

THE PROSTITUTION DEBATE

Breaking down barriers

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The dominance of liberal thought and individualism in Western society has led to a breaking down of barriers. Prostitution, previously a taboo subject, was illegal in Australia until the 1980s,¹ but is now openly discussed and even supported. The notions of autonomy and consent are often used to support the legalisation of the sex trade, such as in the recent domestic debate surrounding Western Australian prostitution law reform. The Prostitution Amendment Bill 2007, which focused on 'minimalist decriminalisation' and the New Zealand model, was debated in the Western Australian Parliament from August 2007 to March 2008.² Against the predictable backdrop of morality-based arguments, the Labor Party and Prostitution Law Reform Working Group defended the Bill by adopting the rhetoric of 'sex work' and characterising prostitution as an 'industry' into which persons had a choice to enter.³ This misunderstanding of autonomy fails to recognise that, in the realm of prostitution, privileging consent is not always an appropriate means of respecting individual human dignity.

Autonomy, as self-government, is used to justify the notion that willing adults are able to 'choose' prostitution as a legitimate work option. Those who argue that prostitution is a 'choice' tend to characterise it as an exercise of contractual freedom or job preference, and should thus be legalised rather than prohibited to protect that choice. However, respecting a person's dignity does not always equate to leaving their apparent consent unchallenged, by legislation or other means. The commercialisation and regulation of prostitution will not increase a woman's sexual autonomy; paradoxically, it will further undermine her ability to make sexual choices and perpetuate gender inequality and injustice. As such, barriers need to be put in place in order to secure sexual autonomy. This article examines the consequences of decriminalising or legalising prostitution for female sexual autonomy and the ability of women to make choices regarding sex when prostitution is considered merely another use of a person's body for labour. Prostitution by nature violates a person's sexual autonomy, and merely respecting the choice to be a prostitute does nothing to protect sexual freedom.

The 'sexual commerce' argument

Those who advocate prostitution as a choice agree that prostitution has many associated harms, such as sexual assault, sexually transmitted disease, battery and

rape. However, they dispute that these harms derive specifically from the decisions of individuals to engage in sexual commerce, either as buyers or providers.⁴ Unless it can be made clear why selling sexual recreation to men contributes more to maintaining women's oppression than other forms of heterosexual relations, it would be unjustified to bar individuals from engaging in voluntary sexual commerce.⁵ Liberal feminists, for example, see stereotyping and social attitudes to prostitution as the problem rather than prostitution itself. The stigma attached to prostitution renders it undignified and is an unjust prejudice of the same sort that once denigrated the activities of female actors, dancers and singers.⁶ Proponents of a liberal feminist viewpoint envisage prostitution being treated as commercial 'erotic therapy'.⁷ As a practitioner, 'the prostitute could be respected for her wealth of sexual and emotional knowledge'.⁸ However, the basis of the liberal position is that the harms of prostitution are separate from the essential nature of prostitution, namely, 'the exchange of sexual for non-sexual goods'.⁹

In contemporary society, there is a distinct separation between sex and commerce. There are compelling reasons for the existence of such a distinction on three levels. First, on a human rights basis, prostitution violates inherent individual dignity. Secondly, on a practical level, commercialisation of sex infringes on sexual autonomy. Thirdly, with regards to social justice, sex commerce perpetuates existing discriminatory views of women and reinforces gender inequality.

Prostitution as a violation of human rights

The *Universal Declaration of Human Rights* recognises the inherent dignity and equal and inalienable rights of all human beings as the foundation of freedom, justice and peace.¹⁰ In protection of dignity, Article 5 states that 'no one shall be subjected to cruel, inhuman or degrading treatment'.¹¹ There are some who maintain that prostitution is not subordination but the sexual empowerment of women. However, in practice, prostitution often does involve the degradation of women. It is not that only women are prostitutes, but the empirical reality is that the majority of prostitutes are female, and the majority of clients are male. Andrea Dworkin claims that prostitution involves the sale of an individual's degradation. As a survivor of prostitution, she describes the inhumane violence targeted at the female body as 'a whole human life ... reduced to a few sexual orifices'.¹² On the premise that prostitution involves degrading treatment, the issue becomes a

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2. Ibid. Note that the Prostitution Amendment Bill 2007 passed the State Parliament in April 2008.
3. Ibid.
4. Scott A. Anderson, 'Prostitution and Sexual Autonomy: Making Sense of the Prohibition of Prostitution' (2002) 112 (4) *Ethics* 728, 757.
5. Ibid.
6. Martha Nussbaum, 'Whether from Reason or Prejudice: Taking Money for Bodily Services' in Martha Nussbaum (ed.), *Sex and Social Justice* (1999), 276–98.
7. Sibyl Schwarzenbach, 'Contractarians and Feminists Debate Prostitution' (1990) 18 *New York University Review of Law and Social Change* 103–30.
8. Ibid.
9. Anderson, above n 4, 758.
10. Universal Declaration of Human Rights, adopted by the United Nations' General Assembly on 10 December 1948, arts 1–2.
11. Ibid, art 5.
12. Andrea Dworkin, 'Prostitution and Male Supremacy' in Andrea Dworkin, *Life and Death* (1997), 145.

question of consent. The theoretical sustainability of prostitution as 'choice' rests on the assumption that one can consent to degrading treatment without undermining one's inherent human dignity.

Immanuel Kant suggests that there is a difference between marketable and non-marketable goods.¹³ The value of a marketable good, which can be replaced by something else as its equivalent, is its price. However, the value of a non-marketable good, which has no equivalent, is its dignity. A distinction is drawn between a market price, which has relative worth depending on market competition and the availability of alternatives, and intrinsic worth. It is a well-established principle of human rights that every individual has inherent, intrinsic dignity that is inalienable and not marketable. Thus, 'to dispose of oneself as a mere means to some end of one's own liking is to degrade the humanity in one's own person which... was entrusted to man to preserve'.¹⁴ As such, sex as a marketable good demeans a person's intrinsic worth. The trading of sex through commerce inherently conflicts with the notion of protecting the individual's right to be free from inhuman treatment.

Commercialisation: placing sex in the workplace

Commercialisation of prostitution gives validity to a willing adult's choice to sell sex in the market. It is argued by some liberal feminists and others, that prostitution should be seen as a work choice, 'one of the helping professions, a service like medicine, social work or the law which helps people cope with their problems'.¹⁵ The basis for this argument is that 'all work involves selling some part of your body'.¹⁶ As Dolores French states,

a woman has the right to sell sexual services just as much as she has the right to sell her brains to a law firm ... sell her creative work to a museum ... sell her image to a photographer when she works as a model or to sell her body when she works as a ballerina.

Margo St James of COYOTE states, 'When it's a matter of voluntary consensual acts between adults, it shouldn't be the government's business if there is money being exchanged'.¹⁷ This is problematic because the chance to sell sex impinges on the seller's freedom, or sexual autonomy. I will first differentiate prostitution from contractual freedom and other forms of work. I will then argue that the removal of restrictions on prostitution will not further, but limit, sexual autonomy.

Prostitution and contractual freedom

In prostitution, autonomy is too often equated with consent and understood in a way that attributes importance to decisions themselves, rather than how and why those decisions are made. The contract theory approach sees prostitution as 'an unremarkable payment of a fee for the performance of a service'.¹⁸ Upon this construction, as long as entrance into the contract is freely chosen and not coerced, the state should not disrupt the performance of the contract. Autonomy is viewed as the liberty to contract. To protect autonomy, objections to the exchange are considered outdated 'moral' objections which

individuals may be entitled to have, but should not interfere with the choices of others.¹⁹ However, prostitution cannot be seen as an exercise of contractual freedom because it is not a complementary transaction and inherently involves coercion.

The basis of the 'contract theory approach' is that an employment contract is different from slavery because there is a sharp distinction between the sale of a slave, as a commodity or item of property, and sale of a worker's labour power, a commodity external to the individual who is the owner.²⁰ In this way, skills can gain an external relation to an individual and can be treated as if they are property, so that in the employment contract, the worker's whole person is not sold but only their labour power.²¹ This would accord with human rights principles as an individual is able to 'contract out any of his pieces of property, including those from which he is constituted, without detriment to his self'.²² It is difficult to see how labour power can indeed be considered separate from the body, or person of the worker. But even if labour power was severable from the body, the disturbing conclusion is that the body of a prostitute is commodified. In essence, the prostitute's body is no longer human, but considered property able to be bought and sold.

There is a misconception about the inequality of the contracting parties involved in an agreement for prostitution. The problem of prostitution as an employment contract does not lie in exploitation of the contract, but in the contract itself.²³ The prostitution 'contract' creates subordination and allows exploitation to take place.²⁴ The contracting parties are not in positions of equal bargaining power. Too often, the client is male, wealthy and his identity kept private. In contrast, the prostitute is generally female, and comes from a low socio-economic background coupled with a history of abuse. Thus, the prostitution contract is different because of its gendered nature, and it is with the customer, not an employer. The customer exerts control over the prostitute just as an employer does with a worker, but with one major qualification:

Whereas employers are generally happy to replace workers with machines because they are cheaper, the customer wants the body of a real live woman. In prostitution it is the body of the woman which is the subject of the contract.²⁵

The transaction is not the 'mutual, pleasurable exchange of the use of bodies, but the unilateral use of a woman's body by a man in exchange for money'.²⁶ This reinforces the coercion involved in the male demand for sex; and prostitution as an expression of masculine sexuality inherently subjects women to male domination.

Prostitution as a profession

Prostitution does not fit into the common definition of a profession. Professions such as the law, medicine or teaching require aspirants to attain a set body of skills and reach an examinable standard.²⁷ The role of a professional body is that of a gate-keeper; ensuring that the lucrative opportunities open to professionals are not undermined by cheaper, unqualified labour.²⁸ Nevertheless, some have argued that prostitution should be subjected to the same licensing laws as

13. Immanuel Kant, *Fundamental Principles of the Metaphysic of Morals* (1785).

14. *Ibid.*

15. Roberta Perkins and Garry Bennet, *Being a Prostitute* (1985), 222.

16. Gail Pheterson (ed), *A Vindication of the Rights of Whores: The International Movement for Prostitutes' Rights* (1989), 146.

17. Dolores French, prostitute, president of the Florida branch of COYOTE (Call Off Your Old Tired Ethics) and president of HIRE (Hooking Is Real Employment) quoted in Sheila Jeffreys, 'Just a job like any other? Prostitution as work' in Sheila Jeffreys, *The Idea of Prostitution* (1997), 164.

18. Noah Zatz, 'Sex work/sex act: law, labor, and desire in constructions of prostitution' (1997) 22(2) *Signs* 277.

19. *Ibid.*

20. Carole Pateman, *The Sexual Contract* (1988), 146.

21. *Ibid.*

22. *Ibid.*, 149.

23. Jeffreys, above n 17, 175.

24. *Ibid.*

25. *Ibid.*

26. Pateman, above n 20, 199.

27. Jeffreys, above n 17, 166.

28. *Ibid.*

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other occupations. To become licensed, a prostitute would have to undertake tertiary level education to equip them for their profession.²⁹ Standards would be imposed to reflect the kinds of knowledge and skill required for the sex provider's work, and these would in turn protect society from any harm ensuing from her work.³⁰ But, as espoused by Sheila Jeffreys,

the problem with the idea that prostitution involves special abilities which require it to be recognised as a profession, particularly as a therapeutic profession, is that the basic act which the average [customer] wants to perform in the body of a prostituted woman can be performed without the exercise of any special skills on her part.³¹

The only skills that a prostituted woman needs to develop are those for her own survival; 'dissociation, being alert to danger, and limiting the activities that the customers request to those she is prepared to accept without too much damage to her health and sense of self'.³² Thus, prostitution is very different from the skills that university courses develop in other occupations. Normalisation of prostitution through the characterisation of it as a work choice merely shields the level of exploitation, abuse and humiliation involved.

Consequences of commercialisation for sexual autonomy

Prima facie, it may appear paradoxical to suggest that restrictions constraining our activities could promote autonomy in them, since placing external controls on an activity would seem to reduce the individual's control over the activity.³³ To provide for sexual autonomy, it is a common assumption that society should forgo attaching any special significance to the sexual use of the body and instead leave it up to the individual to determine the proper uses of sex for him or herself.³⁴ Whilst it is true that the majority of society view sex as permissible under a relatively wide range of circumstances, in particular, outside the boundaries of heterosexual marriage, this fails to recognise that sex has its place in the social framework, governed by explicit and tacit restrictions. Scott Anderson gives the example of an expensive date. Spending lavishly on a date does not create a moral or legal obligation for the woman to have sex she does not want. Although this example is not analogous with the situation of prostitution, it does illustrate the fact that 'some of the restrictions which govern sexual practices serve to prevent certain kinds of pressures or incentives from being used against a person to alter her sexual choices'.³⁵ Thus, the removal of restrictions by treating

prostitution as a commercial activity, would affect the freedom of individuals to make sexual choices.

One implication of merging sex and commerce would be an increase in incentives for people to have sex, making it legitimate to demand, solicit, encourage and expect sexual activity as a norm. This would seriously undermine the sexual autonomy of all job seekers by subjecting them to the possibility of being pressured by employers to have unwanted sex as a condition of employment.³⁶ An extreme example might be the refusal to give welfare benefits to unemployed people considered 'suitable' for prostitution because they are expected to take such work if it is available. Further, this would expose sex to contract law. Just as contracts can be made by an implied or explicit agreement, individuals may be bound by the courts to fulfill sexual obligations when they have led another to believe sex would be performed. The creation of such incentives to have sex may seem far-fetched. However, by examining the consequences of the claim that prostitution is merely a use of the body, it is evident that this would seriously undermine an individual's sexual freedom.

This hypothesis would allow outside bodies to influence and control the way in which some individuals conduct their sexual activities. Workers do not enjoy a right to privacy in the workplace. Yet those who advocate prostitution as a work option have called for better working conditions so that 'prostitutes can provide their services under the conditions that are absolutely determined by themselves and no-one else'.³⁷ This demand contradicts the assumption that prostitution is work. Even if prostitution was treated as another form of work, this would not enhance autonomy, but rather subject prostitutes to the control of managers, corporate entities and government regulatory bodies. This could involve monitoring the prostitute's health by checking for STDs and HIV/AIDS against her will and the inclusion of non-discrimination policies in employment on the basis of age, sex, race, religion or disability. Sex under such a regime deprives individuals of the degree of control they would have over their sexual practices if sex were confined to the bedroom.

Further, the commercialisation of sex would exacerbate the existing economic divide in society. While a person with power and resources has the ability to reject unwanted sexual bargains without loss, a person who lacks resources might be placed in a position where they must choose between protecting sexual autonomy or keeping a decent standard of living.³⁸ Currently, there are

29. Laurie Shrage, *Moral Dilemmas of Feminism: Prostitution, Adultery and Abortion* (1994), 159.

30. *Ibid.*

31. Jeffreys, above n 17, 167.

32. *Ibid.*, 168.

33. Anderson, above n 4, 759.

34. *Ibid.*

35. *Ibid.*, 761.

36. *Ibid.*, 763.

37. Gail Pheterson, above n 16, 40.

38. Anderson, above n 4, 766.

sexual harassment policies in the workplace prohibiting those in superior positions from making sexual demands or offers to employees. But removing the barriers between sex and career could potentially put sexual ends and career ends at odds.³⁹ In this way, allowing people to use sexual activity as another means of making money may not actually increase autonomy on a whole, but would undermine it. Sexual autonomy should not be tied to economic or political autonomy. Doing so would result in the loss of the good associated with sex by nature — one that depends on the connection between sex and intimacy, or sex and commitment.

Justice in the realm of prostitution

Christine Overall argues that 'sex work is an inherently unequal practice defined by the intersection of capitalism and patriarchy'.⁴⁰ According to Overall, prostitution epitomises male dominance and is a practice constructed to reinforce male supremacy. It is distinguishable from other forms of labour because prostitution is the only type of 'work' constructed 'solely from the oppression of women'.⁴¹ As Jeffreys suggests, 'it is not equally open to men, and could not be; the very idea of prostitution, of men's imperative sexual urges and that women should be used in this way, is a political construction arising from male supremacy'.⁴² Unlike other kinds of 'women's work' such as child-care or housework, which can be performed by anyone, the existence of prostitution depends on a political system of oppression. Equality in prostitution will never be attainable so long as demand is driven by the sexual needs of men and supply is the way in which women fulfill them. Thus, the commercialisation of sex will not resolve these inequalities, but merely perpetuate and legitimise gender inequality within the wider social framework.

39. Ibid.

40. Christine Overall, 'What's Wrong with Prostitution? Evaluating Sex Work' (1992) *Signs* 705, 724.

41. Jeffreys, above n 17, 184.

42. Ibid.

43. Margaret Jane Radin, 'Market Inalienability' (1987) 100 *Harvard Law Review* 1849, 1903–05, 1922 in Jody Freeman, 'The Feminist Debate Over Reform: Prostitutes' Rights Groups, Radical Feminists, and the (Im)possibility of Consent' (1989–1990) 5 *Berkeley Women's Law Journal* 75, 101.

Conclusion

Autonomy is central to modern interpretations of human rights principles, but is too often understood in a way that prioritises consent and individual choice as a means of respecting human dignity. This interpretation is applied by those who argue for the commercialisation and regulation of prostitution. However, by analyzing the claim that prostitution is a 'choice' on a human rights level and practical basis, it is evident that commercialisation would hinder, not enhance, individual sexual autonomy. It violates the dignity of women by subjecting them to degrading and inhumane treatment. The removal of barriers between sex and commerce would curb the freedom with which individuals are able to make sexual choices. As Margaret Radin states, 'the universal commodification of sexuality would be damaging to human flourishing'.⁴³ To protect individual human dignity, we must look past apparent consent to the circumstances in which decisions are made. Thus, the characterisation of prostitution as a legitimate work choice does nothing to foster sexual autonomy; it does not respect, but undermines human dignity and self-worth.

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'Activism and the Academy' continued from page 204

be shared with our students and inform our research. Academics who engage in activism find that participation in such performances of embodied resistance shapes and influences our theoretical critiques.

So, to return to the question posed at the conference in 2006: we can, as academics, support activists by writing commentary and delivering speeches. We can also, as academics, be activists, and allow the experience of activism to enliven and enrich our roles as teachers and researchers.

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