Feminism, Legal Activism, and Sex Work: Reconciling to Move Forward

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When it comes to the sex trade, some principles of feminist legal theory have done grave damage to those on the ground. While intended to uplift, these principles have instead created more violence, discrimination, and gender-based hierarchies. Two main areas where feminist legal theory has failed to appreciate the lived realities of sex workers are its reliance on the criminal legal system and its limited view of who counts as a woman.

While I wish to explore the relationship between theory and practice, I reject the idea that these are two separate spheres that should interact. This view posits that the interaction between theory and practice is a choice, but it is not. Sex work has inspired theories on how to understand and address certain issues related to transactional sex. The creation of theories and their implementation impacts people in the sex trades. This interaction is a constant reinforcing loop, but only theorists can choose to ignore it. While we should continually re-envision what lessons from the ground feminist legal theory can learn from, the exchange between theory and practice must begin with repair, and it must recognize the effect that feminist legal theory has already had on people who trade sex. This work must begin to repair the incredible damage done to sex workers as a result of the implementation of these theories.

For this Essay, I will use the term “women,” including when referring to people in the sex trades, but in other spaces, this is not how I refer to people who trade sex. This essay is centered on the discourse of feminist legal theory—a discourse which centers the concept of “women,” not the lived experiences of sex workers broadly. Feminist theory has little to say about people in the sex trades who are not cis women or assumed to be cis

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women. The diverse experiences of people in the sex trades across the gender spectrum and the ways in which sex workers intentionally relate to and shape gender norms in their work are meaningful and important conversations but are outside of the scope of this Essay.

This Essay will also focus on the work of feminist legal theorists and scholars who have taken a carceral approach to analyzing the sex trade and those who do not incorporate the work of sex-positive feminism, which recognizes the importance of sexual freedom to women’s liberation. This evolution of feminism fought hard for sex positive approaches and spaces, validating the sex trades and the people in it in many ways. This approach had other challenges in its reliance on privacy and the lack of a meaningful critique of the role of the state and resource access. Removing them from the discussion is not to invalidate their contributions but to narrow the scope of one school of thought, as it remains the dominant foundation for many approaches to the sex trade.

I also need to situate myself within this conversation as an advocate for people in the sex trades and as someone who has traded sex in criminalized ways. I have been an advocate and peer support in cases where community members have been criminalized under a range of prostitution-related charges and in cases where sex workers have been victimized and chose to seek legal redress. I have helped sex workers navigate issues of intimate partner, manager, and client violence, and I have helped them access social and private services. In each case, the criminalization of the sex trade has posed a barrier or hindrance to accessing support or services. For this Essay, I draw on these experiences.

Acknowledging History

We cannot discuss contemporary feminist legal theory without acknowledging the roots of feminism’s approach to people who trade sex. This approach has relied on legal advocacy to try to end the sex trades. While feminist jurisprudence was formalized in the late 1970s, women’s collective advocacy groups, unified under the banner of feminism, have been pushing for legal reforms to affect the status of women for far longer. Their success cannot be divorced from the opening of the legal profession to women.¹ And feminist legal advocacy has always weighed in on sex work. Whether in Victorian Europe, when Josephine Butler advocated for the end of state regulation of prostitution;² in turn-of-the-century U.S. feminism, when purity advocates termed sex work as “white slavery” and sought to expand

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criminalization;\textsuperscript{3} or second-wave feminism, when Catharine MacKinnon fought to ban pornography and, by extension, bring an end to the porn industry through local ordinances,\textsuperscript{4} feminist legal advocates have always had something to say about the sex trade.

**Relying on Criminal-Legal Expansion**

One area where theory has fallen short is its uncritical reliance on expanding the legal system, often without regard for the myriad consequences. In the early 1900s, feminist advocacy groups like the Women’s Christian Temperance Union campaigned around the issue of “white slavery” and advocated for increased criminalization of the sex trades based on the assumption that most women were either tricked or forced into their work. The result was the federal White Slave Trade Act\textsuperscript{5} and state and city-level red light abatement laws, which opened additional avenues for citizens to file civil suits against brothels.\textsuperscript{6} On the ground, the result was the expansion of the federal government’s criminal legal purview into issues that were previously considered local\textsuperscript{7} and civil suits that pushed brothels, and the workers within them, to more isolated areas of cities and towns. In some places, red light abatement laws and vagrancy laws enabled discriminatory enforcement practices, especially along racial lines,\textsuperscript{8} and increased the prevalence of street-based sex work.\textsuperscript{9}

A paradigm for feminist legal theory’s impact on the sex trades was the development of a new international criminal-legal standard for human trafficking.\textsuperscript{10} Formalized in 2000, the Palermo Protocols are a set of three protocols that supplement the United Nations Convention Against Transnational Organized Crime and outline the definition of human trafficking.\textsuperscript{11} During negotiations, the most significant debate was on how to consider the sex trades in relation to other forms of exploitation. The fight


\textsuperscript{5} See Megan Vohs, Sex and the City: The Women’s Christian Temperance Union and the Mann Act of 1910, at 7 (unpublished manuscript), https://cardinalscholar.bsu.edu/bitstream/handle/123456789/201228/Sex%20and%20the%20City%20-%20The%20Women%E2%80%99s%20Christian%20Temperance%20Union%20and%20the%20Mann%20Act%20of%201910.pdf?sequence=5&isAllowed=y [https://perma.cc/74P9-JPMX].


\textsuperscript{7} PIILEY, supra note 3, at 104.

\textsuperscript{8} MARA KEIRE, FOR BUSINESS AND PLEASURE 192, n.121 (2010).


\textsuperscript{10} Previously, international human trafficking protocols had been part of human rights discourse, not criminal-legal interventions.

was between advocates who recognized the agency of sex workers, a coalition that included sex workers themselves, and a coalition of second-wave feminists led by groups such as the Coalition Against Trafficking in Women and the European Women’s Lobby, who conceptualized all sex work as human trafficking and wanted it legally defined as such. The compromise segregated labor trafficking from sex trafficking by specifically excluding sex work from the definition of recognized forms of labor. Sex workers across the globe have noted the impact of anti-trafficking enforcement and its singular focus on the sex trades, including forced rehabilitation, increased violence, and discrimination from services.

Today, many feminists advocate for increased criminalization of purchasers of sexual services, known as the Nordic Model. Since 1999, eight different countries have adopted the Nordic Model. In at least five of these countries, people who trade sex report increases in violence, discrimination, and exploitation. Despite this, European and American feminists continue to push the model as a success and advocate for its expansion.

In each of the above cases, feminists relied on expanding the legal system to attack the sex trades, a movement which Elizabeth Bernstein coined “carceral feminism.” The trend mirrored other advocacy efforts, such as the expansion of domestic violence laws and the introduction of the Violence Against Women Act, which allocated significant funding to implement the law—eighty-five percent of which went to law enforcement. While efforts to recognize domestic violence as an identifiable form of violence are understandable, there is a significant difference between domestic violence and the sex trades. With regard to domestic violence, there are many victims who were asking to be taken seriously as victims and for additional police involvement when they report harm.

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14 While eight countries have passed legislation, there is information lacking from three countries. Iceland enacted legal changes, but the implementation of those reforms was never funded. Israel and Finland have also passed similar laws more recently, but there are no reports yet on their effects in those countries.


19 There were also many victims of violence, mainly women of color and queer women, who were not asking for the expansion of the criminal-legal system and were vocally opposed to this agenda,
When Catharine MacKinnon drafted an ordinance, she defined pornography as a practice that discriminates against women. MacKinnon constructed herself as the victim for existing in the same world as pornography. The people who would be impacted by these laws, sex workers who were reliant on porn work for their income, were never even considered. The examples are numerous—erasure of sex workers from the dialogue on the impacts of the Nordic Model, forced rehabilitation through court-mandated reform efforts, the silencing of sex workers after the closure of Backpage and other advertising sites—because it happens every time. The feminist advocates behind these pushes have not merely ignored the gap between theory and practice, but they have silenced what happens in practice to continue to promote flawed theory. You cannot construct a legal theory about women while erasing the existence of the women whose lives will be tangibly impacted unless you consider those women disposable to your cause or not women at all.

What Makes a (Good) Woman?

Another challenge is the continued reliance on limited ideas about what makes a good woman, in addition to the inability for either feminist advocacy or the legal system to consider sex workers within that frame. Within these limited frameworks, sex workers are either deserving of criminal punishment—which is exemplified by their arrest, incarceration, and deportation, and the violence they experience at the hands of the police—or are in need of forced rehabilitation. From Josephine Butler through the current era, feminist advocates have described a need for law enforcement intervention for people who trade sex based on the idea that people who trade sex are victims in need of forced rescue and rehabilitation. In turn-of-the-century progressive movements, institutions like the New York State Reformatory at Bedford were created to focus on younger women with mostly low-level “public order crimes,” including those arrested as “common prostitutes,” as they were not yet considered “delinquents.” Their mandate was clear: rescue and reform.

Little has changed. A century later and only forty miles away, a Queens judge drove the creation and expansion of prostitution-diversion courts in New York City, which mandated counseling sessions in lieu of jail noting that this would expand state violence. This is not to erase these important historical legacies, but to provide contrast for the claims of who is impacted by sex work.


21 See Anne E. Bowler, Chrysanthi S. Leon, & Terry G. Lilley, “What Shall We Do with the Young Prostitute? Reform Her or Neglect Her?”: Domestication as Reform at the New York State Reformatory for Women at Bedford, 1901–1913, 47 J. SOC. HIST. 458, 462 (2013).
The idea is that counselling will get someone out of the sex trades, and this practice replicates the Bedford reform approach and moralizes the decision to trade sex. In each of these cases, and in the proliferation of prostitution-diversion courts around the country, the progressive theory is that someone who trades sex must reject their status as a sex worker to be considered legitimate—otherwise, you’re just another criminal. They can either successfully complete a program and leave the sex trades or face jail time—in other words, become a woman, or become a criminal. The message is clear: sex workers do not fall within the parameters of what is considered “women,” but they can be redeemed if they reject sex work. This theory concretizes the importance of non-existence—sex workers are erased as women and therefore cannot participate in feminist conversations about sex work.

In the end, sex workers are not women but criminals who experience a gendered form of state, cultural, and social violence. In this theory, women are imbued with the assumption of virtue and purity while criminals are harmful and require punitive responses. The reliance on the criminal legal system, which is built on this distinction, separates sex workers from women through carcerality. Expanding the legal system’s ability to target the sex trades has caused irreparable harm to people working in them.

Conclusion

While expanding criminalization has nominally targeted the sex trades broadly, sex workers are the ones bearing the pain of that violence. What is the way forward?

To meaningfully engage with the lived realities of people who trade sex and the legal system, feminist legal theory must begin with transparency and accountability to the ways in which these theories have harmed people in the sex trades. As a sex worker and a queer person, I cannot let people off the hook for loving the sinner while hating the sin—for those who continue sinning, our eradication is integral to that logic. The expansion of criminalization of the sex trades has caused incredible harm and violence to people who trade sex.

Recognizing the harms caused by the theories that have denied inclusion of people who trade sex and the reliance on systems of state violence towards people in the sex trades is the first step in repair.

To say there is a gap to close between theory and practice masks the need to consider the theorists’ impact on the lived realities of women on the

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23 See generally The Impact of Criminalisation on Sex Workers’ Vulnerability to HIV and Violence, GLOBAL NETWORK OF SEX WORK PROJECTS (2017), https://www.nswp.org/sites/default/files/impact_of_criminalisation_pb_prf01.pdf [https://perma.cc/HV7K-SF8G] (demonstrating how the criminalization of sex work has increased incidences of violence for those engaged in sex work).
ground. When theories are applied and sex workers are acted upon, they become practice. Theorists are not removed from action and must be held accountable for their actions and the impact that they have. Similarly, sex workers are theorists with the ability to conceptualize their own experience and community. A practice of strategic collaboration demands that scholars begin with a rich understanding of how the legal system is impacting people, and what material changes are necessary to better day-to-day lives. It begins with understanding that sex workers and those who conceptualize them are already in dialogue; it simply reflects an unequal power dynamic of who is the actor and who is the subject. When a theory is only as good as its practice, it is those living the material realities day to day who must be shaping our strategies through advisory councils and expanding concepts of what is theory and what is practice. We need a critical approach to power dynamics between these spaces. This is not about simply creating a dialogue between legal feminist theorists and sex workers. It is about recognizing that such a dialogue already exists, but the academy and the legal system seems to only value one side’s contributions.