

Prostitution: You Can't Have Your Cake and Sell It

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2017 OXFORD UEHIRO PRIZE IN PRACTICAL ETHICS

HONORABLE MENTION

ABSTRACT

I offer an unorthodox argument for the thesis that prostitution is not just a normal job. It has the advantage of being compatible with the claim that humans should have full authority over their sexual life. In fact, it is ultimately the emphasis on this authority that leads the thesis that prostitution is a normal job to collapse. Here is the argument: merchants cannot (both legally and morally) discriminate whom they transact with on the basis of factors like the ethnicity or the religion of their client; but if prostitutes are 'sex merchants', then they cannot (both legally and morally) discriminate whom they have sex with on the basis of these factors. Yet everyone should have the full discretionary power to refuse to have sex under any circumstances.



1. INTRODUCTION

You have made it thus far: the wedding preparation is almost over. You enter your local bakery, cheekily anticipating the moment when you'll order a wedding

cake for ‘John & John’. But to your dismay, the baker turns you down because your marriage goes against his ‘Christian beliefs’.

This is a true story and it is a recurrent one. In 2013, Administrative Law Judge Robert N. Spencer found the owner of Masterpiece Cakeshop guilty of discrimination on the basis of sexual orientation.¹ The decision was then maintained by the Colorado Civil Rights Commission² and again by the Court of Appeal³. The Supreme Court of Colorado refused to reconsider the case.⁴ Analogous situations have occurred in Texas and in Northern Ireland.

Discrimination occurs, unfortunately, much more frequently than homosexual weddings. Thus it has been the object of laws around the globe. For instance, the article that Spencer invokes reads:

It is a discriminatory practice and unlawful for a person, directly or indirectly, to refuse, withhold from, or deny to an individual or a group, because of disability, race, creed, colour, sex, sexual orientation, marital status, national origin, or ancestry, the full and equal enjoyment of the goods, services [...]. (Colorado Anti-Discrimination Act: 24-34-601, (2) (a))

In 24-34-601, discriminatory practices are defined in the context of trade within a business establishment or a public institution, but other similar laws⁵ apply to all trade indistinctly.

Sometimes discrimination is allowed. For instance, on safety grounds, a dwarf may be denied access to a rollercoaster and a leper may be refused a chiropractor’s massage. With this qualification in mind, we can introduce the following principle:

Non-Discrimination: A tradesman has the enforceable obligation not to refuse goods or services to clients on the basis of their disability, religion, sexual orientation, etc., unless this trait makes it dangerous for them to receive the service or possess the good.

1. See *Craig & Mullins vs Masterpiece Cakeshop Inc. & Phillips*; CR 2013-0008, December 2013.
2. See the Colorado Civil Rights Commission’s decision, CR2013-008, May 2014.
3. See Court of Appeals No. 14CA1351, August 2015.
4. See Supreme Court Case No. 2015SC738, April 2016.
5. See, for instance the Equality Act 2010 of British Law or ch. I, 1., 10-12. of Québec’s Charter of Human Rights and Freedoms.

Thereby the State should intervene, were it to recognise relevant discrimination. This seems plausible: discrimination can directly cause severe harm to individuals—harm they could not resist on their own. Allowing discrimination might also indirectly harm other individuals by giving rise to a toxic social environment.

Surprisingly, the cake story teaches us a lesson about prostitution: if the Court's ruling is correct, then *prostitution is not a job like any other*.⁶ This conclusion follows from the inclusion of sex in the list of 'goods and services' mentioned in *Non-Discrimination* together with some equally plausible principles.

§2 describes why some have taken prostitution to be a normal job. §3 argues against this from *Non-Discrimination* and addresses some objections. §4 concludes.

2. THE DEBATE OVER PROSTITUTION

Why should prostitution be recognised as a job and prostitutes as sex workers? Transactions should be legal if (and only if⁷):

1. The transaction is voluntary;
2. The transaction does not directly harm people who are not parties to it⁸;
3. The transaction does not cause an unacceptable kind or degree of harm to any of the parties of the transaction.

Call *liberalism about prostitution* the view that sex transactions involved in prostitution satisfy or could in principle satisfy these three criteria. Liberals about prostitution argue as follows. Firstly, people often get involved voluntarily in prostitution. When the sexual transactions are involuntary, this is 'rape' or 'human trafficking', not 'prostitution'. Secondly, no one else is involved in the sex transaction: it is a service delivered by an individual to another, in a private environment. Thirdly, the harm of prostitution to the prostitute is comparable to the harm of many other stressful jobs

6. After the completion of this paper, the author discovered that a comparable approach was taken in a blogpost to defend a similar claim (Watson 2014).

7. Although it seems reasonable to add 'only if', it is not strictly necessary for my argument.

8. Differently put, those who do not consent should not be directly harmed (cf. Saunders 2016, IIII). Of course, what counts as direct harm needs to be strictly limited: for instance, the man who engages in a voluntary sexual transaction with his wife's friend may harm his wife in one sense.

(Nussbaum 1999, 288–97). Voluntary activities that fail to satisfy the third criteria are very rare (e.g. cannibalistic transactions⁹) and do not include prostitution.

The liberal about prostitution then normally claims something along the following line. If the transactions that make up a job meet conditions (1), (2), and (3), then this is sufficient for a job being a normal job in the sense that it should be legalised and regulated according to the general rules of trading goods and services¹⁰. Therefore, liberals about prostitution endorse:

Normal Job: Prostitution is a job like any other, i.e. it should be legalised and regulated, in general, in accordance with the rules of trading goods and services.

It is important to note that *Non-Discrimination* is not only one of these rules; it is a crucial rule of trading goods and services. By contrast, there may be non-crucial rules of trading goods and services which need not apply for some normal jobs.

Non-liberals about prostitution normally object to *Normal Job* on the grounds that prostitution does not satisfy (2) and (3). They firstly argue that the transaction harms people outside of the sexual transaction because it transforms the nature of non-market sexual relationships (E. Anderson 1993, 154–55), for instance by representing women as sexual servants of men (Satz 1995, 78). Non-liberals secondly argue that selling sex is extremely harmful to the prostitute because it expresses a lower social status and a loss of identity (Pateman 1988, 207) or because it limits the prostitute's autonomy (S. A. Anderson 2002, 386).

The disagreement over (2) turns principally on which harms should be recognised as such by the State. For instance, if I hurt my wife by kissing another woman, it is not the State's business. Liberals think that the same goes for the sexist symbols conveyed by prostitution. For our purpose, I will leave this question aside.

The disagreement over (3) turns on whether sexuality is special to human integrity. Selling sex is degrading, claims the non-liberal. The liberal disagrees: it is up to anyone to determine the meaning of sex in their life. State intervention only worsens the lives of prostitutes. More generally, the liberal endorses:

9. See the case of Detlev Günzel (<http://www.bbc.com/news/world-europe-32146031>).

10. When it is explicitly laid out, this premise may sound unacceptable to some liberals about prostitution. This does not however prevent them from often making the claim that prostitution is just a normal job, which is the main thesis under evaluation.

Liberal Sexuality: The State is permitted to prevent, or punish one of the parties to, a sexual transaction if and only if this transaction is or was involuntary.

This principle enshrines the absolute discretionary power that each has over their sex life.

3. DISCRIMINATION OF CLIENTS: SEX AND CAKE

Liberalism about prostitution gives us an appealing picture thus far: because it involves voluntary transactions which do not directly harm others and which are not unacceptably harmful, prostitution is a normal job. This claim is *prima facie* coherent with our intuition that the State has no business in regulating voluntary sexual transactions. Nevertheless, this picture is incompatible with the lessons of the cake story. Consider again:

Normal Job: Prostitution is a job like any other, i.e. it should be legalised and regulated, in general, in accordance with the rules of trading goods and services.

Non-Discrimination: A tradesman has the enforceable obligation not to refuse goods or services to clients on the basis of their disability, religion, sexual orientation, etc., unless this trait makes it dangerous for them to receive the service or possess the good.

Liberal Sexuality: The State is permitted to prevent, or punish one of the parties to, a sexual transaction if and only if this transaction is or was involuntary.

These three principles are jointly untenable. *Normal Job* and *Non-Discrimination* together entail that prostitutes have an enforceable obligation not to refuse service to clients on the basis of their disability, religion, etc. Now assume that a prostitute refused a sexual service to a client on such a basis. The prostitute might find it sickening to sleep with a married man; she might detest having sex with a fundamentalist; whatnot. According to *Non-Discrimination*, the state may intervene (to require that

she stop discriminating and compensate the client). But *Liberal Sexuality* tells us that the State may *not* intervene because there has *not* been an involuntary sexual transaction. The prostitute is free to refrain from having sex *regardless of her reasons*. To avoid this contradiction, I suggest that we abandon *Normal Job*.

A natural response to this argument is, for those who refuse to amend *Normal Job*, to insist that the State intervention in such a case is not strictly speaking about sex. The State does not force the prostitute not to discriminate, but rather not to discriminate *if she wants to keep her job*. The object of the enforced obligation is thus not sexual. It reads: '*If you want to keep being a prostitute, then ...*'. Thereby, *Normal Job*, *Non-Discrimination*, and *Liberal Sexuality* are compatible.

This reply at best defers the refutation of *Normal Job*. In a word, if the three principles are true, it allows the State to create some exploitative situations, which is absurd. Consider two additional principles:

Exploitation: One's being forced either to have sex with someone whom one does not want to have sex with or to quit one's job is a case of an exploitative situation¹¹

And

Role of State: The State should never create exploitative situations.

Role of State is minimal: most liberals think that the State should not only refrain from creating but also fight (directly or indirectly) exploitative situations. *Exploitation* is also difficult to deny. It warrants our judgement that teachers and bosses should generally not have sex with their students or their employees. This is because there is a high risk for a person in authority of putting her subordinates in an exploitative situation or in a situation that is perceived as such.

Note that if a prostitute in the situation described in *Exploitation* decided to have sex nonetheless, without changing her mind about what she wanted, she would act intentionally, but not voluntarily. If I decide to hand in my wallet to a burglar because I do not want to risk my life, I do so intentionally but involuntarily (Hyman 2015, 87-91).

11. I do not wish to rely on a specific account of exploitation here. Yet, that Exploitation turns out true is seemingly an important desideratum of any satisfactory account of exploitation.

Exploitation, *Role of State*, *Non-Discrimination*, *Liberal Sexuality*, and *Normal Job* are jointly contradictory. Here is how. A prostitute who would discriminate on the basis of her client's sex, religion, etc. would infringe her enforceable obligations (by *Non-Discrimination and Normal Job*). At this point, the State cannot directly intervene to force the prostitute to have sex (by *Liberal Sexuality*). Rather, it may send the message to the prostitute: 'have sex against your will or abandon your job'. The State has thus created an exploitative situation (by *Exploitation*). But the State should never do so (by *Role of State*). To avoid this contradiction, I suggest that we abandon *Normal Job*, for it is the weakest link of the reasoning.

Importantly, my argument does *not* assume that there are voluntary sexual interactions that the State should recognise as degrading. The argument simply maintains that the State should intervene when the interaction is involuntary; it says nothing about undesired, unemotional, non-committal sex. As such, it is compatible with *Liberal Sexuality*. (Note that the argument does not assume the opposite either, i.e. that there are no voluntary sexual interactions that the State should recognise as degrading. The argument remains neutral on this general topic.)

This becomes clearer once we distinguish the claim that voluntary sex is a special good (which the liberal denies) and the claim that involuntary sex is a special wrong (which everyone should admit). You do not need to think that sex is particularly transcendent to agree that being forced to choose between unemployment and sex with an individual that you do not want to transact with is exploitative. Some might point out that *Exploitation* should also be applied to similarly harmful tasks. I fully agree: if prostitution were just like some normal jobs, it would mean that these jobs were exploitative.

4. CONCLUSION

I am aware that my argument might look contrived to people who are concerned with the serious injustices of the sex trade. Clients who are discriminated against are certainly not the actual victims of this system. But this was not the point: I rather wanted to show the tension amongst liberal tenets on prostitution and discrimination. If we think that one should retain the absolute power to refrain from having sex and if we agree with the Court of Colorado's enforcement of civil rights, we should resist the idea that prostitutes are normal tradesmen.

If prostitution is not a normal job, what should the liberal say about sexual trans-

actions? On the one hand, the liberal may admit that sexual transactions should be directly or indirectly outlawed. It follows that either sex transactions do not satisfy (1), (2), and (3) (the alleged conditions for legalisation) or these criteria are insufficient. On the other hand, the liberal may insist that sexual transactions be legalised. For instance, individuals may trade sex, but it does not make them normal traders. Prostitutes could be protected workers, but who do not have legal duties regarding discrimination. This would make it a very special job indeed.¹²

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12. Further work needs to be done on comparing prostitution with other 'special jobs'. For instance, a Catholic priest can refuse to conduct a funeral service for a Protestant without breaking the law, and a mohel can refuse to circumcise a non-Jew even though they may charge a fee for their service. But perhaps such exception is justified by the fact that religious organisations are recognised as non-profit organisations. As a matter of fact, discrimination is sometimes allowed – or rather, some exclusions are sometimes not considered discriminatory. For instance, Article 20 of the Quebec Charter of Human Rights and Freedom reads, 'A distinction, exclusion or preference based on the aptitudes or qualifications required for an employment, or justified by the charitable, philanthropic, religious, political or educational nature of a non-profit institution or of an institution devoted exclusively to the well-being of an ethnic group, is deemed non-discriminatory'. Clearly, Article 20 is not relevant to prostitution. Should there be additional restrictions analogue to those mentioned in Article 20 which would deal with prostitution? This may be the liberal's best avenue.