<u>Is it possible to draw a clean line between forced and free choice</u> prostitution?

Laura Brace argues that liberals have traditionally thought it possible to 'draw bright lines between slavery as a wrong and a logical impossibility and individual autonomy as a good and a right' (Brace 2004:1-2). In the following paper I will argue that in the same way that it is not possible to draw a clear line between free/unfree labour more generally, neither is it possible in relation to free choice/forced sex work. With radical feminism I agree that liberals are mistaken in suggesting that a clear distinction is possible; however, I disagree with the radical feminists approach to the forced/free binary.

I will first discuss the radical feminist approach to prostitution. I will then briefly discuss the contemporary influence that the radical feminist understanding of prostitution is having on legal-institutional power in the UK. I will suggest that both the radical feminist approach to the forced/free binary, as well as that of the government, is inadequate. Despite radical feminists' disdain for liberalism, their approach still operates largely within its theoretical, and practice-orientated confines.

In looking for alternative formulations I will first consider some of the inadequacies of liberalism, in particular, the 'slavery'/'free' wage labour binary, and the notion of 'property in the person'. Finally, I will consider arguments that attempt to bridge, or carve out an alternative position to that of the radical feminist (victim)/ pro-sex (agency) binary. I will argue that a formulation of this approach is preferable. Concluding I will suggest that how we deal with the liberal forced/free binary is important precisely because of the impact it can have on how we approach the legal regulation of sex work and the human rights of sex workers, both of which are utilized by radical and pro-sex work feminists in divergent ways.

I: Radical feminism, Prostitution and Legal Regulation

i: Radical Feminism: domination and the fallacy of 'choice'

The central tenet of radical feminism states that sexuality is the fundamental ordering principle in society; it produces a male-over-female hierarchy. Catharine MacKinnon elaborates on this point, suggesting that women do not control the process of becoming a woman in any sense other than internalizing the male construction of female sexuality (MacKinnon 1982:531). For MacKinnon, prostitution is a clear example of the sexual subservience of women. Since a 'woman is a being who identifies and is identified as one whose sexuality exists for someone else, who is socially male', men determine the parameters in which female sexuality can exist, and so it is little wonder that a practice such as prostitution exists and is legitimated in society (533). For MacKinnon prostitution not only harms the women involved, it damages all women who cannot be truly 'free' under such a system of male domination, which is 'metaphysically nearly perfect' (MacKinnon 1989:116-7).

Kathleen Barry argues that prostitution violates the human right to dignity and so there can be no right to 'be prostituted.' As such it is not possible to choose to sell sex, as this would suggest it is possible to consent to undignified treatment. Hence there is no distinction to be made between forced/free prostitution; all prostitution is forced sex. Further, there is no distinction to be made between prostitution and trafficking; both are 'sexual slavery' (Barry 1995). Sheila Jeffreys believes that freedom under such a system of male dominance is a myth, and denies that women are exercising 'choice' when they enter prostitution (Jeffreys 1997:128). She argues that choice is a liberal fallacy created by men in a system of male domination and that when 'prostituted women' use this term to explain their decisions they are engaging in 'neutralising techniques', whereby women create rationalizations that allow them to survive (137).

Jeffreys is highly critical of 'pro-sex' work feminists, whom she argues draw on liberal rhetoric to emphasise the agency of sex workers, and of socialist

feminists who have built alliances with the 'pro-sex' lobby. For her, their rhetoric amounts to 'decontextualised individualism of personal choice' (Jeffreys, 2009:18). Jeffreys suggests that the analysis of prostitution as violence against women (VAW) can account for the phenomenon on a global scale, and dismisses Ratna Kapur's arguments that VAW campaigns are premised upon gender and cultural essentialist representations of the sex worker. Jeffreys believes that 'choice' arguments not only do not apply in the West, but have no application in the 'non-West', where, she suggests, it would require applying the argument to the 'most impressively unlikely situations...' (20) Therefore, Jeffreys sees those in the 'non-West' as being particularly oppressed, a position that is further demonstrated through her (mis)understanding of trafficking and migrating to sell sex.

'Those who take a sex work approach see the prostitution of women who 'migrate for labour', meaning those who have been trafficked into debt bondage since women from poor countries do not have the resources or knowhow to 'migrate' under their own steam, as being positively beneficial for developing countries' (30) (My emphasis)

Carole Pateman is also critical of liberal theory, focusing on the notion of contractual freedom. As Sullivan notes, Pateman's work is primarily a critique of 'the way that concepts like 'freedom' and 'consent' are used in modern day relations (for example, in employment, marriage and prostitution 'contracts') to oppress women' (Sullivan 1995:4). Pateman highlights how these forms of *gendered* contract work to conceal forms of domination and subordination and so takes us beyond the Marxist understanding of contract (O'Connell Davidson, 1998:122). However, although all contractual forms work to oppress and coerce workers under capitalism, Pateman singles prostitution out as different to other work. This is surely, in part, due to her desire to show how contacts are gendered, but as Sullivan notes, for Pateman 'the embodied nature of prostitution means that it is not like other paid work' (Sullivan 1994:4). For Pateman, as for other radical feminists, the prostitution contract is different because it is the self

that is being sold, and ultimately this damages the prostitute (O'Connell Davidson 2002:4).

ii: Radical feminism & New Labour

Jeffreys argues that the sex work lobby is utilizing neo-liberal language to push their agenda for decriminalization. She asserts that the sex work argument is a comfortable one for governments because it fails to challenge the 'male right' to buy sex (Jeffreys 2009). She also argues that groups that see prostitution as VAW have not been so successful and that this is 'perhaps because they do not fit the politics and practice of neo-liberal economics so well' (17).

However, it has been suggested that radical feminist rhetoric buttresses neo-liberal legislation and crime-based policies, and that what we are actually seeing in the UK is the institutionalization of radical feminism. Scoular and O'Neill argue that radical feminism has influenced recent governmental reforms, such as the now enacted proposal to criminalize those who buy sex from a sex worker subject to exploitative conduct, along with 'the efforts to 'empower' those involved in selling sex by recognizing their victimization and facilitating their exit' (Scoular & O'Neill 2008:17). In so doing, we have seen the government focus on the individual as the cause and cure of their 'criminality.' It is argued that focusing on criminalizing the buyer, and 'saving' women, allows the government to stress that the sale and purchase of sex is a question of individual morals and risk factors that are to be managed by the individual. Scoular & O'Neill contend that these strategies neglect 'the underlying structures of the state, market and family' and turn the 'buying and selling sex into phenomena that exist independent of state structures' (21-22).

Scoular & O'Neill's arguments are clearly evidenced in the various speeches and addresses of Harriet Harman, and by senior ranking officials within the Police.ⁱⁱ It is presumed that demand (men) is the cause of both trafficking and prostitution (which are often conflated) and that criminalization works only to

stop the undesired behaviour. The real 'victim' is the trafficked prostitute, and the government has introduced various offences over the last ten years to criminalise 'traffickers.' Any structures, beyond patriarchy, fail to be considered, and where they are are turned into individual risks factors to be managed by the sex worker. For example, section 17 of the Policing and Crime Act 2009 states that any person found guilty of soliciting may be dealt with using a rehabilitation order. The order requires that three meetings are attended with a supervisor in which the offender should 'address the causes of the conduct constituting the offence' and 'find ways to cease engaging in such conduct in the future. In addition in the case of breaching the order the court will revoke the order and is able to deal with the offender in the same way as if the person had just been convicted (Schedule 1 Part 2 s.4(2)(b)). This means that another rehabilitation order could be imposed, or an Anti-Social Behavioural Order (ASBO), which if breached, could result in incarceration. As Tracey Sagar perceptively notes, premising the failure to agree to rehabilitate on the possibility of an ASBO, and imprisonment, 'hardly leaves sex workers a choice' (Sagar 2009:105).

ii: The limits of Radical Feminism

As Heli Askola argues, 'the valuable insight here is an awareness of prostitution as connected with gender inequality and the structures of society' (Askola 2007:24). However, the shortcomings of radical feminism for the theorization of sex work cannot be overlooked. I am in agreement with Scoular and O'Neill regarding the problems inherent in this view of the sale of sex. Scoular & O'Neill (2008) contend that the view of power is myopic. As such, radical feminism 'suggests that power is identical across diverse historical and cultural states and relegates class and race as subordinate to gender' (19). Indeed, MacKinnon's work is a clear example of the subordination of other structures to male sexuality. MacKinnon deflects other structural analyses by locating sexuality as 'the linchpin

of gender inequality' and as the central site of gender domination (MacKinnon, 1989:113).

Scoular & O'Neill contend that by defining sex work as an inherently abusive male practice, and as inherently connected to the self, radical feminists attach particular value is attached to sex, which works to reify 'the dominant norms of sex that they seek to destabilize' (Scoular & O'Neill, 2008:19). In addition, the authors argue that through the appeal to law radical feminists have failed to consider the way in which law helps to structure 'the marginal position of sex work' (20). Arguably, by perpetuating a victim discourse through appeals to the state radical feminism is re-inscribing an injured identity (Brown, 1995).

Radical feminists have been unwilling to concede that there is a small minority of people who sell sex and would strongly disagree that their decision is the outcome of patriarchal forces. 'Pro-Sex' work positions range from seeing sex work as a freely chosen form of emotional labour, through to celebration of sex work as a deviant sexual identity (see Chapkis, 1997;Pheterson, 1989). However, in the same way that radical feminism over-determines patriarchy, pro-sex worker feminists tend to over-determine the position of law 'as the central source of a repressive power that subjugates prostitutes' (O'Connell Davidson, 1998, 16). Also, by positing a link between sex and the self - through the inherent value of selling sex – pro-sex work feminists tend to reinforce and reify certain forms of sexual behaviour, such as the male need for sex (O'Connell Davidson 2002). Again, such claims hold similarities with radical feminism; naturalizing certain sexual formations, whilst remaining inattentive to the role of practices, such as law, in producing and constraining such formations (Scoular, 2004).

Radical feminists have also been criticized for failing to recognize the agency of sex workers and in particular for arguing that women from the 'non-West' are particularly victimized. Kapur argues that choice is identified with wealth, and coercion with poverty, leaving little room for consideration and legitimation of the difficult choices that are made by people living in poverty. In

addition, it is argued that the dichotomy works to legitimate help and 'rescue' of those forced into sex work, without considering what services other sex workers might need (Kapur, 2001; Doezema, 1998). This criticism can be seen clearly in the radical feminist inspired government response to sex work and sex trafficking. Those who are deemed 'trafficked' are the main focus of attention, (thought it should be noted that the help given is meager) whereas those who are deemed to have chosen to sell sex are 'responsibilised' and 'rehabilitated' for their individual failings, and if they continue to fail, could end up in prison. Moral condemnation of 'sex slavery', and the 'bad men', turns out to be compatible with flippancy towards the structures that underpin decisions to sell sex.

Lastly, despite radical feminists rejection of the forced/free binary, their approach still operates largely within a liberal framework. As Julia O'Connell Davidson has demonstrated, the questions posed by radical feminists operate via the presumption that property in the person is a truism (2002). Jeffreys juxtaposes 'prostitution as slavery' against 'ordinary work', and hence is working within the assumption that a clear line can be drawn between the two phenomena (2009:37). Therefore, although she is critical of the 'fallacy of choice', it seems only in relation to prostitution. In addition, though distrustful of liberal legalism, especially its attachment to formal equality, radical feminists have enthusiastically engaged in law and policy reform efforts, especially the criminalization of (male) buyers of sex, without consideration of how these reforms may look once implemented.

II: Liberalism, 'Slavery' and 'Free Wage Labour'

i. 'Free' Wage Labour & 'Slavery'

It is necessary to reconsider the binary that has allowed the government to focus solely on those who have been 'sex trafficked', creating divisions between those

who are deemed deserving victims, and those blamed for choosing to sell sex.¹ Robert Steinfeld's argument regarding the free/forced binary in liberal thought helps bring to light its constructed nature. Steinfeld argues that we tend to presume that a division between free and coerced labour is possible, and that this occurs where physical violence is used to extract labour. However, he argues, quoting Robert Hale,

'When we speak about most forms of labor compulsion, we are talking about situations in which the compelled party is offered a choice between disagreeable alternatives and chooses the lesser evil' (Steinfeld 2001: 14).

Further, he argues that this type of compulsion is present in both 'slavery' and 'free wage labour'. Hence both the 'slave' and the 'free wage labourer' could be described as being coerced to perform the labour, or as freely chosen the lesser of two evils. Therefore, these forms of labour cannot be distinguished according to one position being voluntary and the other involuntary. 'As a matter of logic we have to say either that both are involuntary in different degrees or that both involve the free choice of a lesser evil' (15).

Steinfeld notes that in modern law pecuniary compulsion is distinguished from non-pecuniary compulsion; economic and legal compulsions draw the line between free and forced labour. Following this argument, I think it is particularly interesting that economic pressures under capitalism are presumed to work 'impersonally and indirectly' on 'free workers', and to operate in a disassociated sense from legal, non-pecuniary coercion with only the latter being categorized as making labourers 'unfree'. As Steinfeld notes, 'Economic coercion always has its source in a set of legal rights, privileges, and powers...' (19) Hence, both law and economy can be said to coerce, or offer the labourer a choice of the lesser evil.

Once we see that the degree of economic compulsion a person faces is given shape by law it becomes difficult to separate them out into distinct forms of compulsion. To adapt one of Steinfeld's examples, whether welfare is a good

option for a person, or whether perhaps sex work is preferable, 'depends on welfare law, eligibility rules, and the payment standards' (22). Added to this is the fact that economic compulsion may actually be more coercive. 'The threat of starvation may certainly operate more powerfully than a short term of confinement' (25). Hence the claim that sex workers can be 'rehabilitated' into more legitimate forms of labour via a rehabilitation order, ASBO, and possible incarceration if breached seems naïve at best, if the possibility is that without work, the worker will go hungry. Therefore, instead of thinking about labour compulsion in terms of abstract types of pressure we should 'begin thinking in terms of a combined pecuniary/non-pecuniary scale of coercive pressures running from severe to mild' (25). This would allow us to see that both legal/economic pressures are working in tandem, that both exert coercive pressure, with the difference being the degree rather than the type.

ii. Property in the person, or inalienable property of the person?

In addition, the Marxist criticism of the liberal notion of 'property in the person' can help us further break down the binary. O'Connell Davidson convincingly argues that the notion that clients buy sexual services is problematic in the same way that arguing employers buy labour from workers is. She argues against the liberal understanding of property in the person, following instead Harry Braverman. 'Labor, like all life processes and bodily functions, is an inalienable property of the human individual' (O'Connell Davidson 1998: 9). The implication is that the employment/prostitution contract, 'actually involves a transfer of powers of command over the person' (2002:2) which, she argues, requires the seller 'to temporarily surrender or suspend aspects of her will' (3). The problem with the notion of property in the person, then, is that it conceals the power relations that are at play in the transfer of one person's will to another.

The argument helps bring sex work in line with other forms of labour as both being coerced under capitalism. However, as will be explored in the

following section, there are obviously differing power relations at play when selling sex. O'Connell Davidson argues that, following on from the 'sex work' argument (that selling sex has continuities with other forms of labour), feminists should begin 'a critical analysis of the class, gender, race, and global power relations that underpin the contemporary sex industry' (4). However, she notes that instead of, or alongside, considering such power relations, 'sex work' feminists attempt problematically to posit a link between sex and self in terms of the inherent worth of selling sex (or in the case of radical feminists, the inherent damage). I would suggest, then, that as long as this argument is not made, and that we see sex work as a form of 'mere service work' (6), we can emphasise the continuities with other forms of labour and move forward with the broad critique that O'Connell Davidson advocates.

In summary, both 'forced' and 'free choice' sex work cannot be distinguished via the latter being voluntary and the former involuntary: instead we can say that both pose a choice between the lesser of two evils. Nor can we distinguish via the type of compulsion: economic compulsion may operate just as powerfully as the law. In addition, introducing the Marxist notion of 'inalienable property of the individual' allows us to see that all workers are coerced to surrender aspects of their will under capitalism, bringing sex workers into the frame with other labourers. Taken together, then, these arguments allow the question to be reframed. Instead of asking whether a distinction can be made between free choice/forced sex work, we can ask: What forms of coercive pressures do sex workers face in deciding to sell sex, and how are we to assess these pressures in order to build appropriate legal and political responses?

III: Beyond the 'Pro-Sex' and 'Anti-Prostitution' Divide: A Critical Pro-Sex work position

i. Coercive Pressures and Spaces of Resistance

In this section I will briefly sketch out what an alternative approach to the forced/free choice binary might begin to look like. In doing so, I think that it is crucial to retain a focus on the possible sites of resistance for sex workers, and that this is complimentary to a discussion of the coercive pressures that sex workers face.

In our analyses, we need to carefully distinguish between sex markets. For example, both O'Connell Davidson (1998) and Bernstein (2007) offer useful models for doing this, showing the need to combine details of social location and other defining features, as well as a consideration of the forms of compulsion that workers face. Read together, these accounts demonstrate the need for analyses to account for both the relations between worker and client, worker and any third party, the setting in which the exchange takes place, the 'legal, institutional, social, political and ideological context' (1998: 17) and the related economic and cultural space in which sex markets are situated. These considerations obviously extend far beyond the focus of radical and pro-sex feminists on the repressive function of male domination and legal structures respectively.

In addition, as suggested above, if all workers are coerced into surrendering aspects of their will, then we do have the ability to choose between the lesser of two evils, and I think this is one way that resistance can be integrated into an analysis of sex work. For example, as Bernstein notes some street based workers believe that they are challenging structures of oppression, such as class, by choosing to sell sex work over other (less well paid) jobs. I think that it is important to integrate these accounts into our analysis, as well as how they are affected by constructions of class, race, gender and sexuality.

Alongside considering forms of compulsion and possibilities for resistance, I agree with Agustin that we must see sex work as a form of service work. 'To give them no name means erasing them and the people doing them, whether to survive, get ahead, become wealthy or support other people...' (Agustin 2007:65) She notes that at the moment, sex work is classed as informal work, and is not

seen as a dignified job within that sphere, or the formal sphere. Seeing sex work, as work, is crucial in fostering solidarity across the informal work sector. Sex workers need to be connected to broader struggles, described by Bernstein as 'sex-worker activism through coalition building' (2007:187).

ii. Conclusion: Critiquing criminal law reform & liberal rights

Currently, the government is reproducing the radial feminist discourse through criminalization of 'bad men', be they traffickers or clients. However, academics are increasingly interrogating the role of law in the regulation of sex work. Bernstein notes that the focus on criminalization of men and decriminalization of the industry have 'thus far failed to achieve either empowerment or protection for women in the most vulnerable tiers of the industry...' (Bernstein 2007:183) She is one of a handful of academics bringing to our attention the gap between the introduction and implementation of sex work law and policy where differing ideological agendas at the former stage are turning out to produce similar results at the latter. In various cities, whether the agenda is criminalization, legalization, or decriminalization, on the ground street based sex work is increasingly marginalized, and indoor work is tacitly accepted (Bernstein 2007; Hubbard et al 2008). Bernstein suggests that this is due to 'the failure to situate sexual commerce within a broader political -economic framework' (20), meaning that the interests shaping implementation (such as real estate developers) may not accord with those shaping the introduction (feminists and sex workers). This critique surely adds impetus to the need to broaden our analysis of sex work, and proposals for change, beyond criminal law reform.

The human rights based arguments of both pro-sex work and radical feminist often take the form of the 'right to sell sex/choice of employment' and the 'right to not be prostituted/to be free of inhuman and degrading treatment', respectively. Hence, both are caught up in the classical liberal understanding of

rights: to be free to pursue a chosen life-plan and to be protected from abuse/vulnerability, which Benton describes as the two limbs of 'the moral priority accorded to the well-being of the individual person' (Benton 2006:22). However Benton underlines that we can still be in favour of individual well-being, but that this requires us to posit a far more radical critique then that advanced by the liberal focus on non-interference and freedom from intentional harms.

For example, the ability to pursue a life plan requires 'cultural and material resources' that may, or may not be available depending on 'our actual placing in society' (25). Further, in considering the ability to live out a life plan we need to recognize that 'relations of dependency and subservience' (27) exist, and that substantive equality would require the abolition of these power structures. In relation to protection from abuse, liberal rights theory advocates protection from 'intentional acts of other individuals or the sovereign power' (28), however, I would argue that radical feminists instead need to focus less on the harms caused by individuals, and more on what Benton terms the 'intentional acts of public powers' (29-30), and in particular the 'The global system of trade regulation, investment and development aid' which has enforced 'a neo-liberal model of economic policy across the world' (30), and is arguably the cause of much of the harm with which they are concerned.

I have demonstrated that both radical and sex radical feminist accounts, with the former emphasizing coercion and the latter choice, are too simplistic, in terms of the limited structural accounts of power posited, and the tendency to posit an inherent link between sex and self. In addition, I have critiqued more broadly the liberal notion of the free/forced labour binary. I have instead advocated a model that seeks to understand the broad array of forms of coercive pressure shaping decisions to sell sex in relation to specific sex markets, whilst advocating for sex work as a form of work in order to foster coalition building, and emphasizing the resistance of workers. Further, I have argued that the criminal law and human

rights arguments of both radical and pro-sex work feminists are inadequate. Our critique needs to move away from the myopic focus on 'bad men' and 'bad laws', towards a much 'broader political-economic' evaluation of contemporary sex markets.

When referring to radical feminism I will use the term prostitute since it is the preferred term. However, wherever else I will use the term sex work to highlight my belief that selling sex should be conceived as a form of service work.

[&]quot;Home Office Press release 'Tough action to protect vulnerable women and tackle kerb crawlers' available at: http://press.homeoffice.gov.uk/press-releases/tough-action-protect-women

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