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 non-paternalistic reasons.” 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 benefited by this limitation.” 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. 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. 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.” 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. 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.”

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.”

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. 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.”

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. 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. 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. Such an interpretation casts *Lochner* as a case in which the value of liberty was pitted against that of a liberty-depriving
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. Because the dominant practice of prostitution consists of men’s contractual offers for sexual access to 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. 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 be 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. 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 social 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. 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 patronalist 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. 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

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.

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.


See de Marneffe, Liberalism and Prostitution, pp. 38-39.

Martha Nussbaum suggests such an argument in Sex and Social Justice, pp. 276-98.