

SEX WORK, AUTONOMY AND THE INJUSTICES OF CRIMINALISATION*

BY AMBER KARANIKOLAS



** Due to the disproportional amount of women involved in the sex industry, this article will be concerned with what may appear to be a particularly heteronormative view of the industry. Although I acknowledge the heterogeneous and diverse identities of those involved in sex work, (especially the fact that men are sex workers as well), this is, unfortunately, outside the scope of this research, as I will be focusing on those who identify as women who are involved in sex work.*

I. INTRODUCTION - A WAR BETWEEN DEFINITIONS

Understandings of the definition of autonomy have been central to the way we view human rights in relation to sex work. The conflicting views on whether sex work is 'real work' seem to crux on how we define sexual autonomy itself. Stephen Schulhofer defines sexual autonomy as the freedom of every person to decide whether and when to engage in sexual activity.¹ In specific relation to sex work there ought to be a "right to safeguard and exclude, the freedom to refuse to have sex with any person at any time, for any reason or for no reason at all."² Questions of autonomy will always involve problems of degree, and social conditions habitually prevent individuals from

making truly autonomous choices.³ Physical coercion interferes with autonomy but is not the only factor impeding the autonomous right of persons.⁴ The respective literatures of St James Richards and Schulhofer assume a broad definition, whilst Elizabeth and Scott Anderson have favoured a narrow approach.⁵ For the purposes of this essay I will adopt Schulhofer's wide delineation to consider how international societies have developed customs which impinge on the choice and consent of its democrats.

II. SEX WORK VERSUS 'NORMAL WORK': IS THERE A DIFFERENCE?

It prima facie appears impossible to reach a single conclusion about the role of autonomy in the choices of sex workers, or lack thereof, particularly in light of the protracted history of feminist literature around the issue. Sex workers themselves hold a multitude of conflicting views about their own autonomy, and scholars, academics and advocacy groups are all opinionated on the dynamics of consent and autonomy in the realm of sex work.

When considering a woman's choice to enter sexual relations in return for money, it becomes necessary to evaluate whether sex work can be discussed in the same

light as other professions. If the answer is in the negative, what then makes sex work different?

Many sex workers defend their right to be paid for sexual acts and value the “dignity and liberty” of the profession.⁶ It is also often argued that sex work does not fundamentally differ from other kinds of professions through arguments that whatever exploitation or degradation accompanies sex work originates from its morally and legally stigmatised practice.⁷ Jody Freeman eruditely summarised the ‘inescapable dilemma’ of the prejudiced practice, signposting two overarching issues:

“[R]esist[ing] the commodification of women’s sexuality ...requires [either] circumscribing choices that some women themselves insist are voluntary, or to support the right of women to do the work they say they want to do, at the cost of reinforcing male dominance.”⁸

This dichotomy in opinion affects our interpretation of sex work. Are sex workers exercising sexual freedom and pleasure as free agents, or conversely, are sex workers exclusive victims of their customers?⁹

Gayle Rubin rightly believes that “democratic morality should judge sexual acts by the way partners treat one another, the level of mutual consideration, the presence or

absence of coercion, and the quantity and quality of the pleasures they provide.”¹⁰ This ethical view ought to be accepted as the proper lens through which we evaluate the role of autonomy in sex work. This is because there is general acknowledgement, not only that women participate in sex work ultimately for economic gain, but also because receiving an income should not trump the safety of the individual. Many (but definitely not all) workers of the sex industry are unfairly, yet likely, to be exposed to “danger, disease, mistreatment, [violence], insecurity, psychological abuse, and emotional pain”.¹¹

Ample research provides that socio-economic and political factors such as gender parity, loss of job security and the feminisation of poverty are the major causes for female involvement in the sex industry.¹² For some women it is an active choice but for many it is a last resort where women are required to consent.¹³ It is this permeating notion of socio-economic and political coercion which is the point of disagreement and a major reason why sex work has historically proved so perplexing. In any case, the conditions sex workers have worked and continue to work under has been overshadowed by notions of ‘voluntariness’ and the sex profession’s ‘patriarchy’.¹⁴

Interestingly Kathleen Barry rightly champions the idea of the existing “uselessness” of “choice” rhetorics by highlighting that sex work is not concerned with female autonomy, but rather the autonomy of customers.¹⁵ An increasing number of writers are understandably requesting greater focus on those who purchase sex work, rather than concentrating on the female workers themselves.¹⁶ This is in an attempt to attack the “root of the problem”.¹⁷

THIS DICHOTOMY IN OPINION AFFECTS OUR INTERPRETATION OF SEX WORK. ARE SEX WORKERS EXERCISING SEXUAL FREEDOM AND PLEASURE AS FREE AGENTS, OR CONVERSELY, ARE SEX WORKERS EXCLUSIVE VICTIMS OF THEIR CUSTOMERS?

III. TO REFORM, OR NOT TO REFORM? THAT IS THE QUESTION

Crafting policy and reform proposals that protect the autonomy of the individual without legitimising sexist elements of the practice has proved overwhelming for moral and legal theorists.¹⁸ State regulation or criminalisation is often a further imposition on the autonomy of sex workers.


Advocacy groups, such as the Canadian Organisation for the Rights of Prostitutes (CORP), lobbies for reform of criminal laws in relation to sex work. CORP strives not only for decriminalisation of the so-called 'offensive' and 'amoral' sex worker profession but also justifiably believes that sex workers be allowed to organise, pay taxes and receive unemployment insurance. In short, CORP's "ideal situation is" to set their "own standards."¹⁹

Decriminalising sex work is especially important from a moral standpoint. This is because it is increasingly difficult for sex workers to report violence and other crimes committed against their person for fear of themselves being prosecuted. Combined with the lack of protection and support available for sex workers in such circumstances, the criminalisation of sex work has ironically yet unjustifiably only achieved the opposite of its

legislated purpose; it has propelled the sex industry further underground.²⁰

Decriminalisation, the granting of (some) autonomy back onto sex workers, thus seems a viable solution to the conundrum. If sex workers can organise, form support groups and run self-help networks, they will be enabled to exert some control over the coercive elements of the practice.²¹ By listening to sex workers themselves, it is clear that many are weary of being subjected to other people's views of appropriate sexuality.²²

However, decriminalisation and reform are only the starting points for the professionalisation of the practice which could lead to improved working conditions for many women. Although lobby groups for sex worker rights and many feminists unwaveringly express different long-term goals, they ought to agree on short-term reform proposals to create some prospect for any long-term aspirations.²³ Decriminalisation, albeit not a conclusive end to sex worker discrimination, would allow for unionisation, harm-minimisation policies, the extension of worker benefits, and health and safety regulations. All of which could significantly improve the life of, and provide some empowerment to, those working in the sex industry.²⁴



AN INCREASING NUMBER OF WRITERS ARE UNDERSTANDABLY REQUESTING GREATER FOCUS ON THOSE WHO PURCHASE SEX WORK, RATHER THAN CONCENTRATING ON THE FEMALE WORKERS THEMSELVES. THIS IS AN ATTEMPT TO ATTACK THE "ROOT OF THE PROBLEM".

IV. THE 'SWEDISH MODEL': AN AVENUE FOR JUSTICE?

There has been recent debate in Europe about legal changes introduced in several countries. In Sweden, sex work is considered a 'social problem', and uniquely laws criminalise the purchasers of sexual services in an attempt to reduce demand. The legislation hopes to achieve equality between males and females at a national level in Sweden by defining sex work as a form of violence against women.²⁵ Since January 1, 1999, purchasing or attempting to purchase sexual services has constituted a criminal offence punishable by fines and up to six months imprisonment.²⁶ It is in this way that Swedish laws, despite being highly regulatory, can be considered abolitionist.²⁷

The 'Swedish Model' has recently been adopted by other countries such as France.²⁸ Yet, it is important to note that the 'Swedish Model' is an alternative to sex work distinct from decriminalisation, because under the 'Swedish Model' sex work remains illegal. A support system was introduced that included permanent government funding of municipal sex worker projects, counselling and retraining possibilities.²⁹ Yet, their success has been hampered by the way statutory regulations affect the women involved.

The first effect after enactment was an immediate drop in the numbers of women *visibly* working. A problem here arises, because these findings unlikely reflected a departure from sex work, but rather only likely emphasised how sex workers and their clients have chosen less visible ways of proceeding with their business. Also, the number of convictions is startlingly low. In the first nine months of 1999 only three sex clients were found guilty and charged. While project workers have emphasised that they are available to sex workers for support, sex workers seem to find it increasingly difficult to contact project workers. Subsequently, project workers have had little success.³⁰

Moreover, not only should the effect of the legislation be considered at the local level, but ought to be discussed on an international, scale, because immigrant sex workers in Sweden are also likely to be driven underground in fear of deportation.³¹ The consequences of sex work being driven underground means that sex workers and their clients increasingly evade visibility and thus criminal sanction.

Although the 'Swedish Model' is a practical and virtuous legal policy solution to the sex worker dilemma by aiming to criminalise the agents and managers of brothels who

**IF SEX WORKERS CAN ORGANISE, FORM SUPPORT
GROUPS AND RUN SELF-HELP NETWORKS, THEY WILL
BE ENABLED TO EXERT SOME CONTROL OVER THE
COERCIVE ELEMENTS OF THE PRACTICE. BY LISTENING
TO SEX WORKERS THEMSELVES, IT IS CLEAR THAT
MANY ARE WEARY OF BEING SUBJECTED TO OTHER
PEOPLE'S VIEWS OF APPROPRIATE SEXUALITY.**



financially profit from the sex work, it is often the working women in particular who suffer.³² The 'Swedish Model' therefore ultimately fails to protect the autonomy of sex workers. Is then decriminalisation the only justiciable answer?

Governments therefore ought to opt for decriminalisation, the establishment and permanent funding of health and support programs, and to follow the United Nations' recommendations on sex work policy which would establish sex work as 'real work'.³³ Decriminalisation of sex work should include the abolition of criminal laws and penalties for the purchase of sex (as Sweden does) the management of sex workers and brothels, and other activities in connexion with sex work.³⁴

V. CONCLUSION – DECRIMINALISATION: THE ONLY REASONABLE ALTERNATIVE?

Sex work is largely a response to a lack of economic alternatives which not only

results in constraints on women's options and freedom, but also contemporaneously forces them into a position of limited choice in what should be a right to choose or refuse sexual partners.³⁵ Although some undertake sex work voluntarily, we must remain cognisant of the relativity of choice; where there exists an ability of social constituents to influence decision making which could impede an individual's capacity to give 'consent'. We ought to remain aware that legislation aimed at eliminating poverty and increasing employment options for women is equally as necessary as state action regulating or the practice itself.³⁶ As seen with the failures of the 'Swedish Model', without formal and pragmatic state efforts to achieve gender equality, legal regulation and criminalisation of sex work, there will remain ineffective strategies to deter those involved in the sex industry. Subsequently, without decriminalising sex work, legal systems ubiquitously will continue to, and further, deprive sex workers of their human right to autonomy.

REFERENCES

1. Stephen J Schulhofer, *Unwanted Sex: The Culture of Intimidation and the Failure of Law* (Harvard University Press, 1998) 99.
2. Ibid.
3. Ibid 107.
4. Ibid 100.

5. Jeffery, Gauthier, 'Prostitution, Sexual Autonomy, and Sex Discrimination' (2011) 26(1) *Hypatia* 166, 176.
6. Christine Overall, 'What's Wrong with Prostitution? Evaluating Sex Work' (1992) 17(4) *Signs* 705, 705.
7. Gauthier, above n 5, 167.
8. Jody Freeman, 'The Feminist Debate Over Prostitution Reform: Prostitutes' Rights Groups, Radical Feminists, and the (Im)possibility of Consent' (1990) 5 *Berkeley Women's Law Journal* 75, 76.
9. [The citation given was incorrect and no part of the article cited reflected the ideas expressed by this sentence] In the event that you do find the ideas reflected, the correct citation is 'Ibid 77.'
10. Gayle Rubin, 'Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality' in Carole Vance (ed), *Pleasure and Danger* (Routledge and K. Paul, 1984) 143, 153.
11. Overall, above n 6, 710.
12. Monica O'Connor and Grainne Healy, *Coalition Against Trafficking in Women and the European Women Lobby, The Links between Prostitution and Sex Trafficking: A Brief Handbook* (2006) 6.
13. Overall, above n 6, 711.
14. Freeman, above n 8, 86.
15. O' Connor and Healy, above n 12, 12.
16. Jan Macleod et al, 'Challenging Men's Demand for Prostitution in Scotland: A Research Report Based on Interviews with 110 Men Who Bought Women in Prostitution' (Report, United Kingdom: Women's Support Project), 5.
17. Ibid.
18. Gauthier, above n 5, 166.
19. Ibid 83.
20. Freeman, above n 8, 81.
21. Ibid 92.
22. Ibid 104.
23. Ibid 72. Freeman's essay goes deeper into what most feminist think on the topic and the divergence between liberal feminists (proponents of liberal individualism) and radical feminists, and how they too have differing aspirations for the future or the sex industry.
24. Gauthier, above n 5, 182.
25. Ministry of Industry, Employment and Communications, Government of Sweden, *Prostitution and trafficking in human beings* (April 2005) Government Offices of Sweden, <<http://www.regeringen.se/sb/d/2664>>.
26. Ibid.
27. Judith Kilvington, Sophie Day, and Helen Ward, 'Prostitution Policy in Europe: A Time of Change?' (2001) 67 *Feminist Review* 78, 78.
28. Emily Denny, *France's newest import? Parliamentary Commission calls for "Swedish model" client criminalization* (9 September 2011) *Nordic Prostitution Policy Reform* <<http://nppr.se/2011/09/09/france-newest-import-parliamentary-commission-calls-for-swedish-model-client-criminalisation>>.
29. Kilvington, Day and Ward, above n 27, 83.
30. Ibid 85.
31. Ibid 89.
32. UNAIDS, *Guidance Note on HIV and Sex Work* (2012) 6.
33. Ibid.
34. Ibid.
35. Schulhofer, above n 1, 111.
36. Gauthier, above n 5, 168.