Supreme Court ruling not about legalizing prostitution but making life safer for prostitutes

posted December 21, 2013 / No Comments

NationalPost.com – Full Comment
December 20, 2013. Andrew Coyne

The striking thing about the Supreme Court's ruling in the case of *Canada (Attorney General) v. Bedford* is not how radical it is, but how reasonable. Which is perhaps to say how unreasonable the laws it has struck down were and are. How then could they have remained on the books all these years? Why did it take the courts, rather than the legislature, to right this wrong?

That is not an example of judicial activism, but of legislative inaction. The court has not struck down the law against prostitution, because there is no such law. It has merely struck down a raft of surrounding laws, framed in such a way as, not to prohibit prostitution, but to make it more dangerous — a danger that is not speculative, but amply evidenced in the murders and beatings of prostitutes that go on every day.

The law against keeping a "common bawdy house," i.e. working at home, obliges prostitutes to work on the street or in other locations ("out-calls") where they are at greater risk. The law against "communicating for the purposes" of prostitution makes it impossible, in the fleeting exchanges it requires, to assess or mitigate the threat posed by a given customer. The law against "living off the avails" of prostitution makes it illegal to hire a bodyguard, a driver or a doorman.

All three might have been drafted with legitimate purposes in mind: to prevent the conduct of prostitution from posing a nuisance to others in the neighbourhood, to prevent the exploitation of prostitutes by pimps. But they vastly overreached, as the court found, what was necessary to achieve those ends. It was not necessary, to strike at pimps, to forbid a prostitute from employing anyone at all. It was not necessary, to protect others from nuisance, to forbid prostitutes from working in any safe locations anywhere, or having done so, to forbid any efforts to protect themselves, such as screening clients or negotiating conditions.

That the laws overreached would be enough on its own to make them constitutionally dubious. But when the effect of such overreach is not merely to lessen people's liberty, but to threaten people's lives, then there is no excuse for their continuance, nor any insult to democracy in overturning them. Parliament decreed, in Sect. 7 of the Charter of Rights, that any law that threatened the "life, liberty or security of the person" was of no force or effect. How, then, could the court fail to strike down a law that threatens all three?

It is not as if we have not been here before. As with *Morgentaler*, as with the *Chaoulli*medicare case in 2005, the court has not presumed to judge the purposes the legislature had in mind. Whether the state may restrict abortion, or establish a public health-care monopoly, or regulate prostitution are all

Search

MOST POPULAR TOPICS

Last Week | Last Month | Past 6 Months | Past Year

01. Canada's new super-union expands its membership to include everyone — even people without a job — No comments
02. Canadian values include feeding the poor — No comments
03. Canadians should have a guaranteed annual income — No comments
04. Parliament finally shines a light on the politics of inequality — No comments
05. Why Rob Ford is mad as hell — No comments

RECENT COMMENTS

- Noella on 'Pay-for-performance' poverty plan
- Gerry Gagnon on Trudeau's words about aboriginals resonate
- Millstev on Ontario must ban SLAPP suits to protect free speech
- Obgen el camino on Past Yellen and Lagarde, women still have a long way to go
- seo on Food banks: Don't stop at giving

CATEGORIES

- Child & Family
  - Child & Family Debates
  - Child & Family Delivery System
  - Child & Family History
  - Child & Family Policy Context

subjects on which the court has expressly declined to intervene. All it has insisted in each case is that, in the pursuit of these objectives, the state may not actually kill people, or put their safety at risk.

The government's defence was that prostitutes make a choice to enter the trade knowing the risks it entails. The weak reply to this is that many prostitutes are in no position to make such a choice, whether because they are addicted to drugs or enslaved to their pimp. That's true of some, but untrue of others. The stronger reply is that the risks are the result of, or greatly heightened by, *state action*; the choice they make is not one they should have to face. Coal mining is a risky business, which people are free to enter or not. That doesn't mean the state is entitled to forbid mines from operating safely.

So now the laws are flat, or soon will be: the court left Parliament a year to redraft them. How should it respond? One option, given the contradiction at the heart of the court's ruling — that prostitution is a legal activity the government makes illegal to carry out in safety — is to make prostitution itself illegal. Talk about overreach: Besides the question of enforceability, this would only make worse the problems the court identifies, and would very likely be struck down.

A better, though still overbroad option is to criminalize, not the sale of sex, but the purchase: the so-called Nordic option, after the policy in Sweden and other countries. This would make sense where a prostitute is clearly not able to choose freely: the exchange in that case is not one between consenting adults, but rank exploitation. (The laws on under-age prostitution or human trafficking remain on the books for this reason.)

But what of those cases where the prostitute does choose freely, or appears to? And how to tell one from the other? Rather than simply "prosecute the johns," a more workable approach might be a system of licensing for prostitutes. As a condition of license, they would be required to certify their age, submit to tests for drugs (and sexually transmitted diseases), and work in licensed premises. Prosecution might then be reserved for johns who patronized unlicensed prostitutes.

If that makes you uneasy, it is the approach we take now to strip clubs, which remain no less sleazy and disreputable for it. Regulating a practice does not imply approval, or even indifference. It suggests only that there are other and better means of addressing social ills of this kind than the criminal law — especially where there is evidence that criminalization is itself a big part of the problem, as we have lately been coming to realize with respect to drugs.

As with drugs, it would still be open to society to dissuade people from getting into prostitution, an effort that might have more chance of success once the threat of prosecution was lifted. It would still be open to cities to regulate how and where it took place. We just wouldn't be using the law to condemn people to death, for practising a trade of which we disapprove.

< http://fullcomment.nationalpost.com/2013/12/20/andrew-coyne-supreme-court-ruling-not-about-legalizing-prostitution-but-making-life-safer-for-prostitutes/ >

Tags

- Education
  - Education Debates
  - Education Delivery System
  - Education History
  - Education Policy Context
- Employment
  - Employment Debates
  - Employment Delivery System
  - Employment History
  - Employment Policy Context
- Equality
  - Equality Debates
  - Equality Delivery System
  - Equality History
  - Equality Policy Context
- Governance
  - Governance Debates
  - Governance Delivery System
  - Governance History
  - Governance Policy Context
- Health
  - Health Debates
  - Health Delivery System
  - Health History
  - Health Policy Context
- Inclusion
  - Inclusion Debates
  - Inclusion Delivery System
  - Inclusion History
  - Inclusion Policy Context
- Social Security
  - Social Security Debates
  - Social Security Delivery System
  - Social Security History
  - Social Security Policy Context

ARCHIVES

Select Month

← Previous post Next post →

LEAVE A REPLY