

CHAPTER EIGHTEEN

Obscene Division

*Feminist Liberal Assessments of Prostitution
Versus Feminist Liberal Defenses of Pornography*

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INTRODUCTION: FEMINISM, LIBERALISM, AND
THE SEX INDUSTRY¹

A review of the academic literature on both prostitution and pornography reveals a striking difference: while pornography has become a popular topic in the academy, there is still comparatively little written about prostitution *per se*. In philosophical circles, prostitution and pornography are thought to raise different sets of questions: pornography is discussed in the context of free speech issues and postmodern thought about subjectivity, while prostitution is typically only discussed (if at all) in the context of paternalism and gender oppression.

Historically, this has much to do with the development of classical liberal interest in speech issues and traditionally feminist interest in concerns about women's labor, set against a back-drop of changes in technology and the legal concept of obscenity.² But bound up with the differing legal,

1. I am grateful to Scott Anderson, Anne Eaton, Mark Gutzmer, Martha Nussbaum, and Debra Satz for their comments on earlier versions of this article.

2. "Obscene. Objectionable or offensive to accepted standards of decency. Basic guidelines for trier of fact in determining whether a work which depicts or describes sexual conduct is obscene is whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest, whether the work depicts or describes, in a patently

social, and academic histories of prostitution and pornography,³ there is a philosophical problem concerning the *justification* for their continuing different treatment, particularly by feminist liberals interested in women's sexual liberation and empowerment. Facing the different theoretical treatment of the two activities, and confronting the realities of the lives of those involved in them, we should wonder whether it makes sense to continue to compartmentalize real-person pornography as a speech issue relating to questions of obscenity, separate from discussions of the acts involved in prostitution.

The goal of this article is to tackle head-on the problem of the disparity between many feminist liberal assessments of prostitution and a frequent feminist liberal defense of live-actor pornography, and to suggest a remedy for it. The aim is both theoretical and practical: to understand and address some weaknesses in a common strain of many feminist liberal defenses of (certain aspects of) the sex industry, and to make some suggestions about how feminist liberalism might better address the conditions of the lives of the least well-off women. The theoretical points are made in the service of the ultimately practical end. For in order to improve the lives of a category of women typically left out of feminist liberal analysis, that analysis needs a change in focus and in tools.

offensive way, sexual conduct specifically defined by the applicable state law, and whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." *Black's Law Dictionary*, 1990, 6th ed. (St. Paul: West Group), p. 1076. In addition to being a definitive source for Anglo-American legal terminology and phrasing, *Black's* is sometimes itself cited as legal authority. [Originally published as *Dictionary of Law, Containing Definitions of Terms and Phrases of American and English Jurisprudence, Ancient and Modern*, 1891, by Henry Campbell Black (1st edition).]

See also the Model Penal Code article on obscenity, which covers commercial material only: "Material is obscene if, considered as a whole, its predominant appeal is to prurient interest, that is, a shameful or morbid interest, in nudity, sex or excretion, and if in addition it goes substantially beyond customary limits of candor in describing or representing such matters." American Law Institute, Model Penal Code §251.4(1). Commentaries published 1980.

3. Despite its close connection to legally legitimate parts of the sex industry, prostitution remains illegal everywhere in the United States, except certain counties in Nevada. A popular misconception is that prostitution is legal in Las Vegas. In fact, it is illegal in all Nevada counties over a certain population; and street-walking is illegal everywhere in the State. Currently, brothels are the only legal form of prostitution in Nevada, and they are legal only in ten out of Nevada's seventeen counties. For an account of working conditions inside Nevada's legal brothels, see Alexa Albert, 2001, *Brothel: Mustang Ranch and Its Women* (New York: Random House).

My argument about how to effect this change has two parts. The first concerns the degree to which the disparity between many feminist liberal treatments of prostitution and defenses of pornography are based on differing conceptions of freedom and the self, and the role that sex and sexuality play in those conceptions. The second part of my argument concerns the contrast I identify between the respective focus on worker and on consumer in many feminist defenses of the legal legitimacy of prostitution and live-actor pornography. I make the case that even though feminist liberal defenses of pornography tend to offer more satisfying accounts of the self as socially “situated” than do feminist liberal treatments of prostitution, they do so while ignoring the very worker who is supposed to be of such primary concern to the feminist liberal in the case of prostitution.

There are three central debates in the academic literature on prostitution and pornography: (1) the issue of harm and the possibility of consent (2) the question of prohibition, and (3) the liberating value versus oppressive function of the practices. In what follows, I argue that these debates are *not* (as many would have it) simply about sexual mores, but are more fundamentally disagreements about the relation between individual autonomy and society, as well as varying conceptions of the good life, and involve different perspectives on whose interests are relevant for discussion. I begin, in the first half of the paper, by sketching the outlines of the feminist debates about harms caused by the sex industry (See “THE QUESTION OF HARM AND THE POSSIBILITY OF CONSENT”). Then I deal with the individualism at the heart of the feminist liberal defense of the legitimacy of prostitution (See “LIBERAL INDIVIDUALISM”), and discuss the more Aristotelian approach feminist liberalism tends to take in its defense of pornography (See “HUMAN FLOURISHING AND THE VALUE OF EXPRESSIVE LIBERTY”). In the second half of the paper, I suggest a change in approach to both topics, combining an interest in the person whose body is needed for the production of live-actor pornography with attention to the social nature of self and its implications for appeals to individual consent (See “SOMEBODY SOMEWHERE”).

This analysis has the potential to change the landscape of current thought not only about the sex industry, but also about the self and bodily commodification more generally, making room for a view that is both more complex and more practical, that looks at the context and harm of certain sorts of voluntary acts *for the participants*. As long as we are unclear about what, or who, is relevant to a discussion of commercial sex, there is little hope that we can be clear and consistent about other areas of bodily commodification where the sale of certain kinds of bodily services or products is considered suspect, such as surrogacy, cloning, stem cell research, etc. And if we should change our focus in feminist liberal

investigations of commercial sex from consumer to the person whose body or labor makes the commercial product possible, then that may have implications for the realms of bodily commodification that involve even more complex questions about whose interests are relevant to the discussion.⁴ Therefore, we begin with sex.

THE QUESTION OF HARM AND THE POSSIBILITY
OF CONSENT

Traditionally, the central issue in academic discussions of the sex industry has been the question of harm and the possibility of consent, and following upon this, arguments about the merits of prohibition versus decriminalization or legalization.⁵ Defenders of the legitimacy of prostitution and pornography argue that either nobody is harmed by them, or that the participants consent to these harms as part of an economic

4. I have in mind here questions about surrogacy versus the sale of eggs and sperm. But there are many other issues involving reproductive commodification that also share the same conceptually dicey ground as the issues of prostitution and pornography.

5. Legalization is distinguished from decriminalization. Advocates for legalization support government regulation of prostitution, whether as a job like any other or as a special kind of work. For instance, see Martha Nussbaum, 1999, "Whether From Reason or Prejudice: Taking Money for Bodily Services." In *Sex and Social Justice*, pp. 276–98 (NY: Oxford). Advocates for decriminalization support removing criminal penalties for prostitutes, although not always for their customers or pimps. For an argument for the latter, see Margaret Jane Radin, 1996, *Contested Commodities*, pp. 134–36 (Cambridge, MA: Harvard University Press). Sweden recently instituted such policies. Many advocates for sex worker rights also support decriminalization rather than legalization because they are skeptical of any government involvement in prostitutes' lives. For instance, see Norma Jean Almodovar, Winter 1999, "For Their Own Good: The Results of the Prostitution Laws As Enforced By Cops, Politicians, and Judges." *Hastings Women's Law Journal* 10:1, pp. 113–114; and Pat Califia, 2000, *Public Sex: The Culture of Radical Sex*, 2nd ed., pp. 261–68 (San Francisco: Cleis.). Almost anybody who professes feminist concerns argues for the legal *status quo*. However, some have argued that the solution to the problem of harm requires, as a first step, equal enforcement of the laws that are already on the books. See Julie Lefler, Winter 1999, "Shining the Spotlight on Johns: Moving toward Equal Treatment of Male Customers and Female Prostitutes." *Hastings Women's Law Journal* 10:1, esp. pp. 16–35; and Dorchen A. Leidholdt, "The Sexual Exploitation of Women and Girls: A Violation of Human Rights." In Drucilla Cornell, ed., 2000, *Feminism and Pornography* (Oxford: Oxford), esp. p. 422.

trade-off that rational adults should be free to make. Opponents of the two activities argue that they are indeed harmful, and that the kinds of harms involved are not the kind to which one rationally consents. The view here is that consent is meaningless or absent in cases where what is being commodified is a form of abuse.

In the case of prostitution, the harm question primarily concerns both women who have sex for money as well as women in general. Possible harm to male prostitutes is typically subsumed under the harm to women, or dismissed as either not significant enough for attention or nonexistent, given the different gender dynamics involved in male versus female prostitution.⁶ The harms to women who engage in prostitution themselves are thought to be direct: the woman who has sex for money is physically hurt and socially denigrated. These harms are so great that it is thought that she cannot reasonably be said to consent to them. She may be forced into the exchange by a need for money, or coerced by noneconomic means. MacKinnon calls the idea that women meaningfully submit to such harms “the myth of consent,”⁷ arguing that consent is missing in the case of prostitution because harms like death and physical violence do not have a legitimate price, let alone the paltry price charged by street prostitutes in urban America, or the even more paltry amount left to them after pimps take their cut.⁸

6. For instance, see Scott Anderson, July 2002, “Prostitution and Sexual Autonomy: Making Sense of the Prohibition of Prostitution,” esp.p. 49, *Ethics* 112, pp. 748–780; Carole Pateman, 1988, *The Sexual Contract* (Stanford: Stanford University Press), ch. 7, esp. pp. 192–94; Dorchen Leidholdt, 1993, “Prostitution: A Violation of Women’s Human Rights,” *Cardoza Women’s Law Journal* 1, pp. 138–39; Catharine MacKinnon, 1993, “Prostitution and Civil Rights,” *Michigan Journal of Gender and Law* 1, pp. 13–31; and Debra Satz, October 1995, “Markets in Women’s Sexual Labor,” *Ethics* 106:1, p. 64. Although MacKinnon calls the prostitution of women and girls “the paradigm” case, and says: “prostitution is overwhelmingly done to women by men,” she asks us to remember that men and boys are also prostituted. For sociological examination of the problem of harm to male prostitutes in particular, see two English studies: Donald J. West and Buz de Villiers, 1993, *Male Prostitution* (London: Harrington Park Press); and Barbara Gibson, 1995, *Male Order: Life Stories from Boys Who Sell Sex*, (London: Cassell), esp. pp. 154–72.

7. MacKinnon makes this point in a variety of ways in a variety of places, but it is centrally the focus of Catharine MacKinnon (April 25, 2000) “Trafficking and the Myth of Consent,” given as a public lecture at Trinity College, Hartford, CT.

8. MacKinnon’s point is that, in fact, the consideration (i.e. payment) involved in the typical prostitution “contract” is too paltry to even be considered legitimate consideration. This is part of a larger argument she makes about the contract issues

For critics of prostitution *per se* (rather than of the poverty that undergirds the practice), such harms are of a different sort than harms resulting from other labor. This view is often confused with (and criticized as) a form of essentialism about a woman's sexual identity. But it need not be. Pateman makes the harms case by asking us to consider why there is, in social fact, a demand for commodified sex with women.⁹ The prostitute's gender is pivotal, according to Pateman, who argues that prostitution is a "problem about women," not just a matter of commodified sex, in that it involves the purchase of a right over a woman's body. This is important for Pateman, because it means that prostitution is not simply a type of ordinary wage labor. According to her, prostitution is unlike other physical labor, because it involves the unrestricted right to use a woman's body, not for the production of some further end, but for its own sake. As an inherently gendered exchange, the prostitution contract is an instantiation of an over-arching sexual contract that trades patriarchal sexual rights over women. So, because sex and power are linked in this way, we cannot treat prostitution as just another form of wage labor.¹⁰

This position, often called "radical feminist," maintains that prostitution is not merely the fallout of poor economic conditions, but is the *ur-*form of women's oppression.¹¹ A system of gender oppression corrupts the "free market" and prevents equal exchange between men and women, particularly regarding anything related to sex.¹² According to this view,

in prostitution. Typically, in contract law, what matters is the *fact* of consideration, not its adequacy. Inadequate consideration may be taken as evidence of undue influence, which could void a contract, but it is not an element in a case to rescind. MacKinnon's larger argument addresses this.

9. Carole Pateman, April 1983, "Defending Prostitution: Charges Against Ericsson," *Ethics* 93, pp. 561–65, p. 563.

10. Carole Pateman, "What's wrong with Prostitution?" *op. cit.*

11. Representatives of the radical feminist position include Margaret Baldwin, 1992, "Split at the Root: Prostitution and Feminist Discourses of Law Reform," *Yale Journal of Law and Feminism* 5, pp. 47–120; Kathleen Barry, 1995, *The Prostitution of Sexuality* (New York: New York University Press); Andrea Dworkin, 1997, "Prostitution and Male Supremacy," in *Life and Death* (New York: Free Press), pp. 138–216; Evelina Giobbe, "Prostitution: Buying the Right to Rape," in Ann Wolbert Burgess, ed., 1991, *Rape and Sexual Assault III* (New York: Garland), pp. 143–60; Catharine MacKinnon, "Prostitution and Civil Rights," *op. cit.*; Christine Overall, Summer 1992, "What's Wrong with Prostitution? Evaluating Sex Work," *Signs*, pp. 705–24; and Carole Pateman, *The Sexual Contract*, *op. cit.*

12. See Kathleen Barry, "The State: Patriarchal Laws & Prostitution," from *The Prostitution of Sexuality*, *op. cit.*, p. 246.

the problem with arguments aimed simply at the economic coercion in prostitution is that they draw attention away from the gendered nature of this sex-power exchange.

Beyond the direct harms to the prostitutes from this sex-power exchange, the feminist critic charges that the practice of prostitution harms women generally.¹³ If men think they possess a right to purchase dominion over a woman's body, then this cannot but affect the entire social and economic climate for women.¹⁴ Some have even argued that part of the problem with the focus on consent is that, by misleading us into thinking that prostitution is the kind of thing one meaningfully chooses, it turns prostitution in particular into a problem about "other women" rather than a problem with gender and power relations for all women. If a woman chooses a life of prostitution, then "the rest of us" can distance ourselves from the harms that befall her. Baldwin charges that abstract academic arguments about prostitution perpetuate this "us/them, good-woman/whore" dichotomy, turning the problem of harm into an intellectual one about the conditions for consent.¹⁵

This critique of the meaningfulness of consent (or its sheer absence) goes to the heart of the feminist liberal view that prostitution can enable the disadvantaged to gain control of their own labor power. The standard liberal line on activities that are thought to be disreputable, degrading, or harmful is that it is up to the participants to decide whether or not they want to engage in them. So, even though prostitution might be

13. Catharine MacKinnon, "Prostitution and Civil Rights," *op. cit.*, pp. 30–31. MacKinnon's view is that the harms of pornography bring the harms of prostitution to all women, since "pornography is an arm of prostitution." For an early economic argument for how prostitution harms women generally, see Elizabeth Blackwell, "Preface and Chapter II: The Trade in Women," *Essays in Medical Sociology* pp. 135–41 and 155–74. [Originally in *The Human Element in Sex*, London: J.A. Churchill, 1884] (Interestingly, Blackwell happens to have been the first woman M.D.)

14. In his argument against the normalization of prostitution, Anderson runs a thought experiment about the bad consequences of treating prostitution as a legitimate form of work. See Scott Anderson, "Prostitution and Sexual Autonomy: Making Sense of the Prohibition of Prostitution," *op. cit.*

15. Margaret Baldwin, "Split at the Root: Prostitution & Feminist Discourses of Law Reform," *op. cit.* See also Margaret Baldwin, Winter 1999, "'A Million Dollars and An Apology: Prostitution and Public benefits Claims,'" *Hastings Women's Law Journal* 10:1, pp. 189–224, where Baldwin makes the same general point, but without the emphasis on the power of anecdote versus abstract argument.

harmful (as are many forms of wage labor), it should be left as a matter of individual choice.

Many feminist liberals even acknowledge the gendered nature of the practice of prostitution in their defenses of the possibility of consent,¹⁶ holding that prostitution is something women disproportionately do because our society generally fetishizes women's sexuality. But this, according to the liberal line, does not mean that sexual wage labor must be illegitimate. Indeed, the view goes, if we attend to past puritanical judgments about the appropriate sphere of women's labor, we see that prostitution is much like other traditionally stigmatized occupations for women. What is really needed, according to this view, is a sustained comparison between prostitution and other forms of wage labor, to try to identify precisely what might be troubling about prostitution, or rather, about the way that it is practiced. Schwarzenbach likens the prostitute as physical laborer to a dancer, while Nussbaum compares prostitution to a number of jobs that skew female, including domestic servant and masseuse, and Shrage points out the similar way that child care workers and prostitutes tend to come from disadvantaged socio-economic classes.¹⁷ The point of such analogies is to show that the wage labor involved in prostitution is not so different from other traditionally women's wage labor in being potentially physically damaging and historically seen as degrading. Accordingly, since we treat other such jobs as legitimate choices, we should similarly treat prostitution. For feminist liberalism, it is the worst form of paternalism to preclude the choices of women whose options are already limited.¹⁸

16. The representatives of the feminist liberal position that I focus on in the following discussion are Laurie Shrage, January 1989, "Should Feminists Oppose Prostitution," *Ethics* 99:2, pp. 347–61; Sibyl Schwarzenbach, 1991, "Contractarians and Feminists Debate Prostitution," *NYU Review of Law and Social Change*, pp. 103–13; and Martha Nussbaum, "'Whether From Reason or Prejudice': Taking Money for Bodily Services," in *Sex and Social Justice op. cit.* I focus on these authors because they offer three very different and compelling arguments in defense of the legitimacy of prostitution that all maintain the possibility of consent, while still being sensitive to harms caused by the practice.

17. Sibyl Schwarzenbach, "Contractarians and Feminists Debate Prostitution," *op. cit.*, pp. 114; Martha Nussbaum, "'Whether From Reason or Prejudice': Taking Money for Bodily Services," *op. cit.*, pp. 276–98; and Laurie Shrage, "Should Feminists Oppose Prostitution," *op. cit.*, esp. pp. 358–59.

18. I am grateful to Martha Nussbaum for our expanded discussions of these points. As she has rightly pointed out to me, her ultimate assessment of prostitution is not a romantic one—in fact, she describes the prostitute as more often

LIBERAL INDIVIDUALISM

So the radical feminist critique of prostitution is both an argument about the harms caused by prostitution and an argument about the fact (or sometimes, about the possibility) of consent to such harms, while the feminist liberal defense of the legitimacy of prostitution is an argument that the harms are not of a different kind than the harms caused by other jobs and, as such, can be subject to meaningful consent. This is not a disagreement to be resolved here (if anywhere). But it is one that reveals a deeper disagreement not only about the status of women, but also about the social elements of personhood and the conditions necessary for freedom. The radical and the liberal may agree about the pervasive nature of women's sexual oppression, and even about the generally deplorable conditions of the lives of many prostitutes, but they disagree fundamentally about the influence such oppression must have on the possibility of the self's integrity and the power of choice.

This is partly because the two views tend to differ concerning what constitutes free choice. The radical feminist sees the prostitute who appears to "consent" to prostitution as so affected by systematic gender oppression that her choices are distorted—and even her sense of self shaped—by it. Whereas the liberal believes in the individual's ability to transcend her oppressive circumstances somewhat by making a rational decision to do the best she can, considering. And to choose to do the best one can, considering, is to be free. The choices one has might be limited, and the circumstances one finds oneself in might be terrible, but one still can act as a rational agent, deliberating over options and choosing a course of action. Recently, Martha Nussbaum has critiqued what she terms this Kantian view of the individual moral agent, explicitly advocating a more Aristotelian conception of the self. But this is in the context of a critique of the Kantian-Rawlsian view of the family, not in the context of her discussion of prostitution. This is important, for I am about to argue that liberal feminist treatments of prostitution and pornography (including Nussbaum's) tend to employ different models of the self: Lockean in one case, and more Aristotelian in the other.¹⁹

According to Locke, the capacity for self-determination rests upon a proper prudential concern for oneself and the ability to rationally choose

akin to the capitalist wage slave than the creative artist. One of her points is that what feminism needs to do is discuss the conditions of the wage slave *generally*.

19. See Martha Nussbaum, 2000, "The Future of Feminist Liberalism," *Proceedings and Addresses of the American Philosophical Association* 74, pp. 49–79.

actions that further one's own good.²⁰ This Enlightenment conception of freedom as self directed (autonomous), prudential rational action is implicit in the liberal defense of the prostitute's ability to choose to sell sex and meaningfully consent to what may be degrading or dangerous work conditions. Liberals need not defend the form most prostitution takes (in the United States or elsewhere) in order to think that consent can still be meaningful. What is important to the liberal is that the *individual* surveys options, and reasons practically about which course of action will further her own ends. The feminist liberal may admit that a person's social context and relations are important, but it is still ultimately the individual person, or self, and her rational choices that are key here, rather than the good for a group of people, or a conception of human flourishing. That is why the feminist liberal defender of the legitimacy of prostitution focuses so heavily on the harms caused by the stigma surrounding prostitution. The social stigma oppresses the individual, preventing the exercise, without suffering social repercussions, of will concerning the use of one's own body. The stigma thus prevents the individual from expressing and exploring her own choices.

This view of the person, or self, as a discrete individual whose choices and actions come from within and can be analyzed somewhat independently of social practice, has of course been criticized from the Enlightenment onward. Much feminist liberal discussion of prostitution is sensitive to this and concerned with the problem of how to ensure that the individual's choices really are free and that a life of prostitution is truly a viable one. But despite a sensitivity to the influence on the self of social practices and context—typically expressed as a recognition of the constraining power of social stigma—feminist defenses of prostitutes' free choice to engage in the sex trade still tend to be based on a foundation of liberal individualism.²¹ This is not only something that many feminist

20. A person who has the capacity to rationally reflect, deliberate, and adopt a course of action is *self-determined*. Without the capacity for self-determination, the agent cannot bind herself to an authorized course of action, so cannot be obligated or capable of law. See John Locke, 1975, *An Essay Concerning Human Understanding*, edited by Peter H. Nidditch (Oxford University Press) esp. p. 2.21 "Of Power," pp. 233–87.

21. For instance, compare Martha Nussbaum's (2000) critique of adaptive preferences and list of human capabilities as central political goals in *Women and Human Development: The Capabilities Approach* (Cambridge: Cambridge University Press) with her discussion of prostitution in particular in "Whether From Reason or Prejudice: Taking Money for Bodily Services," *op. cit.* As mentioned above, Nussbaum explicitly critiques the Kantian-Rawlsian conception of the isolated individual self. But that critique makes no mention of the case of

liberals admit, but also something they are proud of: championing the rights and interests of the individuals who work in prostitution in order to secure for these individuals the same choices and economic opportunities as other individuals.

A main point of disagreement between the radical feminist critics of prostitution and feminist liberal defenders of its legitimacy is over this issue of an *individual's* ability and right to choose a type of life that may not generally be considered a good one. Feminist liberals worry that sexual conservatism lies at the core of the social stigma surrounding prostitution, and are concerned that the feminist critics of prostitution play into the sexual conservatives' hands by limiting the type of sexual expression open to women. They argue that individuals with sexual desires and preferences outside of the romanticized norm are marginalized and their identities reduced to their sexual activities. Shrage and Schwarzenbach both claim that this tendency to identify persons with their sexual activities (e.g. slut, prude, lesbian, etc.) contributes to the stigmatization of women who exchange sex for money.²² *But their suggested solution is not to give up the idea of a "true self;" rather, their suggested solution is to recognize that one's sexual activities do not in fact constitute that "true self."* One has a body, with which one engages in sexual activity, but the self, or person, is not that body or those activities, whether those activities are thought to liberate or constrain.

Notice here that for many feminist liberals, the entire discussion of prostitution rests on questions about the agency of the individual prostitute. Whether the issue is economic coercion, sexual expression, or differing notions of the good life, feminist liberalism focuses on the woman who is exchanging sex for money, and on the conditions of her labor. Her agency is typically thought to be isolable and separately analyzable—even while social stigma is recognized as a powerful influence—and the discussion is phrased in the terms of her options and choices, constrained though they might be. Yet this is not the case when it comes to pornography. As we shall see, this disparate treatment of prostitution and pornography reveals a tension in the feminist liberal view between an individualistic perspective and a more socially constructed view of agency—a tension coincident with a shift in focus from worker to consumer, and from

prostitution and, I maintain, her explicit defense of prostitution seems to involve a more Lockean than Aristotelian conception of the self.

22. Both Schwarzenbach and Shrage discuss the "reification" of one's sexual identity. See Schwarzenbach, "Contractarians and Feminists Debate Prostitution," *op. cit.*, p. 117; and Shrage, "Should Feminists Oppose Prostitution," *op. cit.*, esp. p. 356.

concern with the conditions of labor to concern with the liberty interests associated with speech.

HUMAN FLOURISHING AND THE VALUE OF
EXPRESSIVE LIBERTY

While the radical feminist concern in the case of live-actor pornography remains both the woman who is exchanging sex for money (whether directly or indirectly), and the condition of women generally, the feminist liberal focus shifts away from the individual worker and the conditions of her labor, to the consumer and the consumer's relation to the product of pornography. In the case of pornography, the traditional or classical liberal (in some degree of contrast with the feminist liberal) tells us that we need not watch it, read it, or listen to it if we do not like it. As rational adults, we make our own choices about the private activities in which we wish to engage, and any attempt to curtail those choices impinges on our freedom. According to the classical liberal, much pornography may be disturbing, but we can, at the least, turn away from it and, at the most, make our views heard in the free public realm so that we can convince others that it is disturbing and that they should turn away from it too.

This view has often been criticized by feminists of all stripes for predicating too much on a distinction between a private realm of free choice and a public one of free debate. As many have argued, this distinction between a private realm and a public one is problematic because it itself reinforces the gender hierarchy that is at issue.²³ The "private" is typically construed as the realm of the personal and the intimate. But if the worry is that the personal and the intimate are implicated in and affected by pornography in harmful ways, then it does no good to close off discussion of those harms through appeals to privacy.

However, the problem with privacy appeals is even more fundamental than this point about the gendered nature of "the private." The concept itself is too loose to form the basis of any solid defense of the liberal position. The classical liberal view is concerned with protecting privacy without being clear about the *sense* of private. If "private" means anything that is not the law's business, then it is circular to argue that the law should steer clear of the private realm. If "private" means what happens at home or what is not exposed to view, then further argument is required to show

23. For a sustained argument of this sort, see especially Susan Moller Okin, 1989, *Justice, Gender, and the Family* (New York: Basic Books).

that the law *should* stay out of it. Because of the looseness of the concept of “privacy,” simply appealing to privacy is inadequate as a defense of the liberal position.

Yet, as problematic as the privacy defense is, it at least is meant to be broad enough to defend the legitimacy of both prostitution and pornography. It is when the more sophisticated feminist liberal accounts attempt to defend the legitimacy of pornography, including live-actor pornography, by means other than the privacy appeal that their approach to the two activities splits apart, shifting from an Enlightenment model of personhood and agency—with its emphasis on individual autonomy and rationality—to a view of the self as more socially embedded and fluid.

Many feminist liberals recognize the problems with the privacy appeal and seek to defend pornography’s legitimacy by other means, as a form of expression representative of ideas rather than defending it as a legitimate type of bodily commodification. Instead of arguing that the sexual sphere of rational adults should be off limits to the law, people like Sally Tisdale argue that pornography’s value is in what it teaches us about ourselves.²⁴ The “us” here is of course the viewer. Tisdale, for instance, is careful to note that (live-actor) pornography may have harmful effects on male viewers’ attitudes about women, but she thinks this is balanced by the educational benefits it has for women like her.²⁵ The view is that pornography is fantasy, and as such, it comes wholly from within.²⁶ So, rather than being harmful to women, pornography can be liberating, enabling women to control their own sexuality.

This sort of defense often employs a legal model of obscenity to interpret pornography, treating the live-actor pornography product as a representation of ideas in the same way as a work of fiction.²⁷ For the liberal

24. Sallie Tisdale, 1989, “Talk Dirty to Me,” in Alan Soble, ed., *The Philosophy of Sex* (New York: Rowman and Littlefield), p. 278.

25. Sallie Tisdale, “Talk Dirty to Me,” *op. cit.*, p. 276.

26. Sallie Tisdale, “Talk Dirty to Me,” *op. cit.*, p. 273. For a similar argument about the importance of pornography’s being *fantasy*, but a very different conclusion about the significance of such fantasy, see Beverley Brown, “A Feminist Interest in Pornography—Some Modest Proposals” in *m/f*, 5/6 London: 1981. pp. 5–18.

27. Most of this discussion is focused on US obscenity law. The US Supreme Court has ruled that First Amendment protections of free speech and expression do not cover obscenity. This sense of ‘obscenity’ always refers to sex, and is defined by the Miller test, based on the 1973 Supreme Court ruling in *Miller versus California* that held that, in determining whether speech or expression could be labeled obscene, courts must consider all of three criteria:

defender of pornography's legitimacy, the difference between textual or virtual pornography and pornography that uses real, live human bodies is not significant. Even pornography that shows real people having real sex is considered to be part of the realm of ideas and fantasy. Thus, live-actor pornography is assimilated to speech with the additional defense that our *sexual identities* are partially formed by exposure to breadth and variety in such speech. Whether or not real people are laboring to produce the product is beside the point: what matters is the consumer's relation to the product of that labor.

Such a view of the value of pornography as sexual expression is compelling. If women's sexuality is constrained in a male-dominated culture, then it seems liberating to reclaim that sexuality and acknowledge one's own sexual identity. On this view, pornography can help "us" do that by showing us the good, the bad, and the ugly in our culture's sexual tropes and stereotypes. After all, knowledge is power, and the more we know about what arouses us and what does not, the more we can own and control our own sexual identities.

Joshua Cohen offers a more intellectual version of this argument, responding to the call for legal restrictions on live-actor pornography, by trying to make some space for societal interests in protecting pornography.²⁸ Cohen argues that the harm pornography does can be combated in a way that preserves sexual expression. He suggests treating some pornography as a subcategory of obscenity,²⁹ thus leaving room for discussions of its worth in the context of decisions about what might be regulated.³⁰ This is important, according to Cohen, because expression itself is part of liberty. So live-actor pornography is completely assimilated to speech

- (1) whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest;
- (2) whether the work depicts/describes, in a patently offensive way, sexual conduct specifically defined by applicable state law; and
- (3) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

See *Miller versus California* 413 US 15 (1973). But see also the British *Obscene Publications Acts* (specifically 1959 and 1964) and the Limitations clause of the *Canadian Charter of Rights and Freedoms* (Clause One).

28. Joshua Cohen, 1996, "Freedom, Equality, Pornography," in Austin Sarat and Thomas Kearns, eds., *Justice and Injustice in Law and Legal Theory* (Ann Arbor: University of Michigan Press), pp. 99–137.

29. See reference, above, to *Black's Law Dictionary* and Model Penal Code for definitions of obscenity, under US law.

30. See Joshua Cohen, "Freedom, Equality, Pornography," *op. cit.*, p. 134.

and defended as involving distinct liberty interests for its producers and society at large.

This is the classic argument Mill gives for free speech in general in *On Liberty*. There Mill argues that one of the reasons that free speech is so important is because we need to hear a variety of opinions in order to know what is true and to hold true beliefs for the right reasons. The great thing about human judgment, according to Mill, is that it can be corrected—but only if we have access to a range of views. So free expression, of good or bad views, is helpful.

But Mill (and Cohen, to some extent) go beyond this argument based on the value of free expression for us as individuals searching for truth. Mill, the classical liberal, and some contemporary feminist liberals following him, argue that a free marketplace of ideas enables one to develop one's capacities and become a more fully realized person by providing information to guide choices and explore one's sense of self. What is needed for this is not just negative freedom, but a variety of ideas and experiences to have and choose from. Indeed, for Mill, this is what makes us human; such "experiments in living" help us figure out the best way of life for each of us.³¹ And in a community with others, we learn from their choices and they learn from ours. In this way, a free society is the best facilitator of human flourishing.³²

For Tisdale, Cohen, and other defenders of the value of pornography, the classical liberal defense of free speech, combined with this more Aristotelian appreciation for the centrality of choice in the formation of character, takes the form of a defense of the way pornography portrays *varieties* of sexual experience—for good and ill. So pornography—even nasty, hateful pornography—helps one develop a sense of who one is and who one is not. The value of live-actor pornography then, lies in its role of offering representations for its consumers to emulate or reject. Because desire is partly socially structured, limiting access to a variety of commercial pornographic representations can stunt the development of a person's own patterns of desire and sexual identification. For this reason, severe restrictions on live-actor pornography are not just impractical, but wrong, especially since it is women (and other oppressed groups, such as homosexuals) who have historically had such choices and experiences closed off to them.

31. See John Stuart Mill, *On Liberty*, ch. 3.

32. Mill is at his most Aristotelian here. For a discussion of Mill's "experiments in living," and a comparison of the differences between Mill and Aristotle on the role of choice in human flourishing, see John Gray, 1991, "Mill's Conception of Happiness and the Theory of Individuality," in *J.S. Mill's On liberty in Focus*, ed., John Gray and G.W. Smith (New York: Routledge), pp. 190–211.

Now, of course, the critic of commercial live-actor pornography would argue that your sexual awakening and development is not worth someone else's abuse and subjugation, even if one were to buy the idea that pornography facilitates the former (which most critics do not³³). Nonetheless, the thing to notice here is that this liberal defense of the value of pornography does not make the self out to be an isolable object, available for individual analysis, in the way that the liberal treatment of prostitution does. On the contrary, this liberal defense is predicated on the self's developing partly in response to social constraints and experiences. Here the Lockean conception of a person as an individual standing alone and deciding to sell her labor power³⁴ has given way to a more Aristotelian defense of the value of an abundance of choices for a community of fully functioning moral agents.

This shift is made without much consideration of how such choices are distributed. And this encapsulates part of the problem with the feminist liberal shift from a discussion of the harms/benefits for the worker, in the case of prostitution, to a discussion of the value of pornographic speech for the consumer, even in the case of live-actor pornography. The worker³⁵—the person whose labor power, or body, is needed for the

33. The most obvious objection to the claim that pornography is valuable as an aid in sexual awakening is the counter-claim that it is merely a masturbatory device. I do not wish to enter into a debate over whether or not something *can* be both things at once, or even a debate about whether any pornography is *indeed* both things at once. But it is important to note that many critics of pornography would object to all the high-minded talk of "human flourishing" and speech in this context. (See, for example, Mackinnon's famous remarks that one can't argue with an orgasm and that "an erection is neither a thought nor a feeling, but a behavior." Catharine MacKinnon, 1993, *Only Words*, ch. 1, Cambridge: Harvard).

34. For further discussion of the Lockean conception of ownership in the context of the prostitution exchange, see Sibyl Schwarzenbach, "Contractarians and Feminists Debate Prostitution," *op. cit.*, §3. Of course Locke himself may have had a more nuanced conception of self than the version described. In any event, Hume certainly did. Nevertheless, it is the individualism of the Lockean conception that has had so much influence on the liberal tradition.

35. The terms 'work' (in this context) and 'sex worker' are themselves controversial. The term 'sex work' is typically credited to Carol Leigh (aka Scarlot Harlot), who initially introduced it as a way to emphasize the legitimacy of commerce in sex and to reclaim some dignity for those who exchange sex for money. Although the term 'sex work' has become increasingly popular in some circles as a way of referring to those who make money as prostitutes, pornography actors, strippers, etc., it is still rejected by many. Some see it as a way of whitewashing the abuse suffered by many who are used in the sex industry, and thus

viewer of live-actor pornography to have the varieties of experience with different forms of speech that the liberal argues are so important—has dropped out of the account of the feminist liberal treatment of pornography. There are a number of pornography workers who offer defenses of what they do for money.³⁶ But even consideration of these accounts is missing from the liberal theorists' treatment of pornography. It is as if the person who is important in the case of pornography is not the worker at all, but the person who benefits from her labor. The worker herself, isolable rational agent or not, fades from view as if no pornography were live-actor pornography at all, but *mere* representation.

SOMEBODY SOMEWHERE

Leaving aside pornography that does not involve real human bodies having real sex, since that raises a host of different issues for both the critic and the defender of pornography's legitimacy,³⁷ we are here faced with

prefer terms like "prostituted woman," or "survivor." (For a general overview of the anti-prostitution objection to the term "sex worker" see Dorchen Leidholdt, "Demand and the Debate," a speech on trafficking and the history of the Coalition Against Trafficking in Women (CATW), given on October 16, 2003. Available on the CATW web site <http://www.catwinternational.org>. See also Janice Raymond, "Ten Reasons for Not Legalizing Prostitution," in *Prostitution, Trafficking and Traumatic Stress*, ed. Melissa Farley, 2003 (Binghamton: Haworth Press). Some criticize the term "sex work" as erasing what sets prostitution apart, in a good way, from regular "work": the sense of the forbidden, the special nature of what a prostitute does, even the very *badness* of it. And some point out that the term has class connotations and affiliations that the term "prostitute" does not. I only use the term "sex work" here when referring to the position of those for whom it is the term of choice. Where I refer to those who criticize the sex industry as being inherently exploitative and *not* involving legitimate "work," I do not use the term. After all, if somebody considers herself to have been a slave, then it is a terrible thing to re-describe her as a worker—terrible both for slave and worker alike.

36. For instance, see Nina Hartley, "In the Flesh: A Porn Star's Journey" in *Whores and Other Feminists*, *op. cit.*, pp. 57–65 and generally, the work of Annie Sprinkle, Susie Bright, and Theresa Reed.

37. In the case of pornography that does not involve the representation of real humans having real sex, the critic tends to focus on the question of harm to women generally. In this case, the issue becomes one of causation, the question of whether such pornography leads to mistreatment, degradation, and abuse of real people. For an excellent discussion of the various conceptions of causation

the question of whether or not the disparate treatments of prostitution and live-actor pornography are justifiable. In the one case, there is a fairly direct exchange of sex for money (although the “worker” may not ever see any of the money for her putative labor, in which case she is more properly classified a slave), while in the other case, the consumer’s purchase is mediated by the camera. Both prostitution and live-actor pornography may involve a third party (pimp or pornography producer) or neither may (consider the pornographic work of Susie Bright, Annie Sprinkle, Carol Leigh, and others who market their own work). The difference is the different role the consumer plays in the transaction. In one case, the consumer purchases sexual interaction with another person, and in the other case, the consumer purchases the record of other persons’ sexual interaction—a representation, as some would have it.

So it may not seem so strange after all that the feminist liberal treatment of pornography involving real persons should look very different from the feminist liberal treatment of prostitution: the *consumer* is engaged in a different activity in each case. In the case of prostitution, what is bought is—depending upon one’s point of view—a sexual service, access to a body, or a person’s sexual self. In the case of live-actor pornography, what is bought is a product, a record, a representation. What is of central importance to the feminist liberal is not the fact of commodification necessary for the making of this product, but its element of expression and its connection to liberty interests in speech. Where the debate over prostitution had been about whether or not sex was a proper candidate for commodification, the expressive liberty defense of pornography’s legitimacy proceeds as if commodification were *necessary* for the human flourishing that it champions.

This presumption that commodification of sex is necessary for sexual expression is itself problematic for several reasons. First, it is problematic because nothing about the Millian/Aristotelian conception of identity as partly socially structured and developed through exposure to varieties of experience and choice requires that the *market* supply these experiences and choices. Not without further argument anyway. It may be that a (relatively) free market is the best way to ensure such variety, but then the case would seem to be for actively *promoting* sexual commodification, not just allowing us all to blossom in our own ways through unrestricted access to *ideas* about differing sexual tastes and identities. And *that* argument

at work in such a view, see Anne W. Eaton, “Might Pornography Cause Harm?” unpublished manuscript. On the liberal side, see Martha Nussbaum’s discussion of literary pornography in “Objectification” in *Sex and Social Justice*, *op. cit.*, pp. 213–40.

simply is not made by the feminist liberal defenders of pornography's legitimacy, who assimilate live-actor pornography to speech and *thereby* justify it.

None of what I have just argued is a direct argument against pornography. For one thing, one could bite the bullet and argue in response that what we need is more commodification of sex, not less—a position that would probably trouble most liberals (let alone most feminist liberals). At the other end of the spectrum, one could accept that the modern pornography industry has gotten beyond the obscenity models used to analyze it, and agree that the sexual commodification involved in live-actor pornography is potentially, or even actually, harmful and yet *still* think that the harms of regulation are worse for the sort of human flourishing reasons raised, as well as for more practical reasons of politics and legal enforcement.³⁸

Such arguments are commonly made about nonsexual matters, such as the use of drugs, the practice of euthanasia, and (less frequently) abortion. There is nothing incoherent about the view that some things that are harmful should not be disallowed. Perhaps the products of the pornography industry are like the products of the gun industry: weapons that can be used to harm, but access to which is intimately connected to other values we hold dear. According to such a view, we might consider various means of minimizing the potential for harm caused by these products (through restrictions like age limits, licensing, and trigger locks), but should also try to preserve access where we can, in order to maximize liberty.³⁹

This may sound like a solution to the problem of harmful pornography. It is certainly appealing to this author's liberal intuitions. But the elephant in the room here is the fact that actual sex with real people—sexual labor or subjugation, as the case may be—is being exchanged for money in the case of commercial live-actor pornography. And this is the second problem with the presumption that commodification of sex is necessary for sexual expression. The product in such pornography depends upon a real person's having sex in exchange for somebody's making money. The person who is having sex in such a commercial context is thought to be of central importance in feminist liberal thought about prostitution, but is seemingly

38. One example of the dangers of regulation that is often cited, accurately or not, is the confiscation of Andrea Dworkin's writings under the MacKinnon-Dworkin anti-pornography regulations adopted in Canada.

39. This view, minus the connection to issues of gun control, is essentially the one put forward in various versions by Cohen, Nussbaum, and other feminist liberals who are concerned both about the status of women and about the value of expressive liberty.

irrelevant to feminist liberal thought about pornography. Academic discussions of expressive liberty typically center on the liberty interests of *consumers*, or possibly producers, but seldom on the people whose bodies are necessary to the making of pornography. This is not the case for feminist critics of pornography of course. For instance, MacKinnon and Dworkin famously argue that pornography is an arm of prostitution.⁴⁰ But very few feminist liberals who write about pornography even mention prostitution, and *vice versa*. Nussbaum is a notable exception here, but even her work on the two subjects seemingly preserves the same split between conceptions of the self and subjects of focus that is found in the rest of the feminist liberal discussion. The academic discussion of prostitution centers on the autonomy of the individual worker whereas the academic discussion of pornography centers on the value of expressive liberty, its relation to obscenity, and the social development of sexual identity.

This dichotomy is *not* generally preserved in the writings of those with practical experience working in or around the sex industry—whether they write in critique or defense of it.⁴¹ A range of testimonials and social studies reveals a more fluid industry than the academic and legal compartmentalizations of prostitution and pornography (as well as other forms of sexual commerce) would seem to indicate. People who strip or perform in pornographic movies are very often also prostitutes off-camera and *vice versa*. Or they consider themselves such.⁴² According to one study of

40. See their work generally. Specifically, see Catharine MacKinnon and Andrea Dworkin, 1998, *In Harm's Way* (Cambridge: Harvard), and Catharine MacKinnon, 1993, *Only Words* (Cambridge: Harvard).

41. See, generally, the discussions in Laurie Bell, ed., 1987, *Good Girls/Bad Girls: Sex Trade Workers and Feminists Face to Face* (Toronto: Women's Press); Leidholdt and Raymond, eds., 1990, *The Sexual Liberals and the Attack on Feminism* (New York: Pergamon); and Jill Nagle, ed., 1997, *Whores and Other Feminists* (New York: Routledge), as well as the writings of Carol Leigh, Jill Leighton, Theresa Reed, and many others.

42. See, for example, Traci Lords's description in her recent autobiography of work in the pornography industry and her attempts to leave it for work in the mainstream movie industry: "We were scripted prostitutes, performing for the camera." See Traci Lord's (2003) *Underneath It All* (New York: HarperCollins), p. 192. Of course, many people do not work in more than one department of the sex industry, but even those who testify to remaining on one side of a line or the other tend to emphasize that, by doing so, they differ from their peers. Tracy Quan often describes her work in prostitution as partly motivated by the secrecy and sense of the forbidden around prostitution that is not the same in the case of pornography. See Tracy Quan's various writings, especially her novel (2001), *Diary of a Manhattan Call-Girl* (New York: Crown). See also Lili Burana,

prostitution, thirty-eight percent of the women surveyed reported being used in child pornography.⁴³ Some estimates of the percentage of strippers involved in prostitution range from twenty-five to forty percent.⁴⁴ According to reports available from various anti-prostitution organizations, stripping is often used as a pipeline into prostitution, and women move, or are moved, between prostitution and pornography without restriction. In fact, many pro-prostitution activists decry the way the commercial pornography industry has tried to distance itself from prostitution in the public imagination in order to preserve its growing legitimacy, while hypocritically employing prostitutes and promoting the prostitution of its workers.

All of this stands in striking contrast to the academic feminist liberal treatment of prostitution and pornography as raising different ethical questions. The standard feminist liberal defense of prostitution's legitimacy maintains that prostitution is often harmful and degrading, but that we should work to eliminate the conditions that make women feel they have to do it rather than penalize them for doing it. While, on the other hand, the standard feminist liberal defense of the legitimacy of pornography maintains that pornography is generally beneficial and we can try to address its harms without curtailing the general practice, and so preserve what is generally good about it.

The problem is that this defense does not attend to the way live-actor pornography is produced and to the costs for those whose bodies are

2001, *Strip City* (New York: Talk Miramax Books); and Elizabeth Eaves, 2001, *Bare: On Women, Dancing, Sex, and Power* (New York: Crown). Burana and Eaves are part of recent spate of former workers chronicling their experiences at the no-contact peep show establishment "The Lusty Lady." Their accounts are especially revealing here for the time they spend discussing the authors' choices *not* to engage in sexual contact for money. Linda Lee Tracey, 1997, *Growing Up Naked* (Toronto: Douglas & McIntyre), describes the affect the growth of pornography had on the world of stripping during the 1970s. She is avowedly a former stripper, not a pornography worker or prostitute, but discusses how this contrasted with the behavior of many of her stripper peers who exchanged direct sexual contact for money. Tracey was also the subject of the controversial National Film Board of Canada documentary about pornography, "Not A Love Story."

43. Silbert and Pines, 1984, "Pornography and the Sexual Abuse of Women," *Sex Roles* 10, discussed in Margaret A. Baldwin (Spring 1989) "Pornography and The Traffic in Women," *Yale Journal of Law and Feminism* 1:1, pp. 111-55.

44. "Prostitution in Hartford," research compiled by Michele Kelly under the supervision of this author as part of an ongoing research project partially funded by the Hartford Metropolitan Research Program at Trinity College.

necessary for making it. As a thought experiment that should help illustrate what is wrong here, consider the following: a liberal defense of the legitimacy of prostitution based solely on the benefits prostitution has for the consumer, without any discussion of the role of the service provider. According to such an account, the legitimate sale of sex would be a good thing because it would aid “the rest of us” in our sexual development and exploration of our identities. Even nasty, harmful prostitution exchanges where prostitutes are abused could help teach us what we like or don’t like, and traditionally marginalized sexual groups (such as sadomasochists) could find an outlet for sexual desires that might otherwise find improper outlet in the real (noncommercial) world of personal relationships. By enforcing other laws that are more narrowly targeted, such as those against kidnapping and underage sex, we could still weed out the forms of prostitution that are *truly* unacceptable, without preventing a person from exercising autonomy in deciding what to buy—which in a capitalist system, is central to human flourishing and the good life.⁴⁵ Although some prostitution may be unpleasant for the worker, the costs, for the sexual expressiveness of society at large, of limiting the practice would be too great to regulate it. So we should instead tolerate the bad and celebrate its value in helping consumers learn about their sexual identities.

Such an account would seem anathema to the broadest feminist concerns with the status of women and the conditions of the lives of the underprivileged because it leaves out a crucial element: the putative workers who may be trafficked or otherwise have so few options as to be unfree. (Neither would such an account satisfy pro-prostitution activists concerned with improving working conditions for those who choose to exchange their sexual labor for money, because such activists typically have, well, a worker in view.) It also treats prostitution as generally a good thing, in contrast with the standard feminist liberal treatment of prostitution, which either concedes to the critic that most forms of prostitution are troubling *as practiced*—arguing that they are just made worse through stigmatization and criminalization—or which refuses to essentialize the

45. This thought experiment is offered somewhat tongue-in-cheek of course. But similar defenses can be found in the literature. Ericsson and Califa, for instance, both defend the legitimacy of prostitution largely through such accounts of the benefits it offers to the consumer. See Lars O. Ericsson, April 1980, “What’s Wrong with Prostitution?” *Ethics* 90:3, pp. 335–66; and Pat Califa, “Whoring in Utopia,” *op. cit.* Schwarzenbach also offers a brief argument in this vein. See Sibyl Schwarzenbach, “Contractarians and Feminists Debate Prostitution,” *op. cit.*

activity in any way at all. Even those feminists sensitive to queer theory, who recognize the value of nonheteronormative expressions of sexuality, would likely shy away from an argument that completely ignores all costs to the worker in such commercial transactions.

The problem is how to maintain a concern with individual women and the conditions of their lives, while not making the classical mistake of ignoring the effect that social practice has on a person's self-conception and very ability to make autonomous choices. This is an old problem for feminism, but it is at its sharpest in the different ways that prostitution and pornography are treated in academic discussion. It is here that feminist liberalism must come to grips with the tensions in its treatment of women as individuals and as a group, and with its traditional interest in the welfare of the "rest of us" that overshadows interest in bettering the lives of women who are the most marginalized.

I am not arguing that feminist liberalism lacks the tools to analyze prostitution or live-actor pornography, but rather that (1) different tools are being used to analyze each, undercutting the credibility and usefulness of both analyses, and (2) in defending the legitimacy of pornography, feminist liberalism is using the *wrong* tools. Using obscenity law to interpret live-actor pornography is not adequate for addressing concerns about the welfare of persons who are involved in the making of live-actor pornography. And privileging the interests of consumers to the exclusion of all else flies in the face of the values of both feminism and liberalism. At the same time, feminist liberal analyses of prostitution tend toward the simplistic when assessing individual choice and consent, simultaneously emphasizing the damaging effects of stigmatization and treating the individual's choice to exchange sex for money as problematic only in so far as it results from economic coercion. That is, only in so far as it is a symptom of poverty.

Feminist liberalism needs to do two things to remedy the troubling disparity between its treatment of prostitution and its treatment of pornography. It needs to be more critical of the meaningfulness of consent and choice in prostitution, given the social context. It should also combine the concern for the worker that is central to the defense of prostitution, with sensitivity to the social and cultural embeddedness of self that is central to the defense of pornography. Then it can look at live-actor pornography as a form of prostitution that raises additional questions about third-party consumption.

So first, what is needed is attention to the labor in live-actor pornography, rather than a concern, to the exclusion of all else, for the consumer. Examining the context for pornography workers rather than just

consumers will present some difficulties. For instance, consent may be more meaningful for some persons and in some instances. Nevertheless, the point is to assess and justify *consent*, not the consumer's purchase right. We already do not permit consent to mutual combat with the idea that such "consent" is not rational. Apparent exceptions are more apparent than real, because they are highly regulated in a way that pornography is not, as in the case of boxing.⁴⁶ Even such apparent exceptions may be disappearing in the United States. Courts do not ask whether two hockey players consent to mutual combat when they throw off their gloves and fight. So-called "no holds barred" competitive combat, such as the Ultimate Fighting Championship (UFC), has been outlawed in many states. The big venue for Mixed Martial Arts (MMA) is now Japan, not the United States. Indeed, it seems that commercial live-actor pornography stands alone as a legally legitimate industry where interest in consumer access obviates concerns about the worker/participant.⁴⁷

Traditional feminist liberal interest in preserving individual women's autonomy must be combined with a sensitivity to the fact that more options for some can sometimes mean less freedom for others.⁴⁸ Pornography that uses real people having real sex requires a supply of prostitutes to produce the product. That is something that feminist liberal defenders of the empowering potential of pornography for "the rest of us" need to take into account. We can recognize that persons are not isolable objects whose scope of choice is analyzable apart from social context, without losing sight of those who are least well-off and have the most to lose from

46. The recent epidemic of HIV/AIDs within the mainstream commercial pornography industry has brought some attention to the lack of regulations governing it. But even this concern is expressed more as a concern over public health issues than a specific concern for workers within the pornography industry.

47. Readers might consider the recent television "reality" shows about boxing. As attractive or repulsive (or both) as they may be, it is interesting to note that these shows have (so far, anyway) focused on the perspective of the boxing hopefuls rather than on the perspectives of promoters or audience.

48. For an excellent, detailed analysis of how sexual autonomy might be hindered by the normalization of prostitution, see Scott Anderson "Prostitution and Sexual Autonomy: Making Sense of the Prohibition of Prostitution," *op. cit.* Although Anderson's focus is solely on prostitution (indeed, preserving the same distinction between prostitution and pornography that I identify in much of the feminist liberal literature), I think his analysis of the ways in which prohibitions can preserve one's sexual autonomy can, in fact, also be applied to pornography.

the further commodification of the sexual sphere that evidently goes along with an increase in avenues for sexual expression.

Second, what is needed is for feminist liberalism to bring the same sensitivity to the social and cultural embeddedness of self that is central to its pornography analysis, to the concern for the worker that is the subject of its prostitution analysis. Combined with a more socially embedded view of the self, the feminist liberal argument about the harms done by stigmatization would then be made stronger. If the self is partly socially structured, and our identities are built in the context of exposure to a variety of experiences and expressions of sexuality, etc., then true freedom of choice and self-determination are near impossible when an entire sphere of activity (commercial sex) is so publicly stigmatized. Our very ability to develop and flourish is stunted by the opprobrium heaped on anyone who expresses his or her sexual self commercially. And it is the least well off who often suffer the most from such stigmatizations because they start out at a disadvantage.

We have these discussions about the tensions between freedom and protection all the time in other arenas, when debating the ethics and practicality of regulating “hate speech” and certain forms of group harassment, and remedies like affirmative action. It is not easy. But in other arenas aside from the sexual one, there does not seem to be such a striking bifurcation of thought for liberals between concern for the worker and concern for the consumer. The very different ways pornography and prostitution are viewed in our culture reveal something deeper about the way our culture views persons: the boundaries of persons, the proper functioning of persons, and the appropriate activity of persons. Sex seems to be the place where all these come together for us.

One option open to the feminist liberal is to offer a defense of pornography’s legitimacy that combines the expressive liberty argument with an argument that workers do meaningfully choose to participate in such an enterprise commercially. The question then becomes one of whether having the “option” to exchange sex for money is more like having the option to sell one’s (even nonessential) bodily organs, or more like having the option to be a ballet dancer, professional basketball player, or paid subject for medical experiments. As a society, we have decided that the former is not acceptable because it puts what are deemed undue incentives/economic pressures on the least well off. But we have apparently decided that the incentives/economic pressure on poor kids to try to excel at sports rather than academics is acceptable. If we decide that selling sex is more like organ selling, then we have decided that sex is an essential part of human identity, or a unique sort of activity in some way. If we

decide that selling sex is more like being a professional athlete, then we have decided that, for the purposes of *public* morality, sex should not be cordoned off as a special sphere of human activity with a wholly different set of public rules than other physical activity/labor.

I do not believe that these issues need be cast in terms of a theoretical versus practical interest, as many critics of the sex industry charge.⁴⁹ Indeed, what I offer is a theoretical critique with practical consequences. What I identify as a theoretical disparity between feminist liberal treatments of prostitution and pornography means that the feminist liberal is not answering the charges against the two brought by the radical critic, and so not addressing the critic's practical concerns.

This is important if we ever *do* hope to resolve any of the disputes between feminist critics and defenders of the legitimacy of the sex industry. For if the critic keeps asking about the welfare of the worker, and the defender keeps answering with an argument about the benefits of pornography for "the rest of us," we will get nowhere. I remain hopeful that we can indeed get somewhere, and actually help improve the lives of those persons who are the subjects of feminist concern, while preserving the value of free expression and, yes, even the classical Millian value of varieties of experience. This will not be easy, for it means getting our hands dirty with some very tough philosophical and more globally moral questions: about what pornography is and what it does, what the significance is of real live bodies to pornography's function, and finally, what we want to say about the degree to which sex and sexuality are essential to the kinds of creatures we are.

I think, although I cannot argue the case here, that selling sex is neither like selling one's organs nor like being a professional athlete. My own view is that it is more like the case of the subject paid for medical experiments: it *can* be acceptable, depending on context, but it can also be unacceptable and especially harmful, depending on context, despite the participants all apparently freely choosing to be involved. In the current landscape of feminist liberal discussions about the sex industry, there is no room for such a view. That's the point.

49. For instance, see Margaret A. Baldwin, "Split at the Root: Prostitution and Feminist Discourses of Law Reform," *op. cit.*; or Vednita Carter and Evelina Giobbe, Winter 1999, "Duet: Prostitution, Racism, and Feminist Discourse," *Hastings Women's Law Journal*, 10:1, pp. 37-57.