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Normalizing Prostitution versus Normalizing the Alienability of Sexual Rights: A Response to Scott A. Anderson*

Hallie Rose Liberto

Though commentators agree that the current state of prostitution in the United States needs to be changed, they disagree about what change, exactly, needs to be made. A standard, liberal position on prostitution is that the institution should be legalized and regulated.[1] This would afford prostitutes more safety, a more secure position for negotiation with clients, and more control of their own careers. The idea is that if we "normalize" prostitution and release prostitutes from the stigma surrounding their profession, we can then treat commercial sex as we would treat any other commercial exchange.[2] Radical feminists disagree. They typically support the prohibition of prostitution and demand that the government work harder to enforce the prohibition.[3] In an essay in this

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1. There is debate between liberals as to whether the normalization of prostitution should be obtained through legalization or decriminalization.

2. I will attribute the liberal position on prostitution to which I'm referring in this essay to Martha Nussbaum, "'Whether from Reason or Prejudice': Taking Money for Bodily Services," in *Sex and Social Justice* (New York: Oxford University Press, 1999), 276–98; and Lars Ericsson, "Charges against Prostitution: An Attempt at a Philosophical Assessment," *Ethics* 90 (1980): 335–66.

3. The position of the radical feminist in this essay is based on the writings of Andrea Dworkin, "Prostitution and Male Supremacy," in *Life and Death* (New York: Free Press, 1997), 138–216; Catharine MacKinnon, "Prostitution and Civil Rights," *Michigan Journal of Gender and Law* 1 (1993): 13–31; Kathleen Barry, *The Prostitution of Sexuality* (New York: New York University Press, 1995); Carole Pateman, *The Sexual Contract* (Stanford, CA: Stanford University Press, 1988); Sheila Jeffreys, *The Idea of Prostitution* (North Melbourne: Spinifex, 1997); Evelina Giobbe, "Prostitution: Buying the Right to Rape," in *Rape and Sexual Assault III: A Research Handbook*, ed. Ann Wolbert Burgess (New York: Garland, 1991), 143–60.

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journal, Scott A. Anderson has defended the radical feminist position by arguing that the legalization and normalization of prostitution actually reduces sexual autonomy, a specific type of autonomy on which we all place a special value.[4] I contest Anderson's position by arguing that there are two types of prostitution, sexual-rights-alienating prostitution and sexual-rights-preserving prostitution, and Anderson's argument only applies to the former.

Radical feminists maintain that the harms that prostitution unavoidably causes outweigh whatever goods might come from legalization. Anderson divides the radical feminists' criticisms of prostitution into three categories. Prostitution is (1) degrading, (2) an effect of social injustices, and (3) a cause of sexist attitudes toward women.[5] As an example of the first criticism, Andrea Dworkin thinks that men hire prostitutes in part because of the accompanying power to treat women inhumanely and to degrade them. As an example of the second critique, Susanne Kappeler suggests that prostitution would not exist if children weren't inducted into the institution and raised without other options, if women did not make up a large percentage of America's poor, and if men were not raised believing that they could oppress women. The resources required to legalize, normalize, and regulate prostitution could be better spent attending to these social injustices.[6] Carole Pateman's critique of prostitution is of the third kind. She argues that the prevalence of prostitution accentuates women's sexuality over their other characteristics and, in this way, leads to the objectification of all women.[7]

Though a critic of legalization, Anderson thinks that these feminist arguments are vulnerable to a single liberal response. Though liberals generally agree that contemporary American prostitution degrades women, exploits inequalities, and objectifies women's bodies, they deny that these are intrinsic features of prostitution. They maintain that the choice to exchange sexual services for money need not be degrading, if prostitutes were empowered to negotiate the terms of their trades. In the liberal's view, some women can (and do) reasonably choose prostitution over other valuable life options. Liberals such as Lars Ericsson and Martha Nussbaum think that prostitutes have skills that enable them to provide some people with a form of happiness

4. Scott A. Anderson, "Prostitution and Sexual Autonomy: Making Sense of the Prohibition of Prostitution," *Ethics* 112 (2002): 748–80.

5. Ibid., 752.

6. Susanne Kappeler, "Liberals, Libertarianism, and the Liberal Arts Establishment," in *The Sexual Liberals and the Attack on Feminism*, ed. Dorchen Leidholdt and Janice Raymond (New York: Pergamon 1990), 180–81.

7. Pateman, *The Sexual Contract*, 208.

heretofore legally unavailable to them.[8] Normalization is the liberal solution to the problems associated with prostitution in the United States. If the law were to treat the sex trade as it treats any other trade, then the stigma associated with being a prostitute would eventually wear thin. Once prostitution loses its stigma, it will be easier to regulate it and to protect prostitutes.

Even if the United States legalized, regulated, normalized, and cleaned up prostitution (i.e., empowered prostitutes, made them safe, and enforced prohibitions against degrading aspects of the institution), Anderson thinks that there would still be something irremediably wrong with prostitution that provides some justification for its prohibition. Anderson asks us to consider the following possible consequences of treating sexual commerce just like other forms of commerce:

1. Job descriptions might be re-described to include sexual tasks.
2. Welfare might be denied to people who are capable of doing available sexual work.
3. People could write enforceable contracts that include sexual services. Courts would be required to uphold them.
4. Corporations that provided sexual services could monitor the sexual acts of employees.
5. Sex workers might have to adhere to non-discrimination standards when taking on clients.
6. The government would be entitled to inspect the health of sex workers and might prohibit risky sexual behavior outside of work.
7. Corporations might market aggressively to change prejudices about buying sex.
8. Schools would have to counsel students about their options in sex work.[9]

Anderson does not suggest that these are likely outcomes of normalizing prostitution. He is only pointing out that these are the sort of additional possibilities that the normalization of prostitution makes possible.[10] Anderson maintains that government prohibition of prostitution improves people's autonomy by giving them the freedom to keep their sexual lives apart from their work lives and from the ways in which they are

8. Lars Ericsson writes, "A prostitute could be respected for her wealth of sexual and emotional knowledge" ("Charges against Prostitution," 366).

9. Anderson, "Prostitution and Sexual Autonomy," 762.

10. Note that the possibility of enforceable sexual contracts needs to be considered in view of our current laws pertaining to specific performance. Unlike property contracts, courts usually do not require that specific services agreed to in contracts be performed. However, courts will often deal out other penalties, or damages, for breaking service contracts. If these penalties are severe enough, they may render contract breaking an unviable option for contractors.

surveyed.[11] Anderson argues that almost everyone highly values sexual autonomy: "If sexual activity needs to be couched in a set of institutional protections different from those that apply to work activities in general (such as OSHA regulations, nondiscrimination standards, fair labor laws, etc.), then we appear to share a desire for autonomy in our sexual activity that justifies these protections."[12] Anderson points out that sexual autonomy deserves special consideration precisely because of the deference we feel for it, which is evidenced by our emotional reaction to numbers 1–8 on the list.[13]

In what follows, I will argue that the normalization of prostitution and the reduction of sexual autonomy are linked in the way Anderson describes only if prostitution alienates sexual rights rather than preserves them. To explain this distinction, I will briefly consider some misleading distinctions that Joel Feinberg draws.[14] Errors like those that can be found in Feinberg's account of alienation are one source of the misconception that prostitution simply is the alienation of sexual rights.

Feinberg distinguishes between two types of alienation: I may waive my rights, or I may relinquish them. If, for example, I waive my right to not have you walk on my property, it is with the understanding that I can change my mind whenever I want and, in so doing, effectually retract your privilege to walk on my property. This would be what Feinberg calls a "weak" waiving of rights. Alternatively, I could waive my rights for a period of time through a lease; Feinberg would call this a "strong" waiving of rights. In this case, I might change my mind during the course of the lease, but changing my mind would not affect a change to the rights relations stipulated by the contract. Finally, I could completely relinquish my rights by selling the property or giving it away. If I decide to voluntarily participate in a duel, then I am waiving my right to life, but, depending on the rules of the duel, I may opt out at any

11. Anderson, "Prostitution and Sexual Autonomy," 763.

12. Ibid., 770.

13. For the rest of this discussion I am going to ignore numbers 2, 7, and 8 from Anderson's list. Number 2, dealing with welfare, is inconsistent with prostitution's normalization. If prostitution were legalized and truly normalized, then it would be a job for which training would be lengthy and difficult, given the physical, emotional, and psychological dangers involved. It would take at least as much safety training as would be required to become a professional firefighter or social worker. We are not in the habit of denying welfare to people who, technically, could go through lengthy training to become firemen or social workers. Furthermore, if prostitution didn't have these psychological, emotional, and physical dangers, we might not be as bothered by the items on Anderson's list in the first place. Additionally, no one who agreed with Nussbaum that prostitutes could be valuable contributors to society, and should be respected as such, would object to numbers 7 and 8.

14. Joel Feinberg, "Voluntary Euthanasia and the Inalienable Right to Life," *Philosophy & Public Affairs* 7 (1978): 93–123.

time. Feinberg tells a fictional story of a village that encourages its youth to spend an hour once a year "hunting" each other. All participants would waive their right to life for that hour (though all would hope to survive). They would get back their right to life at the end of the hour, but not before. Feinberg says that this story is an example of a strong notion of "waiving." I could "relinquish" my right to life by selling you the right to kill me at any time you choose (even if you never choose to kill me before my natural death).

How might this be applied to prostitution? We can describe forms of prostitution and market alienation of sexual rights using Feinberg's taxonomy. If Jane is (A) legally having sex for money but may effectually choose to stop at any time, then she has waived her right to control her sexual activity in the weak sense, according to Feinberg's distinctions. If she is (B) legally bound to a contract that gives another person rights to her body for a period of time within which she can not opt out, then she is waiving her bodily rights in the strong sense. If she (C) legally sells herself into permanent sexual slavery, then she is relinquishing her sexual bodily rights.

In the course of his discussion regarding the right to life, Feinberg only uses the word "exercise" to describe the weak waiving of a right.[15] However, "exercise" is a term that appropriately describes any legal choice, even if that choice involves the relinquishment of one's rights. She who alienates a right makes use of a legal power that she has with respect to that right; specifically, she exercises her power to alter certain rights relations.[16] If Jane sells herself into the sexual slavery of John, Jane exercises her power to change the rights relationship between Jane and John regarding Jane's sexual services.

What I believe to be the distinction between cases that Feinberg considers the "weak waiving of rights" and cases that he considers "the strong waiving/relinquishing of rights" does not turn on whether or not the right holder exercises her right. The real distinction has to do with

15. Ibid., 118–23. Feinberg refers to voluntary euthanasia as the weak waiving of the right to life and later describes voluntary euthanasia as the exercising of the right to life.

16. Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Legal Essays* (New Haven, CT: Yale University Press, 1923), 36. For Hohfeld, legal powers are not themselves rights in the "strict" sense of the term. A right in the "strict" sense is a claim (e.g., a claim against others that they not engage with one's body sexually). Though, in practice, philosophers use the word "right" to describe claims, privileges, and powers (see Judith Jarvis Thomson, *The Realm of Rights* [Cambridge, MA: Harvard University Press, 1990]), for the sake of this discussion, it does not matter whether a power is itself a right. What matters is that, in cases like the one described above, exercising a power also amounts to exercising a claim right, as what one exercises is a power that one has only in virtue of having the claim. Jane is making use of her claim right if she sells her right, because having the power to sell the right requires that she have the claim right in the first place.

whether, in the process of exercising her right, the initial right holder maintains jurisdiction over that which the right regards. Consider, in cases A, B, and C, that the prostitute exercises her right to control her sexual activity because, in each case, she chooses an option that is only available to her by virtue of her being the owner of her right to such control. However, in cases of prostitution of type A, the prostitute may back out at any point during the sexual encounter; there is no time at which she is without jurisdiction over choices made pertaining to whether or how she will have sex. Whereas, in the cases of strong waiving and relinquishing, B and C, in which one person contracts away her right to control her own sexual activity to another, there is a period of time in which the first person is without jurisdiction over choices made pertaining to whether or how she will have sex. This distinction renders my account of alienation importantly different from Feinberg's.

While Feinberg regards cases A, B, and C as forms of alienation, I deny that A involves the alienation of a sexual right. If Jane is having sex and may, legally, opt out of that sex at any time, then she is never without a claim against every other individual that he adhere to her chosen sexual limits. In contrast, in both B and C there is a period of time (no matter how small) in which Jane's customer has an enforceable right to the use of her sexual organs and Jane does not have the legal option of preventing or refraining from her customer's use.[17]

Most advocates of legalizing prostitution seem to consider (primarily) the legalization of A, that is, the legalization of trading sexual services for money without any contract requiring sexual services.[18] The potential circumstances delineated by Anderson that make him (and me) so uneasy are of type B. For instance, employers within normal businesses could draw up contracts that included sexual services only if contracts requiring sexual services were legalized. Merely legalizing the trading of sexual services for money would not permit corporations to claim surveying rights over women's sexual activity.

The unpalatable consequences described by Anderson would be the consequences of normalizing the alienation of sexual bodily rights rather than the consequences of normalizing prostitution. This explanation of what is wrong with the circumstances Anderson describes also

17. Note that it is not the transfer of the right but the loss of sovereignty over her bodily choices that characterizes the alienation of the bodily right. After all, we could imagine a circumstance in which Jane alienated her rights without giving them over to anyone (e.g., alienating her right to vote).

18. A contract of some sort might still be advocated. For instance, if the prostitute takes the money and then refuses to provide the sexual service, a contract could be useful in helping the client retrieve the money spent. However, a contract that required the return of money in this way is not morally alarming in the way that Anderson expects the contractual demands of sexual services to be alarming.

explains why "pimping" seems so much more objectionable than the activities of entrepreneurial sex workers, and it is more compatible with the value Anderson attaches to sexual autonomy.

The distinction between trading sex for money and alienating the rights to one's sexual activities does not map onto the familiar distinction between low-end streetwalkers and high-end call girls or to the distinction between independent sex workers and sex workers who give large portions of their earnings to middlemen. This distinction has nothing to do with the financial yield of various forms of prostitution and little to do with safety; it pertains only to sexual autonomy. Some sex workers have the ability to opt out of trades, and some sex workers do not. Pimps are reprehensible in part because they usually select customers for the prostitute, determine how much the prostitute will make for her services, and enforce these arrangements. Not all middlemen serve these roles; some get a cut negotiated by the prostitutes and serve only to provide protection. A middleman of this sort (not what we would call a pimp) would not compromise the sexual jurisdiction of the prostitute over her own body.

Anderson fears that what is now the role of pimps will be taken on, legitimized, and normalized by big business in a capitalist economy. However, the transfer of these powers from pimps to big business would be possible only if we legalized and normalized the alienation of sexual rights. Legalizing prostitution does not entail the market alienability of sexual rights.

Anderson argues that restraining the sexual liberty to sell sex enhances sexual autonomy. This paradoxical claim is reminiscent of John Stuart Mill's rationale for not permitting people to sell themselves into slavery.[19] If the reason for permitting sales is personal liberty, then why should sales that undermine personal liberty be permitted?

Permitting the alienation of one's sexual rights arguably limits rather than promotes sexual liberty. Permitting the exchange of money for sex does not. The liberty to maintain jurisdiction (at least, constraints) over one's sexual activity at all times may well be more important than the liberty to obtain money by giving that jurisdiction to someone else. But prohibiting the noncontracted exchange of sexual services for money cannot be justified as promoting liberty. Normalizing rights-preserving sexual services opens an additional legal option to individuals, provided that at any time they may opt out.

Of course, we know that people who are currently involved in prostitution, legal and illegal, are rarely in positions in which they can afford to "opt out." But recall that Anderson's discussion is presuming an

19. John Stuart Mill, *On Liberty (1859)*, in *On Liberty and Other Essays* (London: Oxford University Press, 2008), 114.

idealized world of prostitution, one that has been cleaned of the social factors that ground the more traditional radical feminists' objections to the institution (otherwise, his own objection to prostitution would be mere icing on the cake). In this idealized world, people are not choosing between refraining from sex work and feeding their children.

Distinguishing rights-alienating from rights-preserving prostitution provides a new method with which to assess the moral debate in the real world. If the inability to opt out of prostitution is entirely due to truly desperate circumstances, then what does it matter if the trade is illegal rather than legal? Even if some avenues for safer prostitution are legalized, there will be faster, more anonymous illegal avenues for entering sex work. If the inability to opt out of prostitution is, in part, due to the coercion of pimps and middlemen, then the debate over legality is more interesting. Would legalizing and/or normalizing prostitution do any work to keep the jurisdiction of sexual choices in the hands of the prostitutes themselves, or would legalization and normalization of prostitution lead to the market alienability of sexual rights? Does the continued prohibition of prostitution contribute to the maintenance of an environment in which pimps can control prostitutes in ways that involve the illegal alienation of their sexual rights? I have not tried to answer these questions, but these are the questions that we should be trying to answer if we really care about sexual autonomy.