

# **“Sex Workers are Feminists Too”<sup>1</sup>**

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*A Capabilities Approach to Legislating Sex Work in South Africa*

Stefan Ranoszek

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Thesis Advisor: Professor Nancy Hirschmann

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<sup>1</sup> Asijiki Coalition. “A Struggle of Another Woman Is a Struggle for Every Woman. Sex Workers Are Feminists Too.” Tweet. @Asijiki4decrim (blog), December 10, 2020. <https://twitter.com/Asijiki4decrim/status/1337057398620626945>.

## **Abstract**

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This project combines an analytic normative framework, drawing from Martha Nussbaum's capabilities approach, with field research – including a 67-participant survey study of sex workers in Cape Town – to investigate regulatory models for the commercial sex industry in South Africa. Though this paper advocates, based both on normative principles and empirical findings, for the full decriminalisation of sex work, arguments for its partial decriminalisation are given significant attention through analysis of Carole Pateman and Elizabeth Anderson's alienation theories. By considering survey study findings through a capabilities lens this project shows that the full decriminalisation of sex work would, more effectively than other regulatory models, protect South Africa's sex workers, promote their central human capabilities, and unequivocally affirm their equal dignity.

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## Introduction and Project Overview

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COVID-19 has exacerbated South Africa's worst characteristics, exposing the fragility of the nation's post-apartheid political economy. Sex workers — mostly poor, Black women — have, above all, been failed by relief measures that neglect those trapped outside of the formal economy. The social and economic exclusion of South Africa's sex workers is not, however, the isolated consequence of this national health crisis alone. Rather, these effects are manifestations of a system which ineffectually criminalises sex work and, in doing so, perpetuates government ambivalence towards the needs of this marginalized group, inhibits sex workers from accessing vital healthcare resources, and permits the continued, and now intensified, molestation of vulnerable women at the hands of police.<sup>2</sup> Globally the commercial sex industry has become the focus of intense and emotive debate. Human rights concerns form foundational elements of the arguments both for and against decriminalisation, while political, ethical, and cultural factors continue to obscure the lived realities of sex workers on the ground. Even the oft referred-to dichotomy between criminalisation and legalisation is misleading in its simplification of a complex, intersectional discussion. Despite this complexity, there is universal consensus that prostitution – or sex work, as the practice will be referred to in this paper – and the surrounding socio-economic framework in which it is situated facilitates suffering on an egregious scale. The relegation of society's most vulnerable to a life of violence, exploitation, and persecution has come to the fore as one the great failings of humanity and activists, academics, and politicians alike have sought to respond.

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<sup>2</sup> For more information about the impact COVID-19 regulations have had on South Africa's sex workers refer to the linked article I was fortunate enough to have published in the online newspaper New Frame in August 2020: Ranoszek, S., *Sex workers: Ignored by the state, abused by police*, (August, 2020), <https://www.newframe.com/sex-workers-ignored-by-the-state-abused-by-police/>

The profound nature of the pain the commercial sex industry proliferates has seen deep ideological divides emerge where legislature is concerned. While formal alterations to laws will not provide an all-encompassing remedy, the legislative framework in which the commercialised sale of sex is situated defines and shapes efforts toward a resolution. Several nations have decriminalised or sought to regulate sex work, notably the Netherlands, Germany, and New Zealand, while a host of Scandinavian countries, including Sweden and Finland, have opted for policies of partial decriminalisation. Sex work is currently criminalised across the vast majority of Africa which sees the worst of the ills associated with the enterprise continue to develop at an alarming rate. This project concerns the South African case but – through a deliberate focus on employing a complex normative framework rooted in Martha Nussbaum’s capabilities approach – aims to develop morally significant, generalizable recommendations for regulating the commercial sex industry in a manner consistent with equal human dignity and autonomy.

Before developing Nussbaum’s capabilities approach this paper will elaborate on the four broad categories of legislative models for regulating the commercial sex industry. This project describes, and provides examples of, the policies of criminalisation, regulation, partial-decriminalisation (the decriminalisation of the sale of sex only), and full-decriminalisation. Nussbaum proposes that where criminal and abusive conditions do exist in the commercial sex industry, sex workers should be viewed as poor women with limited options and the law should be used to protect their persons and dignity. In “Women and Equality: The Capabilities Approach”<sup>3</sup> Nussbaum explicates her capabilities approach to assessing life quality and determining public policy aims; with a particular focus on addressing gendered inequalities. The capabilities approach

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<sup>3</sup> Nussbaum, M., “*Whether from Reason or Prejudice*”: *Taking Money for Bodily Services* (The Journal of Legal Studies, 1998), 693-723.

draws from Kantian and Marxist principles to develop a normatively complex and contextually responsive methodology. For Nussbaum the correct response to the issues raised by the sex work debate is to enhance the economic autonomy and personal dignity of sex workers, not stigmatise women who do make a living this way.<sup>4</sup> In considering the consequences of alternative legislative models for the commercial sex industry in South Africa the capabilities approach serves as an effective, and normatively sound, evaluative tool for assessing the life quality of sex workers confronted with intersecting social and economic inequalities. Its sensitivity to context – the disparate needs of and obstacles faced by sex workers – and its foundational respect for human dignity renders this approach compatible with Carole Pateman and Elizabeth Anderson’s frameworks; both of which will be presented in constructing a case for the partial decriminalization of sex work. This project, ultimately, applies the capabilities approach to the findings of my 2019 field study in Cape Town South Africa – and subsequent interviews and research – to evaluate the normative and empirical viability of the policies of full or partial decriminalisation as alternatives to the fully criminalised status quo.

The debate over legislating sex work in South Africa is dominated by the agendas of Embrace Dignity, a non-governmental organisation and leading advocate of partial-decriminalisation, and the Sex Worker Education and Action Task Force (SWEAT) the longest-standing NGO lobbying group on this issue committed to a full decriminalisation agenda. Aspects of SWEAT’s legislative proposals and research will be explicated in order to situate the commercial sale of sex in South Africa and propose a preliminary argument for full decriminalisation in terms of Nussbaum’s capabilities. According to SWEAT, sex work provides a valuable source of income to poor, and often uneducated, women and their families. That many

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<sup>4</sup> Ibid.

South African women are driven by economic necessity to enter the commercial sex market does not undermine the legitimacy of their decision to do so (a point that Nussbaum reiterates). Given the limited set of economic opportunities available to them the law should work to protect the autonomy and persons of poor women, not limit their options further. This line of reasoning echoes Nussbaum's emphasis on the importance of respecting sex workers' agency and promoting their capability to exercise practical reasoning in their decisions. SWEAT's arguments pertaining to criminalisation's role in perpetuating an antagonistic relationship between sex workers and law enforcement – and fostering the harmful stigmatisation of sex workers through denying their equal standing in society – illustrate how the status quo undermines sex workers' affiliation, control over their environments, and physical health capabilities. Conversely, full decriminalisation, according to SWEAT, effectively promotes these constituent components of human flourishing.

This project presents and develops Carole Pateman's theory of *The Sexual Contract* as a normative basis for Embrace Dignity's case. Pateman describes the contracting process as creating an illusion of mutual consent which facilitates and justifies men's ownership of women's bodies and persons.<sup>5</sup> Sex work sees vulnerable women alienate fundamental elements of their identities in the market and subordinate themselves to their clients' ends. The decriminalisation of sex work represents the harmful public affirmation, by government, of the implicit contractual premise that women's bodies are the property of men. Elizabeth Anderson, through her theory of value, develops a complimentary case for the prohibition of sex work. For Anderson, the good of personal relationships – and the value of human sexuality – derives from the objective ideals of intimacy and commitment; both of which are at odds with market norms. The commodification of sex destroys the kind of reciprocity required to realise the true value of human sexuality as a shared

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<sup>5</sup> Pateman, C., *The Sexual Contract*, (Stanford University Press, 1989).



good.<sup>6</sup> Aligning with Pateman's delineation of market transactions as mechanisms for alienating property in one's person, Anderson argues that the purchase of sex – an intimate facet of a woman's identity embodied in her person – expresses a valuation of her as rightful male property.<sup>7</sup> Decriminalised sex work undermines the freedom and autonomy of, not just sex workers, but all women in society who are increasingly perceived as male property and whose actions represent valuations imposed on them by men. Pateman and Anderson both depict sex workers as victims of unjust exploitation. While criminalisation aims to eradicate the commercial sex industry it is ineffective in achieving this end and fails to recognise the unique vulnerability of sex workers. Taken together Pateman and Anderson's arguments thus combine to present a compelling case in favor of partial decriminalisation; a regulative model which works to protect sex workers while simultaneously targeting the demand for commercialised sex and working abolish an inherently damaging and degrading practice.

Conversely, Martha Nussbaum in ““Whether from Reason or Prejudice”: Taking Money for Bodily Services” forcefully rejects Pateman and Anderson's respective alienation and commodification analyses. On Nussbaum's account, arguments for the prohibition of sex work embody either an irrationally grounded immorality charge bound up in implicit ideals of class privilege and sexual taboos, or, a totalizing ignorance of the material context in which sex workers struggle to provide for themselves and their families.<sup>8</sup> A substantive examination of the sources of stigma toward sex workers – as well as a contextualising comparison between sex work and related, legitimate forms of employment women currently accept wages to perform – will lead into

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<sup>6</sup> Anderson, E., *Value in Ethics and Economics*, (Harvard University Press, 1995), 150.

<sup>7</sup> Anderson, E., 150.

<sup>8</sup> Nussbaum, M., “*Whether from Reason or Prejudice*”: *Taking Money for Bodily Services* (The Journal of Legal Studies, 1998), 693-723.

a presentation of Nussbaum's responses to six commonly cited objections to decriminalised sex work. These arguments address Pateman and Anderson's theoretical objections to decriminalising the commercial sale of sex while remaining firmly rooted in the constrained material environment sex workers must negotiate. This belies what Nussbaum takes as the most urgent issue raised by the discussion of sex work: the lack of employment opportunities for working women and their limited control over the conditions under which they labour.<sup>9</sup> "Far from promoting the demise of love", Nussbaum maintains, "the legalisation of sex work is likely to make things a little better for women who have too few options to begin with."<sup>10</sup>

While numerous studies have sought to quantify the deleterious consequences of criminalisation the opinions and lived realities of poor sex workers themselves are still too often overlooked, spoken for by advocacy groups, academic experts, and political figure heads. The basis for this project is a survey study of 67 sex workers from Cape Town and the surrounding rural areas I conducted in the summer of 2019. Twenty-six of the survey participants were black South Africa women who work in Cape Town, twenty-two black South African women from farms and the rural areas surrounding Cape Town (Grenadendal, Haarlem, Kranshoek and Reitpoort), and nineteen black foreign sex workers working in Cape Town. The overwhelming majority of South African sex workers are women and so this study consisted of women only – not to neglect or dismiss the plight of male or trans sex workers – but to maintain consistency across the sample group and limit the scope of this project.<sup>11</sup> This study endeavoured to provide insight into the experiences and opinions of South African sex workers and bring their concerns to bare in the

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<sup>9</sup> Nussbaum, M., (1989), 697.

<sup>10</sup> Ibid.

<sup>11</sup> "Sex Work and Feminism," *Sonke Gender Justice* (blog), accessed April 29, 2020, <https://genderjustice.org.za/publication/sex-work-feminism/>.

discussion of legislative change. In doing so five overarching, pertinent issue categories emerged: Economic necessity, stigma and its relation to law, sex worker-client relations, health concerns and condom use, and sex worker-law enforcement relations. To a lesser extent, sex worker-third party relations were also a topic of inquiry. While a similar number of questions were devoted to this issue as to others it became clear through interviews and follow up qualitative questions that the self-reporting structure of this study was limited in its capacity to construct a full image of participants' array of experiences under this heading.

Ultimately, through applying Nussbaum's capabilities approach to the findings of this study – in conjunction with a thorough consideration of opposing normative argumentation, extensive analysis of academic research, and sustained scrutiny of Embrace Dignity, SWEAT, and the South African Law Reform Commission's proposals – this project concludes in favor of the full-decriminalisation of the commercial sex industry in South Africa. As Nussbaum shows, there is nothing inherently immoral or degrading about the use of one's body to earn a living wage. Sex workers, however, are profoundly and deeply affected by the ongoing stigmatisation of their work and their legal status as second-class citizens. While partial decriminalisation purports to enhance sex workers' dignity inherent within this model's framework is the claim that sex work is degrading. Partial decriminalisation thus – importantly for both Nussbaum's normative analysis and SWEAT's empirical arguments – does not work to eradicate the stigma which afflicts sex workers. This policy infantilises sex workers as victims in need of saving, even from themselves, and in doing so violates the equal respect owed to their persons. In a country plagued by an ongoing gender-based violence epidemic sex workers – vulnerable, low-income, women – can no longer be ignored and undermined by policy makers. While full decriminalisation is not a catch-all solution to the problems that pervade the commercial sex industry, it is a necessary and efficacious

first step toward respecting the dignity of sex workers and safeguarding their persons. This legislative alteration would substantively protect South Africa's sex workers, promote their central human capabilities, and unequivocally affirm their equal human worth in society.

## Definitions

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### Sex Worker:

Aside from quotation, paraphrasing or references to written law, this project utilises the term ‘sex worker’ to refer to the sellers of sex in the commercial sex industry. This phrasing, as opposed to ‘prostitute’ or ‘prostituted person’, definitively and deliberately characterises sex work as a legitimate occupation and respects the personhood of those to whom it applies. Conversely advocates of partial decriminalisation who perceive sex work as inherently violent and exploitive, Embrace Dignity being the key example here, use the term ‘prostituted person’.

### Third-party Actors:

Encompasses pimps, brothel owners and managers, human traffickers who supply the commercial sex market, people who coerce or lead others into prostitution, and those who facilitate prostitution financially or logistically (e.g. connecting buyers to sellers).

### Buyers and Clients:

Refers to the purchasers of commercial sex.

## Legislative Models

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Broadly categorised, there are four regulatory models used in the context of the commercial sex industry: full-criminalisation, partial-decriminalisation, regulation, and full-decriminalisation.

Full criminalisation, as mentioned previously, is the current model employed in South Africa under which the sale, purchase, and third-party facilitation of commercial sex is illegal. Under South African law Section 20(1A)(a) of the Sexual Offences Act 505 provides that any person who has unlawful carnal intercourse or commits an act of indecency with another person for reward, commits an offence.<sup>12</sup> A person cannot, however, be arrested simply for being known or suspected to be a sex worker; law enforcement must establish a reasonable claim that an indecent act has been or will be committed by said person at the time in question.<sup>13</sup> This stipulation has translated into police officers searching suspected sex workers for condoms, which they confiscate as evidence of intent to sell sex, and the harassment of sex workers. Full criminalisation defines the commercial sale of sex as inherently exploitative and detrimental to society at large. It thus seeks to eliminate practice of sex work entirely. Such a policy is characterised by an adversarial relationship between sex workers and law enforcement, the disproportionate arrest and prosecution of the sellers of sex, widespread stigmatisation of sex workers, the underground and unregulated operation of sex workers and coercive third-party influences, and sex workers having limited access to healthcare and other social services as a result of their criminal status.

This project limits the discussion of the partial decriminalisation model to that of decriminalising the sale of sex only, as is the current law in Sweden, and is often referred to as

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<sup>12</sup>Decriminalisation of Adult Sex Work; SALRC Project 107” (South African Law Reform Commission), accessed April 29, 2020, <https://www.justice.gov.za/salrc/reports/r-pr107-SXO-AdultProstitution-2017-Sum.pdf>.

<sup>13</sup> “Decriminalisation of Adult Sex Work; SALRC Project 107.”

either the Swedish or Nordic model. Since 1999, under the Swedish Penal Code, sex work is not criminalised but the buyers of sex and other third parties may face criminal consequences.<sup>14</sup> Norway, Iceland, Finland, Israel, Korea and the United Kingdom have since adopted similar legislative models. Similarly, to a system of full criminalisation ‘prostitution’ is regarded as inherently exploitative and a form of violence against women symptomatic of gender inequality.<sup>15</sup> The intent here is to afford formal legal protections to those victimised by the sex industry while deliberately targeting the demand for paid sex. Such a model is abolitionist in that it seeks eliminate the sex industry rather than to regulate it or mitigate its harm.

Government regulation of the sex industry within a non-criminalised framework has been implemented in the Netherlands and Germany. Sex work is decriminalised in the Netherlands but subject to municipal regulations on location and practice.<sup>16</sup> Provided the proper licenses have been obtained from the relevant municipality it is legal to own and operate a brothel as well as sell sex directly.<sup>17</sup> A deliberate focus on combatting criminal elements and eradicating involuntary prostitution whilst pursuing the integration of sex work into the formal economy is facilitated by administrative and labour laws.<sup>18</sup> Regionalised regulatory responsibility sees local governments enforce licensing and health and safety requirements.<sup>19</sup> Licensing stipulations detail permitted substance consumption by sex workers, safe sex practices, and the right to refuse clients or specific

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<sup>14</sup> “Sex Work Decriminalisation: Commission on Gender Equality, SWEAT, South African Law Reform Commission, Department of Justice, Parliamentary Legal Services | PMG,” accessed April 30, 2020, <https://pmg.org.za/committee-meeting/23084/>.

<sup>15</sup> “Sex Work Decriminalisation.”

<sup>16</sup> “Decriminalisation of Adult Sex Work; SALRC Project 107.”

<sup>17</sup> Ibid.

<sup>18</sup> Ibid.

<sup>19</sup> Ibid.

sex acts.<sup>20</sup> Roughly half of Dutch municipalities require sex workers who operate from their homes or to possess licenses to do so. The Aliens Employment Act of 1944 prohibits the issuing of a work permit for the sex industry to undocumented foreigners and requires that people operating in such a capacity be deported as illegal aliens.<sup>21</sup>

The discussion of the efficacy of government regulation as a legislative model for the sex industry is contentious, nuanced, and still ongoing in Netherlands.<sup>22</sup> While this paper draws on information and experiences gleaned from studies pertaining to the Dutch model it does not take regulation to be a viable option in the South African context. Any potential legislative framework for the South African sex industry should prioritise the concerns of low-income women, who make up the majority of South Africa's sex worker population.<sup>23</sup> Licensing and locational regulations would be both unenforceable and detrimental in the South African case. Sex workers, who currently face stigma from society at large, and abuse at the hands of law enforcement, would be unwilling to register with municipal authorities.<sup>24</sup> This buy-in problem is evident in Senegal, the only African state to implement the regulatory legal model for its sex industry, which currently sees an estimated 8% to 25% of its sex worker population registered for the appropriate licenses.<sup>25</sup> Formal registration is perceived as labelling oneself for exploitation and numerous NGOs confirm

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<sup>20</sup> Ibid.

<sup>21</sup> "Decriminalisation of Adult Sex Work; SALRC Project 107."

<sup>22</sup> "Decriminalisation of Adult Sex Work; SALRC Project 107."

<sup>23</sup> "Sexuality, Poverty and Law," accessed April 30, 2020, <http://spl.ids.ac.uk/sexworklaw>.

<sup>24</sup> "Sexuality, Poverty and Law."

<sup>25</sup> "Sexuality, Poverty and Law."



this concern reporting that police routinely harass sex workers demanding bribes or sex.<sup>26</sup>In the case of South Africa's rural sex worker population licensing and locational restrictions are likely to be treated as obstacles to be overcome rather than as efforts to protect the interests of sex workers. Currently, the criminal status of sex workers in South Africa isolates vulnerable women, preventing them from accessing social services and the protection of law enforcement or exiting the industry once convicted. Rather than mitigate these issues, partially enforceable regulations with low participation rates would merely perpetuate the exclusion of the majority of sex workers in a different form. Regulation does not do enough to alter the dynamics between sex workers and law enforcement or how sex workers are perceived in society.

The Prostitution Reform Act 28 of 2003 saw sex work entirely decriminalised in New Zealand with respect to people selling their bodies for sexual services, brothel keeping, living off the proceeds of someone else's sex work, and street solicitation.<sup>27</sup> New Zealand's decriminalisation of sex work is an oft cited event in the arguments proposed by SWEAT, the leading proponent of decriminalisation in South Africa. Like regulation, full decriminalisation facilitates the integration of sex work into the formal economy and aims to guarantee the physical safety and agency of sex workers. However, full decriminalisation does not require sex workers to register for licenses or operate in circumscribed areas. Beyond the buy-in issues described previously this aspect of decriminalisation enhances sex workers' social basis of self-respect and autonomy. Full decriminalisation recognises sex workers as independent business owners within a legitimate profession. That sex work does entail special, restrictive, regulations beyond health

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<sup>26</sup> Maya Lau, "Sex Tourism In Senegal," HuffPost, September 8, 2011, [https://www.huffpost.com/entry/senegalese-sex-tourism\\_b\\_952640](https://www.huffpost.com/entry/senegalese-sex-tourism_b_952640).

<sup>27</sup> "Sex Work Decriminalisation."

and safety standards publicly affirms that the practice is not immoral or in some other way degrading. Sex workers are empowered as equal citizens to access healthcare resources, seek protection from law enforcement officials as innocents in need of help, and pursue compensation for injuries through the courts without fear of self-incrimination.

## **The Capabilities Approach: A Normative Framework for Evaluating the Law**

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Inherent within each regulatory model for the commercial sex industry is a consequentialist calculus deriving from a set of normative assumptions about legitimate labour, personal dignity, and individual autonomy under risky or restrictive circumstances. Common to criminalisation, partial decriminalisation, and full decriminalisation – the primary subjects of this project – is the assumed worth of sex workers as ends within themselves, as equal citizens deserving of respect and protection. This base premise underwrites this paper’s focus on the opinions and lived experiences of sex workers in evaluating the consequences of regulatory policy. Where criminal and abusive conditions do exist, the law should be used to enhance sex workers’ dignity. In “Women and equality: The Capabilities Approach”, Martha Nussbaum develops a “capabilities approach” to assessing life quality and determining public policy aims, with a particular focus on addressing gendered inequalities. The following section outlines Nussbaum’s capabilities framework and explicates the normative justifications for her methodology. The arguments this paper considers for both partial and full decriminalization are compatible with Nussbaum’s respect for sex workers’ personhood. This paper, ultimately, applies the capabilities approach to my study’s empirical survey results and interview data to assess whether full or partial decriminalisation will more effectively enhance the capability of South African sex workers to lead lives of dignity and human flourishing.

Nussbaum’s capabilities approach, drawing from Kant and Marx, takes as a foundational premise that human beings have inherent dignity and are deserving of respect from legal and social institutions. To respect the dignity and equal worth of persons is to promote their pluralistic pursuits of the good. However, human dignity is often violated and degraded on the basis of sex. Traditional economic approaches to measuring life quality are unable to quantify and capture the

overlapping socio-political factors that shape poor women's lived realities. Carefully calibrated indices of basic goods overlook contextual dynamics – such as cultural prejudices against educating young girls – that impose additional costs on women and result in disparate abilities to convert these resources into functions. The protection of pluralistic autonomy requires more than a formal defense of basic liberties or a guarantee of the same basic economic threshold. Nussbaum's cross-cultural normative standard situates the liberties of choice within material pre-conditions. Liberty is not just a matter of legal rights on paper but the positive capability to exercise these rights within one's social and material environments. States which effectively guarantee basic liberties therefore adopt redistributive policies to meet material pre-conditions.

Nussbaum describes the primary question underwriting her capabilities approach as “what is she able to do and be?” From this starting point, she develops a working list of the functions central to human life. The importance of specific functions derives from two intuitive sources. First, there are those base functions that are physically necessary to human survival and without which life would cease. Secondly – as Marx found in Aristotle – there is something important about performing these functions in a truly human way. Many people, confronted with extreme poverty or political repression, lead lives which do not rise to the level of dignity owed to a human being. They go on living at a base level, unable to develop or exercise their higher human powers. For Marx, a starving person doesn't consume food in a fully human way – infused with practical reason and sociability – but, instead, realises only the animal function of its physical sustenance. Similarly, the human senses can operate at an animal level if they are not cultivated by education, valuable associations with others, expressive and associational liberty, and leisure for play and self-expression. For Nussbaum human abilities thus exert a moral claim that they ought to be developed. When a person is deprived of the necessary educational, social, and material support

to transform their basic, lower-level, capabilities into higher-order ones, it is a tragic waste of potential and a violation of their inherent, human dignity.

The capabilities approach makes each person a bearer of value and – in line with Marx as well as Carole Pateman and Elizabeth Anderson whose arguments for partial decriminalisation will be considered later in this project – maintains that it is profoundly wrong to subordinate the ends of some individuals to those of others. Nussbaum distinguishes between three types of capabilities: basic capabilities are the foundational capacities necessary for developing higher-order, human capabilities; internal capabilities are described as the mental and emotional states of the person herself which enable her to exercise the requisite functions; combined capabilities, as the term suggests, incorporate both of these concepts and can be defined as internal capabilities in conjunction with suitable external conditions. To realise combined capabilities entails both promoting the development of one's internal powers as well as preparing the choice environment so that one is able to exercise practical reason and the other major functions. Capability is, therefore, a demanding standard that is attentive to material conditions but does prescribe functioning.

Nussbaum constructs a list of ten central combined capabilities as the crux of her approach. This project briefly explicates several of those most pertinent to the discussion of regulating sex work. The Practical Reason capability comprises the human ability to form a conception of the good and engage in critical reflection about the planning of one's life. The Affiliation capability requires maintaining the “social bases of self-respect and non-humiliation; being able to be treated as a dignified being whose worth is equal to that of others.” Promoting this capability entails public provisions of non-discrimination on the grounds sex, race, class, nationality and religion. Control over one's (material) Environment is enhanced by the positive right to seek employment on an

equal basis with others, earn a living wage, and the guarantee of freedom from unwarranted search and seizure. The combined capabilities of Life, Bodily Health, and Bodily Integrity encompass a person's physical health and bodily autonomy.

Capabilities protect and do not close off spheres of human freedom. Provided a person is capable of consuming food there is no mandate that she must perform this function which would conflict with her decision to fast. This respect for individual autonomy and pluralistic conceptions of the good is indicative of the heightened importance Nussbaum gives to the capability of Practical Reason. Alongside Affiliation these two capabilities organise and suffuse all the others making their pursuit truly human. The capabilities approach is intended to serve as an evaluative tool for the life quality of women confronted with intersecting social and economic inequalities in both developed and developing nations. Its responsiveness to context and its foundational respect for human dignity render this approach compatible with Pateman and Anderson's arguments and positions this framework as an effective mechanism through which to assess the impact of regulative policies on sex workers.

## **The Sex Worker Education and Action Taskforce (SWEAT) and the South African Context**

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Founded by Shan Petzer, a male sex worker, and Ilse Pauw, a Clinical Psychologist, in the early 1990s the Sex Worker Education and Action Taskforce has become one of South Africa's leading advocates for the total decriminalisation of sex work.<sup>28</sup> SWEAT makes deliberate use of the term 'sex worker' as a part of this advocacy campaign. Working alongside the Women's Legal Centre SWEAT offers pro-bono legal advice to sex workers while pursuing the case for decriminalisation in the nation's courts. By 2003, SWEAT initiated a research program aimed at gathering credible information on the commercial sex industry and documenting the experiences of sex workers to further legitimise the decriminalisation movement. SWEAT's legislative stance maintains that the criminalisation of the commercial sex industry is the primary cause of many of the problems sex workers in South Africa are currently faced with. By labelling sex workers as criminals, the state indirectly endorses a harmful stigma and sees them denied equal treatment by healthcare workers, routinely abused and harassed by police, and ostracised by society at large. This project uses aspects of SWEAT's research and policy arguments, here, to contextualize the current state of the commercial sex industry in South Africa and offer a pre-liminary case for decriminalisation as the most effective legislative model for ensuring and enhancing sex workers' combined capabilities. This analysis will then be contrasted against the normative arguments of Carole Pateman and Elizabeth Anderson which favour the partial decriminalisation model espoused by Embrace Dignity, SWEAT's main ideological opposition.

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<sup>28</sup> "Sex Work Decriminalisation."

The South African commercial sex industry comprises an estimated 130,000 to 180,000 sex workers, 90% of which are female and the remaining 10% male or transgender.<sup>29</sup> Poverty in South Africa is highly feminised with women shouldering the responsibility for the vast majority of unpaid domestic work. 27.1% of women compared to 15.6% of men occupy the poorest fifth of households in the country.<sup>30</sup> The limited number of employment opportunities for low-income women has seen sex work emerge as a valuable source of income for poor, female-headed, households. A 2010 study of sex workers on Cape Town's streets found that participants earned between 1.5 and 5.4 times more than they had in previous employment depending on their education levels.<sup>31</sup> Although most female sex workers in South Africa have not completed high school the same study found that they earned on average more than double the mean income of employed South Africans and 76% of participants in the study reported that their primary reasons for selling were financial.<sup>32</sup> Sex work allows women with familial or other dependents to set their own working hours and effectively meet domestic obligations through earning a more lucrative hourly income.<sup>33</sup>

That many South African women are driven by economic necessity to perform domestic labour, sex work, or one of many other unpleasant forms of bodily work does not undermine the legitimacy of their decisions (a point that Nussbaum reiterates). All but the extremely, independently wealthy are forced to labour for a living under capitalism. Given this reality, rather

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<sup>29</sup> "Sex-Workers-Size-Estimation-Study-2013.Pdf," accessed April 30, 2020, <http://www.sweat.org.za/wp-content/uploads/2019/09/Sex-Workers-Size-Estimation-Study-2013.pdf>.

<sup>30</sup> "Sex Work and Feminism."

<sup>31</sup> "Sex Work and Feminism."

<sup>32</sup> Ibid

<sup>33</sup> Ibid



than limit impoverished women's freedoms further, the law should work to protect their autonomy and persons. Decriminalised sex work would expand the choice set of poor women and facilitate their use of practical reason in deciding how to earn a living. In doing so the law recognises sex workers as fully autonomous, equal citizens and enhances their control over their material environments. The increased earning potential of sex work results in subsidiary bodily health benefits for both sex workers and their dependents. Criminalisation fixates on the specious immorality of transactional sexual exchanges. By identifying sex workers as offenders criminalisation fails to mitigate coercive influences or provide poor women with economic alternatives.

In addition to limiting the autonomy of low-income women, for SWEAT, sex workers' criminal status provides the framework through which the associated societal ills of the industry are proliferated. The current illegality of the sex work in South Africa drives sex workers underground – away from social services – and fosters animosity between sex workers and law enforcement. Police abuse, harassment, and rape of sex workers is widely documented in South Africa.<sup>34</sup> A report published by SWEAT and Sonke Gender Justice in 2017 found that of the sex workers surveyed 74% answered yes to the question 'Is local policing behaviour a problem and do you avoid police?'<sup>35</sup> This distrust manifests in the majority of sex workers being reluctant or unwilling to report crimes to the police and one participant was quoted as saying, "I am very scared of the police. I am scared the police might shoot me again. I am worried that if I follow up my complaint this Metro Police Officer might himself, or send another person, to arrest me or hurt me

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<sup>34</sup> Ibid

<sup>35</sup> Ibid

again.”<sup>36</sup> Nussbaum’s Control over one’s material environment capability explicitly identifies freedom from unwarranted search and seizure as necessary to itself realisation. Furthermore, the continued abuse of sex workers by police isolates these vulnerable women from protections against coercion by third parties and violence at the hands of their clients. This antagonistic relationship, and cycle of exploitation, can only be broken by the effective and mutual alliance of sex workers and law enforcement. Partial decriminalisation positions sex workers as leads for police to follow to their clients. It does not – in the same way that full decriminalisation does – mandate that law enforcement officers protect and serve women participating in a legally recognized profession.

According to SWEAT this aspect of full decriminalisation – the unqualified avowal of sex workers as equal citizens engaging in a legitimate form of work – indispensably serves to mitigate the harmful stigma currently associated with the practice and perpetuated by criminalisation. Nussbaum too, as this paper will describe in later sections, identifies the stigmatisation of sex work as intimately linked to the law and responsible for inflicting considerable suffering upon vulnerable women. The societal reproach of sex workers undermines their Affiliation capability – one of Nussbaum’s two essential capabilities for human functioning – by degrading sex workers’ social basis of self-respect. The promotion of this capability requires that the law make public provisions for non-discrimination akin to full decriminalisation’s definitive recognition of sex workers as autonomous, law-abiding people worthy of our respect.

Toward illustrating the manifestations of stigma arising from sex workers’ criminal status, SWEAT cites obstacles sex workers encounter in accessing reproductive healthcare, including

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<sup>36</sup>Ibid

condoms and HIV treatments.<sup>37</sup> Sex workers are hesitant to go to reproductive health clinics for fear of being insulted and ostracised by nurses and doctors who perceive them as criminals who ought to suffer the consequences of their lifestyle choices. That sex workers are commonly denied treatment at clinics endangers their physical health as well as that of their clients and further undermines their equal standing in society. Criminalisation means that sex workers who wish to report incidents of treatment being withheld or abuse risk being arrested themselves. This fear of self-incrimination is perhaps the clearest illustration of the role the current illegality of sex work in South Africa plays in perpetuating stigma and discrimination against sex workers who are then unable to access – on equal terms – health, labour, and safety laws afforded to all South African citizens.<sup>38</sup> In *Kylie versus CCMA 2010*, the Labour Appeals Court ruled that sex workers are protected by South African labour law despite the present illegality of their work.<sup>39</sup> However, owing to the stigma associated with sex work it is unlikely that any real benefits will flow from this ruling. Sex workers are technically entitled to equal protection under South African law yet substantially unable to exercise this right.<sup>40</sup> Even those combined capabilities which the law does not explicitly deny them are thus, too often, unrealised in reality.

SWEAT's case for the full decriminalisation of sex work in South Africa can be stated succinctly as follows: The dangers faced by sex workers and the associated societal ills of the commercial sex industry are predominantly a product of the risky and abusive environment created

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<sup>37</sup> "Sex Work and Feminism."

<sup>38</sup> Ibid

<sup>39</sup> "Decriminalisation of Adult Sex Work; SALRC Project 107."

<sup>40</sup> Ibid.

by criminalisation.<sup>41</sup> Decriminalisation entails the removal of all laws which outlaw sex work its incorporation into the formal economy.<sup>42</sup> The commercial sex industry would fall under the jurisdiction of labour laws and extend occupational protections, such as health and safety regulations, to sex workers. Sex workers are able to work as contractors and unionise, enhancing the control they have over their work and creating more space for the exercise of practical reason.<sup>43</sup> Decriminalising sex work does not necessitate an endorsement thereof.<sup>44</sup> Rather it recognises the ineffective and dangerous consequences of criminalisation and serves as a public acknowledgement of the equal humanity of sex workers.<sup>45</sup> Rather than attempting to remove sex work as an option decriminalisation enshrines and reinforces the sexual and reproductive health rights of sex workers.<sup>46</sup> It is not the prerogative of the government to dictate under what circumstances consenting adults engage in sexual activities especially when attempting to do so perpetuates the very harms such laws are meant to guard against.<sup>47</sup>

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<sup>41</sup> “Sex Work Decriminalisation.”

<sup>42</sup> “Sex Work and Feminism.”

<sup>43</sup> Ibid

<sup>44</sup> Ibid

<sup>45</sup> Ibid

<sup>46</sup> “Decriminalisation of Adult Sex Work; SALRC Project 107.”

<sup>47</sup> Ibid

## **The Normative Case Against Decriminalisation**

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SWEAT's arguments for full decriminalisation assume that sex work is a legitimate form of labour which poor women ought to be able to pursue. That South Africa's sex workers currently suffer violent abuse at the hands of their clients and law enforcement officers, face obstacles to obtaining basic reproductive health resources, and are subjected to dehumanising stigma, are indeed a tragedies that we should care deeply about and use the law to amend. However, the failings of the criminalised status quo alone do not establish full decriminalisation as the best or, morally justified, legislative alternative. This project takes the counter arguments made by proponents of partial decriminalisation seriously. The following sections present Carole Pateman and Elizabeth Anderson's normative arguments against the decriminalisation of sex work. Sex work entails the alienation and commodification of women's sexuality through market transactions. These exchanges acknowledge men's rightful ownership, not just of the services of sex worker's bodies, but of important constituent elements of their identities. Sex work thus facilitates the unjust subordination of women, as sexual objects, to the ends of men. This normative characterisation of sex work as inherently exploitative and unjust supports Embrace Dignity's arguments in favour of the partial decriminalisation of sex work.

### Carole Pateman: Contracting and Sex Work

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In *The Sexual Contract* Carole Pateman develops a gendered framework that lays bare the subversive and deliberately unstated dynamics between men and women inherent in the contractarian tradition. Pateman argues that – rather than serving as a mechanism for guaranteeing the cooperation of equally situated parties – contracting creates a pernicious illusion of mutual consent, justifying and perpetuating men’s access to women’s bodies.<sup>48</sup> This law of male sex-right is manifested in both the public and private spheres and substantively shapes the social construction of masculine and feminine identities. Ultimately, and pertinently to the discussion of sex work, Pateman echoes Mill and Marx in maintaining that contracting gives rise to the political fiction of property in the person. This facilitates the alienation of vital, and substantial, parts of one’s identity within relationships of subordination.<sup>49</sup> Pateman draws these concepts together in “What’s Wrong with Prostitution?” to argue that decriminalised sex work represents the public affirmation, by government, of the law of male sex right and the ratification of the implicit contractual premise: that women’s bodies are the property of men.

For Pateman, modern contract theorists misguidedly subsume sexual difference within the universal, gender-neutral, concept of the individual.<sup>50</sup> This abstraction works to disguise, but not fundamentally amend, the paradoxical reality of women as both parties to, and the subjects of, the original contracts as imagined by Kant, Hobbes, and Rousseau.<sup>51</sup> For contractarians, if the individual owns his mental and bodily capacities then he stands in the same external relation to

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<sup>48</sup> Pateman, C., *The Sexual Contract*, (Stanford University Press, 1989).

<sup>49</sup> Pateman, C., 211.

<sup>50</sup> Pateman, C., 51.

<sup>51</sup> Pateman, C., 72.

these intimate functions as he does to any other form of property.<sup>52</sup> To assert his will over these functions and render his person truly ‘his’ he must establish a relation between himself and this innate, bodily property. The social contract thus emerges as a consequence of the mutual recognition of oneself and other persons as property owners.<sup>53</sup> Parties to the original contract bargain in good faith and recognise that contracts must be kept in order to safeguard their own property in their person and maximise individual freedom. While Kant’s hypothetical original contract and Rawls’ abstract original position speciously elicit the consent of equally situated parties, Pateman argues that this is illusory. Contracting entails the creation of a transactional relationship and does not guarantee that this exchange is equal or that it occurs between equally situated contractors. These inequalities facilitate the coerced ‘consent’ of weaker parties and, even in cases where overt coercion is absent, permit people to enter into relationships of subordination.<sup>54</sup>

Pateman takes particular issue with theorists’ disregard for the consent of women in contracting. In her critique of Kant’s marriage contract, Pateman illustrates the deep hypocrisies embedded in this approach:

Women exemplify the individuals who consent theorists have declared to be incapable of consenting. Yet, simultaneously, women have been presented as always consenting, and their explicit non-consent has been treated as irrelevant or has been reinterpreted as consent.<sup>55</sup>

Indeed, Kant, to varying degrees across his writings, excludes women from full moral agency.<sup>56</sup> This proscription has been interpreted as stemming both from women’s natural inability to develop

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<sup>52</sup> Pateman, C.,65.

<sup>53</sup> Pateman, C.,65.

<sup>54</sup> Pateman, C.,50.

<sup>55</sup> Pateman, C.,72.

<sup>56</sup> Hirschmann, N.J., *Gender Class, & Freedom In Modern Political Theory*, (Princeton University Press, 2008), 195.

the higher power of reason or, as Hirschmann describes, as a deliberate prescription to curtail women's reasoning capacities.<sup>57</sup> On both readings Kant's social contract is explicitly gendered and positions women as not in full possession of their persons. For Kant, sex embodies the worst of the phenomenal realm -- an act in which one is driven by animal desire to treat another as a means to an end.<sup>58</sup> The Kantian marriage contract works to contain and order this base desire to conform with categorical morality. Within the matrimonial contract equal rights are accorded to husband and wife and both agree to transfer the entirety of their respective persons to the other.<sup>59</sup> This reciprocal exchange is not, however, grounded in substantive equality. Rather, it is a mechanism for negating the natural, and disparate, powers men and women have over one another. This creates a scenario of "mutual domination," or complementary superiority, wherein woman's "natural talent for mastering man's desire for her" and man's "physical power and strength" are held in reflexive equilibrium.<sup>60</sup> Kant establishes this balance of dominions in favour of men, stating that "there certainly can be only one who coordinates all transactions in accordance with one end, which is his."<sup>61</sup> Laws that privilege the rights of husbands over those of their wives are thus consistent with man's natural capacity to promote the shared interests of 'his' household.<sup>62</sup> Within the Kantian marriage contract the equal status of women is wholly dependent on man's ability to discern the categorical imperative and maintain a state of mutual domination.

Pateman describes the illusory consent generated by the original contract in similar terms.

Women who are not recognised as being in full possession of their persons independently of men,

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<sup>57</sup> Hirschmann, N.J., 2008, 196.

<sup>58</sup> Hirschmann, N.J., 2008, 197.

<sup>59</sup> Hirschmann, N.J., 2008, 198.

<sup>60</sup> Ibid.

<sup>61</sup> Hirschmann, N.J., 2008, 199.

<sup>62</sup> Ibid.



and thereby lack the capacities necessary to make contracts, are supposed to agree voluntarily to the social compact.<sup>63</sup> The supposedly voluntary nature of contractual relationships masks their instrumental role in establishing and maintaining gendered inequalities. For Pateman the original contract is a fraternal pact predicated on the exclusion of women. Beyond affirming men's status as a property owner -- and securing men's right of self-government -- this agreement ensures collective, patriarchal access to women's bodies.<sup>64</sup> In the emergent society, "civil individuals have a fraternal bond, as men, they share a common interest in upholding the contract which legitimises their masculine patriarchal right and allows them to gain material and psychological benefit from women's subjection."<sup>65</sup> The law of male sex right is reaffirmed by the legal, political, and familial systems that establish men's orderly access to women and deny women full possession of the property in their persons.

In the original agreement creation story of civil society, the private sphere is often treated by political theorists and activists as a necessary but distinct foundation of civil, public, life.<sup>66</sup> Women are brought into the new social order as partially autonomous actors within this private principality; a subset of civil society removed from the public world of contracts, rights, and citizenship.<sup>67</sup> Pateman argues that the theoretical divorce of the private and public worlds is misleading insofar as it suggests that the law of male sex right is confined to the private matters of family and marriage. Rather, she contends that civil society as a whole is patriarchal and that is the subjugation of women to men which binds these domains together into a social whole.<sup>68</sup> For

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<sup>63</sup> Pateman, C.,6.

<sup>64</sup> Pateman, C.,43.

<sup>65</sup> Ibid.

<sup>66</sup> Pateman, C.,11.

<sup>67</sup> Ibid.

<sup>68</sup> Pateman, C.,113.

women, the personal is political, as public factors structure individual circumstances.<sup>69</sup> Pateman cites laws about rape and abortion, the status of wives, policies on childcare and the allocation of welfare benefits, and, pertinently for this paper, the legal status of prostitution as examples of this reality. Women are thus confronted with the “Wollstonecraft Dilemma”: an inherent tension between the drive toward full and equal socio-political status (on par with that of men) and the need for differentiated citizenship owing to the unique capacities, talents, and biology of women.<sup>70</sup>

Applying this theoretical framework to the question of sex-work regulation, Pateman argues in “What’s Wrong with Prostitution”<sup>71</sup> that the commercial sex sector functions as a fundamental driver of the capitalist, patriarchal system. Through facilitating men’s access to women’s bodies in the market, “freedom of contract” comes to embody a patriarchal right and not a mere economic liberty.<sup>72</sup> Contemporary contractarian arguments in favour of decriminalised sex work are, thus, the primary points of contention for Pateman’s case. On the contractarian view, the sex work contract – when entered into by consenting adults – is an agreement exchanging a form of labour power for money and should not be treated as distinct from other contracts of employment.<sup>73</sup> The sex worker, like other individuals, stands in external relation to the property in her person. A sex worker thus does not sell herself, her body, or parts thereof, but temporarily contracts out the use of sexual services. Conceiving of the sex worker as a service-provider addresses the commonly levied accusation that sex work is degrading to the self.<sup>74</sup> Pateman characterises the rise to prominence of the contractarian argument as intimately linked to third-

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<sup>69</sup> Pateman, C.131.

<sup>70</sup> Ibid.

<sup>71</sup> Pateman, C., *What’s Wrong with Prostitution?*, (Women’s Studies Quarterly, 1999), 55.

<sup>72</sup> Pateman, C., (1999), 55.

<sup>73</sup> Pateman, C., (1999), 56.

<sup>74</sup> Ibid.

wave feminist ideals of sexual liberation.<sup>75</sup> Entwined with the contractarian case, third-wave thinkers describe concerns over degradation as reflecting archaic and restrictive attitudes toward women's sexual freedom fostered by male propaganda.<sup>76</sup> Proponents of the contractarian view have been influential in advocating for addressing the Wollstonecraft Dilemma through gender-neutral policies which guarantee women identical political and economic liberties as men. Thus, for contractarians, while certain reforms of the commercial sex industry to protect sex workers are necessary, a sound, non-gendered formulation of the sex market is both achievable and preferable to the criminalised alternative. Sex work would, then, come into its own as a form of therapy akin to other intimate services (such as care taking of the elderly).<sup>77</sup> Ultimately, the gendered contract between the buyers and sellers of sex would give way to neutral agreements between individuals.

For Pateman, that the universal, contractarian defence of sex work denies the significance of the gender imbalance between buyers and sellers reveals embedded problems in this approach. Feminist contractarian rhetoric works to obscure the illusory nature of sex workers' consent and distract from whose interests are served by the contracting mechanism. Criticising the commercial sex industry does not necessitate a criticism of sex workers themselves, nor does doing so vilify female sexuality. Rather, Pateman endeavours to draw a distinction between women themselves and the structural problem of sex work – a problem analogous to the Kantian marriage contract.<sup>78</sup> The consent of wives – given from a position of inherent dependence – to their husbands' subjugation does not legitimise the matrimonial covenant, and an objection to this institution does not represent a critique of women themselves. Instead, it perceives how the contracting process

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<sup>75</sup> Ibid.

<sup>76</sup> Pateman, C., (1999) 57.

<sup>77</sup> Ibid.

<sup>78</sup> Pateman, C., (1999) 60.

establishes and maintains husbands' access to, and control over, their wives. Similarly, Pateman's objection to the decriminalisation of sex work focuses on the question of why men demand that women's bodies are sold in the market. Here, Pateman describes sex work as an extension of the law of male sex right; it is merely another way in which men guarantee access to women's bodies. Unlike even the most casual social sexual encounter, sex work does not entail the mutual, pleasurable, exchange of the use of bodies but, rather, the unilateral control of a woman by a man in exchange for money.<sup>79</sup>

For Pateman, sex work represents a uniquely pernicious form of civil subordination. In responding to the contractarian case, she questions the legitimacy of any employment contract that alienates property in one's person to establish a relationship of servitude and, especially, sex work contracts that combine this exploitation with the perpetuation of the law of male sex right. The divorce of human beings from their bodies, labour power, services, and agency, alongside the assertion that persons need lay claim to themselves at all, represent political fictions generated by the contracting process.

People do not relate externally to the property in their persons. Rather, these capacities are inalienable facets of a person's identity.<sup>80</sup> The fiction of property in one's person existing independently of oneself renders these capacities alienable and subject to contractual agreements.<sup>81</sup> For Pateman, contracts involving property in the person – within the context of juridical and civil freedom – inherently create relationships of civil subordination (such as between a husband and wife or worker and employer).<sup>82</sup> Contracts of this kind undermine the freedom and basic equality

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<sup>79</sup> Ibid.

<sup>80</sup> Pateman, C., (1988), 150.

<sup>81</sup> Ibid.

<sup>82</sup> Ibid.

of those who submit to them. Civil subordination thus “depends upon the capacity of human beings to act as if they could contract out labour power or services rather than, as they must, contract out themselves and their labour to be used by another.”<sup>83</sup>

Inherent within the political system established by the original contract is the denial that a woman owns the same property in her person as a man.<sup>84</sup> Contract theory maintains that women, “both possess and lack the capacities required to contract – and contract demands their womanhood be both denied and affirmed.”<sup>85</sup> While Pateman objects to all exploitative employment contracts – on the grounds that a worker’s capacities form an integral part of his self-identity – she views the case of sex work to be singularly destructive. Masculinity and femininity are sexual identities and, while they do not constitute the self in its entirety, they are inseparable from its construction.<sup>86</sup> Through attaining sexual access to women’s bodies, men affirm their manhood. Womanhood, too, is substantiated through sexual activity.<sup>87</sup> While no form of labour power can be separated from the body, only the prostitution contract gives the employer unilateral right to the direct sexual use of a woman’s body.<sup>88</sup>

A woman entering the prostitution contract, therefore, does sell herself – or at least a fundamental part of herself – in a way that other female labourers do not.<sup>89</sup> Beyond the alienation of one’s labour power within the employment contract the commercial sexual contract appropriates a fundamental part of the female identity. For self-protection she must seek to distance herself from her sexual use. Thus, the construction of prostitution as an economic contract entails the

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<sup>83</sup> Pateman, C., (1988), 231.

<sup>84</sup> Pateman, C., (1988), 224.

<sup>85</sup> Pateman, C., (1988), 60.

<sup>86</sup> Ibid.

<sup>87</sup> Ibid.

<sup>88</sup> Ibid.

<sup>89</sup> Pateman, C., (1988), 63.

divorce of sex, body, and self, and sex workers come to perceive a fundamental human experience and expression of their identity as a labourious, dispassionate source of income. This creates a conflict for the clients of sex workers who, as researchers have documented, complain about the emotional “coldness” of the women they solicit. Herein lies the crux of Pateman’s argument; while manufactured plastic substitutes and unenthusiastic sex workers fulfil the purely functional end of the prostitution contract, they do not provide the buyer with the kind of dominance over a woman necessary to affirm his male identity -- i.e. Kantian control over her whole self.<sup>90</sup> The deleterious, individual effects of the prostitution contract can be extended to our analysis of women within society as a whole. For Pateman, by decriminalising sex work, the state acknowledges the law of male sex right explicitly and in the public domain. The implicit contractual premise – that women do not own their bodies in the same manner as men – is legitimised, in both the market and private spheres, by the laws and emergent social norms of societies where sex work is permitted freely. Thus, Pateman concludes, in the context of sex work:

The sex act itself provides acknowledgment of patriarchal right. When women's bodies are on sale as commodities in the capitalist market, the terms of the original contract cannot be forgotten; the law of male sex right is publicly affirmed, and men gain public acknowledgment as women's sexual masters - that is what is wrong.<sup>91</sup>

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<sup>90</sup> Ibid.

<sup>91</sup> Pateman, C., (1988), 64.

### Elizabeth Anderson: Commodifying One's Sexual Identity

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In *Value in Ethics and Economics* Elizabeth Anderson develops a pluralistic, prosocial theory of value.<sup>92</sup> Her aim is to “explain and vindicate [the] pluralism of ordinary evaluative thought and to develop some of its practical and theoretical implications.”<sup>93</sup> Anderson argues that, in quotidian affairs, we value things and people in different ways. Some things are valuable for their uses, others draw value from emotive, socially constructed foundations such as honour or duty, while personal relationships are forged and sustained through the giving of gifts which are appreciated within the context of the relationship. Anderson contends that people act rationally when they adequately express their own rational valuations; that is, when a person acts in accordance with the objectively valid, expressive norms connected to a particular sort of socially constructed valuation in the relevant case.<sup>94</sup> Norms, for Anderson, are objectively valid when they are reflectively endorsed through an open social dialogue between equally situated actors.<sup>95</sup> In responding to critiques of ethical relativism she develops a standard of authenticity in which a valuation is authentic if a rational actor acknowledges that it makes sense to guide their actions by it, and if said valuation's claim to authority is not rooted in delusion, error, or other cognitive defect.<sup>96</sup> A person maintains an authentic valuation “when it seems to make sense to her and when it survives the gamut of critical strategies that can be launched against it in discussions governed by the norms of objectivity.”<sup>97</sup>

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<sup>92</sup> Maybee, J.E., *Book Review: Value in Ethics and Economics*, (Hypatia 10, no. 3, 1995), 175.

<sup>93</sup> Maybee, J.E., 175.

<sup>94</sup> Maybee, J.E., 177.

<sup>95</sup> Maybee, J.E., 178.

<sup>96</sup> Ibid.

<sup>97</sup> Maybee, J.E., 180.

Anderson distinguishes between personal and market relations. In doing so, she does not definitively separate the private and public spheres. Instead, Anderson applies her pluralistic theory of value to illustrate how norms governing personal and market relations differ, and how these disparate modes of valuation are derived. For Anderson, personal relationships are founded on the ideals of intimacy and commitment.<sup>98</sup> Living on intimate terms with another person should involve sharing one's cherished emotions and personal concerns, while being attuned to the other's personal characteristics.<sup>99</sup> Intimacy embodies passion, affection, and trust – but not necessarily devotion, as these sentiments may be fleeting. Commitment truly realised, however, involves dedicating oneself permanently to living a shared life with another.<sup>100</sup> The goodness of such a life is shared by each partner and cannot be realised by either as an individual. A person's committed interests are thus defined and satisfied in communal terms; sharing in one another's happiness or lack thereof.<sup>101</sup> Anderson maintains that these ideals inform people's valuations of those with whom they have personal relationships and, thus, determine the nature of goods exchanged in this context.

The goods of the personal sphere can only be realised fully through what Anderson describes as “gift exchange;” they cannot be bought or annexed, rather, the worth of these goods depends upon the motives of the people providing them.<sup>102</sup> The gift exchange of trust, loyalty, affection, and companionship affirms the bond between the giver and receiver while maintaining little intrinsic value outside of this relational context. The norms of gift exchange thus differ markedly from market transactions. While gift-giving acknowledges and strengthens the shared

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<sup>98</sup> Anderson, E., *Value in Ethics and Economics*, (Harvard University Press, 1995), 150.

<sup>99</sup> Anderson, E., 150.

<sup>100</sup> Ibid.

<sup>101</sup> Ibid.

<sup>102</sup> Anderson, E., 151.



goods of a relationship, market exchanges aim to realise distinct goods for each party.<sup>103</sup> In the market an uncontracted deviation from the stipulated terms of reciprocation is cause for formal legal action. Conversely, gift exchange incorporates an informal, personalised understanding of reciprocity over the long term. A gift freely given expresses an intrinsic valuation of the recipient, and gifts are tailored to the particular qualities of the friendship.<sup>104</sup> The isolated individualism and inherent wariness of others that underwrite the accounting mentality of the market are, thus, greatly removed from Anderson's pro-social conception of personal relationships. For Anderson, therefore, these differences illustrate how personal goods are undermined when market norms govern their circulation.<sup>105</sup>

Anderson's characterisation of personal relations and gift exchange has been criticised by feminist theorists for masking the sources of women's oppression in the personal sphere. The social norms of intimacy and commitment are, themselves, informed by gendered power relations and have historically served to subordinate wives to their husbands. In this asymmetric context, intimacy thus guarantees a husband's access to his wife's body and commitment is a manifestation of economic dependence which limits a woman's capacity to freely exit the relationship.<sup>106</sup> Rather than expressing her own valuation of a personal relationship, a woman's gifts to her male partner embody his determination of her worth and reinforce the domineering dynamic between them.<sup>107</sup> When the basis for gift exchange embodies the very disparities it is supposed to remedy, women

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<sup>103</sup> Ibid.

<sup>104</sup> Anderson, E., 152.

<sup>105</sup> Ibid.

<sup>106</sup> Ibid.

<sup>107</sup> Ibid.

can only achieve equality if they acquire full property in their persons, and the freedom to remake the marriage contract as active participants.

Anderson's standard of authentic valuations and reflexive endorsement within norms of objectivity allows her to respond to critiques of this kind which characterise intimacy and commitment as entirely socially constructed. Rather, Anderson proposes that the objective ideals of intimacy and commitment provide a means of criticising contemporary personal life, and are not themselves products of the personal sphere.<sup>108</sup> Intimacy requires honesty and sensitivity to each other's needs – ends that are undermined by oppressive, gendered dynamics within relationships. Commitment to a shared life entails mutual respect and the reconfiguration of individual desires as subsets of shared aims. A masculine identity that is threatened by the equality of its feminine counterpart is incompatible with true commitment. The concepts of intimacy and commitment, governed by the norms of objectivity, work to forge relationships of mutual respect between partners related as equals. This framework, Anderson argues, provides grounds to question whether women can be freed from relationships of subordination by proposals making use of impersonal, transactional, market norms to regulate women's sexual and reproductive powers.<sup>109</sup> Here, Anderson echoes Pateman's criticism of the contracting process; rather than maximising freedom and equality, contractual agreements use the language of consent to obscure inequalities between actors and the fiction of property in the person to justify relationships of subordination.

Anderson takes legalising sex work to be a definitive example of how commodification – and, with it, contractual norms – debases both the value of a gift and its giver. Proponents of legalised sex work argue that through according women property rights in their bodies which they

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<sup>108</sup> Anderson, E., 153.

<sup>109</sup> Ibid.

currently lack, women are empowered to use their sexuality for economic gains independently of any one man.<sup>110</sup> Women's economic freedoms are thus advanced, while in the private sphere they are acknowledged as having full property in their persons. For Anderson the commodification of sexual services destroys the kind of reciprocity required to realise the true value of sexuality as a shared good.<sup>111</sup> The good of human sexual acts exchanged as gifts is rooted in the mutual affirmation of an intimate relationship through the sincere offering of each partner's self to the other.<sup>112</sup> The value of this shared good can only be realised when each partner reciprocates the other's gift in kind; offering her own sexuality in the same spirit which she received the other's.<sup>113</sup> The commodification of sexuality creates distinct individual goods for the parties and results in each partner valuing the other only instrumentally.<sup>114</sup>

Yet, the nature of contractual sexual exchange does not degrade human sexuality independently of the contractors, or even debase both actors equally. The buyer of sexual services offers only an impersonal, fully alienable, payment to the sex worker. He thus yields no power over his own person to her.<sup>115</sup> Conversely the sex worker sells her sexuality (which is, necessarily, embodied in her person.) Aligning with Pateman's arguments, Anderson maintains that mental and bodily capacities are not discrete from, or in external relation to, the self but are, instead, its constituent parts. Therefore, in appropriating a sex worker's sexuality – an intrinsic aspect of her identity and humanity – a customer expresses a valuation of her as rightful male property.<sup>116</sup> She is an object to be owned and used for men's sexual purposes, which need not respond to her own

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<sup>110</sup> Anderson, E., 154.

<sup>111</sup> Ibid.

<sup>112</sup> Ibid.

<sup>113</sup> Ibid.

<sup>114</sup> Ibid.

<sup>115</sup> Anderson, E., 155.

<sup>116</sup> Ibid.

needs. This one-sided appropriation of another person embodies Pateman's characterisation of an unjust relationship of subordination. This legitimised, explicitly gendered ownership of women's sexuality by men further instantiates the law of male sex right within the market domain.

However, Anderson does not take the debasing of human sexuality, or even the degradation of sex workers, to be sufficient grounds for the formal prohibition of sex work. For Anderson, it is possible to argue that the limited commodification of sexual exchanges increases pluralistic freedom.<sup>117</sup> The liberal commitment to safeguarding pluralistic conceptions of the good permits those with conflicting ideals to pursue them in private spaces, protected from state-sponsored interference by adherents of rival ideals (provided that doing so does not diminish the freedom or autonomy of those involved.)<sup>118</sup> Why not let those who value non-commodified sex enjoy it as a higher good, and those who value it as a commodity exchange it in the market? Anderson argues that the state can legitimately restrict the commodification of a good if doing so increases freedom – by creating significant opportunities for people to value different kinds of good in different ways – and if it increases autonomy (defined as the power of people to value goods in ways they reflexively endorse.)<sup>119</sup>

While Anderson's formulation of the differential norms of personal and market relations may suggest a *prima facie* separation of the public and private spheres, she maintains that there are deep connections between the ways women's sexuality is valued by men in both estates. Analogising with Pateman's law of male sex right, Anderson describes the heterosexual masculine identity as partly defined by possessing the power and capacity to have sex with women.<sup>120</sup> Sex

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<sup>117</sup> Ibid.

<sup>118</sup> Ibid.

<sup>119</sup> Ibid.

<sup>120</sup> Anderson, E., 155.

work and pornography provide avenues through which the unmet demand for sex, generated in the personal sphere, can be satisfied by the market. The contractual terms which govern these market transactions provide models of sexual gratification which men then import back into the sphere of personal relations.<sup>121</sup> This is not to claim that legalised sex work results in women being treated solely as sexual property within personal relations; rather, Anderson proposes that within heterosexual personal relations an element of the masculine identity imposes an appropriative and unshared dimension on sexual exchanges that contradicts the personal valuation ideals of intimacy and commitment.<sup>122</sup> Decriminalised sex work enables this annexationist aspect of masculinity to be gratified through both personal and commodified sexual relations.<sup>123</sup> These domineering, appropriative, dynamics that emerge in the private sphere are the only elements of masculinity to be satiated in the economic realm. This aspect of male sexuality, for Anderson, becomes increasingly prevalent within personal relationships, diminishing the capacity of men and women to realise human sexuality as a shared good defined by the ideals of intimacy and commitment.<sup>124</sup> Pluralistic freedom and the dignity of women may therefore be enhanced by prohibiting the commodification of sexual exchanges.

Anderson's argument on autonomy grounds is a restatement of her prior analysis that property in the person is inalienable. In selling her sexuality, a sex worker alienates a good embodied in her person and subjects herself to the demands of the buyer.<sup>125</sup> Her actions under contract therefore do not express her own ends or valuations but, instead, those of her customer. Similarly, her decisions related to whom she serves and how she operates do not express her own

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<sup>121</sup> Ibid.

<sup>122</sup> Anderson, E., 155.

<sup>123</sup> Ibid.

<sup>124</sup> Anderson, E., 156.

<sup>125</sup> Ibid.

valuations but, instead, those of her pimp or other controlling, third-party actors. Despite the claims of contractualists, sex work does not enhance women's autonomy over their sexuality; instead, it constitutes another mode by which men can appropriate it for their own uses in an extension of the law of male sex right.<sup>126</sup> The power of women to value their sexuality in a manner that they reflexively endorse is thus enhanced by laws that ensure that their sexuality – a good embodied in their person – remains inalienable.

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<sup>126</sup> Ibid.

## Embrace Dignity and the Fight for Partial Decriminalisation

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Taken together Pateman and Anderson's theories construct a compelling normative case for the abolishment of sex work as an inherently immoral and damaging practice. However, as SWEAT's research suggests, a policy of criminalisation may not best achieve this end. Pateman and Anderson describe sex workers as victims of predatory gendered power structures in need of our sympathy and protection, not criminal prosecution. The dual mandates to protect the vulnerable women exploited and degraded by those who demand that their bodies are sold in the market, while simultaneously striving to eradicate the commercial sale of sex in all its forms, are embodied in Embrace Dignity's campaign for the partial decriminalisation of sex work in South Africa.

Embrace Dignity is a South African feminist and abolitionist human rights advocacy NGO established in 2010.<sup>127</sup> Embrace Dignity characterises sex work as an inherently exploitative form of gender-based violence and works to provide support for women attempting to exit the commercial sex industry, examine men's demand for commercial sex, and advocate for legal reform.<sup>128</sup> On their view, sex workers are referred to as prostituted peoples to emphasise the existence of male oppression and differentiate commercial sex from other economic transactions.<sup>129</sup> Sex work is degrading not only for sex workers but for women in general as the practice thereof submits to the will of men who would seek to own women's bodies.<sup>130</sup> Mickey Meji, the advocacy manager at Embrace Dignity, said at a 2019 conference in Germany,

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<sup>127</sup> "Embrace Dignity - Join Us in the Fight against Sexual Exploitation in SA," accessed April 30, 2020, <http://embracedignity.org.za/>.

<sup>128</sup> Ibid

<sup>129</sup> "Sex Work Decriminalisation."

<sup>130</sup> Ibid

“prostitution is neither sex nor work, nor is it a free choice.”<sup>131</sup> She is a vocal critic of decriminalisation and argues that in order for the law to respect the dignity and equal value of women in society it should seek to abolish sex work, not condone it.<sup>132</sup> Embrace Dignity acknowledges the deeply harmful effects of the criminalised commercial sex industry on sex workers but maintains that decriminalisation would exacerbate rather than address these ills.<sup>133</sup> The organisation is thus an outspoken proponent of the partial decriminalisation legislative model pioneered by several Scandinavian countries and Sweden in particular. This ‘Swedish Model’ for legislating the commercial sex industry, which entails the decriminalisation of the sale of sex only, works to address the flaws inherent within the status quo and presents a viable alternative to full decriminalisation.<sup>134</sup>

### **Swedish Model**

In Sweden sex work is regarded as an aspect of male violence against women and as a symptom of inequality between the sexes.<sup>135</sup> In order to protect the vulnerable actors in the commercial sex sector Swedish law does not criminalise the sellers of sex but targets their clients and third party actors.<sup>136</sup> Since 1999 it has been illegal under the Swedish Penal Code 546 to buy sexual services.<sup>137</sup> The maximum penalty for soliciting a sex worker was revised upwards in 2011 to one year in

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<sup>131</sup> “Don’t Decriminalise Sex Work, Former Cape Town Prostitute Tells World Congress,” TimesLIVE, accessed April 30, 2020, <https://www.timeslive.co.za/news/south-africa/2019-04-04-dont-decriminalise-sex-work-former-cape-town-prostitute-tells-world-congress/>.

<sup>132</sup> Ibid

<sup>133</sup> “Sex Work Decriminalisation.”

<sup>134</sup> Ibid

<sup>135</sup> Ibid

<sup>136</sup> Ibid

<sup>137</sup> Ibid



prison to reflect the Swedish government's prioritisation of this issue. This legislative model is 'abolitionist' in that its ultimate aim is to eradicate the commercial sex sector entirely through targeting the demand for paid sex.<sup>138</sup> The financial need of sex workers does not justify their submission to this violent form of exploitation; a stance indicative of Sweden's strong social welfare system and low levels of poverty.<sup>139</sup> Following an inquiry by the Chancellor of Justice to evaluate the effects of the law 10 years after its implementation the Swedish government published a report in 2010.<sup>140</sup> It noted that sex work had not increased in Sweden over the previous 10 years and that 'street prostitution' had been cut in half.<sup>141</sup> There was no evidence that former street sex workers had migrated indoors or were now conducting their business over the internet.<sup>142</sup> The Swedish government, law enforcement agencies, and NGOs have all reported that there has been far less trafficking for sex since the prohibition compared to that of neighbouring countries.

### **Partial Decriminalisation in the South African Context**

Grizelda Grootboom, the author of 'Exit,' a book about her experiences as a prostitute in South Africa and her eventual escape from the violent world she became trapped in, is a vocal opponent of decriminalisation.<sup>143</sup> In response to a question about whether sex work is a job like any other she replied:

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<sup>138</sup> "Sex Work Decriminalisation."

<sup>139</sup> Ibid

<sup>140</sup> Ibid

<sup>141</sup> Ibid

<sup>142</sup> Ibid

<sup>143</sup> Taina Bien-Aime, Contributor Executive Director, and Coalition Against Trafficking in Women, "Blessing The Sex Trade In South Africa: A Sex Trafficking And Prostitution Survivor Testifies," HuffPost, 15:14 400AD, [https://www.huffpost.com/entry/post\\_12702\\_b\\_11220970](https://www.huffpost.com/entry/post_12702_b_11220970).

“I often ask them what they mean by “sex worker”: the 16-year-old sold on the street? The stripper who was gang-raped as a child? The privileged white woman who dabbles in escorting? In South Africa so-called “sex workers” aren’t just any women - they’re Black women. In prostitution, we are stripped of our dignity and often left to die. How can that be a job?”<sup>144</sup>

The South African Law Reform Commission’s 2015 report on Adult Prostitution echoed these sentiments in justifying its rejection of full decriminalisation as a viable option. Decriminalisation would entail “tolerating the creation of a separate, expendable, throwaway class of women.”<sup>145</sup> The report presented two legislative recommendations for South African lawmakers: pursue an agenda of partial decriminalisation in the mould of the Swedish Model or, retain the full criminalisation status quo. The decriminalisation of the sale of sex only in South Africa would see the country adopt the view that, “their (sex workers) desperate economic plight should not be manipulated against them by institutionalising businesses that specialise in facilitating the sale of sex as a legitimate business.”<sup>146</sup> Sex workers are characterised as victims in need of protection, even from themselves, in the same manner that government prohibits one from selling oneself into slavery.<sup>147</sup> Regardless of the conditions under which one’s decision to engage in sex work was made this ‘choice’ is characterised as either coerced or degrading to oneself and therefore not a legitimate exercise of individual autonomy.

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<sup>144</sup> Ibid

<sup>145</sup> “Decriminalisation of Adult Sex Work; SALRC Project 107.”

<sup>146</sup> “Decriminalisation of Adult Sex Work; SALRC Project 107.”

<sup>147</sup> Hyunsoo Chung, “Sex Work and the Law in South Africa, Sweden and New Zealand: An Evidence Based Argument for Decriminalisation,” *The Journal of Global Health*, 2015, [//www.ghjournal.org/sex-work-and-the-law-in-south-africa-sweden-and-new-zealand-an-evidence-based-argument-for-decriminalisation/](http://www.ghjournal.org/sex-work-and-the-law-in-south-africa-sweden-and-new-zealand-an-evidence-based-argument-for-decriminalisation/).

Partial decriminalisation purports to respect the dignity of women who fall victim to an abusive and exploitative practice. It does so through affording them formal legal and police protections which serve to lessen the power imbalance between sex workers and their clients who are now the sole party operating outside of the law. This regulative model better positions sex workers to negotiate condom use and access healthcare services.<sup>148</sup> The unique vulnerability of sex workers is thus accounted for by a legal framework which, simultaneously, does not condone or permit the proliferation of sex work. However, partial decriminalisation has unintended consequences. While this regulatory model no longer explicitly labels sex workers as criminals it does facilitate their continued stigmatisation. The commercial exchange of sex is still a crime and sex workers are still associated with illegal activities and societal degradation.<sup>149</sup> Law enforcement officers no longer take sex workers to be the primary subjects of their attention but treat them as leads to arresting their clients.<sup>150</sup> In order to avoid arrest the buyers of sex will demand to conduct business in more secluded locations which increases the risks taken by sex workers.<sup>151</sup> As sex workers are driven further underground they have less access to health services and are less able to exchange information about risky clients.<sup>152</sup>

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<sup>148</sup> “Sex Work Decriminalisation.”

<sup>149</sup> Ibid

<sup>150</sup> Ibid

<sup>151</sup> Ibid

<sup>152</sup> Ibid

### **Martha Nussbaum: Sex Work, Stigma, and Social Context**

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Toward constructing a nuanced normative argument in favour of full decriminalisation and responding to Pateman and Anderson's case for partial decriminalisation, this paper develops Martha Nussbaum's defense of decriminalised sex work. Martha Nussbaum locates the origins of theoretical debates about the morality and legality of sex work in two key areas: first, a broad analysis of the beliefs and practices shaping perceptions of accepting money for the use of one's body and, second, a general awareness of the material conditions limiting the choice options of poor women. Through considering the historical bases of stigma pertaining to the sale of bodily services, Nussbaum shows that intuitive rejections of sex work as immoral or degrading stem, fundamentally, from an incoherent combination of class prejudices and sexual taboos. Through a comparison with several related, legitimate professions, Nussbaum argues that most of the problematic elements of sex work are common to other market activities. Yet, sex work, uniquely, is often considered by philosophers and theorists, like Pateman and Anderson, in abstraction from the material context in which it is situated. This belies what Nussbaum takes as the most urgent issue raised by the discussion of sex work: the lack of decent economic opportunities for working women, and women's limited control over the conditions under which they labour. "Far from promoting the demise of love," Nussbaum maintains, "the legalisation of sex work is likely to make things a little better for women who have too few options to begin with."

All people, save the vastly wealthy, accept money for services rendered by their bodies in varying contexts. Some people are well compensated for their work and others poorly, some have a high degree of control over their working conditions and others are cogs in larger production processes, and some forms of employment are stigmatised while others are not. Nussbaum considers a number of examples demonstrating how the social aversion to sex work is malleable

in its construction and, therefore, receptive to changing cultural conceptions. Two centuries ago, Adam Smith described opera singers in need of an exorbitant wage to compensate them for the stigma attached to publicly prostituting themselves. Today, rather than being perceived as cheapening her talent, fair compensation under contract guarantees an opera singer the necessary income and working conditions to develop her artform and reach her full potential. Nussbaum argues, therefore, that the historical stigmatisation of paid artists and performers is rooted in class conflict.

Originating with the Greek aristocratic aversion to earning wages, prejudicial views about accepting compensation for one's labour were deeply embedded in the hierarchical class structure of modern Europe. These prejudices did not attach to the activities themselves but to the use of one's talents for money. Consequently, those with inherited wealth were free to become opera singers (provided their doing so embodied the respected and acceptable sentiment of genteel amateurism.) Social stigma against money-making and commodification – with specious claims to moral superiority over working people -- have permeated a range of activities throughout history. The case of stigma against sex work thus requires closer scrutiny to discern and root out class prejudices. Intersecting with this belief is the powerful, historical notion that it is shameful for women to display their bodies in public, or expose themselves to strangers, especially in the expression of passionate emotions. When considering why forms of women's labour are stigmatised Nussbaum thus cautions against perpetuating irrational conclusions rooted in class conflict and fear of the female body and its passions.

Before investigating the sources of sex work's stigmatisation, Nussbaum situates the sex worker in comparison to women, throughout history and across the world, who accept economic compensation for their bodily services. This contrast establishes a number of similarities between

sex work and other occupations and clarifies the differential nature of the social stigma sex workers are subjected to. Nussbaum begins this discussion by contrasting the sex worker alongside a factory worker in a Perdue chicken factory who plucks feathers from nearly frozen chickens. Both the sex and factory workers face health risks, although, Nussbaum emphasises, the threat of violence and sexual disease transmission to the sex worker would be greatly reduced by decriminalisation. Contrarily, the factory worker faces a heightened chance of nerve damage in her hands. The sex worker does endure invasion of her internal private space, however, provided that she is a consenting adult, this does not strike Nussbaum as unacceptable.

While both occupations can be low-paying, sex-work wages often increase with decriminalisation. Under a legalised, regulated regime, the sex worker might enjoy better working hours and conditions than the factory worker in all but the most extreme situations. The sex worker's greater control over her material environment blends with her capability to exercise practical reason through her work. A sex worker has a degree of control over the clients she accepts, the services she performs, and her tasks require skill and responsiveness. Conversely, the factory work has no such latitude for thought or autonomy as she performs the same unthinking task over and over again. Sex workers, though, are the subjects of uniquely pervasive social stigma. The factory worker is not perceived as perpetuating harmful gender hierarchies and her occupation is not bound up in gendered conflicts. The sex worker, by contrast, suffers greatly from public reproach.

Following this discussion, Nussbaum uses the example of a Professor of Philosophy to focus her investigation on the unique stigma attached to sex work. Like a sex worker, the Professor takes money in exchange for an especially intimate part of herself: her thoughts, writings, and theories as they relate to understanding the human search for meaning and purpose. In ancient

Greece, and later in the European clergy, the talent for pondering these questions was thought to be cheapened by the receipt of a wage. Today, the Professor may even be perceived as a credit to all women for subverting gender hierarchies and succeeding in a male-dominated profession. Conversely, the sex worker is denounced for her role in perpetuating gendered inequalities.

For Nussbaum, a comparison between the sex worker and the domestic servant or care worker yields important parallels between the two occupations. In South Africa, domestic service and care work are deeply feminised forms of labour, and usually entail worse hours and pay than sex work (which, of course, involves the invasion of one's body and greater health risks.) These occupations are also closely associated with a woman's working-class status, and involve intimate, physical interactions in exchange for pay, yet, sex work carries the added social burdens of criminality and immorality. Despite the trying nature of their work domestic servants in South Africa are proud of their status as employed women providing for their families. In crowded minibus taxis, during the week, domestic workers will often wear the uniforms they clean houses in to signal their occupation to others. Similarly, sex work allows poor women to support their families, however, sex workers are stigmatised for their efforts. Nussbaum questions whether the use of one's body – in intimate physical contact with a client in exchange for money – should, justifiably, illicit such disparate moral attitudes based solely on whether sex acts are part of the transaction. Nussbaum describes a number of intuitive defenses for this distinction (i.e. that women shouldn't have sex with strangers, and that commercialised sex degrades women) as rooted in patriarchal conceptions of female sexuality.

Here Nussbaum turns to address the arguments of reflexive feminists, like Pateman and Anderson who maintain that sex work is bound up with patriarchy and sustains male domination over the female body. These arguments view sex workers as victims of unjust systems; while they

depict commercialised sex as the extension of the masculine desire to control women, Nussbaum concedes that they are hardly the source of the universal stigmatisation of sex work. The societal reproach of sex workers that differs so markedly from public perceptions of related forms of work has a long history that predates the emergence of reflexive feminism. Nussbaum proposes that gendered hierarchies explain the stigma associated with sex work via a different mechanism: people committed to restricting the power of women's sexuality and reproductive labours have long vilified extra-marital sex, and sex workers, in particular, as a means of maintaining the male-dominated social order.

In this view, marriage serves as a safe outlet for men's sexuality while various social meanings are deployed to keep female sexuality securely within its designated, monogamous bounds. Nussbaum cites a study by Alain Corbin into the regulation of late 19<sup>th</sup>-century French sex workers to illustrate this point. Corbin shows that the legal regulation of sex work was justified by the public interest in reigning in, and subordinating, a dangerous form of female sexuality that could potentially corrode marriage and disrupt the social order. For Nussbaum, against reflexive feminist critiques, this sexual hierarchy thus causes stigma against sex workers (rather than sex work itself perpetuating sexual oppression.) Prejudice towards sex work draws from the same set of social meanings that have justified the seclusion, veiling, and genital mutilation of women. The sex worker embodies the threat of unrestricted female sexuality and, thus, must be undermined constantly; "as an honest woman, a woman of dignity, she will wreck society." Feminists therefore have good reason to connect the stigma associated with sex work with patriarchal, background conditions. Yet, so long as sex work is stigmatised, women continue to be injured by that stigma in powerful way. This is not best addressed through legal prohibition, Nussbaum argues, but,



instead, through efforts promote the equal status of sex workers and improve their working conditions.

Nussbaum moves from a theoretical analysis of the stigmatisation of sex workers to addressing six commonly cited objections to decriminalised sex work:

1. Sex work involves health risks and risks of violence.
2. The sex worker has no autonomy; her activities are controlled by others.
3. Decriminalised sex work makes it harder for people to form relationships of intimacy and commitment.
4. The sex worker alienates her sexuality on the market; she turns her sexual organs and acts into commodities.
5. The sex worker's activity is shaped by, and in turn perpetuates male dominance of women.
6. Sex work is a trade people do not enter by choice; therefore, the bargains people make within it should not be regarded as legitimate.

Nussbaum, here, engages with the arguments advanced by Anderson and Pateman. Her agency analysis (2.) responds to and refutes Anderson's autonomy-grounds argument for the prohibition of sex work. Anderson concedes that sex workers' autonomy, already bound by impoverished material conditions, is not increased by criminalisation. This admission brings her true stance in line with Nussbaum's contextually informed capabilities approach which will be presented later in this paper. Anderson's freedom-grounds case for the criminalisation of sex work describes a process whereby commodified, market-based models of sexual exchanges are imported from the public sphere into personal relationships. Nussbaum objects to this reasoning (3.) and maintains that one type of relationship does not diminish the demand for, or value of, another. Pateman and Anderson both argue for the inalienability of property in the person. Pateman holds that one's

talents, body, and labour are constituent parts of the self and that one's sexual identity comprises a substantial part of who one is. Anderson, too, characterises the commodified exchange of female sexuality as a mechanism of subordination. In response Nussbaum (4.) questions whether property in one's person is truly alienated through market exchanges at all. Sex workers retain their sexuality independently of their clients and nothing seems lost from their persons. For Nussbaum the commodification of sexuality poses a similarly theoretical but non-substantive threat. Nussbaum reiterates her prior analysis of gender hierarchies (5.) in order to show that the law best serves sex workers' interests when it protects their dignity and status as equal citizens. That sex workers make difficult decisions under dire conditions of economic scarcity does not invalidate their choices (6.). Rather, Nussbaum maintains, we ought to respect their agency, work to improve the choice-set available to them, and not restrict their options further.

### **1. Sex work involves health risks and risks of violence.**

Nussbaum echoes SWEAT's arguments in maintaining that the hazards associated with sex work are made worse by illegality. Decriminalisation provides sex workers with increased access to reproductive health resources, such as regular STI testing, and enables protective regulations to be introduced and maintained. The threat of violence, too, is greatly reduced by positioning police as the protectors, rather than oppressors, of sex workers. To the extent that these risks are inherent to sex work, and not a product of its legal status, Nussbaum asks: what general view of risky undertakings ought one defend? If the potential for physical harm to oneself is sufficient cause for legal prohibition, then all manner of work available to poor people – from factory jobs to labouring in treacherous mine shafts -- should be criminalised. In his early twentieth-century muckraking novel *The Jungle*, Upton Sinclair famously described the hellish, brutal world of Chicago's meatpacking industry. Destitute migrant workers were described as routinely suffering grievous

injuries while cutting slabs of meat and, in one extreme case, an employee, locked in a refrigerator unit overnight, was eaten alive by rats. By comparison, decriminalised sex work lies well within the domain of acceptable personal risk which working class people accept in order to survive and flourish. Nussbaum concedes that the fact that poor people are faced with such a limited, and potentially dangerous, set of economic options is itself an unjust obstacle to their human flourishing. However, the law should not work to make their plight worse or limit their options further. Instead, as full decriminalization does, it should respect their autonomy under difficult circumstances and work to improve the choice environment which constrains them.

## **2. The sex worker has no autonomy; her activities are controlled by others**

That sex workers lack control over the work they perform, for Nussbaum, does not distinguish their activities from those of any poor person involved in a form of repetitive labour. Marx describes labour that does not make some use of one's own reasoning in the planning and execution of one's work as deficient for the realisation of true human flourishing. However, this is a pervasive problem for much of the modern labour market. Given this, Nussbaum argues that would-be sex workers do not gain more control or better achieve human functioning in unemployment. Rather than removing one of the few options open to poor women, our focus should, instead, be directed toward programs which promote more control over choice activities and more general humanity in the types of work that people with low levels of education have open to them.

Illegality, above all, does not promote the autonomy of sex workers. Nussbaum, here, engages directly with Anderson's autonomy-grounds justification for the prohibition of sex work. In response Anderson concedes that, "if the prohibition of prostitution is to serve women's interests in freedom and autonomy it should not function to drive them to starvation." Criminalising sex work can only enhance the freedom of sex workers where expanded economic opportunities

eliminate women's need to resort to selling sex in the first place. This claim is far less demanding than the total proscription of sex work as immoral. It grounds Anderson's theory of value in the material conditions informing Nussbaum's capabilities approach and elevates concerns over sex workers' quality of life, which this paper considers in terms of capabilities, to a higher priority status than the potential damage decriminalised sex work inflicts upon personal relationships.

### **3. Decriminalised sex work makes it harder for people to form relationships of intimacy and commitment.**

Continuing to engage with Anderson's arguments, Nussbaum examines whether decriminalised sex work does, in fact, undermine personal relationships based on intimacy and commitment. She observes that people still fall in love the Netherlands and Germany where sex work is legal and regulated, and that people fell in love in ancient Athens where sex work was subsidised by the state. There has been no observed or reported degradation of the intimacy and commitment involved in these personal relationships. For Nussbaum one form of relationship does not remove the need for another, just as the availability of the Twilight saga in a bookstore does not fundamentally affect readers of Proust. Nussbaum maintains that, in societies where sex work is decriminalised, people continue to seek out relationships of intimacy and commitment because of the special value they provide and do not have difficulty separating them from commercialised alternatives. Furthermore, Nussbaum asks, whose intimate and committed relationships is Anderson concerned with protecting? For sex workers – poor women using one of the few employment options open to them – continued legal exclusion from civil society actively undermines their dignity and status as equal citizens. Criminalisation thus greatly reduces their capacity for affiliation and the formation of human relations. If, however, Anderson is concerned that sex workers' efforts to survive may inconvenience middle-class women in their pursuit of love

this seems to be a fundamentally flawed and deeply class prejudiced claim which disregards the equal, human, worth of sex workers entirely.

**4. The sex worker alienates her sexuality on the market; she turns her sexual organs and acts into commodities.**

Nussbaum questions whether the theoretical concept of alienation occurs in reality. Does the singer alienate her voice and the professor her mind? The sex worker still maintains her sexuality independently of her work; just as a domestic worker may cook and clean for her family, the sex worker is free to engage in personal sexual relationships. Further still, she can cease to be a sex worker and her sexuality is still with her -- she has not given anyone a monopoly over that part of herself. Rather than alienation, the real issue here seems to be the degree of choice the sex worker has in performing particularly intimate acts. However, choice in and control over one's work is a luxury millions of poor women cannot afford. Provided the necessary safeguards against physical harm and coercion are in place, leaving open the option of legal sex work does nothing but expand women's choice set. Anderson, toward the end of her discussion of sex work, seems to agree with this reasoning. She proposes that the sale of sexual services could have a legitimate place in a just civil society provided the occupation is governed by professional norms. Professionals do not alienate control over themselves through transactions, as their activities are governed by the reflexively endorsed non-market ideals of their vocation. The normative distinction between a sex worker and masseuse is, thus, not the moral legitimacy of their work, but that the former's occupation lacks the legal legitimacy and infrastructural support to establish a uniform and reflexively endorsable set of operational standards. Sex workers, at present, lack the ability choose to work in the way they wish to.

Similarly, Nussbaum asks what commodification means in the context of female sexuality. If it entails that money is exchanged for sexual services then this is obviously true within sex work and not necessarily a bad thing. In many instances, accepting money for the use of one's talents creates a sphere of economic and creative freedom in which, say, the professor can focus on her research and the musician practices or composes throughout the working-day. In neither case does it appear that the contract has converted these abilities into externally related things which can be exchanged separately from the body of the producer; these capacities remain firmly housed in their possessors. Nussbaum does not, therefore, think that a contract pertaining to property in the person creates a relationship of subordination. That sex workers are not treated as unique full human beings by their clients is not a form of degradation unique to their occupation. In quotidian affairs we accept services from many people who we do not know very well.

However, Anderson argues that in the intimate and personal sphere of sexual exchanges one must return in kind the gifts of another. That is not to demand that all sex must entail deep mutual understanding of each partner's self but that the terms of exchange and what is exchanged are equivalent. Pateman echoes this sentiment in her description of the emotional coldness which sex workers are forced to affect as a protective mechanism. The sex worker separates herself from her sexuality to withhold some of herself within an asymmetric, domineering contractual relationship. For Nussbaum these arguments do not describe the immoral annexation of another's self but the very point of the commercial exchange of sex in the first place. That the sex worker's acts are less intimate does not flow from the introduction of money into the exchange. People engage in other intimate acts, such as the creation of art, without a loss in their work's expressive value. Rather, the sex worker's acts are less intimate because she intends them to be so. She is, like the masseuse, a professional exercising a physical skill for her client's pleasure. She is not being tricked into

signing over part of herself to another nor is her identity split by the dissonance of non-intimate sex. The horrors of rape, abuse, and violence which afflict so many poor sex workers do not arise from a lack of intimacy, or the dehumanising law of male sex right, but from unsafe criminalised working conditions and social stigma.

**5. The sex worker's activity is shaped by, and in turn perpetuates male dominance of women.**

For Nussbaum, sex work has certainly been shaped by aspects of male domination over women. Gender hierarchies have, of course, entrenched the perception that female sexuality is dangerous and in need of careful regulation. Yet, for Nussbaum, sex work is not harmful because it perpetuates ideas of male sexual domination. Instead, these ideas in themselves belie the true source of pain and injustice in the commercial sex market. Sex workers have not been treated with the legal and social respect befitting human beings. They share this burden with working-class people of many sorts across time periods. Some of the particular evils associated with the commercialisation of sex – i.e. the physical abuse of sex workers and control of their earnings by coercive third parties – are features of male dominance that do not have as widely documented parallels in other forms of low-paid work. Yet, even these singular instantiations of male dominance are not the purview of sex work alone. The dowry system in Bangladesh, for instance, undermines the worth of female children and is responsible for malnutrition, neglect, and death of millions of young girls. Sex work, Nussbaum posits, does not have such widespread and all-consuming negative implications. Western marriage contracts – an institution cited by both Pateman and Anderson for its deleterious consequences for women – reinforces male dominance on a far more prolific scale than sex work. While marriage laws can be improved to better protect women, to prohibit all marriage on the grounds that it reinforces gender hierarchies would be a

gross violation of individual liberty. So too, Nussbaum says, with sex work. The law should, instead, be used to protect the bodily safety of sex workers, to guard them against financial and other forms of coercion, to ensure their access to reproductive healthcare, and to guarantee their equal civil and criminal rights under the law.

**6. Sex work is a trade that people do not enter by choice; therefore the bargains people make within it should not be regarded as real.**

Here, Nussbaum distinguishes between three types of cases where a sex worker's entry into the commercial sex market can be described as coerced: first, when her entry is caused by criminal conduct (such as threats of violence, deception, or the activities of sex traffickers), second, when she is below the legal age of consent, and, third, when she is compelled by desperate economic conditions. In the first two instances Nussbaum sees the "choice" to become a sex worker as clearly invalid and the agents of coercion should be punished under the law. Yet, she takes the case of an adult woman who becomes a sex worker because of economic necessity as a different kind of infringement upon autonomy. Nussbaum cites Joseph Raz to this end;<sup>153</sup> for Raz, to be truly autonomous, agents have to meet three conditions: they must possess certain mental capacities, they must have an adequate range of valuable options, and they must enjoy independence from coercion and manipulation. To illustrate this definition Raz describes a woman trapped on a desert island where she is pursued day and night by a fierce carnivorous animal. In one sense she is free to go anywhere on the island and do anything she desires. But, if she wants to remain uneaten, she is instead forced to spend all her time and energy calculating her movements to avoid the beast. Despite her internal capacity for freely determined behaviour the hounded woman's autonomy is

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<sup>153</sup> Joseph Raz, *The Morality of Freedom* 374 (1986).



thus constrained by her environment. Many poor people lead nonautonomous lives in this sense; they fulfill the internal conditions necessary to act autonomously but this potential is not realised if their struggle for survival limits them to unpleasant options. Sex work, alongside occupations like meatpacking, might not be an option many women would select if they had an endless list of alternatives; but that does not delegitimise the choices of poor women to perform these types of work. Sex work cannot be considered in isolation from its legal and economic context. We can acknowledge that poor women unjustly lack employment alternatives while respecting the decisions they make under difficult circumstances.

For Nussbaum the stigma attached to sex workers stems from a conglomeration of beliefs which are rationally indefensible. While relationships of subordination, as described by Pateman and Anderson, are of serious concern, they apply to many of the types of work poor people do. Where criminal and abusive conditions exist, the law should be used to protect sex workers' dignity. For Nussbaum the correct response to the issues raised by the sex work debate is to enhance the economic autonomy and personal dignity of sex workers, not to restrict further their already limited options. As the arguments of both SWEAT and Embrace Dignity have shown full criminalization has failed South Africa's sex workers. In the following section this project applies Nussbaum's capabilities approach to the empirical survey results and interview data to assess whether full or partial decriminalisation would more effectively enhance the capability of South African sex workers to lead lives of dignity and human flourishing. The sensitivity of the capabilities approach to context – the disparate needs of and obstacles faced by women – and its foundational respect for human dignity renders this approach compatible with Pateman and Anderson's frameworks. The subversive inequalities identified and explained by Pateman's Sexual Contract are precisely the dynamics the capabilities approach works to mitigate.

Anderson's reflexively endorsed evaluations draw from a basis equivalent to Nussbaum's Practical Reason and Affiliation capabilities. Personal relationships underwritten by the objective norms of intimacy and commitment entail a rational endorsement of these values as good principles by which to guide one's actions (Practical Reason) with the aim of sustaining relationships of certain kinds (Affiliation). The capabilities approach is thus an effective mechanism through which to assess the impact of regulative policies on South African sex workers.

## Survey Results: Applying the Capabilities Approach

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The structure of my survey analysis is informed by interviews with NGO activists and sex workers in Cape Town as well as by thorough research into the South African commercial sex market more broadly. The primary goal of this study is to amplify the voices of South African sex workers within the debate surrounding legislative reform. This research methodology produced five overarching issue categories which organise the ensuing presentation of the study results: Economic necessity, stigma and its relation to law, sex worker client relations, health concerns and condom use, sex worker-law enforcement relations, and, to a lesser extent, sex worker-third party relations. Through considering first-hand qualitative accounts and self-reported data – alongside the arguments advanced by SWEAT, Embrace Dignity, the South African Law Reform Commission, and other regionally specific research – this paper constructs a vivid picture of the material reality South African sex workers are confronted with and the role the law currently plays in shaping and constraining their choices. The normative theories developed by Carole Pateman, Elizabeth Anderson, and Martha Nussbaum supplement this empirical account imbuing this project's argument for full decriminalisation with moral weight and generalising its claims beyond the South African case.

Nussbaum's capabilities approach – grounded in contextual realism and drawing from Marxist and Kantian principles – bridges the divide between normative theory and empirical data enabling this project to present its findings in a nuanced and compelling form. Within each overarching issue category of the survey results this paper considers the effects regulative policies have on the central combined capabilities of: Life, Bodily Health, and Bodily Integrity, Control over one's Environment, Practical Reason, and Affiliation. The combined capabilities of Life, Bodily Health, and Bodily Integrity are presented together and encompass arguments against decriminalising sex

work which cite excessive risks of violence, abuse, disease transmission. The material stipulations of the Control over one's Environment capability – pertaining to earning a living wage, freedom from unwanted search and seizure, and the right to seek employment on an equal basis with others – are greatly affected by the legal status of sex work.<sup>154</sup> The Practical Reason capability – a priority for Nussbaum – here will be applied to the degree to which regulative policies enhance sex workers' ability to plan and make thought out decisions in the execution of their activities as well as the latitude they enjoy to express themselves within their work. Affiliation – Nussbaum's adjoining subsuming capability – is importantly related to the stigmatisation of sex work and its relation to law. Promoting this capability involves securing the social bases of self-respect and being able to be treated as a dignified being whose worth is equal to that of others."<sup>155</sup> This aim necessitates either the decriminalisation of sex work – the removal of a law that undermines sex workers' status as equal citizens – or the deliberate prohibition and abolition of sex work as an activity that is inherently degrading and stigmatised for good reasons.

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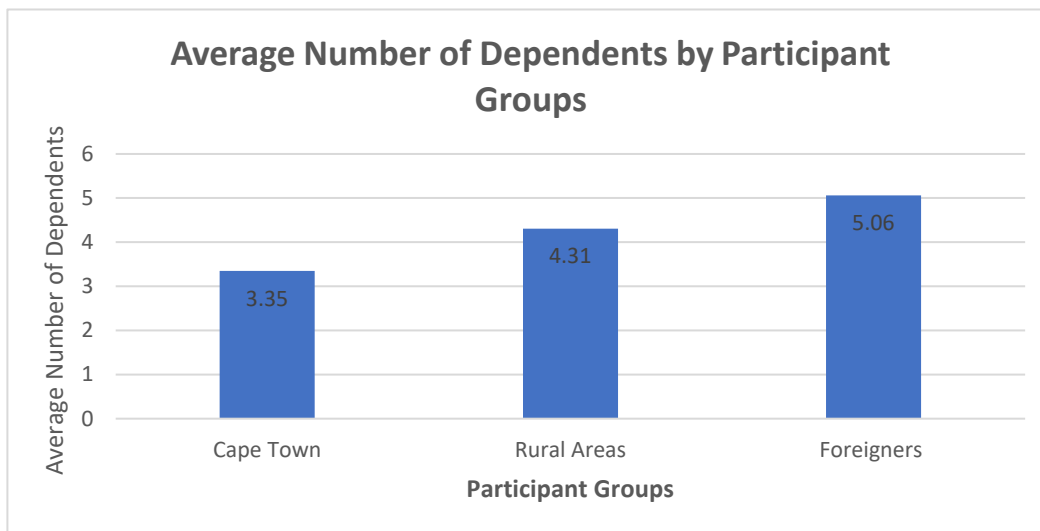
<sup>154</sup> Ibid.

<sup>155</sup> Nussbaum, M., (1999), 33.

## Economic Necessity

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Of the 67 survey participants only one respondent, from the Cape Town group, indicated that she did not support any dependents with her income as a sex worker. From the Cape Town group two respondents stated that they supported 8 and 12 dependents respectively, from the rural areas group 6 respondents indicated that they supported 6 or more dependents with the highest response being 11, and from the foreigners groups 4 respondents replied that they supported 9 or more dependents with a highest response of 14.



The high numbers of dependents supported by the income of sex workers suggests that these activities are important for maintaining the Bodily health capability of a number of South African children living in low-income households. However, it can still be argued that the risks to sex workers themselves outweigh these considerations or, as Pateman and Anderson maintain, that sex work represents an unjust relationship of subordination which limits the autonomy of sex workers to an unacceptable degree. The majority of survey participants had not completed high school and a few exceptions per group had higher educational attainment levels. Of the 26 Cape Town respondents 19 did not complete high school, 6 graduated from high school, and one pursued

a Business Science degree at university before dropping out in second year. Respondents from the rural group indicated similar educational attainment levels with 12 of 19 not graduating high school, 4 completing graduating from high school, and 3 qualifying for technical diplomas. The group of foreign sex workers had higher and more diverse educational qualifications on average with 5 participants completing high school, 4 attaining university degrees, 1 a nursing diploma, and another qualifying as a teacher. This divergence from the other two groups corresponds with the qualitative descriptions of the often-tragic circumstances under which these participants were forced to leave their home countries.

Taken together the added financial pressure of supporting dependents and the limited educational attainments of sex workers constrains sex workers' autonomy in deciding whether to enter the market. Pateman would argue that the asymmetric economic capability of clients and sex workers renders the emergent contractual agreement involuntary and illegitimate. Sex workers do not freely consent in the same way that the buyers of sex do and this inequality produces an unjust relationship of subordination.<sup>156</sup> Decriminalising sex work would publicly endorse, and proliferate, relationships of this kind. However, sex workers are themselves victims of this predatory dynamic and should not be treated as criminals by the law. Rather an abolitionist regulatory model of partial decriminalisation, that recognises the unique vulnerability of sex workers, should be employed to protect their persons and work to dismantle the commercial sex sector.

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<sup>156</sup> Pateman, C., *The Sexual Contract*, (Stanford University Press, 1989).

**Responses to the question:** *If you were not a sex worker would you likely be unemployed or struggle to find job?*

<b>Answer Options</b>	<b>Cape Town</b>	<b>Rural Areas</b>	<b>Foreigners</b>	<b>Total</b>
<b>Yes</b>	<b>17</b>	<b>21</b>	<b>18</b>	<b>56</b>
<b>No</b>	<b>8</b>	<b>1</b>	<b>1</b>	<b>10</b>

As the above table illustrates most survey participants across the three groups indicated that they would likely be unemployed or encounter difficulty in finding another source of employment if they were to exit the commercial sex market. Follow-up questions pertaining to the alternative forms of employment available to participants revealed that, rather than a lack of other options, remuneration levels were the primary concern for sex workers who would not be able to support their families sufficiently by working as a cleaner or cashier. A majority of respondents did not see finding another job as a problem but preferred their earnings as sex workers. Rather than as a last resort, sex work was repeatedly described as the best available option given difficult childhoods, limited educational attainment, and low earning potential. Mbali – originally from Durban but who moved to Cape Town to earn enough to support her family – described sex work as “a God send. It saved my life.” Rather than fixating on economic factors concerns over sex workers’ agency should be directed toward criminalisation’s limiting consequences. A majority of participants indicated that they were concerned that criminal records might prevent them from acquiring alternative work, and that any work available for people with criminal backgrounds might pay poorly. These concerns were echoed in answers to the question *“Do you think that sex*

*workers are able to freely exit the industry when they want to?*” of the 20 respondents from the Cape Town group who answered this question 17 replied *yes* and 3 answered *sometimes*. Their qualitative responses were almost unanimous in highlighting that they would only want to quit sex work if they were able to find a job which paid a similar level and that this was not the case. For the rural areas group 5 selected *yes*, 2 *sometimes*, and 14 *no*. This reversal in answers was primarily due to respondents with criminal records not perceiving alternative employment as a possibility. Foreign sex workers were equally split between *yes* and *no* citing the same reasoning. Rather than combat the commercial sex industry and deter sex workers from becoming repeat offenders through criminal sanctions, criminalisation can be seen to trap sex workers therein.

Nussbaum accepts Pateman’s argument in so far as it criticises the limited employment options available to sex workers and describes their work – which is often insufficient for full Marxian human flourishing – as unjust. But she does not take this objection, which can and is levelled against all contracts of employment under capitalism, as sufficient justification for a policy regime which continues to undermine the dignity of sex workers and aims at eradicating sex work as an employment option. For Nussbaum, as was explained through Raz’s *Hounded Woman* example, extenuating economic circumstances do not invalidate sex workers’ decisions. In fact, the survey results emphasise the conscious and calculated choices many sex workers make in deciding to continue earning a higher income than they would pursuing alternative forms of work. In addition to representing an instantiation of the Practical reasoning capability opting for greater earning capacity enhances sex workers’ control over their environments. The law, currently, unjustly constrains sex workers’ autonomy. Where survey participants perceive obstacles to exiting the commercial sex industry it is because of their criminal legal status.



Furthermore, criminalisation undermines sex workers' dignity, excluding them from participating in public life as full and equal citizens. This fact that was illustrated, painfully, by the catastrophic loss of earnings sex workers experienced when a nation-wide lockdown came into effect in March of 2020.<sup>157</sup> Sex workers, as a consequence of the criminal status of their work, were omitted from state unemployment relief schemes and support programs. Constance Mathe — National Coordinator of the Asijiki Coalition for the Decriminalisation of Sex Work — described the exclusion of sex workers from lock-down unemployment benefits as deliberate in its intent: “[the grant] goes to unemployed people but it is different for sex workers who run their own businesses... because sex work is criminalised they can't register their work or prove that this is how they earn a living.”<sup>158</sup> Dr. Marlise Richter — former head of Sonke Gender Justice's Policy, Development and Advocacy Unit — added that the only financial assistance sex workers qualify for is the Social Relief of Distress grant of only R350 (US\$23) per month. Inherent within sex work is a high risk of interpersonal disease transmission, with sex workers particularly vulnerable to contracting COVID-19 and disproportionately unable to earn a living even after lockdown is eased.<sup>159</sup> Criminalisation perpetuates government ambivalence towards the needs of this marginalised group of South African women and undermines their social basis of self-respect in society.

Decriminalising sex work would affirm the equal dignity of sex workers and respect their autonomy to decide for themselves what kind of work they ought to be doing while mitigating against barriers to freely entering and exiting the industry. Anderson's concession, that the

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<sup>157</sup> Ranošzek, S., *Sex workers: Ignored by the state, abused by police*, (August, 2020), <https://www.newframe.com/sex-workers-ignored-by-the-state-abused-by-police/>

<sup>158</sup>

<sup>159</sup>

prohibition of sex work should not limit further the freedom of sex workers, would thus see her align with Nussbaum in advocating for full decriminalisation. Sex workers are not helpless victims of subordination but women providing for their families under difficult conditions. Partial decriminalisation is an affront to their dignity – and thus their Affiliation capability – as well as their Practical reasoning and Control over one’s Environment capabilities. Full decriminalisation recognises sex workers as fully autonomous and equal citizens, enables them to earn an income sufficient to support their families, and freely exit the industry without a criminal record if this is no longer the case.

## Stigma and its Relation to Law

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**Responses to:** *Do you think that sex workers in South Africa face harmful stigma/judgement from other parts of society?*

<b>Answer Options</b>	<b>Cape Town</b>	<b>Rural Areas</b>	<b>Foreigners</b>	<b>Total</b>
<b>a. Yes; it is widespread and harmful.</b>	<b>23</b>	<b>21</b>	<b>18</b>	<b>62</b>
<b>b. There is a stigma but its impact is not that great.</b>	<b>3</b>	<b>1</b>	<b>1</b>	<b>5</b>
<b>c. No; sex workers are treated fairly by society at large.</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>

An overwhelming majority of respondents across all participant groups indicated that the stigmatisation of sex workers in South Africa is widespread and harmful. For Nussbaum this stigma is the genesis for the many of the ills associated with the commercial sex industry. Most perniciously of all it cripples sex workers' ability to realise the Affiliation capability by stripping them of their social bases for self-respect and denying their equal worth in society.<sup>160</sup> Pateman and Anderson characterise the stigmatisation of sex workers as a product of gender hierarchies and the masculine compulsion to possess, and guarantee men's access to, women's bodies. Decriminalised sex work publicly affirms and extends the law of male sex right permeating both public and private relationships. This annexation of female sexuality does not begin and end with

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<sup>160</sup> Nussbaum, M., (1989).

sex workers but affects women throughout society who are increasingly perceived as the rightful property of men. The stigmatised status of a sex worker – whose sexuality is alienated and commodified in the market – represents the logical extension of the law of male sex right which currently pervades society. Pateman and Anderson both portray sex workers as exploited and in need of protection. Partial decriminalisation does not unjustly label sex workers as criminals nor does it endorse and perpetuate their exploitation in the market. It works to eradicate the commercial sale of sex, mitigating the proliferation of the law of male sex right, and safeguarding the dignity of women who were once reproached as prostitutes.

Nussbaum rejects this reflexive description of the relationship between sex work, gender hierarchies, and stigma. Sex workers do not perpetuate a harmful masculine ideal of ownership throughout society but are themselves harmed by social degradation emergent from men's attempts to control women's sexuality. This stigma inflicts profound pain upon sex workers and their families. Across all three survey groups a majority, and for the rural respondents 22 out of 22 sex workers surveyed, had been afflicted by stigma in their daily lives and within their communities. Participants from rural areas shared particularly emotive stories about their children being ostracised at schools, churches no longer welcoming them on the premises, public verbal harassment, and rejection from their families. Ndiliswa described her struggles growing in impoverished conditions working seasonally as a farm labourer. Sex work enabled her to provide for her children better than inconsistent employment as a manual labourer and when asked what other work she would be doing if she were not a sex worker she replied, "I can not. Sex work give me life." For her, sex work is not a dehumanising or degrading pursuit but the source of economic freedom and an important enhancer of her control over her environment. Tnozuma, a farm girl who lost her parents when she was a child and did not finish primary school, described sex work

as a lifeline which save her from starvation. However, because of the stigma attached to her work she has been “rejected from women’s community gatherings.” Mosipho speaks about her work in similarly positive terms but sadly adds that, “My family don’t want to openly associate with me when they find out I do sex work.” For Kuhle sex work affords her the time to care for her sick mother however, after a friend of hers told her landlord about her work, she was thrown out of her home with her small child. Upon hearing that Lulama was a sex worker her landlord refused to let her use the taps for drinking water in her shared farmhouse accommodation and told her to use the toilet water instead. Common to all these stories is the positive effect sex work has had on enhancing poor women’s control over their environments alongside the catastrophic consequences of dehumanising stigmatisation.

Follow-up qualitative questions revealed sex workers in rural areas were often verbally abused by doctors and nurses and denied condoms, STI tests, and abortions on account of their work. Ndiliswa was embarrassed by her doctor in front of all his staff and told that if she came to the clinic again with her sickness she would not be treated. A nurse in a clinic in Paarl shouted at Tnozuma that she was spreading HIV while a nurse in a similar clinic threatened to withhold Kuhle ARVs since they were “going to waste.” The effects of stigma on sex workers appear to be more severe in low income communities and remote clinics where it is more difficult to enforce standards of patient care. While sex work does entail a heightened risk of contracting sexual transmitted infections the negative effects on sex workers Bodily health capabilities are unjustly exacerbated by laws which label them as criminals underserving of treatment.

While there is variation among participant group responses as to whether conservative religious beliefs and non-religious African cultural beliefs are fundamental sources of the stigmatisation of sex workers, the answers were consistent across the groups for the question *Do you think that the South African law which criminalises sex is a primary cause of stigma?*

<b>Answer Options</b>	<b>Cape Town</b>	<b>Rural Areas</b>	<b>Foreigners</b>	<b>Total</b>
<b>Yes</b>	<b>19</b>	<b>20</b>	<b>16</b>	<b>55</b>
<b>It contributes but not as much as other factors</b>	<b>5</b>	<b>2</b>	<b>3</b>	<b>10</b>
<b>No</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>

In qualitative responses participants also identified race, gender, class, and nationality as important contributors to the stigmatisation of sex workers. All of these elements function within and intersect a legal framework which currently labels already vulnerable South African women as criminals. When asked *“Do you think decriminalisation would help reduce stigma?”* participants responded in the affirmative:

<b>Answer Option</b>	<b>Cape Town</b>	<b>Rural Areas</b>	<b>Foreigners</b>	<b>Total</b>
<b>Yes</b>	<b>15</b>	<b>21</b>	<b>16</b>	<b>52</b>
<b>No</b>	<b>2</b>	<b>0</b>	<b>0</b>	<b>2</b>

Unsure	5	1	3	9
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Partial decriminalisation does not fully disassociate sex work from criminality as the purchase of sex is still illegal. Sex workers are also infantilised as needing to be saved from their own, immoral, decisions. Partial decriminalisation thus does not effectively dispel the destructive stigma which currently afflicts sex workers. Nussbaum describes the stigma associated with sex work as stemming from efforts to curtail and control dangerous feminine sexuality. Full decriminalisation respects sex workers' equal dignity to define and pursue their own definitions of the good. By recognising sex workers as fully in control of their sexuality and persons, and that female sexuality is not immoral in and of itself, decriminalisation works effectively to dispel the stigma surrounding sex work. The capability of sex workers to Affiliate on a basis of mutual respect with others, in both private and public life, is thus best secured by a policy of decriminalisation.

## **Sex Worker-Client Relations**

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Pro-decriminalisation Nussbaum and proponents of partial decriminalisation Pateman and Anderson – whose arguments respectively align with the ideologies of SWEAT and Embrace Dignity – characterise the status quo full criminalisation of sex work as perpetuating a harmful power imbalance between sex workers and their clients. Within ideal theory Pateman and Anderson maintain that the prohibition of sex work is preferable to full decriminalisation which publicly affirms the law of male sex right and legitimises an inherently harmful practice. The buyers of commercialised sex satiate an appropriative aspect of the masculine identity treating sex workers not as equal people – ends in and of themselves – but as commodified objects to be owned and used. Partial decriminalisation recognises the asymmetric relationship between sex workers and their clients and thus aims to mitigate these inequalities – by criminalising the buyers of sex and not the sellers – while eradicating male demand for commercialised sex. Conversely, Nussbaum contends that consensual sexual transactions between adults are not instantiations of unjust female subordination by domineering male clients but that it is the law which currently heightens the vulnerability of sex workers relative to their customers facilitating a predatory dynamic.



This project found that while sex workers currently (under criminalisation) perceive their clients to be highly unlikely to report observed instances of abuse to the police this situation can be improved by legislative change:

*In your experience are clients likely to report incidents of abuse or crimes committed against sex workers?*

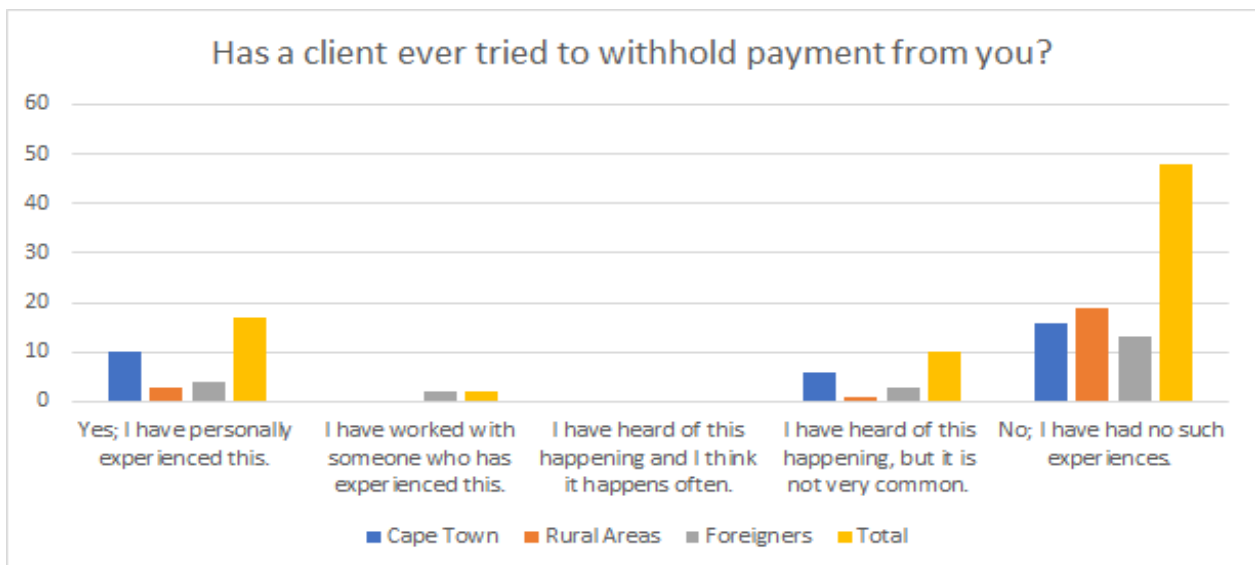
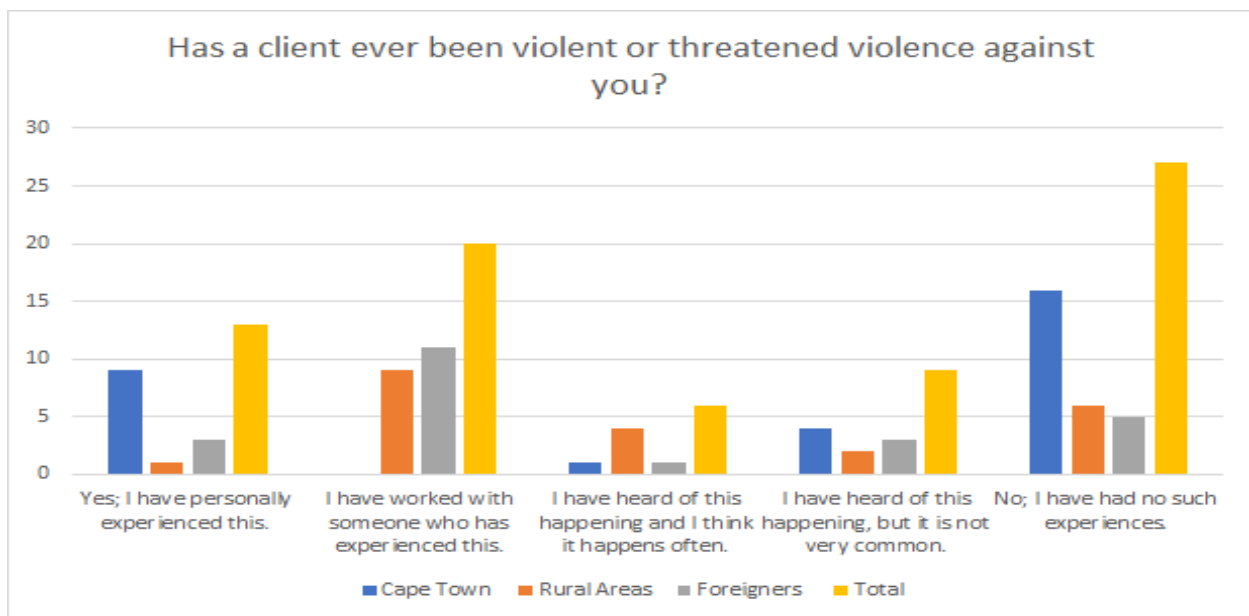
<i>Answer Options</i>	<i>Cape Town</i>	<i>Rural Areas</i>	<i>Foreigners</i>	<i>Total</i>
<i>Yes</i>	2	1	0	3
<i>Most of the Time</i>	0	0	0	0
<i>Sometimes but Unlikely</i>	5	1	2	8
<i>No</i>	18	20	17	55

*a. Do you think clients would be more likely to report such incidents if sex work was decriminalised?*

<b>Yes</b>	<b>9</b>	<b>18</b>	<b>10</b>	<b>37</b>
<b>No</b>	<b>2</b>	<b>1</b>	<b>1</b>	<b>4</b>
<b>Not Sure</b>	<b>15</b>	<b>2</b>	<b>8</b>	<b>25</b>

On Pateman and Anderson's accounts clients would be unlikely to report instances of abuse to the authorities because they do not see sex workers as fully human victims but as male property. Clients themselves are also likely perpetrators of abuse themselves. This argument doesn't explain why under a regime of full decriminalisation – when the law of male sex right is extended to its logical end – a majority of participants perceive their clients as becoming more empathetic and inclined to report incidents of abuse (with only 4 participants answering definitively *No* the law change would not have a positive effect). This change in response suggests that it is the criminal status of sex work which poses the biggest obstacle to reporting abuse not that clients perceive sex workers as sub-human property. Decriminalisation would bring both sex workers and their clients into the folds of South African law and labour regulations. In a commercial sex industry subject to health and safety standards and the enforcement of laws by police sex workers and their clients would be allied in the common pursuit of legally sanctioned and mutually beneficial transactions. As with the professional status afforded to masseuses, sex workers are respected as dignified workers exercising a skill. Their basis of self-respect, and thus their Affiliation capability, is enhanced. The increased access to police protection and the judicial system, as law abiding citizens, address the asymmetry between sex workers and their clients. Both parties are no longer deterred by the prospect of self-incrimination from reporting incidents of abuse and criminal activity. Decriminalisation increases sex workers' Control over their Environment capability as they relate to their clients on an equal basis. The guarantee of protection from law enforcement and access to healthcare in a non-stigmatised environment promotes sex workers' Bodily health and Life capabilities.

Rather than ally sex workers with their clients partial decriminalisation facilitates mistrust and animosity between parties with disparate legal status. Pateman and Anderson alongside advocates of partial decriminalisation maintain that the buyers of sex do not see sex workers as full human beings and are often the perpetrators of abuse themselves the aim of ‘allying’ these two parties as equals is thus self-defeating. Whether the buyers of commercialised sex are perceived as likely to report incidents of abuse to the police is thus irrelevant. Toward testing these claims this project sought to determine the prevalence of client perpetuated abuse toward sex workers:



In terms of clients withholding payment from sex workers the responses across the groups indicated that this was not a common occurrence. The more serious concern of clients directly enacting or threatening violence against sex workers yielded mixed responses. While a majority of participants had not directly experienced violence at the hands of their clients a high number of sex workers from the rural areas and foreign participant groups had worked with someone who did. There is no denying that at present the buyers of sex do inflict considerable pain on sex workers. However, the mixed nature of the survey results indicates that characterising clients as either purely malicious or magnanimous is unhelpful for investigating the effects of legal reform on their relationship to sex workers. Rather, as Nussbaum proposes, our primary focus should be on identifying which regulative structure increases sex workers' control over their environment and capability to exercise practical reason safely as they interact with those who demand commercialised sex. What is clear is that criminalisation disproportionately disempowers sex workers and deters both sex workers and their clients from reporting incidents of abuse to the authorities.

Proponents of partial decriminalisation argue that the Swedish Model empowers sex workers relative to their clients by positioning them as law-abiding citizens capable of reporting the criminal activities of their clients to the police. The abolitionist intent of this policy also aims to decrease the demand for transactional sex. When asked to describe the *likely effects of partial decriminalisation on their clients* the survey participants responded:

<b>Answer Options</b>	<b>Cape Town</b>	<b>Rural Areas</b>	<b>Foreigners</b>	<b>Total</b>
<b>This would not affect how your clients behave.</b>	<b>0</b>	<b>3</b>	<b>0</b>	<b>3</b>
<b>Your clients would be more worried about the police and want to meet in more secluded (hidden) places.</b>	<b>11</b>	<b>16</b>	<b>17</b>	<b>44</b>
<b>This would give sex workers more power when interacting with clients since they can now report client abuse to the police.</b>	<b>15</b>	<b>7</b>	<b>8</b>	<b>30</b>
<b>This would decrease the number of clients (the demand for sex) in South Africa.</b>	<b>17</b>	<b>6</b>	<b>10</b>	<b>33</b>

While partial decriminalisation would provide sex workers with increased access to police protection the targeted criminalisation of their clients would likely result in them engaging in transactions in deliberately isolated places away from these resources. It is naive to think that clients would solicit sex workers in areas where they could be readily arrested now that they are the sole, explicit targets of law enforcement. Sex workers will effectively encounter greater difficulty finding clients as well as safely engaging in transactions with them rather than be empowered to report abuse to the police. Participants indicated that a policy of partial decriminalisation would effectively discourage demand for commercialised sex. But is this really

a good thing? In qualitative responses participants indicated that decreased demand for commercial sex caused by partial decriminalisation would diminish their ability to negotiate with clients over prices and condom use. Sex workers competing for a diminishing number of buyers would necessarily need to cater to their demands in order to stay in business. There is no reason to suspect that partial decriminalisation would succeed in completely abolishing the sex industry rather the gains such a policy would make in restricting demand would be outweighed by the increased hardships it would cause for sex workers. The persistence of the sex industry despite the persecution sex workers currently face shows that attempting to make the practice more inhospitable is not an effective deterrent but rather a form of punishment for those who the law purports to protect. Partial decriminalisation can thus be seen to greatly diminish sex workers' control over their material environments and isolate them from services intended to protect their bodily health and safety.

When asked what they thought the likely effects of full decriminalisation on their clients would be 58 respondents indicated that they would feel empowered in their interactions with customers and 31 predicted that this would increase the demand for commercial sex in South Africa. While it can be argued that decriminalisation will lead to more sex workers entering the market causing the price of sex to decrease qualitative responses highlighted that, while there may be a modest increase in the number of sex workers, most of this industry growth is expected to come from new buyers. Sex workers would thus be better positioned to negotiate with their clients setting their own prices and demanding safe sex practices be observed. Furthermore, even if the commercial price of sex were to decrease the greater transparency in the industry and access to police would facilitate sex workers' capability to exercise practical reason in deciding whether to remain in or exit the market. Decriminalisation's capacity to increase sex workers' control over

their working conditions has been observed in New Zealand. A study conducted by Mossman and Mayhew in 2007, four years after decriminalisation, found that the law change had helped increase the reporting of violence to the police which resulted in an increase in the number of buyers arrested as opposed to their victims.<sup>161</sup> Rather than promoting the belief that men are entitled to women's bodies decriminalisation empowers sex workers to exercise their right to bodily autonomy and dictate the terms of transactions as the provider of a regulated service.<sup>162</sup> Prior to decriminalisation only 37% of sex workers felt that they could refuse clients compared to 62% of interviewed respondents four years after decriminalisation.<sup>163</sup> The enhanced bargaining power of sex workers under decriminalisation can thus be seen to ensure their capability to maintain their Bodily Integrity on their own terms. Decriminalisation recognises sex workers as the equals of their clients, enhances their ability to exercise practical reason within interactions with clients, and promotes their control over their environment.

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<sup>161</sup> Kathleen Preble, Regina Praetorius, and Andrea Cimino, "Supportive Exits: A Best Practices Report for a Sex Worker Intervention," *Journal of Human Behavior in the Social Environment*, September 4, 2015, 1–17, <https://doi.org/10.1080/10911359.2015.1082852>.

<sup>162</sup> Ibid

<sup>163</sup> Gillian M. Abel, Lisa J. Fitzgerald, and Cheryl Brunton, "The Impact of Decriminalisation on the Number of Sex Workers in New Zealand," *Journal of Social Policy* 38, no. 3 (July 2009): 515–31, <https://doi.org/10.1017/S0047279409003080>.

## Health Concerns and Condom use

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The dangerous consequences of the discrimination sex workers in rural areas endure at the hands of healthcare practitioners highlights the importance of full decriminalisation's role in addressing stigma. The continued criminal prosecution of sex workers during South Africa's coronavirus lockdown exacerbated reductions in healthcare access for this marginalised group.<sup>164</sup> National Coordinator Mathe described how many specialist reproductive health clinics were forced to close or to stop stocking contraceptives as a part of pandemic response preparations. National Coordinator Mathe spoke with a number of sex workers in areas on the outskirts of Cape Town, finding that "almost all their money is going towards buying condoms since they aren't earning like they used to and clinics don't have anything for sex workers." Qualitative responses from the rural areas group revealed that a significant portion of healthcare practitioners perceive giving condoms and STI tests to sex workers as wasteful since they continually engage in risky sexual activities. However, even without the assistance of legal safety standards sex workers themselves are not as reckless as this stereotype suggests.

*How often do you use condoms?*

<i>Answer Options</i>	<i>Cape Town</i>	<i>Rural Areas</i>	<i>Foreigners</i>	<i>Total</i>
<i>Very rarely</i>	0	0	0	0
<i>Sometimes</i>	4	1	3	8

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<sup>164</sup> Ranoszek, S., *Sex Workers: Ignored by the state, abused by police*, (August, 2020), <https://www.newframe.com/sex-workers-ignored-by-the-state-abused-by-police/>



<i>Often</i>	<i>1</i>	<i>2</i>	<i>1</i>	<i>4</i>
<i>Almost all of the time</i>	<i>16</i>	<i>18</i>	<i>15</i>	<i>49</i>

*How often do clients insist on sex without a condom?*

<i>Answer Options</i>	<i>Cape Town</i>	<i>Rural Areas</i>	<i>Foreigners</i>	<i>Total</i>
<i>Very rarely</i>	<i>1</i>	<i>1</i>	<i>0</i>	<i>2</i>
<i>Sometimes</i>	<i>15</i>	<i>6</i>	<i>7</i>	<i>28</i>
<i>Often</i>	<i>0</i>	<i>11</i>	<i>9</i>	<i>20</i>
<i>Almost all of the time</i>	<i>6</i>	<i>3</i>	<i>3</i>	<i>12</i>

*When clients insist on not using a condom are you able to negotiate with them?*

<b>Answer Options</b>	<b>Cape Town</b>	<b>Rural Areas</b>	<b>Foreigners</b>	<b>Total</b>
<b>I can negotiate with them and they agree to use a condom.</b>	<b>11</b>	<b>8</b>	<b>12</b>	<b>31</b>
<b>I negotiate with them and they often offer more money in exchange for not using a</b>	<b>11</b>	<b>2</b>	<b>5</b>	<b>18</b>

<b>condom and I agree to this.</b>				
<b>They refuse and I lose their business.</b>	<b>10</b>	<b>12</b>	<b>6</b>	<b>28</b>
<b>If other please describe briefly:...</b>	<b>2</b>	<b>3</b>	<b>1</b>	<b>6</b>

The overwhelming majority of participants reported using condoms almost all of the time. This suggests that sex work is not inherently, unacceptably dangerous to one's Bodily Health in terms of the risk of sexual transmitted infections. While the widespread preference of clients for unprotected sex is concerning, the ability and intent of sex workers to insist on condoms and negotiate thereover is positive. Despite the unequal power dynamics between sex workers and their clients the majority of participants reported that they had a hard-line 'no condom no business' policy and that ultimately most clients agree to use a condom. A significant number of participants indicated that in situations when a client cannot be persuaded to use a condom they refuse his business. The qualitative responses revealed that this awareness of the dangers of unprotected sex and individual hard-line policies of insisting on condom use are the products of the educational campaigns of SWEAT and its affiliate organisations. While neither full nor partial decriminalisation would address instances where clients offer more money to sex workers in exchange for unprotected sex these policies would buttress their ability to negotiate in other contexts to a greater extent than the status quo. The important distinction between these full and partial decriminalisation in terms of health outcomes is their disparate impact on access to treatment and the dynamics between sex workers and the police:

*Do you think full decriminalisation would improve your ability to insist on safer sex practices?*

<b>Answer Options</b>	<b>Cape Town</b>	<b>Rural Areas</b>	<b>Foreigners</b>	<b>Total</b>
<b>Yes</b>	<b>5</b>	<b>16</b>	<b>10</b>	<b>31</b>
<b>No</b>	<b>3</b>	<b>1</b>	<b>1</b>	<b>5</b>
<b>Maybe</b>	<b>12</b>	<b>4</b>	<b>8</b>	<b>24</b>

Follow-up qualitative questions provided context for the predominantly positive responses in the table above. Participants who answered *yes* and *maybe* emphasised issues such as being able to visit hospitals without fear of being mocked or shamed by medical staff, being denied access to condoms, STI tests, and abortions, being able to work in safer legally sanctioned establishments, and protection from police abuse and harassment, as factors which they hoped legal change would address. These answers impress upon us the importance of Nussbaum’s stigma analysis: the unjust discrimination against sex workers on irrational grounds is the source of real and widespread pain. Beyond denying sex workers their equal human dignity necessary for realising the combined Affiliation capability – a priority for Nussbaum – this stigma restricts sex workers’ material control over their environments and endangers their physical health (ie heightened threats of violence and denial of healthcare). All of these capabilities are best served by decriminalisation relative to partial decriminalisation especially the subject of police harassment:

*Have police ever searched you for condoms or confiscated condoms from you?*

<b>Answer Options</b>	<b>Cape Town</b>	<b>Rural Areas</b>	<b>Foreigners</b>	<b>Total</b>
<b>Yes</b>	6	6	5	17
<b>No</b>	8	7	4	19
<b>I'd rather not answer</b>	12	9	10	31

Criminalisation incentivises police officers to target and harass sex workers. Police confiscating condoms as evidence of intent to sell sex in South Africa is a serious health concern. Several participants identified being able to carry protection freely as a reason why they felt that decriminalisation would improve their ability to insist on safer sex practices. A primary constituent of the Control over one's Environment capability is protection from unlawful search and seizure. The status quo actively undermines the central capability and partial decriminalisation, as will be shown in the following sections, fails to effectively ally sex workers and police to resolve. A large portion of the survey participants elected not to answer the question in the above table directly but in their qualitative responses, and answers to a later questions regarding negative interactions with police, it became apparent that most of these non-answers would certainly have been 'yes's. Only full decriminalisation effectively allies sex workers with police such that they are the subjects of their protection – respected citizens – and not criminals or a lead thereto.

## Sex Worker – Police relations

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Further investigation of the dynamics between survey participants and law enforcement found that 75% of respondents had experienced at least one negative interaction with the police in their time as a sex worker; many of whom declined to answer the question pertaining to the confiscation of condoms. Of the 60 participants who answered the question “*With the law as it is in South African do you feel comfortable reporting cases to the police and testifying in court if necessary?*” 90% (54) indicated that they did not. Relative to the status quo 52% of respondents felt that partial decriminalisation would not improve the relationship between sex workers and the police, 44% answered that it might have a positive effect but that they were unsure, and only 4%, 2 participants, responded in the affirmative. This response set is aptly explained by the near unanimous perception among participants that partial decriminalisation would result in police following and harassing sex workers in order to arrest their clients.

*Do you think partial decriminalisation would lead to police following and harassing sex workers in order to arrest their clients?*

<b>Answer Options</b>	<b>Cape Town</b>	<b>Rural Areas</b>	<b>Foreigners</b>	<b>Total</b>
<b>Yes</b>	13	20	18	51
<b>No</b>	1	0	0	1
<b>Maybe</b>	7	1	1	9

In response to “*Do you think that partial decriminalisation will help protect sex workers and be an improvement to full criminalisation? If not please explain why briefly*” a majority of participants indicated that they were strongly averse to, and even scared of, partial decriminalisation. Mpho said that she “hates this law that will kill sex workers” by forcing them to work in isolated areas. Mudiwa echoed this concern, stating that “sex workers are killed now in front of police and it will happen much more if they don’t see anyone and have us alone in dark spaces.” Across the three participant groups’ qualitative responses there was a consistent rejection of partial decriminalisation. Respondents perceive partial decriminalisation as limiting their control over their lives and work and endangering their physical health. Conversely, across all three respondent groups full decriminalisation is perceived by a majority (55%) as having a positive effect impact on the relationship between sex workers and law enforcement officials. A significant portion, 73%, of participants indicated that they would be more comfortable reporting cases to the police and testifying in court if sex work were to be decriminalised. Of the remainder, 25% answered that decriminalisation might improve upon the status quo and only 2% felt that it would not. Given this data Anderson would concede that both her freedom and autonomy grounds conditions for the prohibition, or partial decriminalisation of, sex work are not met. While Pateman calls for the dismantling of exploitative social structures that coerce vulnerable women into activities like sex work her theoretical justification for the continued legal prohibition of the sale of sex is starkly removed from the lived realities sex workers are confronted with.

The urgent need for legal reform, particularly pertaining to the relationship between sex workers and law enforcement, was made painfully clear by the one-sided war heavily armed police and South African National Defence Forces fought against the nation’s poor women in the name

of enforcing COVID-19 lockdown measures.<sup>165</sup> Many of South Africa's sex workers – unable to earn an income during lockdown and excluded from government relief programs – were evicted from their homes. These women subsequently became targets of police harassment and were regularly threatened with arrest or hefty fines for outstanding warrants related to sex work. This punitive policing affected all sex workers, even those living in homes with their families. Coordinator Mathe observed how “sex workers are scared even to go to the shops... police will see them and know that they are sex workers...even if they are just buying food police will stop them, accuse them of doing sex work, or use outstanding warrants against them.”<sup>166</sup> The discriminatory and violent police treatment of vulnerable sex workers during the pandemic is indicative of the manner in which South Africa's law enforcement institutions are anti-working class and anti-women at their core. Incidents of negligence, harassment, and abuse of power perpetuated by police during lockdown are logical extensions of a pernicious system which criminalises the very victims it is supposed to protect. The criminalisation of sex work traps an already marginalised group outside of the legal system through which they are expected to report incidents of rape and abuse. Repeated cycles of arresting sex workers do not target the perpetrators of serious violent crimes in the sex industry, label sex workers with criminal records rendering them unable to seek other forms of employment, and wastes scarce public resources in a nation wracked by intractable gender-based violence and other serious violent crimes.<sup>167</sup> Full decriminalisation would ally sex workers with law enforcement recognising their equal dignity as citizens and enhancing their control over their material environments. The promotion of these capabilities would in turn benefit sex workers' physical health and safety. It is clear that full decriminalisation best protects and

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<sup>165</sup> Ranoszek, S., *Sex Workers: Ignored by the state, abused by police*, (August, 2020), <https://www.newframe.com/sex-workers-ignored-by-the-state-abused-by-police/>

<sup>166</sup>

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enhances the central capabilities of sex workers – acknowledging their equal human dignity and supporting their decisions – in an environment that so unjustly stigmatises their persons and restricts their options.



### **Sex Worker - Third Party Relations**

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The section of the survey study addressing the dynamics between sex workers and third parties investigated whether participants had personal or indirect experiences with trafficking for sex work, drugs and violence as means of third party coercive control of sex workers, and the confiscation or withholding of the earnings of sex workers by controlling third parties. Across these questions a fraction of participants, 2%-3%, indicated that they had directly experienced the behaviour in question. Indirect experiences, as a result of having worked with someone or having heard of someone who experienced these behaviours, were reported by 25%-35% of respondents. A majority of participants in this study answered that they had no such experiences of any kind. While this may appear to support the case for full decriminalisation this project does not claim these limited findings to be generalisable in the same way as questions which were answered within context and with further qualitative explanation.

## Conclusion

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*Do you think that decriminalisation would give sex workers the rights and protections needed to address the abuse and exploitation that some sex workers face in South Africa?*

- ***No - 1 respondent***
- ***Yes - 53 respondents***

The criminalisation of sex work in South Africa has failed. It has failed to target the perpetrators of violent crimes and those who exploit vulnerable women for their own gain. It has failed to protect sex workers providing for their families. It has failed to acknowledge them as equal citizens, as women with agency despite difficult material realities, as people deserving of legal justice and the respect of this nation's police and healthcare workers. Partial decriminalisation in the vein of the Swedish Model offers a prima facie persuasive case for a legislative alternative. By acknowledging the violence perpetuated against sex workers partial decriminalisation does provide them with some formal legal protections and addresses the imbalance between sex workers and their clients. However, inherent within this legislative response is the unfounded assertion that sex work is immoral and degrading. Partial decriminalisation infantilises sex workers as victims needing to be saved from themselves. This violation of their equal dignity is normatively indefensible and dangerous.

Advocates of criminalisation as well as partial and full decriminalisation agree that the primary goal of regulating the commercial sex industry, through any legal framework, is to protect and serve women and other vulnerable actors who are at risk of exploitation. The exclusion of sex workers from discussions over regulating the commercial sex industry has resulted in policies which do not recognise their humanity or serve their material interests. This project developed Martha Nussbaum's capabilities approach as an evaluative tool for determining the potential effects of partial and full decriminalisation on South African sex workers' life quality. On this view, for the

law to promote sex workers' human capabilities it must respect their unqualified personhood at its core. This project takes the opinions and lived experiences of sex workers seriously. They are not an unindividuated mass of fallen women, or victims of exploitation, but people whose agency and capacity for practical reason the law ought to enhance and promote. By centring sex workers as active participants in the debate over legislation this project explicitly aims to construct a policy recommendation which works to their material benefit and respects their equal standing in society at its foundation. Through combining a normative analysis of sex workers' human capabilities with empirical data this paper has shown that a regulative policy of full decriminalisation would realise these ends most effectively. Full decriminalisation substantively protects sex workers from physical harm – while not limiting their agency or ability to support their families – and unequivocally proclaims their status as equal citizens. As Nussbaum shows, the stigma associated with sex work is irrational and not rooted in any normative principle we ought to defend. Sex workers are not criminals nor are they in need of saving. Instead, the law should, as full decriminalisation does, recognise sex workers as people deserving of respect in society, as complex moral agents with the capacity for practical reason, and as feminists fighting for equality.

To reiterate Ndiliswa's words, "*Sex work gave me life.*"

*Do you think sex work should be completely decriminalised in South Africa?*

- *No - 1 respondents*
  - *Yes - 58 respondents*
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