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PROSTITUTION LAW AND PATERNALISM

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A paternalist approach to prostitution law elicits criticism from two distinct sources. Liberals, in particular those with libertarian leanings, are likely to criticize the apparent implication that free choices by consenting adults be subject to the "parental" judgment of the state.[1] Feminists too, even if more circumspect with regard to liberal appeals to choice and consent, may be equally suspicious of the paternalist motives of a patriarchal state in developing policies governing the lives of women.[2] In his recent book *Prostitution and Liberalism*, Peter de Marneffe attempts to address these worries, and to defend paternalistic policies specifically aimed at reducing the number of women who choose to pursue a life in prostitution.[3] Although de Marneffe does not endorse the prohibitionist approach typical in the U.S., he argues that the best reasons for alternative approaches to the practice (including some forms of regulated legalization) are necessarily paternalistic.

In my paper, I question whether paternalism offers the best model for understanding the aims of a reasonable prostitution law. Although I shall not question de Marneffe's extensive and subtle arguments purporting to show that a paternalist approach to prostitution is compatible with liberal principles, I shall dispute the claim that state policy toward prostitution is best conceived as paternalist. Rather than focusing exclusively on first party harms, I argue that an adequate approach to prostitution requires attention to the collective good of women. In part I, I briefly describe de Marneffe's argument for a paternalist approach and what he takes to follow from it. In part II, I suggest reasons why prostitution may not fit the model for a paternalist state intervention, and in part III, I entertain some possible objections to the approach to legal policy that I advocate.

In making these points I should emphasize that, as with de Marneffe's treatment of the subject, I shall be discussing heterosexual prostitution, a sexual economy in which men provide the "demand" for sexual goods and women the "supply." I shall not pursue the question of whether these considerations apply in a similar manner to other kinds of prostitution.

I. The Argument from Paternalism

Before describing de Marneffe's argument that reasonable prostitution laws are paternalist, it is essential to define what it means for a policy to be "paternalist" in the first place. De Marneffe claims that a state action is paternalist if, and only if, "the strongest reasons in its favor are paternalistic, and it cannot be justified by nonpaternalistic reasons."[4] A policy is paternalistic just in case "the policy limits a person's liberty or opportunities in some way, and this reason identifies some way in which the person is benefitted by this limitation."[5] Critically, a policy is paternalistic only if it aims to eliminate first party harms, and it cannot be justified non-paternalistically.

As regards prostitution law, de Marneffe identifies three distinct policies in existence today: Prohibition (the dominant paradigm for prostitution law in the U.S.), abolition, and regulation. A policy of prohibition "categorically criminalizes the sale and purchase of sexual services," and may take on permissive or impermissive forms.[6] Under a regime of impermissive prohibition, all buying and selling is criminalized, while a permissive approach (such as is found in Britain) criminalizes only "closely related activities" such as streetwalking, pimping, or kerb-crawling.[7] In contrast to prohibition, a policy of abolition does not criminalize the *sale* of sexual services or closely related activities, but does criminalize their *purchase* or brokering by third parties. As with prohibition, abolition may impermissively criminalize all purchase and brokering of services (as Swedish law currently does), or permissively criminalize only activities related to buying and brokering. In contrast to both prohibition and abolition, regulation categorically criminalizes neither the purchase nor sale of sexual services, but imposes legal restrictions on either or both, such as "age restrictions, zoning restrictions, and health and safety regulations."[8] In de Marneffe's view, all existing policies of regulation are "impermissive" in that they employ civil and criminal penalties as a means of imposing regulative restrictions on sex commerce.

De Marneffe argues that the best justification for prostitution law is paternalistic, both because such laws invariably involve a limitation on the liberty of prostitutes, and because these limitations cannot be justified apart from a concern for their health and welfare. In making these claims, de Marneffe explicitly rejects the contention of some feminists that prostitution is not really a choice at all, or that it is violence against women—claims that, if true, would mean that there is no actual "liberty" to limit. In opposition to such claims, de Marneffe argues that women in

prostitution typically choose the work they do, and that their choice to do so is voluntary rather than forced.[9] Nevertheless, de Marneffe embraces the argument of anti-prostitution feminists that a life of prostitution is most often severely harmful to the prostitute. Specifically, de Marneffe argues for three points that, taken together, vindicate a paternalist legal framework for regulating prostitution. First, he argues that that prostitution is harmful, "commonly experienced as humiliating and abusive, and [resulting] in lasting feelings of worthlessness, shame, and self-hatred."[10] Second, de Marneffe contends that justifiable prostitution laws work at least to help reduce the number of people who might choose to engage in this harmful practice. Finally, he claims that the harmfulness and stigma attached to prostitution arises from the nature of the work itself, and not from the stigmatizing effect of its illegal status. Were the latter true, of course, legal sanctions against prostitution would be viciously circular, causing the harm that they purportedly seek to address.

Although de Marneffe defends a paternalistic approach to prostitution law, he also argues that the case for such intervention must be balanced against a sometimes-conflicting principle of respect for the autonomy of persons. Specifically, he rules out paternalistic policies that "limit liberties or opportunities" of mature adults in ways that they oppose, where the liberties or opportunities "are important ones...to have," and where an agent's opposition to the policy "does not result from psychosis, acute emotional distress, or ignorance of grave demonstrable consequences."[11] On de Marneffe's account, the value of protecting health and safety must always be balanced against that of permitting personal liberty. In this sense, the problems of developing a reasonable law governing prostitution is analogous to that of legislating rules governing health and safety in the workplace. He cites the infamous majority opinion in *Lochner v. New York*, in which limits on the working hours of New York bakers were struck down as a violation of the liberty to contract, as a classic example of overplaying the value of liberty.[12] De Marneffe argues that the liberty to consensually enter into contracts can be restricted, provided that the interests advanced by the restriction are important, the penalties attached to violations of it are reasonable, and the interests protected "are not outweighed by any autonomy interests that this policy threatens."[13] A reasonable paternalism in prostitution law, much like all labor law, must strike a balance between autonomy and the protection of health and safety.

What would be a reasonable paternalism sanction in prostitution law? De Marneffe's conclusions here are tentative, but he is clear that it could not endorse the prohibitionism prevalent in the U.S. The blanket criminalization of the selling of prostitution subjects prostitutes to arrest,

and forces them into pimping networks, severely worsening the welfare of women in the practice. Prohibitionism also fails to respect the autonomy of either buyers or sellers. De Marneffe claims that this problem also applies to the regime of impermissive abolitionism found in Sweden. While the latter legal framework might be justified on paternalist grounds, because it prohibits a man "from purchasing sexual services from anyone, regardless of age or personal situation," it is a more difficult policy to justify on grounds of personal autonomy.[14] De Marneffe concludes that regimes of either permissive abolitionism or impermissive regulation are the easiest to defend, inasmuch as restrictions on the age of prostitutes and the conditions of the transaction serve to protect the health and safety of the worker, while respecting the autonomy of the parties to the transaction.

II. Must Justifiable Prostitution Law Be Paternalistic?

Although some prostitution activists (in particular those working with women in street prostitution) have welcomed a paternalist interpretation of prostitution law, most have not. This is perhaps most obvious in the case of sex work advocates, who argue that the harmfulness of prostitution derives less from anything intrinsic to the work than from the consequences of its illegal status. De Marneffe argues (with some success in my view) against this claim, and I shall not go into that argument here. He does not, however, address what I take to be the radical feminist objection to paternalism. Radical feminists are most likely to object not to the harm of prostitution, but rather with the focus on women's choices, and whether or not they should have the liberty to make them, as lying at the root of the problem. As Kathy Miriam has argued, it is not women's choices to prostitute, but men's demand for sexual access to women that lies at the root of the sexual economy of prostitution.[15] Just as labor law is not, in essence, an attempt to protect workers from unwise choices, but rather to reduce their vulnerability to exploitative offers, so feminist jurisprudence in this area should not be an attempt to protect women from their own choices, but rather to curb the ability of men to make sexually exploitative offers.

It is worth noting in this context that, despite his criticism of the decision of the Supreme Court in *Lochner*, de Marneffe accepts the libertarian reading of what was at stake in the case. On his view *Lochner* is, at base, a failure to recognize the need for a paternalistic intervention that would limit the autonomy of workers, a case in which the Court valued liberty too highly.[16] Such an interpretation casts *Lochner* as a case in which the value of liberty was pitted against that of a liberty-depriving

appeal to social welfare, with the disagreement being over what was the more weighty value in that instance.

The problem with such an interpretation, however, is that it fails to distinguish between instances in which beneficiaries require a paternalistic state intervention on account of a moral or epistemological failure, and those in which they need the intervention to secure a desired good that exploitative conditions make it difficult or impossible to obtain. As John Kleinig has argued, it is best to see *Lochner* "not as an imposition on workers for the sake of a health that they are prone to neglect, but as a means of securing a health they desire but cannot otherwise ensure."[17] In other words, other things being equal, workers generally have a reasonable interest in limits on the number of hours they have to work. Yet some workers—in particular those least well-off—will find it difficult to resist offers for undesirably long hours given their need for income. In such a situation, the force of law is, to use the words of Mill, "required not to overrule the judgment of individuals respecting their own interest, but to give effect to that judgment."[18]

It is important to emphasize that unlike the case of paternalism, the purpose of this kind of legal intervention is not primarily to prevent a party from making a choice that is harmful to that party individually, but rather to prevent her from undermining the interests of the class of which she is a part. If part of a class of workers is able to consent to contracts for sub-optimum working conditions, this will have a detrimental impact on the bargaining position of the class overall. The direct concern here is for third-party rather than first-party effects.

Assuming that labor law should not be seen as paternalistic, but rather as providing a means for workers to effect their own considered judgments, could the same rubric apply to prostitution law? In the remainder of my paper I shall discuss how such an interpretation might be possible, though it may lead to differing policy recommendations depending upon how we identify the class whose interests are at stake.

Perhaps the most direct application of the labor law model to prostitution would be to take sex workers who are engaged in prostitution as the interested class. If this were the case, it would be reasonable for such workers to desire to continue their practice, but to avoid the worst forms of economic and sexual exploitation. Accordingly, restrictions on age and working conditions (e.g., bans on streetwalking, kerb-crawling, pimping, or brothels), and even required union membership might be entertained. Of course, restrictions could not go so far as to ban the buying of prostitution as in impermissive abolitionism, as that would not be in the interest of the class of sex workers. In fact, abolitionism of any sort could

not advance the interests of sex workers, inasmuch as such a policy would aim to destroy the market upon which they depend for their living. Accordingly, some regime of regulation would be the best way for the state to give effect to their interests.

Rather than limiting the class whose interests are at stake to women who are already in prostitution, however, perhaps it ought to include that of women more generally.[19] Because the dominant practice of prostitution consists of men's contractual offers for sexual access to *women*, women as a class may be affected in ways extending beyond the particular subclass engaged at any one time in the practice. Given this, the question becomes: How could state action restricting or regulating prostitution advance the interests of women generally concerning what they reasonably desire but could not otherwise ensure? It would seem that the most straightforward answer would be that law could aim to minimize the number of women who feel compelled to seek employment in the sex industry.[20] As de Marneffe argues, prostitution is commonly seriously harmful to women in the industry and, other things being equal, very few women would choose prostitution as a career. This means that women have a reasonable desire not to feel compelled by social and economic circumstances to become prostitutes.

For the law to give effect to this desire, some form of abolitionist policy would likely be preferable to regulation. Regulatory policies, even relatively impermissive ones such as those found in the Netherlands and Germany, have generally not been effective in curtailing demand for prostitution, and as a consequence have failed to impede the employment of increasing numbers of poor women, largely from Eastern Europe, to staff the brothels.[21] While both the regulatory and abolitionist models decriminalize the sale of sexual services, only abolitionism seeks to curb demand for prostitution by limiting or prohibiting men's purchase of those services, thus striking at what writers such as Pateman and Miriam have identified as the root of the sexual economy of prostitution. While de Marneffe criticizes impermissive abolitionism for failing to honor the sexual autonomy of purchasers by depriving them of contracts with willing sellers, it should be noted that the strategy of prohibiting undesirable labor offers that poorly-off workers might be willing to accept has long been accepted in labor law. Under the Occupational Safety and Health Act of 1967 (OSHA), for example, employers are forbidden to make offers of hazard pay for technologically eliminable risks, regardless of the willingness of workers to accept or even to welcome them.[22] To give effect to workers' reasonable interest in safe working conditions, the law must limit the right of employers to make certain kinds of offers to willing

employees. To give effect to women's reasonable interest in avoiding the commodification of their sexuality, the law may similarly have to limit the putative right of men to make certain kinds of offers for sexual access to willing women.

III. Concluding Remarks

It should be emphasized that even if there are no theoretical problems with abolitionist and even impermissive abolitionist legal approaches to prostitution, whether a particular state is justified in pursuing such legal policies depends upon other considerations. As already noted, social and economic hardships rather than unusual sexual preferences are the typical motivating force for women who choose a life of prostitution. Where there is little or no hope of escaping such hardships except through prostitution, legal action aiming to curtail severely the male demand for sexual access may have further debilitating effects on the conditions of impoverished women, and may not be justified. It should be noted, however, that massive social and economic hardship on women is itself most often in large part the result of policy failures concerning the rights of women. If an abolitionist policy is to actually move toward relieving the pressure on women to become prostitutes (and not merely pressure disadvantaged women into an underground sex trade), it must be implemented in tandem with policies aimed at eliminating poverty, homelessness, childhood sexual abuse, domestic violence, and other economic and social conditions that contribute to women turning to prostitution in the first place.

It may also be objected that abolitionist policies fail to respect women's autonomy in that some women do freely choose to engage in prostitution, and would do so even in the absence of contributing economic and social incentives. As with paternalist approaches to prostitution, abolitionism involves the state "second-guessing" women's choices with regard to their sexuality and, as such, is objectionable on grounds of sexual autonomy. In response to this objection, it should be noted that abolitionism (unlike prohibitionism), does not prohibit the sale of sex or activities related to it, but rather their purchase, and so does not directly interfere with women's autonomy. Of course, it does interfere indirectly by aiming to reduce or eliminate demand for prostitution, thus diminishing the opportunities for commercial sex transactions.[23] It is important to observe, however, some parts of labor law have a similar effect. OSHA's ban on certain offers for hazard pay, for example, deprives willing risk-takers of opportunities to be contractually compensated for risks they want to take. As in that case, the justification for suppressing offers of prostitution is to protect the third

party interests of a larger class of reasonably risk-averse women, more of whom would be pressured to accept such offers if men had a legal right to make them. One might object, of course, that women's interest in being free from economic pressure to provide sexual access to men has been overplayed, but that is an issue for another paper.[24]

Notes

[1] See e.g., David Archard, *Sexual Consent* (Boulder: Westview, 1998), pp. 106-10, Lars O. Ericsson, "Charges Against Prostitution: An Attempt at a Philosophical Assessment," *Ethics* 90 (1988): 335-66, Martha Nussbaum, *Sex and Social Justice* (New York: Oxford University Press, 1999), pp. 276-98, David A. J. Richards, *Sex, Drugs, Death, and the Law* (Lanham, Md.: Rowman and Littlefield, 1982), pp. 84-153, and Sybil Schwarzenbach, "Contractarians and Feminists Debate Prostitution," *Review of Law and Social Change* 18 (1990-91): 103-30.

[2] See, e.g., Elizabeth Anderson, *Value in Ethics and Economics* (Cambridge, MA: Harvard University Press, 1993), pp. 150-58, Scott A. Anderson, "Prostitution and Sexual Autonomy: Making Sense of the Prohibition of Prostitution," *Ethics* 112 (July 2002): 748-80, Martha Chamallas, "Consent, Equality, and the Legal Control of Sexual Conduct," *Southern California Law Review* 61 (1987): 826-30, and Margaret Radin, "Market Inalienability," *Harvard Law Review* 100 (1987): 1921-25, *Contested Commodities* (Cambridge, Ma.: Harvard University Press, 1996), pp. 132-36.

[3] Peter de Marneffe, *Prostitution and Liberalism.* New York: Oxford University Press, 2010.

[4] De Marneffe, *Prostitution and Liberalism*, p. 79. See Gerald Dworkin, "Paternalism," *Monist* 56 (1972): 65.

[5] De Marneffe, *Prostitution and Liberalism*, p. 79.

[6] *Ibid,* p. 28.

[7] *Ibid,* p. 29.

[8] *Ibid*, p. 29.

[9] *Ibid*, p. 8.

[10] *Ibid*, p. 12. Because it commonly involves a woman providing "sexual services throughout the day or week to a number of men, some of whom she does not know at all, and most of whom she does not know well," prostitution typically has long-term consequences that are harmful and sometimes traumatizing to the sex worker, and would do so under any legal regime (13).

[11] *Ibid*, p. 67.

[12] *Ibid*, p. 155.

[13] *Ibid*, p. 76.

[14] *Ibid*, p. 122.

[15] Kathy Miriam, Stopping the Traffic in Women: Power, Agency and Abolition in Feminist Debates over Sex-Trafficking, *Journal of Social Philosophy* 36 (2005): 2.

[16] De Marneffe, *Prostitution and Liberalism*, p. 155.
[17] John Kleinig, *Paternalism* (Manchester University Press, 1983), p. 197.
[18] J. S. Mill, *Principles of Political Economy* (New York: P. F. Collier and Sons, 1900), p. 442, cited in Gerald Dworkin, "Paternalism," *Monist* 56 (1972): 69n.
[19] Conceiving of prostitution policy as the protection of women's rights rather than a paternalistic intervention is suggested in MacKinnon, "Prostitution and Civil Rights," *Michigan Journal of Gender and Law* 1 (1993): 13-31. See also Linda R. Hirshman and Jane E. Larson in *Hard Bargains: The Politics of Sex* (New York: Oxford University Press, 1998), pp. 286-94.
[20] Linda Hirshman and Jane Larson argue that women generally do have a reasonable interest in curtailing prostitution, in that men's access to prostitutes subverts the greater benefits that wives obtain through the marriage contract: "Apologists sometimes claim that prostitutes spare others the full weight of male desires. But prostitutes in fact damage the interests of nonprostitutes, bidding down the price of heterosexual access. Nonprostitute women are not paid for each discrete instance of sexual cooperation with a man. But over the longer term, a web of economic, social, and emotional exchanges can grow up around an intimate male-female relationship, which usually represents more gain to the woman than the money exchanged in the commercial sex transaction. Moreover, prostitution is a standing offer to violate the marriage contract of sexual fidelity...Where prostitution is curtailed, wives are better situated to force their husbands to bargain with them for sexual access." (Hirshman and Larson, *Hard Bargains: The Politics of Sex*, p. 287.) Presumably few feminists would uncritically endorse the assumption that sexual bargaining is the best that women can hope for in their sex lives.
[21] Louise Osborne, "Why Germany is Now Europe's Largest Brothel," *The Guardian*, 12 June 2013, accessed 1 July, 2013: http://www.guardian.co.uk/world/shortcuts/2013/jun/12/germany-now-europes-biggest-brothel?INTCMP=SRCH
[22] In his discussion of the Occupational Safety and Health Act of 1970 (OSHA), Norman Daniels dubs such contractual arrangements "quasi-coercive," and observes that, "Quasi-coercion undermines true autonomy in much the same way coercion does." See "Does OSHA Protect Too Much?" in *Moral Rights in the Workplace*, ed. Gertrude Ezorsky (Albany: State University of New York Press, 1987), p. 69. For further discussion, see Jeffrey Gauthier "Consent, Coercion, and Sexual Autonomy" in Keith Burgess-Jackson, *A Most Detestable Crime* (New York: Oxford University Press, 1999), pp. 71-91.
[23] See de Marneffe, *Liberalism and Prostitution*, pp. 38-39.
[24] Martha Nussbaum suggests such an argument in *Sex and Social Justice*, pp. 276-98.