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SEX WORK EXPLORED: RETHINKING THE LAWS REGULATING PROSTITUTION

Keynote Address: Carol Leigh and Robin Few

*Panelists: Jubu Thukral, Melissa Ditmore, Denise Brennan,
G.G. Thomas, and Marc Spindelman*

Moderators: Melissa Sontag and Lisa Gerson

you.

GERSON: Thank you, Ms. Thomas. Last and not but least our final speaker today is Professor Marc Spindelman. Professor Spindelman is a tenured Associate Professor of Law at the Moritz College of Law, Ohio State University. He has also taught at the University of Michigan Law School, here at Georgetown University Law Center, where he was my family law professor last year, and at the Johns Hopkins Bloomberg School of Public Health. Professor Spindelman's focus areas include sex equality theory, queer theory, constitutional theory, contemporary approaches to bioethics and health policies and public health ethics. Most recently his scholarship in sex equality theory and constitutional law has appeared in the *MICHIGAN LAW REVIEW*, as well as the *EMORY LAW JOURNAL*. And this recent scholarship has focused on same sex sexuality and its relation to sexual violence and injury, which very much pertains to what he will speak on today. And you can access his publications on his faculty web page through the Moritz College of Law at Ohio State University. And the final thing is that Professor Spindelman has generously offered to start the ball rolling on the questions and answers session, as I think he has a question that he would like to open up for discussion. Then we'll have a good period of time for you all to ask and answer questions and we'll bring back Ms. Leigh and Ms. Few to do that. Thank you.

MARC SPINDELMAN¹: Thank you, Lisa. And, of course, Melissa, too.

The ready availability of prostituted men and boys for sexual purchase and use by men, including self-identified gay men, reveals that prostitution is certainly not only, although it mainly is, a cross-sex phenomenon.

Legal academics, among countless others, have scandalously overlooked the institution of same-sex prostitution, serious discussion and analysis of which has been nearly perfectly non-existent within the recent same-sex sexuality debates. Judging from a broad review of the legal academic literature, one could easily come away with the misimpression that same-sex prostitution does not exist as a social practice at all, or that if it does, it does not need to be addressed, in life, in theory, or at law.

Why might this be so? Why does the intellectual space within which to investigate same-sex prostitution and its implications for sexual politics seem so incredibly tight?

The answer is, I think, extremely complex, as complex, really, as all the reasons individual legal academics have had for foregoing it. Still, it is possible, I think, to identify two of the large-scale political forces that, until recently, have generally referred discussion of same-sex prostitution to the realm of the unthinkable. One is fairly obvious, the other perhaps a little less so.

On the obvious side of the ledger must be counted the homophobic moralism that provides the grounds in the United States against which all conversations

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about sexuality, including same-sex sexuality, are inevitably (if still contingently) situated. On the simplest level, homophobic moralism and its political output on the ground have shaped the pervasive legal academic silence around same-sex prostitution, which is a form of sexual practice, after all. Somehow, and almost remarkably, homophobic moralism's interlocutors, chiefly cultural conservatives (as they are now often known), have not placed same-sex prostitution high in their sights. Their crusades against prostitution have not zeroed in on it. Neither have their jeremiads against lesbian and gay rights. It is not that it is never mentioned, of course. (The adult-child variety especially sometimes is.) Nor is it that the thought that gay men at least are (all) basically whores is ever very far from the top of the homophobic mind. It is just that from this anti-gay perspective, there have, it seems, consistently been bigger fish to fry.

The broad-based failure of homophobic moralists to rally against same-sex prostitution has meant that there has been, well, nothing—no social practice—for their pro-gay, legal academic counterparts to investigate, explain, and defend. In important ways, homophobic moralism has thus been allowed to define what counts as a valid legal knowledge project to be independently pursued. Without challenge, there is nothing we need to know, nothing—certainly, nothing new—we should seek to learn about the lived realities of the social world, including the lives of those whose sex, hence bodies, are literally commodities of (and on) the sexual market.

Hardly anyone, certainly no serious academic, would, if pressed, avow that homophobic moralism properly normalizes knowledge itself—either what is knowable or what should be known. But then, hardly anyone operating within the legal academy has actually sought affirmatively and systematically to criticize and displace it as a normalizing force where same-sex prostitution is concerned.

And so, here we are, facing a second, and related, force that, with homophobic moralism, has operated to constrain the room for thinking and talking about same-sex prostitution. The leadership of the lesbian and gay communities has been perfectly content to see the conversation not take place. What is more, it has approved steps that affirmatively operate to keep it shut down. Amply laced throughout the pro-gay rights briefs filed with the Supreme Court in *Lawrence v. Texas*, to take one prominent illustration, were arguments that the recognition of a right to sexual autonomy on behalf of lesbians and gay men did not imply legal recognition of prostitution, hence the rights of those engaged in it. As the principal merits brief on behalf of John Lawrence and Tyrone Garner flatly put it, “[p]rostitution . . . laws . . . address commercial . . . interactions that have a negative impact on the larger community. This case concerns the narrow but important freedom to choose the expressions of sexual intimacy one shares with another adult partner in private[.]”²

The profound seriousness of this distinction, with its tacit, but unmistakable,

2. Brief of Petitioners at 24, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102).

intimacy that gay sex is fundamentally intimate in a way that prostitution, presumably including same-sex prostitution, is not—a distinction, I should add, that the Supreme Court itself accepted and relied on in *Lawrence*, and which lesbian and gay rights advocates seized upon in its aftermath to defend it against conservatives', including cultural conservatives', rebuke—is more than simply a tactical injunction not to draw a moral equation between homosexuality and prostitution.³ It is also a political injunction not to see prostitution as a sexual form that is itself, in important ways, inscribed within same-sex sexuality, particularly its gay male variety.

The strategic values of both kinds of injunctions are readily apparent in our current political climate. Insisting on giving same-sex sexuality and same-sex prostitution complete independence of analytic terms is part of a larger project, to which legal academics have significantly contributed, of making lesbian and gay male sexualities, and the same-sex relationships to which they can and do give rise, respectable. Just so, these injunctions call upon us to lie about what everyone, or at least every gay man who is awake, knows: Same-sex sexuality entails, among other things, sex for pay, both purchase and sale. The injunctions that bid us to lie about this deserve, in a truth-telling mode, to be resisted, flouted, and ultimately, disobeyed.

Where to begin? Desperately needed to launch a sustainable discussion and analysis of same-sex prostitution is an investigation that aims to figure out what, exactly, it is, in its multiple social contexts. We need to know, for example, what its structures and internal rules, including rules of entry and exit, are, how it has operated across space and time, what its social and individual meanings have been, and continue to be, and to what it is that they're responsive—what set of interests, or whose? What are the social conditions, particularly of inequality, and here of various sorts, that produce this market for trade in male bodies for same-sex sex? What, precisely, does the trade, and the contours of the lives of those who are purchased for same-sex sex, teach us about gay male sexuality, and male sexuality, more generally? What, in this light, is the relation of both to sexual violence, injury and abuse? As part of this inquiry, we ought to ask, Does the wide-spread invisibility of same-sex prostitution serve to naturalize men's sexual use of women for pay? How, if it is possible, could it not? Does it similarly bolster the social construction of women's bodies as properly being for men's sexual use and pleasure? How might it thus underwrite male-on-female sexual abuse? Would addressing—or more, eliminating—it simultaneously strike a blow at that?

Once we have answers—even provisional answers—to these and other questions, we should be in a position to make some tentative normative assessments about what the social facts of same-sex prostitution should be taken

3. Mike Seidman has made this point in a different context. See Louis Michael Seidman, *Out of Bounds*, 65 OHIO ST. L. J. 1329, 1335 (2004).

to mean—and require—on the level of sexual politics.

To be perfectly clear, none of this is to say that we either can or should approach same-sex prostitution, including its facts, without any normative prior commitments. Honestly, I am not at all sure that that would be possible even if we wanted to try. But, as we begin, we may want to approach the inquiry with those commitments only tentatively screwed in place, not completely bolted down.

Were it not already clear, I myself would approach the investigation of same-sex prostitution from within a sex equality frame, persuaded by those who have argued that prostitution's cross-sex forms are manifestations of the sex-based exploitation of women by men through sex. What I am trying to come to terms with is whether this view holds up—and if so, how—where same-sex prostitution is concerned, as it may have to if the sex equality arguments opposing cross-sex prostitution are, in the long run, to be defended against attempts, including those launched from the "Left," to bring them down.

My own sense, based in important respects on the evidence that can already be found, is that same-sex prostitution is a gender-based practice up-and-down the line: Trafficking and pimping boys and men for same-sex sex, like buying them for it directly, happens to them not as women, but as men, including, in some important number of cases, as gay: either way, a certain kind of social man, subordinates within the dominant social class, of men. In this sense, same-sex prostitution appears to be a product of an ideology—of male supremacy—that has ample room within it for some boys and men to be treated the way girls and women more commonly, and commonly, are: as objects to be taken and used by men for their sex. If this is so, gay male sexuality, as a social practice of gender differentiation and inequality, may turn out to bear an uncomfortable family resemblance to male heterosexuality in ways that have, so far, remained largely hidden from view, but need to be exposed and changed if sexual exploitation itself and the violence and injuries that accompany it, are ever to be, as they must be, brought to an end. It is long past time we start trying to find out.

GERSON: I just want to thank everybody for coming and I especially wanted to thank all seven of [our speakers]. It's really been a privilege and an honor to hear all of you speak and share your wisdom and experience so thank you. And upstairs there is some food. Thank you.