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Prostitution policy, morality and the precautionary principle

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Prostitution policy, morality and the precautionary principle

Introduction

Though poorly defined, morality policy typically describes any policy field where emotion and ideology rules over rationality and reason. This intrusion of the moral and emotional into decision-making renders notions of evidence-base policy problematic at best, and impossible at worst (Henricson, 2016). Prostitution – alongside issues such as abortion, drugs, pornography, capital punishment, and gambling – is classically cited as an example of morality policy, one in which policy is determined by a sense of what is ultimately *felt* to be right or wrong (Wagenaar and Altink, 2012). In this sense, any attempt to regulate the consumption of sexual services can be read as an attempt to draw boundaries between 'good' and 'bad' behaviour based on the understanding that the commodification of the sexual relationship is sinful or wrong. This given, 'expert' or close knowledge of the sex industry is not necessarily sufficient to displace the deeply-held moral views of politicians, with public opinion believed to be as valid as the views of academics or researchers in this morally-fraught field. From the perspective of the policy-maker, there are no absolute rights and wrongs, just different perspectives on the ethics and morality of selling sex. This means sex work legislation is determined by the beliefs and convictions of politicians and policy-makers, and not evidence per se.

All this is well and good were it not for the fact prostitution policy – like the policies determining the consumption of drugs and alcohol – is frequently presented as something quite different. Indeed, while there have always been moral crusades against prostitution, some of which persist in the contemporary era in the form of evangelical attempts to save sex workers from 'sin', governments have generally sought to distance prostitution policy from morality by suggesting that policy is both evidence-based and designed to promote public health and well-being. This means that rights-based arguments (e.g. that a consenting adult has the right to sell sex) are often found wanting in the face of laws which repress prostitution on the stated grounds that this is necessary to protect the worker, the client and the health of the population at large. While rights-based arguments sometimes prevail (e.g. *Bedford v Canada* 2013 SCC 72, where the Supreme Court ruled that Criminal Code provisions criminalizing activities related to prostitution violated rights to free expression and personal security), more generally moralistic and censorious policies masquerading as harm-reduction come to dominate (Lawrence, 2015). Here, the parallels with drugs and alcohol policy are clear, such as in instances where claims about protecting public health and safety have scotched initiatives designed to encourage safe consumption (e.g. drug consumption rooms), despite the benefits these have in terms of harm reduction (Zampini, 2014).

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Nonetheless, governments regularly consult on prostitution policy, asking for submissions that demonstrate the impacts of prostitution on workers, clients and the wider community. Our personal experience as participants and expert witnesses in such exercises shows us that academic evidence is *selectively* arrayed to show that sex workers are victimised and exploited, that prostitution harms the well-being of communities, and that it is criminogenic. Policies are hence formulated which, while they typically do not undermine the inherent legality of rights to sell sex, effectively criminalise the selling of sex via laws preventing the opening of brothels, banning street soliciting, or even outlawing the purchase of sex itself.

Of course, there is much national variation here. However, in recent years academic commentators in Europe have noted a slow drift towards a more repressive and punitive policies. As such, in many European nations, a long-standing abolitionist attitude that sex work is undesirable but inevitable has been replaced by a more overtly prohibitionist stance. Indeed, the so-called 'Nordic model' that criminalises the purchase of sex is becoming increasingly influential, with the Northern Ireland Assembly introducing new laws prohibiting the purchase of sex in 2015 and the French National Assembly doing likewise in 2016. Elsewhere, nations that once took a more pragmatic attitude to sex work by decriminalising the sale of sex in particular spaces such as brothels or identified street walking zones (e.g. Austria, Germany, Netherlands, Switzerland) have tended towards more intrusive forms of legalisation that effect a tighter control and surveillance of sex workers and their customers (Outshoorn, 2012; Pates, 2012). However, it is not clear that such emergent policy approaches, typically justified as attempts to prevent exploitation and criminality in the sex industry, are achieving their stated aims (Levy and Jakobsson, 2014). Nevertheless, they have considerable symbolic power, buttressing the moral values that define the 'body politic' in a time of concern about permeable national boundaries (Hubbard et al, 2008). In this light, there is now little political support in England and Wales for the total removal of criminal sanctions from commercial sex, with the opposition leader Jeremy Corbyn's support for a New Zealand type repeal of prostitution law having met a stony reaction even from members of his own Labour party.

In this paper we accordingly argue that in spite of the increasing emphasis in policy circles on evidence (and particularly quantitative evidence) (Ritter and Lancaster, 2013), prostitution policy is best understood as morality policy. This is something we explore in the context of prostitution policy in England & Wales, noting that the 'precautionary principle' currently dominates, with the burden of proof that prostitution is *not* always harmful lying with the government, who typically decline to compile evidence to demonstrate this and instead base prostitution policy on moral values and beliefs. Throughout, we use the term 'prostitution' given policy relating to the sale of sex is framed in such terms, despite the fact that 'sex work' is a more encompassing and less stigmatized term preferred by many working in the sex industry in England and Wales. We also approach the topic as academics promoting a harm reduction or minimisation approach to sex work, an approach that owes much to similar perspectives in drugs and alcohol research. As such, we choose here to emphasise the inevitable and even beneficial dimensions of a

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form of leisure/work sometimes regarded as sinful, but recognise that some interventions may be necessary to protect those who buy and sell sex, as well as those who live and work in proximity to spaces of prostitution.

Sex work in England & Wales: from abolitionism to prohibitionism

The sale of sexual services has never been illegal in England and Wales, although many related activities – soliciting, brothel-keeping and pimping in particular – have. The Wolfenden Committee of 1957 famously articulated what was considered, until fairly recently, to be the logic underpinning this (Self, 2003). Grounded in liberal philosophy, it emphasized that what consenting adults did in private was none of the state's concern unless exploitation was evident: this was the rationale for the *1956 Sexual Offence Act* which consolidated the statute powers relating to brothel-keeping, procuring, and living off the avails of prostitution. The subsequent *1959 Street Offences Act* aimed to reduce the 'public nuisance' of street prostitution by introducing fines for soliciting, targeting any woman identified as a 'common prostitute' loitering or soliciting in public space (Matthews, 2005). Such policies justified and maintained a gender-asymmetry, whereby heterosexual prostitution was assumed to be the only form prevalent and it was the woman who sells sex - rather than her male client - who was the focus of state attention. Likewise, by confining state intervention to the 'public' aspects of prostitution, this approach 'delineated a private sphere of non-intervention' (Hubbard and Scoular, 2009: 150). One consequence of Wolfenden's focus on street work was then an expansion of off-street working, with the state effectively turning a blind eye to most forms of private sex work unless there was suspicion of any coercion.

This framework introduced by Wolfenden remained largely unaltered in the England and Wales for more than four decades. But the policing of prostitution was reactive rather than proactive, and generally a low state priority: women working alone in their home, flats, clubs or via escort agencies were very much 'out of sight and out of mind' (Prior and Hubbard, 2013) and crackdowns on street work infrequent. However, changing sexual norms, gender roles and developments in the sex industry itself have put pressure on the law and prohibitionist approaches (based on a logic of reducing demand for sexual services) have gained much traction since the beginning of the 21st century.

Significantly – and despite the presentation of evidence that male and trans-identified workers constitute as much as one third of those who sell sex (Cusick et al, 2009) - the government's framing of prostitution policy has been strongly gendered, with the female sex worker increasingly figured as exploited rather than exploitative, and in need of protection rather than needing to be protected from. Here, it is clear the national discourse has been heavily influenced by radical feminist arguments suggesting sex work is inherently exploitative of women. The increasing citation of the 'Nordic' model of regulation that criminalises the purchase of sex work outright is entirely in keeping with this (Skilbrei and Holmström, 2013). In England and Wales,

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policy currently stops just short of this, but responsibilises or punishes parties engaged in buying and selling sexual services (Scoular and O'Neill, 2007). This is manifest in new laws which increase punishment for kerb-crawlers, allow for the closure of premises suspected of being used for prostitution, force convicted sex workers to engage with 'exit' strategies and withdraw impunity from those who purchase sex from anyone who has been coerced into doing so by a third party. In relation to the latter, anyone who buys sex from an individual who is later found to have been coerced now commits an offence, even if they were not aware of the coercion at the time (Scoular and Carline, 2014).

The framework for the adoption of such laws was a wide-ranging review into Sexual Offences - *Setting the Boundaries* - in 2003. This Home Office review was informed by a 'violence against women' agenda seeking to reform rape laws to increase justice for victims. However, as the review progressed, the government decided prostitution warranted a dedicated review. The subsequent 2004 Home Office *Paying the Price* consultation - which in turn led to the production of the 2006 *Coordinated Strategy on Prostitution* and *Tackling the Demand for Prostitution* in 2008 - fell short of promoting explicit criminalisation, and sought instead to achieve similar ends via the increased penalisation of clients alongside efforts to 'empower' those involved in selling sex by forcing them to recognise their victimisation and seek to exit (e.g. through compulsory 'engagement and support orders' served on those found guilty of soliciting).

Evidence in policy

The extent to which recent shifts in policy are evidence-based is moot. Certainly, academic submissions to government consultations, and related evidence, show a wide variety of modes of selling sex, and diverse experiences across different sectors (O'Neill et al, 2015). Yet, in recent policy documents, the sex industry has tended to be portrayed in a homogenized way: commercial sex has been recast as the commercial sexual exploitation of women, with male clients pathologised and represented as a species of sexual offender (see Kingston and Thomas, 2014). For example, men who buy sex on the street are described as 'indirectly supporting drug-dealers and abusers whilst perpetuating a market fraught with violence and abuse' (Home Office, 2006, p. 12) at the same time their activities impact on negatively on local communities. This has led to the adoption of 'naming and shaming' policies and amendments to the offence of kerb-crawling. The latter was already a summary offence (*s71 Criminal Justice and Police Act 2001*) and as a result of s19 *Policing and Crime Act 2009* there is no longer a requirement of persistence. Hence, it can be seen that kerb-crawling is now a status-based, as opposed to a nuisance-based, crime (Scoular and Carline, 2014).

At the same time, concerns about the prevalence of migrant workers in the sex industry has produced an empirically-unjustified but widely mediated 'moral panic' about trafficking (see Hubbard and Scoular, 2009). In England and Wales this has involved the circulation of myths of manipulative migrants

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from Eastern Europe engineering flows of women to the UK, coercing them into sex working: those women involved are regarded as passive victims rather than agential subjects who may be working in the sex industry because of the relatively good working conditions, pay and flexibility it offers them, or the way it allows them to look after their families, partners or others (Mai, 2012). Such representations of passivity and exploitation have helped fuel more general discourses that link migration to the UK with sexual immorality and criminality, and made a strong case for policies designed to reduce the perceived influx of sex workers by tackling demand. As noted above, this has resulted in an increased stigmatisation of the purchasers of sex, with section 14 of *Policing and Crime Act 2009* criminalising the act of paying for adult sexual services for the first time by making it an offence to pay for the sexual services of someone subject to exploitative conduct by a third party (Scoular and Carline, 2014).

The discourse suggesting that sex work is endemically exploitative reinforces the view that prostitution is a sector where men exploit women, and makes the case for the adoption of the 'Nordic model'. Yet this policy positioning of women involved in sex work as 'victims' relies on a host of generalizations about who is involved:

> Most women involved in street-based prostitution are not there through choice. They are amongst the most vulnerable people in society. Nearly all are addicted to heroin or crack or both. Many come from abused childhoods and many are homeless. And many become involved before they reach 18 (Home Office, 2006, p. 17).

This provides a stereotyped view of street workers as chaotic victims, and denies they might have any choice in the work they do. Similarly, it has been asserted that there is an inherent association of trafficking and sex work, but that:

> Trafficking for sexual exploitation forms a significant part of the prostitution market in this country but exploitation can take other forms and women involved in prostitution can be controlled by another in order for that person to profit from this involvement. This control can and does take the form of a range of exploitative practices such as threats of violence, or the provision of accommodation or drugs solely on the condition of being a prostitute (Home Office, 2008, p. 8).

Such instances of exploitation are known to exist. However, academic studies imply they are exceptional, and not normal, contrary to the dominant policy rhetoric (see O'Neill et al, 2015). Irrespective, policy is predicated on the idea that significant numbers of street workers are addicted and vulnerable, and likewise that the majority of indoor workers are trafficked or exploited in some way. Neither group of workers is allowed to possess agency: the idea women may work independently, and experience their work as pleasurable or lucrative is ignored.

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Such tendencies towards depicting all sex work as harmful were exacerbated by the 'All Party Parliamentary Group on Prostitution and the Global Sex Trade', convened between 2008-2013 'to develop proposals for government action with a focus on tackling demand for the sex trade' (APPG, 2014, p. 4). Despite the direct oral presentation of peer-reviewed evidence from the authors demonstrating that much sex work is not exploitative, and that it is not directly or inherently connected to trafficking, the report emerging from this group (which was given secretarial support by Christian Action Research and Education) recommended '…reducing the demand for sexual services, by transferring the burden of criminality from those selling sexual services onto those who facilitate or create the demand for its sale' (APPG, 2014, p. 9). The discourse, mirroring 'Nordic' feminist rhetoric, is about the 'harm' that women experience and the incompatibility of prostitution with gender equality aims. The recommendation here was in essence about using the criminal justice system to reduce 'demand' and, implicitly, about modifying the moral landscape via legislative reform.

Prohibitionism: ineffectual policy?

The logic of reducing demand to reduce harm assumes the safety of sex workers can never be guaranteed, and that eradicating sex work is the only possible answer. This disregards alternative approaches promoting harm reduction through decriminalisation or legalisation. For example, recent data from New Zealand, which adopted full decriminalisation of sex work in 2003, suggests that decriminalization makes working women more able to report sexual violence and seek the protection of police (Abel et al, 2009), and hence improves their safety and well-being. Likewise, studies of the situation in New South Wales, Australia, where sex work is regulated through environmental rather than criminal law, demonstrate the considerable benefits of a system that regards prostitution as legal and regulates the spaces where it occurs as a space of work, not a site of criminality: rates of violence against sex workers, nuisance complaints and exploitation within the sector are known to have declined since decriminalisation (Prior et al, 2013) while overall demand for sex has remained constant (Rissell et al, 2016). Comparison between different regulatory systems within Australia further supports the view that decriminalisation has benefits over legalisation (as practiced in Queensland), 'minimal' decriminalisation or containment (as in Western Australia) or outright prohibition (as practiced in Tasmania) in terms of benefits for sex workers, communities and local government (Crofts and Summerfield, 2006; Sullivan, 2010).

This given, it appears that the shift to more punitive position is at least in part informed by a moral rather than analytical position. In effect, the emerging approach in England and Wales appears informed by a form of moral opprobrium, perhaps originated in religious doctrine, that suggests sex work must be harmful because it is sinful. A key factor supporting this view has been the prominence in both national and local media coverage of the presence of migrant workers in the off-street sex work industry, something that has raised understandable anxieties about the possibilities of trafficking

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and the criminal exploitation of these workers. This has been manifest in police raids on premises where migrant women are known to work, many carried out by the police as part of national programmes led by the UK Human Trafficking Centre ('a multi-agency centre' that it is 'police-led' but also involves the HM Revenue & Customs, the Crown Prosecution Service, the Serious Organised Crime Agency and the UK Border Agency). While these raids revealed little obvious coercion or sex trafficking in their initial phases (e.g. Operation Pentameter, 2004-06), concerns about trafficking have continued to circulate, especially London, where the numbers of 'migrant' sex working men and women is thought to be highest (Cusick et al, 2009).

It was talk of the trafficking of 'Eastern women' that provided the case for clamping down on London's informal sex trade in the run-up to the Olympics 2012. Eighty brothels were raided in Newham in 2011-12 alone while Westminster City Council made repeated attempts in 2012-13 to close flats used by female sex workers in Soho. A critical report by Andrew Boff (2012, p. 5) suggested such raids had less than one percent success rate in identifying victims of trafficking, concluding that 'police have been proactively raiding sex establishments without complaint nor significant intelligence that exploitation is taking place'. The organisation 'Open Doors' that provides outreach to sex workers in London, argued that this, and a 'juggernaut' of publicity, created a situation where 'women who have been working off-street, safely, are now on the street selling sex in a much less safe environment' (cited in Boff, 2012, p. 10). Such raids on brothels have then created new fears and vulnerabilities among workers, with this large-scale 'clean up effort' creating an inhospitable climate for sex workers, significantly compromising their safety (and arguably making them less likely to report abuse, exploitation, and other crimes).

Intrusive policing in some areas of London, and in particular the Boroughs that were home to the Olympics, have hence changed the geography of sex work in the city, with some limited displacement of sex work from off-street to street environments (Hubbard and Wilkinson, 2014). Whilst it is hard to evidence these trends, information from grassroots projects suggests that nationally there has however been a significant long-term shrinkage of street sex work markets, with sex workers assumed to have moved into various off-street locations rather than leaving sex work all together. At face value, the move to off-street working appears beneficial from a harm reduction perspective: on-going work by Sanders et al (see www.beyond-the-gaze.com) is beginning to understand how selling through website platforms (e.g. AdultWork) allows sex workers to advertise and organize their work with limited surveillance by the authorities and with benefits in terms of their ability to negotiate the terms of selling sex. But once operating in this effectively deregulated online environment there are further risks and issues of safety that are only beginning to be understood. For instance, Sanders et al, (2015) found that for a significant number of escorts who operated independently through online media, safety was a significant concern. Of 240 internet based sex workers surveyed, new types of crimes were noted such as harassment by text and email, as well as clients attempting or threatening to 'out' the sex worker in public to their family and friends (Sanders et al, 2015). So while early research studies into online sex work environments demonstrate certain

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benefits of this mode of organising and advertising commercial sex, they also highlight certain areas of risk which are not even acknowledged in contemporary prostitution policies that remain predicated on a stereotyped understanding of what sex work is and how it effects those involved (see Sanders et al, 2017).

Conclusion

Commercial sex is, and always has been, part of the leisure industry. But like many pleasurable activities, it is one sometimes regarded as sinful: indulgent, wasteful, excessive, criminal and dirty. This paper has suggested that this conflation of immorality and prostitution is one that currently dominates in policy-making circles in England and Wales, as in much of Europe. The consequence of this is the pursuit of a simplistic model of harm reduction (i.e. eradicating prostitution by reducing demand for sexual services). The espousal of such a model is one resting on a partial reading of evidence, and an unswerving pursuit of a Nordic model whose overall impact on the health and well-being of sex workers and society as a whole remains highly contested (see Skilbrei and Holmström, 2013). In this sense, the espousal of the Nordic model appears to rest on moral intuition as much as the existence of clear-cut evidence about the pros and cons of this particular regulatory approach.

This said, academic comparisons of different approaches to the regulation of sex work elsewhere suggest that decriminalisation – whether in full or part – offers a more tried and tested model of harm reduction. Decriminalisation can reduce policing costs, diminish the stigma surrounding sex work, and produce a safer working environment for women (and men). For example, analysis of reports of violence against sex workers in New South Wales 2001-2008, where brothels are decriminalised and managed via the planning system, suggests extremely low rates of violence, rape and robbery, with around forty reported instances per year for a working population assumed to be as high as 8,000 across the state (Prior et al, 2013). In comparison, data from the English city of Liverpool, where the number of sex workers known to the local outreach project was around 400, suggests attacks numbered around 30-40 per year over the same period (Kinnell, 2008). As such, risks of violence were as much as twenty times higher for those working in England and Wales as opposed to the decriminalised New South Wales model even at a time when there was a push towards reducing demand and penalising clients. To the contrary, research by the authors (and others) suggests that the 'Nordic' model has driven sex work underground, and on-line, where workers are subject to as yet unknown and undocumented risks (Hubbard et al, 2008; Levy and Jakobsson, 2014). The conclusion that the Nordic model reduces the overall amount of sex work (see Jakobsson and Kotsadam, 2013) also needs to be questioned in the light of the fact that prostitution as a whole is less visible in Sweden and Norway because of its illegal status.

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We conclude by suggesting that academic evidence is being selectively read and quoted in on-going processes of policy-making in England and Wales. Our experience as participants and 'experts' in these processes does not convince us that prostitution policy in England and Wales conforms to the ideals of evidence-based policy; to the contrary, it appears that the government seeks policy-based evidence, and is quite willing to disregard or even distort academic evidence to justify its stance. As such, it appears a precautionary principle prevails: instead of considering aggregate trends or patterns, policy-makers seem persuaded by media articles which take extreme or even isolated cases of exploitation and vulnerability, representations that fit certain pre-conceived notions that the sinful must be harmful. This is not to say that cases of exploitation do not exist – academic studies confirm their prevalence (Day, 2007) – but academic research shows risk is not endemic to all forms of sex work. Seeking to avoid such instances of harm, the legislative response nonetheless appears to be about moving towards the criminalisation of *all* sex work (with a 2016 Home Affairs Select Committee sitting to consider the recommendation of the All Party Parliamentary Group that the criminalisation of purchase becomes law). And though the stated aim of this mooted change is the prevention of gendered exploitation, academic evidence from elsewhere suggests sex purchase will be driven underground, with clients purchasing sex online, in clandestine spaces or abroad.

Our conclusion is that the mooted criminalisation of sex work purchase in England and Wales will not achieve the aims that its supporters believe it will (i.e. the disappearance of prostitution), and will also not promote the type of harm reduction that might be best achieved via the decriminalisation that many academics in England and Wales advocate. Moving forward, we hence advocate policy based on rigorous, comparative studies of the effects of prostitution policy in different jurisdictions. The fact that such studies remain relatively rare is perhaps one explanation as to why morality tends to reign supreme in this particular policy field: quite often academics appear unable to answer the key questions policy-makers want answering, and it is this that encourages them to rely on media sources and their own inherited intuition as they construct 'policy stories' (Stevens, 2012). Here then, there is much that those studying prostitution can learn from alcohol and drugs research, where there has already been plentiful discussion of how specific notions of morality and evidence collide to construct particular views of 'what works' (Lancaster, 2014).

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