

Is Cyberprostitution Prostitution?

New Paradigm, Old Crime

position paper, condensed from longer (15 pp) paper

Ithiel de Sola Pool, in his 1983 *Technologies of Freedom*, writes:

Each new advance in the technology of communication disturbs a status quo. It meets resistance from those whose dominance it threatens, but if useful, it begins to be adopted. Initially, because it is new and a full scientific mastery of the options is not yet at hand, the invention comes into use in a rather clumsy form. Technical laymen, such as judges, perceive the new technology in that early, clumsy form, which then becomes their image of its nature, possibilities, and use. This perception is an incubus on later understanding.

The courts and regulatory agencies in the American system (or other authorities elsewhere) enter as arbiters of the conflicts among entrepreneurs, interest groups, and political organizations battling for control of the new technology. The arbiters, applying familiar analogies from the past to their lay image of the new technologies, create a partly old, partly new structure of rights and obligations. The telegraph was analogized to railroads, the telephone to the telegraph, and cable television to broadcasting.

(7-10)

In this paper, I examine the way in which cyberprostitution--a new advance in the technology of communication *sine qua non*—disturbs the status quo heretofore considered the conceptual terrain of prostitution under the Law. First, I map out the “early, clumsy form” of cyberprostitution today—the practices and possibilities which threaten to serve as “an incubus on later understanding” of this new technology. Next, I explore the way in which such technical laymen as judges (and lawyers) have begun to apply familiar analogies from the past in their attempts to assimilate cyberprostitution into some semblance of a structure of rights and obligations. Finally, I suggest that the interface produced by the analogizing of prostitution to today’s lay image of cyberprostitution provides an important and likely short-lived window of opportunity for an honest moment of reckoning with a naked emperor

previously and pervasively dressed up and trotted out as “Prostitution” by our courts and regulatory agencies. In other words, I am as much interested in the way in which the American legal system is expanding the conceptual terrain of prostitution to include cyberprostitution as I am in the way cyberprostitution is by virtue of this expansion changing the very lay of the land.

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In their 2005 analysis of sex regulation in Great Britain in the wake of the 2004 Home Office/New Labour consultation document on prostitution--“Paying the Price”-- titled *Illicit and Illegal*, Joanna Phoenix and Sarah Oerton suggest that “the ‘problem’ of prostitution has been, and continues to be, constituted as a problem of ‘effects’” (77). Phoenix and Oerton ground their theoretical framework in a Foucauldian notion of “sex” as “an especially dense transfer point for relations of power” (HS 103). Such an understanding refuses “sex” any sort of objective reality outside of discourse. Rather, “sex has to be invented and invested with social meaning in order to become ‘sex’ at all” (11). Phoenix and Oerton thus take prostitution to be:

...part and parcel of the new sexual enterprise around sex whose object of control is not sex *per se* (or, in this specific instance, the exchanging of money for sexual activities) but the broader social relationships between men and women and between specific groups of people (in this case between ‘prostitutes’ and ‘pimp/partners’ or between ‘prostitutes’ and the ‘wider community’ who suffers lawlessness, etc.
(103)

Noah Zatz espouses a similarly Foucauldian perspective on sex in his 1997 essay “Sex Work/Sex Act: Law, Labor, and Desire in Constructions of Prostitution.” Working from Foucault’s “insight that legal suppression and rhetorical condemnation may be mechanisms

of sociocultural production as well as repression,” Zatz shifts the focus on prostitution from “sex” (the definitional range of which he argues should not be confined to genitality predicated upon a procreative teleology) to the legal discourses accreted around this perennially missing center. In so doing, Zatz draws attention to the way in which these discourses substantiate “sex” as the causal medium of criminal agency. Ultimately, Zatz concludes that “criminalization does not simply ‘repress’ a preexistent thing called ‘prostitution,’” but rather, “It aids in the production of a particular mode of sex work” (302-303).

In this paper, I have taken a similarly social constructionist approach to the “sex” of cyberprostitution. Should anyone persist in the naïve belief that the criminalization of prostitution was only ever about (or even mostly about) “sex”—whether one considers sex to be an act, a form of conduct, and/or an activity—then the way in which cyberprostitution has been inscribed in the annals of jurisprudence so far in advance of its technological capacity for genital manipulation in real-time and real-space offers a unique opportunity to rethink the structure of rights and obligations presently governing (non-cyber) prostitution. In much the same way that the courts have determined that non-genitally interactive cybersex “counts” as adultery¹ has clarified the fact that adultery has never first and foremost been about “sex,” per se, asking the question “Does cyberprostitution ‘count’ as prostitution?” can help clarify the conceptual terrain of prostitution.

Thus far, the courts and regulatory agencies in the American system have applied to cyberprostitution familiar analogies from the past which fail to address those “Elements of Offense” necessary for a conviction of prostitution as provided by the Model Penal Code:

¹ footnote pending, awaiting further clarification from Prof. Fineman

In order for there to be prostitution, there must not only be sexual activity such as manual sexual stimulation, but payment of money as well.... ‘Prostitution’ is engaging in sexual activity as a business... (251.2).

Rather, the analogies applied—principally, pimping & pandering and pornography—have, per Phoenix and Oerton’s suggestion, addressed the problem of prostitution vis-à-vis the problem of its effects. This exclusive attention to the periphery of a “sex” designated but not defined as prostitution threatens to evade any and every epistemological inquiry into the criminalization of prostitution in its automatic privileging of the ontological status of the crime.

We are in 2006 at a critical juncture at which we can-- if we ask ourselves the right questions--take advantage of an opportunity to interrogate the underpinnings of the criminalization of prostitution before they become solidified as the underpinnings of the criminalization of cyberprostitution-- before it is possible to tell ourselves that the reason cyberprostitution is illicit and illegal has anything at all to do with “sex.” It is precisely in the moment that the technical laymen of the Law apply the familiar analogies of the past to cyberprostitution that one can bear witness to the way in which such analogizations “operate by erasure of the material origins of their legitimation deficits” (Phoenix & Oerton 197). Indeed, it is as the answer to the question, “Is Cyberprostitution Prostitution?” comes up “No,” and “No,” and “No” again-- even as the arbiters of our courts and regulatory agencies paradoxically persist in designating any number of online activities “Prostitution”-- that one can begin to isolate and interrogate the logical fallacies upon which they and their predecessors have relied in dubbing any number of offline phenomena “Prostitution.”