). Further, she argues, while prostitution is objectifying, it is no more so than many other forms of labor that require use of one’s body (1999, 276-298).

and domination here produce not only poverty and desperation in some cases, but also desire, specifically the desire to purchase sex or the desire to be master of another.

But criminalizing poor women helps to reproduce an ideology about the proper place of sexuality in one's life and an economic order that relies on the availability of a pool of poor women to work in underpaid jobs while not addressing incest and drug use, the two main reasons driving younger women into the most abusive forms of street prostitution.<sup>33</sup> If there's no outside of power, then the only way to challenge the production of particular ("bad") desires is to refigure them from within. Abolishing prostitution is an extremely long-term solution if it is at all possible, and continuing to criminalize it has only exacerbated prostitutes' lack of power. Rather than accepting that this is what prostitution must look like and, therefore, it must be abolished, one option is to try to change the juridical and cultural order that creates and makes sense of prostitution. There will always be power relations. So, as Foucault says, "the problem, then, is not to try to dissolve them in the utopia of completely transparent communication but to acquire the rules of law, the management techniques, and also the morality, the ethos, the practice of the self, that will allow us to play these games of power with as little domination as possible" (1994 [1984], 298). One way to begin to open up the ambiguous possibilities for sex workers in many different positionalities—and not just the most privileged ones—is to change the structures of domination that gird the terms in which they work. One of these dominating

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<sup>33</sup> A history of sexual abuse "is more common among street-based workers than among brothel, parlor, escort, and independent out-call workers. This is largely a marker for age, however, as most adolescent prostitutes work on the street, and many street prostitutes began working before the age of eighteen." (Alexander 1998, 190-191). As Evelyn Abramovich (2005, 141-143) makes clear, the link between childhood sexual abuse and prostitution is strongest in the sense that the adolescents are fleeing an abusive home and need to support themselves financially. But the research is unclear whether childhood sexual abuse alone causes women to engage in sex work, or if it does, if it leads to any kind of sex work other than street-based prostitution, as "street-based prostitutes are currently the only population of sex workers being widely researched" (Abramovich 2005, 143).

forces is criminalization. Where one's status is "illegal," the power of the state can be used to enclose one in multiple, overlapping double-binds, making all options fraught with danger.

The political conditions of possibility of sex worker subjectivities and resistance strategies are produced through the intersection of discursive modes of sexual ideology and an economic order that reflect the bifurcation of women's sexuality (Madonna/whore) and the devaluing of women's labor. Neither can be productively engaged unless both are. What this means is that the sexual practices of sex workers can be resistant and productive of competing sexual norms but only if there are exit options. And even if women have exit options this does not mean that everyone who encounters this sex worker will "read" her as fabulously flouting sexual norms, though they will have to confront her refusal to be ashamed of her sexuality. Likewise poor women sex workers are flouting the dominant norms of proper womanhood by choosing sex work over poverty. This resists the figure of the victimized sex worker and the piety of poverty as well as the necessary connection between sexual desire and sexual acts. When sex work is the only option for making a living wage, however, it is also victimizing because overdetermined as the only way out, while simultaneously being an act of agency. There is still a choice to be made—poverty or sex work. There is no feminist reason to make painfully limited options worse by criminalizing one of those options and further limiting women's exit options and life choices, and her ability to make her working conditions more respectful of her person.<sup>34</sup>

Agency is thus conflicting and ambivalent. Sex workers (like the rest of us) are acting despite the lack of assurance of the meaning or relationship they are trying to create or will be creating. The ambiguity of the prostitution encounter is created through the differences in what each person needs to get from an interpersonal exchange as well as the historical and social

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<sup>34</sup> See Ditmore (2005, 116-118) for examples of radical feminist lobbying efforts and arguments for continued criminalization.

conditions producing the site of the exchange. I am drawn here to Noah Zatz's proposal for avoiding an essential theory of sex or prostitution by conceiving of the prostitution encounter as a "bifurcated event, meaning different things to each participant.... Consider, for instance, Carole Pateman's statement, 'Prostitution is the use of a woman's body by a man for his own satisfaction' (1988, 198). This figures prostitution as about a man's pleasure. What of the following redescription: 'Prostitution is about the use of a man's desire by a woman for her own profit'?" (Zatz 1997, 295). Here men's desire becomes a tool women can exploit to improve their economic conditions, which is how sex-as-work feminists often claim to understand what they are doing. Prostitution is ambiguous precisely because it is both of these things at once. Only if sex is inherently demeaning is the sale of sex by women demeaning to them. But as philosopher Laurie Shrage points out, "If a woman's sexed body is part of her humanity, then to desire it is not to reduce her to a non-human thing, and when she yields her body sexually she does not give up her status as a human subject" (2005, 54). Allowing women their sexuality as part of their humanity is, in fact, a highly radical act; that is, conceiving women's sexuality as theirs to live in and shape over the course of time and relationship is to permit a productive engagement of power that is currently lacking in most laws that regulate the uses to which women may put their sexuality (and, by extension, their reproductive capacities).

If men abuse women in the exchange of sex acts for money, the abuse is still criminal, but the sex does not have to be. The question is how to relearn what significance to give to the act of sex—and the act of exchange—in a social context that shames sex and the women who sell it. Decriminalizing sexual labor may help to destigmatize sexual exchange, but family and economic life more generally will also need to be reconfigured if women's and men's sexual relations are going to be re-imagined. The discursive construction of women as "nothing but

whores” because some women engage in sex work is facilitated in part through providing sex work as the only living wage option available to them. To expand ideas about and possibilities for who women are, the conditions for who they can be must change. To realize sex radicalism’s revision of prostitutes as being (simply) “women of unrestrained sexuality,” the labor critique of sex work has to be rendered irrelevant through the revision of the economic conditions of private and public sexual life.

### III. Prostitution versus Pornography

To highlight both what is wrong and what is potentially right with prostitution, I want to compare it briefly to pornography. These are two very different kinds of sex work, phenomenologically, discursively, and legally. A comparison of the two forms of labor as discursive productions of power relations helps to highlight the dominating effects of patriarchal legal systems and the need to re-see sex work and reposition it structurally if women’s collective sexual and economic agency is to be improved. The legal treatment of sex work has profound implications for the degree of stigma the work entails as well as the risks women face on the job. With the exception of the rural counties of Nevada and indoor venues in Rhode Island, prostitution is illegal throughout the United States, while pornography enjoys broad First Amendment protections. I look first at the conditions of production and the messages conveyed by pornography and then put this in the context of the legal treatment of the two forms of sexual labor.

Pornography is obviously different from prostitution in that it is a mediated experience for the consumer, but there is “actual sex” that is being sold. The talent making the movies

engage in sexual acts for pay, making part of the transaction quite similar to prostitution.<sup>35</sup> But the pornography actress or model is not negotiating the sexual exchange or interaction with the customer, thereby making him confront the “realness” of her body and subjectivity, so she cannot respond in any way to the viewer’s (the client’s) response to her. The pornography talent has far less control over the ways in which her sexual acts are “taken up” than does the prostitute, and she has less control over the context in which the sexual representations are used or interpreted (having little to no input into where the porn is viewed), thus she is not really remunerated for the client’s /customer’s use of her image for his sexual satisfaction.

This distance between the sex worker and the client is clear in the pay structure of pornography as well. Pornography talent don’t get paid by the customer, they get paid by the act and see no more or less profit from their images whether the movie sells well or poorly (or the image is downloaded often), since they are paid a flat rate per scene filmed or photo shoot completed. (There are no royalty payments to those on-screen.<sup>36</sup>) Ironically, while her image can be used by customers for years, nearly all pornography actresses and models have a shorter career than prostitutes, given the emphasis on youth and the speed with which the industry “uses up” women.<sup>37</sup>

In most pornography, men behind the camera control the content and distribution and profits of the pictures or film, while the talent have little creative control over content and see little profit from the sale of the work, though an actress usually will get to negotiate what she will and will not do for the camera. There are two primary forms of video pornography, features and gonzo. “Features” have some pretense of narrative, some effort to explain why the actors are

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<sup>35</sup> I refer to pornography actors as “talent” because that is the term that they themselves use. See Abbott (2000, 18).

<sup>36</sup> Abbott (2000, 29).

<sup>37</sup> See Amis (2001) and Abbott (2000, 26).

having sex. “Gonzo” pornography, which is becoming the more common variety, is simply a series of sex scenes with no pretense of narrative. As Martin Amis found in his exposé of the move toward more extreme sexual acts in mainstream heterosexual porn, “Features porno is much, much dirtier than it used to be, but Gonzo porno is gonzo: way out there. The new element is violence” (Amis 2001).<sup>38</sup> Porn producers keep upping the “extreme” ante, in two ways. First, the industry is becoming more extreme with the move to gonzo itself. And second, individual women in porn are pushed to more extreme limits as they are pressured to engage in a wider variety of more intense sex acts to stay “interesting” to their audiences. According to one of the mainstream porn directors that Amis interviewed, ““Some girls are used in nine months or a year. An 18-year-old, sweet young thing, signs with an agency, makes five films in her first week. Five directors, five actors, five times five: she gets phone calls. A hundred movies in four months. She's not a fresh face any more. Her price slips and she stops getting phone calls. Then it's, 'Okay, will you do anal? Will you do gangbangs?' Then they're used up. They can't even get a phone call. The market forces of this industry use them up”” (Amis 2001).

Philosophy professor Laurie Shrage and cultural critic Laura Kipnis have both argued that the violence of porn is stylized and situated in a context that is obviously fictional and meant to be either entertainment or political satire. But the political message of most mainstream pornography is one that dehumanizes women and fails to give voice to negotiation or women’s actual subjective experience. Pornography puts words in women’s mouths and is often gratuitously violent. And rather than stylized or computer generated violence, the violence of pornography happens to real women who are abused in the name of a political message. In the

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<sup>38</sup> As gonzo porn became more prominent, so did anal sex. But once anal sex became standard fare, then “double anal” and “triple anal” started to appear, which goes hand-in-hand with the mainstreaming of more violent (“rough”) fare.

words of Regan Starr, talking about filming Rough Sex 2, “‘I got the shit kicked out of me,’ . . . I couldn't breathe. I was being hit and choked. I was really upset, and they didn't stop. They kept filming. You can hear me say, 'Turn the fucking camera off', and they kept going” (quoted in Amis 2001).

Thus, where the abolitionist argument has the most purchase is in pointing out the near-silencing of women in most mainstream heterosexual pornography. This silencing is why it is an aspect of—or location of—sex work that is phenomenologically and ideologically more problematic in terms of facilitating women’s agency than is prostitution. In prostitution, customers and prostitutes have to come to an agreement about what they will do together and how much the customer will pay for it. But because pornography is a mode of sex work where the production and consumption are so far apart in time and space, there is less room for negotiation over the use and meaning of the product. The women in pornography cannot contest the ends to which their sexual expressions are used. Their images become a means to someone else’s ends, and they can be used to silence the resistance of the flesh-and-blood women with whom pornography’s male consumers are engaging.

Pornography matters for women’s collective agency as well as for the individual women in it. Its influence is pervasive and expanding, and it serves an explicitly ideological function in shaping the imaginations of millions of viewers. Pornography is a booming industry that has grown in reach as the internet has become a household utility and one no longer has to go to a public cinema or even a video store to see a pornographic movie.<sup>39</sup> With the glut of pornography available, porn has an ever-increasing power to shape the cultural narrative about sex and gender. Because pornography simply isn’t going away, and because it is blatantly ideological, it is

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<sup>39</sup> “In 1975 the total retail value of all the hard-core porno in America was estimated at \$5-10 million. [In 2000] Americans spent \$8 billion on mediated sex” (Amis 2001).

important to think about how to intervene in, rather than trying to eradicate, the stories that are told about (and help construct) women's and men's sexual desires. While MacKinnon's argument that "men treat women as who they see women as being. Pornography constructs who that is" (1987, 148) is too totalizing, sexual relations are one central formative nexus of power relations producing identity, a sense of possibility, and one's relations of freedom. Thus, pornography—because of its pervasiveness and its explicit function to "speak" sexual ideological messages—plays a much more central role in configuring sexual ideas and sexual knowledge than does prostitution.

The problem, as the abolitionists point out, is that the primary message of most mainstream heterosexual pornography is that women are less than fully human. That much pornography attempts to strip women of their humanity makes it such a fraught political practice. Rather than dehumanizing, sex needs to be seen as humanizing, as part of the practice of developing oneself in relationship with others. Women's sexual agency is deformed through much current pornographic production (the message of pornography); but as with prostitution, this is not a necessary feature of pornography but rather is a function of its current hegemonic practice. That is, as Martha Nussbaum has argued, objectification in and of itself is not a form of erasure of agency or a violation of the Kantian imperative to treat others as ends in themselves. As I argued above, the objectification of prostitutes is not always a denial of agency because of the context within which some forms of prostitution objectification take place as well as the mutual nature of the objectification (that is, prostitutes are to some degree objectifying clients as much as clients are objectifying prostitutes). Nussbaum argues that there are at least seven "notions" involved in the idea of objectification, and one can objectify people in all of these ways at different times without necessarily violating their autonomy or agency. (These seven

“notions” are instrumentality, denial of autonomy, inertness, fungibility, violability, ownership, and denial of subjectivity, with instrumentality being the most exigent.<sup>40</sup>) As she notes after much discussion, “what is problematic is not instrumentalization per se but treating someone primarily or merely as an instrument. The overall context of the relationship thus becomes fundamental” (Nussbaum 1999, 223). The contexts of prostitution and pornography that are most relevant to the degree to which objectification is a denial (or not) of agency seems to be the degree of fungibility, inertness, and instrumentality involved, which can be measured in large degree by the level of direct interaction customers and sex workers have with each other and the degree to which that interaction is negotiated, negotiable, and individualized. On this scale, objectification takes place in all forms of sex work (as it does in all sexual relations), but the context of pornography seems to make it more objectionably objectifying than prostitution.

Yet while prostitution is largely criminalized in the U.S., pornography is treated as political “speech,” and thus given broad First Amendment protections. That pornography speaks a political message is undeniable; but the content of that message (women’s inequality) makes the criminalization of prostitution even more suspect. How does this legal distinction between pornography and prostitution matter? As many prostitutes make clear, they understand that this is about control.<sup>41</sup> When women try to control to whom they sell sex and how much gets charged, it’s illegal. When other people write the narratives of women’s desire and get rich off of it, and the “client” never has directly to engage or to confront the women whose sex acts he (or she) purchases, then it is legal. The legal structure separating pornography from prostitution makes little sense except as a way to control women’s sexual autonomy. The same acts can take place, and an exchange of money takes place, but one has a camera to document the deed(s), and the

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<sup>40</sup> Nussbaum (1999, 218-221). See also Nussbaum (1999, 276-298).

<sup>41</sup> Niles (1998, 149) and Almodovar (2006).

other doesn't. In one (prostitution) women have some chance of negotiating the act, retaining control of the life of the act beyond the moment in which it is transacted, and controlling (to some degree) where the profits from her sex acts go. In the other (pornography), the woman has less control over which acts are performed, no benefit from the profits made, and no say over the use to which her sexual images are put. Thus the law only recognizes women's sexual commodification when it's least potentially empowering.

#### IV. State Responses: Nevada Versus The Netherlands

There are three broad legal approaches to dealing with prostitution: criminalization, decriminalization, and legalization. Decriminalization removes legal penalties from engaging in prostitution; legalization imposes some form of state regulation, which can be achieved through a number of, and different combinations of, means: zoning, mandatory health testing of prostitutes, brothel residency rules, required registration with state authorities, etc. Criminalization is the tactic supported by radical feminists, and abolitionism has had the most success as a political and legal argument in the United States. Unfortunately, making prostitution illegal has done nothing to decrease the demand for prostitution, the cultural understanding of prostitution, or the harms to women in prostitution. Instead, the abolition arguments help to continue to mark "whores" off from other women as a separate and stigmatized category; they vest in the state continued power over women's bodies and with it powers of domination and discipline; they essentialize male and female sexuality and their relationship to each other. At a practical level, criminalization contributes to some of the worst abuses of streetwalking in particular and makes it harder for women to leave prostitution for jobs in the "licit" economy, particularly if they have a criminal record because of prostitution work.

Where prostitution is criminalized, streetwalkers account for 85-90% of prostitute arrests, despite streetwalking comprising only 10-20% of all prostitution.<sup>42</sup> Additionally, “although women of color constitute approximately 40 percent of streetwalkers, they constitute 55 percent of those arrested for streetwalking and 85 percent of those incarcerated” (Kuo 2002, 74-75). Criminalization also makes sex workers less likely to report to the police theft and violence perpetrated against them and makes accessing needed services even more difficult.<sup>43</sup> The effect of criminalization is control of already marginalized women, not the abolition of prostitution. Legalization or criminalization schemes seem to have no effect on the number of women who enter prostitution, but making women criminals does increase the dangers they face as prostitutes while doing nothing to solve the economic conditions that drive them into prostitution in the first place.<sup>44</sup> “Arresting prostitutes often serves only to heighten their isolation and estrangement, not only from friends, family, and the community but also from the very social services they may need in order to access alternative means of income...” (Kuo 2002, 125). It also strengthens their reliance on pimps. “In prohibitionist countries like the United States, the legal harassment of street workers by the police drives prostitutes into the ‘protection’ of pimps and undermines the worker’s ability to protect herself from dangerous clients by making speedy negotiations necessary to avoid detection and arrest” (Chapkis 2000, 183). Criminalization is a form of

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<sup>42</sup> Kuo (2002, 74).

<sup>43</sup> See Thukral, Ditmore, and Murphy (2005).

<sup>44</sup> Lenore Kuo found that “rates of prostitution are relatively unaffected by the adoption of differing policies” (Kuo 2002, 125). Sibyl Schwarzenbach similarly reports that in most countries in Europe, aspects of prostitution have been decriminalized or legalized. There is no evidence from these countries “that decriminalization causes an increase in the phenomenon of prostitution” (2006, 224). Wijers reports that both demand for and supply of prostitution services has declined over the last ten years in the Netherlands, while brothels have been legalized and prostitution maintains its decriminalized status (2008).

domination, not a means of enabling the production of new modes of relation in and beyond the sexual economy.

Critics of legalization schemes often rightly point out that legalization can be and often is at least as harmful to prostitutes' interests as criminalization. Certainly the one case of legalization in the United States—in rural counties in Nevada—has been quite poorly implemented and needs not to be a model of feminist policy making.<sup>45</sup> That current legalization schemes are deeply flawed does not mean all efforts at legalization have to be abandoned; it means that it needs to be done better. I want to look at the problems with the Nevada legalization approach and compare it to the hybrid decriminalization/legalization model that the Netherlands has begun implementing. The point of this brief comparison is to think about how to change the working environment for sex workers to enable them the greatest degree of control over their sexuality and income.

In Nevada prostitution is only legal in state-licensed brothels. “Because the state has given brothel owners an outright monopoly on legalized sexual commerce, all independent prostitution is a criminal offense. The effect is that no woman can work legally without agreeing to share her income with a state-licensed ‘pimp’” (Chapkis 1997, 162). Further, while they have to work in brothels to avoid being criminals, prostitutes don't count as “employees” but rather

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<sup>45</sup> Flying pretty far under the radar, indoor prostitution has also been decriminalized in Rhode Island since 1980. This decriminalization occurred not by conscious intent but through poorly worded legislation that produced a loophole in which indoor venues have been able to operate legally, though police still arrest women for solicitation in the spas and massage parlors where they work. The state rarely prevails in court. Currently the Rhode Island General Assembly is working to close the loophole to again make all forms of prostitution illegal in Rhode Island. As of this writing, the bill has passed the House and is pending in the Rhode Island Senate. See Lynn Arditi's “Behind Closed Doors: How R.I. Decriminalized Prostitution” at [http://www.projo.com/news/content/PROSTITUTION\\_LAW31\\_05-31-09\\_NVEHGBH\\_v161.3e90048.html](http://www.projo.com/news/content/PROSTITUTION_LAW31_05-31-09_NVEHGBH_v161.3e90048.html). The only U.S. state I examine in this paper is Nevada as almost nothing has been written or reported on the Rhode Island example, and Rhode Island's intent was never to decriminalize sex work.

are categorized as “independent contractors” so that they get no state-provided workers’ benefits (e.g., workers’ compensation, retirement, and unemployment), are not covered by minimum wage or fair labor standards laws or occupational health and safety regulations, nor can they unionize.<sup>46</sup> They have to live in the same place where they work, and they have to register with the police. In most brothels, if a prostitute needs to go into town during her weeks on shift, she has to be accompanied by a non-prostitute, and most are required to live outside of the town limits during their week off each month. They work a standard shift: 12-14 hours per day, seven days a week, for 21 days straight. Fifty percent of the money earned per transaction goes back to the brothel management. In addition, prostitutes have to pay fees for room and board, supplies (including condoms), and are required to tip house employees. To be allowed to refuse a customer, the prostitute has to provide management with what it considers an “acceptable reason.” In most brothels, women are required to participate in a lineup.<sup>47</sup>

It seems the only benefit to the prostitutes in this system is that they are not in danger of being arrested, as autonomy has been legalized out of the Nevada brothel system. Note that none of these requirements is necessary to brothel prostitution as Kathryn Hausbeck and Barbara G. Brents explain in their social and political history of the Nevada system. Additionally, Lenore Kuo describes cooperative brothels in The Netherlands that provide a high level of physical protection for prostitutes while also giving individuals control over their working conditions, offering a very different model of brothel prostitution than that which is practiced in Nevada.

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<sup>46</sup> See Chun (1999, 234-237) on the practical distinctions between treatment of workers versus independent contractors. Note that Nevada is a “right to work” state, so even if prostitutes were classified as employees, they might not be able to unionize there. The point is that if prostitutes counted as employees in all states, they would be able to unionize in some of them.

<sup>47</sup> Chapkis (1997, 163); see also Kuo (2002, 82-84) and Hausbeck and Brents (2000).

The Netherlands offers a legal model premised on protecting the labor interests of prostitutes rather than focusing on the interests of third party moralists or neighbors, as we see in the Nevada scheme. In the Dutch model, “acts of prostitution between consenting adults are decriminalized” (Kuo 2002, 88), but the conditions of work are matters of regulation since a change in the law in 2000. (Before the change, brothels and pimping were banned, but being a prostitute was legal.) Here, zoning of streetwalking consists primarily of “safe parks” and “red light districts.” In the former, police-patrolled parks are established where women are permitted to congregate for purposes of soliciting, and service centers are provided for women who need counseling. In the latter, brothels and window prostitution are located in specified zones in twelve cities.<sup>48</sup> Brothels have to be licensed and are subject to health and safety regulations, and coercion, deceit, and abuse are prohibited.<sup>49</sup> This does not mean that they’ve been eradicated, only that ferreting out coercion and abuse—not prostitution per se—has become the focus on law enforcement. Registered, tax-paying prostitutes can get state-sponsored workers benefits, but many prostitutes avoid registration because of the bureaucratic stigma attached and the risk of losing their anonymity. (For example, being a known prostitute will get one barred from entering many countries, like Switzerland and Austria, thus limiting prostitutes’ freedom of movement and future job prospects.<sup>50</sup>)

The sex worker response to the changes in the law have been mixed, but generally positive, noting particularly “independence (setting prices, organizing working hours and choosing what services to provide), an improvement in the image of the profession and the enforcement of rules on health and safety” as the main benefits to legalization of organized

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<sup>48</sup> Kuo (2002, 88-93).

<sup>49</sup> Wijers (2008). Outshoorn (2004) outlines the policy debates leading up to the overturn of the ban on brothels and explains the basic contours of prostitution policy in the Dutch legal system.

<sup>50</sup> Chapkis (1997, 156-157). And see Wijers (2008).

prostitution (Wijers 2008). There are still a number of problems with this system, including the variability by local jurisdiction in the licensing of establishments and enforcement of health codes. The Red Thread (the Dutch prostitutes' organization) is arguing for more uniform laws, the establishment of a hotline to which prostitutes can report abuses, greater labor law enforcement, greater state support of independent operators, more licenses for small, cooperative brothels, and more support for prostitutes who want to leave the profession.<sup>51</sup> One of the main problems seems to be with the licensing system, which works well for brothel owners, but fails to protect prostitutes' privacy interests. But importantly and positively, "individual sex workers do not have to register [with police] and are not submitted to mandatory health checks" (Wijers 2008). What is clear in reviewing the Dutch model is both that labor interests can be protected in a law that emphasizes cracking down on coercion (trafficking) while legalizing consensual sex work and that state regimes are better at regulating sexuality than they are at promoting freedom. This is why I argue that decriminalization should be the default position, and women working independently should be free from state intervention in their labor.

The problem with simple decriminalization is that third parties (e.g., escort services or brothel owners) can still take advantage of women's labor, so while the state is no longer disciplining her sexually, her labor interests would not be improved tremendously. This is why some sex-as-work advocates argue that legalization is preferable to decriminalization because, as the current status of pornography demonstrates, if we leave it up to the goodness in the hearts of porn producers or pimps to obtain consent and insist on safer sex practices, we haven't done all we can to help women.<sup>52</sup> Decriminalization can aid the sex radicalism agenda, but it alone does not meet the needs pointed out by the sexed labor analysis. To shape sexual and labor relations

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<sup>51</sup> Wijers (2008).

<sup>52</sup> See Alexander (1998, 225).

more positively—to create different social relationships within sexual commerce—prostitutes need to be decriminalized, but any business that hires sex workers needs to be regulated in line with meeting women’s interests. This will not necessarily change the violence that is faced by street walkers, especially in the short term. But the most significant policy change that could improve the lot of streetwalkers is a change in broader economic and social service policies, specifically drug rehabilitation and child protective services, rather than any prostitution-specific policy.

Consider the results of Ine Vanwesenbeeck’s study of the experiences and psychological states of prostitutes in indoor and outdoor venues in the Dutch system, where criminalization is not a factor effecting the experience of sex workers. She found that about one-quarter of prostitute women suffer severely. About half of the women are doing far better than the stereotyped view, at or slightly less well than the average non-prostitute woman in the Netherlands. And a little more than one-quarter are faring “quite well”—even better than the average non-prostitute woman.<sup>53</sup> “The differences in how women fare appear to depend on five factors: childhood experiences, economic situation, working conditions, survival strategies, and interaction with clients” (Kuo 2002, 95). The first two of the five factors are non-specific to prostitution; the final three are related to changing the structure of the job of street prostitutes, and the first two need to be addressed by changing women’s overall cultural and economic well-being so that they don’t face the worst forms of prostitution as their “best” employment options to start with. Those who suffer under exploitative labor conditions in sex work do so for two main reasons: one, criminalization and two, poverty and abuse outside of prostitution.

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<sup>53</sup> Cited in Kuo (2002, 95). A 2006 study of the effects of legalization of Dutch brothels found similar results. When prostitutes’ well-being was assessed, their emotional health was found to be “more favourable than the average score of the general female population” (Wijers 2008).

Prostitution policy can only address the former. Hence, economic policy is prostitution policy. Additionally, domestic violence policy is prostitution policy: “At highest risk were those women who would never prostitute but for great economic necessity. ‘Abuse by a private partner’ was often the source of this extreme economic need” (Kuo 2002, 96).

Legalization schemes have tended to protect community interests and brothel owners’ interests, but as currently constructed they operate almost as oppressively as criminalization for the women involved. Individual interactions may be therapeutic or resistant, but the material structure of the work environment requires serious sex-as-labor challenges in order to meet the possibilities sex workers can provide for a more open sexuality discourse while avoiding the perpetration of the harms abolitionists have documented. Thus, state policies must be a target of feminist activism. But if the only goal is abolition, not only is the policy doomed to fail, it is doomed to punish poor women while failing to attend to the primary reason most women go into sex work: economic need. Because the state sets so much of the discursive and material framework within which women’s sexuality and work are determined, the law and its enforcement are central tools for changing the framework and social meaning of prostitution and women’s sex.

Ideally, feminists would move to supporting a hybrid legalization/decriminalization model that opens up space for women to operate singly or in small groups without state intervention while labor law and safety provisions were applied to any third-party business interests working with prostitutes (e.g., escort service providers, corporate brothel owners). Certain features of current practices would not be part of an ideal state policy. For example, prostitutes must not be required to register with police, and self-employed independent operators should not be required to get a state license. Registration is a further effort to monitor and control

prostitutes—to mark “whores” off from “respectable” women—and is not necessary to allowing women to engage in sex work or to receive services that might put them on the path of improving their working conditions or leaving prostitution. Registration schemes are also unlikely to work. Prostitutes across the globe generally try to avoid complying with registration imperatives, even when it would garner them public benefits. Partly this is because of the temporary nature of most prostitutes’ work in the field, and partly because they wish to avoid the bureaucratic stigmatization of registering.<sup>54</sup>

Decriminalization could begin to change the structures within which sex work—and sexuality more generally—develops and is regulated and produced. It is not meant to be a panacea for all of the harms of prostitution; nor can prostitution alone transform sexual relations between men and women (or between gays or lesbians or transgender people). But because the law helps to regulate—does not “determine” but shapes—not only the way we interact sexually but the desires we have and can imagine and the relationships we build from those desires, changing the law is one important element in creating a more just sexual order. Because the state can be just as coercive as individual pimps and traffickers, it is important not simply to displace one source of coercion for another. The power of the state to do good—promote more equitable economic policies, for example—must be harnessed while not handing the state more paternalistic powers over women’s sexual self-development.

## V. Conclusion

Prostitution should be decriminalized not because it is an inherent good to be protected, but first because of the harms that criminalization brings with it, and second because of the

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<sup>54</sup> Kuo (2002, 132).

role—even if limited—prostitution can play in helping to bring about a new sexual ideology where women’s and men’s sexual desires and imaginations are more open. Prostitution needs to be made less exploitative, and the way to do that is to shine light on it, not to cloak in under the darkness of criminality. So long as women are criminals, they are seen as appropriate targets of abuse. By decriminalizing prostitutes, the state would be saying that they are worthy of respect, worthy of recognition as laborers and as agents. Decriminalizing prostitution would also make it easier to help women who are abused and who want to get out of the business. They would not have to confess to being a criminal in order to obtain help, and if they are no longer engaged in a “crime,” they won’t be turned away from domestic violence shelters because of “criminal” activity. And those who provide services to prostitutes would no longer court police sanction for abetting solicitation, so the many services prostitutes say they need—e.g., counseling, peer support, immigration assistance, and language classes—could be more easily and widely provided to them.<sup>55</sup> Decriminalization here functions as a form of “radical incrementalism” that collapses the distinction between reform and revolution and recognizes the power of “domination but also represents the social field as a dynamic, multidimensional set of relationships containing possibilities for liberation as well as domination” (Sawicki 1991, 9).

The sex-as-work analysis is an answer to the abolitionist definition of sex and gender construction that still recognizes the problems of current sexual practices. To insist on the labor value of sex work, and to insist on women’s understanding of sex as work and not just as sex, is to contest the meaning of sex that says that men make women objects through sexual acts; it is to insist that the sex women have has meaning for them and not just about them. This does not require giving up any challenge to the economic system that limits women’s options to sexual

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<sup>55</sup> Thukral, Ditmore, and Murphy (2005, 13).

labor or poverty. Nor does it mean that any prostitution sex is prima facie liberating; but it does mean that men don't get to define all of the terms on which sex is engaged, even under conditions of asymmetrical power relations. To change the conditions of sexual labor—to legalize it; to organize it; to bring women together to challenge male definitions and male power of ownership within prostitution (focusing on women's cooperative brothels rather than male pimps, for example)—is to wrest agency from the configurations of power within which one exists; it's to face victimization and find agency within it. To change the legal terms of prostitution is to launch a challenge to extant configurations of power, to insist the formal rules governing women's sexualized existence evolve in the face of women's sexualized challenge to the construction of sexuality as dominance/male, submission/female. Such a challenge or denunciation is a form of sexual metaphysics, a means of bringing about –or aiding the becoming of—altered sexual social relations.

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