

Chapter 10

Sex Work, Justice and Decriminalisation: Beyond a Politics of Recognition in Promoting a Social Justice Response to Women at the Margins

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Introduction

Female sex workers are marked as women in transgression. Like women who use drugs, they are viewed as bad or fallen, depending on the discourse applied to the wider institution of prostitution. Female sex workers are bad women, if they are motivated to sell sexual services for self-interest, or fallen when prey to malicious male violence and abuse. Be they agents or victims, female sex workers are enmeshed in the public imagination with historical, political and social anxiety related to appropriate norms of femininity, sexuality and responsible citizenship.

This chapter uses two contrasting country case studies of Scotland and New Zealand to explore how sex work is differently problematised. The chapter shows how this has resulted in distinct legal and regulatory approaches to prostitution. In Scotland, abolitionist discourses that interpret sex work as a site of violence against women have dominated. By contrast in New Zealand, a more liberal perspective has prevailed. This acknowledges sex work as labour, in turn emphasising the formal rights and protection of female sex workers. It is argued that in both countries, legal frameworks fail to recognise or address those structural factors that influence or constrain choices around entry into and continued engagement in sex work. Here there are intersecting parallels with policy and policy processes towards women involved in drug supply-related activities and women who use drugs.

The Impact of Global Drug Policy on Women: Shifting the Needle, 91–100
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This chapter puts forward a social justice approach to marginalised, stigmatised and traditionally criminalised women. This is part of an ‘agenda for change’ (McGarry & FitzGerald, 2018) that promotes a paradigm shift in discourse, debate and policy processes around the ‘problem’ of sex work in order to enable women’s lived experience of laws and regulation to be heard and engaged. A social justice approach can be utilised to overcome binary thinking beyond criminal justice and public health/harm-reduction approaches, whilst recognising decriminalisation as a vital first step for change.

Women at the Margins

Sex work debates reveal a pervasive anxiety about the female sex worker. Prostitution has been infused with a host of often contradictory discourses and stereotypes. These discourses have been tied to public anxieties prevalent at certain periods of time, shown by the ever-changing interpretation of sex work/prostitution and the evolving imagination of who the female sex worker is and what she represents. Prostitution, like drug use, is used as a barometer of both individual characters, and the health and state of society and gender relations within that society. The female sex worker and female drug user, therefore, have become active sites of analysis and at times scapegoated over wider anxieties of, for example, public health, gender relations and women’s rights. Campbell (2000) asserts that women’s rights depend on the degree to which women fulfil their responsibilities as contingent workers, consumers and caretakers, and ultimately ‘purchase their autonomy at the price of good behaviour and social conformity’ (p. 4). Female sex workers, like women who use drugs, contravene this order, and are thus subject to varying degrees of state surveillance and regulation. These play out in various legal and policy frameworks that are designed to criminalise and control women and often their relationships of care.

The links between sex work and drug use have mostly been made in public health literature, policy and associated programmes. There is a huge volume of literature providing evidence of the extent of overlap between drug using and sex working populations (Miller & Neaigus, 2002; Morse, Simon, Baus, Balson, & Osofsky, 1992) and the nature of relationships between various types of sex market and drug market (Kwiatkowski & Booth, 2000). Drug users and sex workers share similar social and political histories of being stigmatised, criminalised, pathologised and marginalised (Sloan & Wahab, 2000). Despite this however, there is limited gender-focussed analysis on women who engage in sex work and women who use drugs in relation to how they experience regulation and surveillance of their work, choices, bodies and lives in liberal democratic systems and market economies. In presenting the case for a social justice approach that goes beyond criminal justice, public health and harm minimisation approaches and priorities, readers from within the drug policy and sex work fields may note parallels in decriminalisation as a vital first step – but not the only task at hand in alleviating the structural conditions that often underpin women’s choices to use drugs and/or to engage in sex work (Ryan, 2019).

‘A Risk’ or ‘At Risk’ | A Double-edged Sword of Neoliberal Power

The concept of risk in relation to sex workers is multi-faceted and, like that of agency, conceptualisation varies depending on the underpinning discourse. For those who view prostitution as an institution built on, and perpetuating gender inequality and violence against women, sex work is pre-defined as a risk behaviour for those who become victimised through prostitution (Levy, 2012). Simultaneously, however, sex workers have, through various historical, political and cultural discourses, been posited as posing risk to wider society (Harris, Nilan, & Kirby, 2011). This paradox of being at risk, whilst posing a risk becomes even more complex when viewed from a critical feminist standpoint, highlighting that women are restricted to a code of non-risk taking behaviours. Risk is thus constructed as the failure of women to take appropriate actions to prevent risks and danger to themselves and to their children.

In recent debates surrounding legal frameworks pertaining to both sex work and drug use, advocates for a less punitive approach are often pushed to adopt a language that embeds the view of women as being ‘at risk’. Whilst this is often a necessary response in highlighting the inadequacies and dangers of the wars on drugs and sex work, state paternalism and welfarisation must also be treated with caution. Welfarisation is recognised as a technique of power and control of neoliberal governments through which female illicit drug users and female sex workers have become governed. It is a process that constructs individuals or groups as at risk and in need of support, whilst setting the parameters of who constitutes the ‘deserving’ (Du Rose, 2015). Whilst this approach is often heralded as a means of supporting those most affected by inequalities and for reducing associated harm, programmes of welfare designed for marginalised and often criminalised women have mechanisms of surveillance and social control embedded within them (Carrington, 1993; Carlen, 1988; Parton, 1991) including women who use drugs (Du Rose, 2015) and sex workers (Phoenix, 1999). In relation to sex work, this welfarisation approach has been linked to a government agenda to ‘responsibilise’ women and encourage them to exit sex work (Scoular & O’Neill, 2007). This approach can be seen most clearly in contexts of sex work regulation in which the purchase of sex is criminalised, and women engaged in the selling of sex are targeted by social support and welfare interventions for ‘rescue’ and rehabilitation (Bernstein, 2010). This is one of many regulatory frameworks governing commercial sex work globally, as discussed in the following section.

Regulating Sex Work and the New Governance of Commercial Sex

Sex work is a site of competing discourses. Differences in how national policy actors and lobby groups ‘problematise’ sex work has led to a diversity of legal approaches to the governance and policing of commercial sex, and in enforcement strategies. As with female users of drugs, the legal frameworks and patterns of enforcement structure the lives of female sex workers.

There are three broad legal approaches to sex work: criminalisation, legalisation, and decriminalisation (Harcourt, Egger, & Donovan, 2005). Four key policy narratives are apparent (Ditmore, 2011; Murray, 2014). These reflect the type of 'problem' that sex work is seen to pose, or conversely, address the types of problems faced by sex workers. They are criminalisation to protect public space, reduce public nuisance and regulate sex work (Control); criminalisation to prevent prostitution and the trafficking of women and girls for sexual purposes (both seen as part of a continuum of violence against women) (Abolish); legalisation of prostitution to regulate the sex industry, including for public health benefits (Regulation); and decriminalisation to ensure the labour, health and human rights of sex workers are upheld as part of a harm-reduction approach (Safeguard).

A common argument within the literature is that often criminal and other laws (e.g. administrative and municipal offences) are used to eliminate prostitution in its most visible sense from public space (Hubbard, 2004; Prior, Boydell, & Hubbard, 2012; Sanders, 2009). Criminalisation has been used in various jurisdictions as a state mechanism to stamp out prostitution from society, or at least the visible aspects and associated public nuisance of prostitution. This view of sex work is largely underpinned by the common stereotype that sex work and forms of criminality, most notably drug use, are unequivocally linked. Despite research that suggests the association between sex work, drugs and other forms of criminality is by no means universal, and often non-existent (Sanders, O'Neill, & Pitcher, 2009), this does not prevent the media perpetuating this stereotype by representing prostitution alongside multiple forms of criminality and associated risk. This perpetuates myths which have led to policy and legal sanctions against sex workers and people using drugs that focus on the implementation of exclusionary measures at the local level, which is an approach that also informs the policing of sex work and drug use (Hubbard, 2004).

A significant shift in this drift towards zero tolerance for sex work in public space has been a discourse of gendered exploitation that posits the (female) sex worker as not merely anti-social, but responsible for putting herself at risk (Sanders et al., 2009). The policy objectives of protecting the public *and* sex workers through this type of criminalisation is thrown into question where sex workers are being actively excluded from public space and displaced into other areas. This process of spatial exclusion has been identified as a common strategy used on marginalised groups, including sex working drug users (Sibley, 1995).

Until recently, unrepentant sex working women were governed through these modes of criminal sanction and other forms of regulation, such as threats of child removal and social stigma and blame. However, the global outrage of human trafficking and sexual slavery that developed in the late 1980s brought new representations of women engaged in sex work to the fore. No longer publicly imagined as morally corrupt or bad women per se, female sex workers were conflated with female victims of sexual slavery and human trafficking and thus 'at risk'. Prostitution, once understood as a victimless crime, became re-classified as a crime that victimises the women and children involved (Phoenix & Oerton, 2005, p. 86). From this time, a shift can be observed in the state regulation of sex workers, from punishment and discipline to more neoliberal mechanisms of control (Bernstein,

2012). Within this renewed focus on women as victims of trafficking and prostitution, conflated upon a spectrum of violence and exploitation, the techniques of state control and governance have pivoted on women's helplessness and acceptance of victimhood as fundamental in their ability to be supported and, arguably, reformed (Scoular & O'Neill, 2007).

These four areas of policy focus are not mutually exclusive, at times producing contradictory approaches to the regulation of sex work. Furthermore, as Levy and Jakobsson (2014) highlight, state interventions may be motivated by a range of concerns. Yet the reality of sex workers' experiences, and accounts of their engagement with different legal and policy approaches shows a range of harms and negative impacts (Levy & Jakobsson, 2014)

Case Study Scotland | Regulating to Protect the Public and Rescue Women from Male Violence

The general legal framework adopted in Britain to prostitution is one of partial criminalisation, or 'criminalization to control' (Ryan, 2019). In practice this framework represents a paradoxical legislative situation. The act of prostitution is not illegal but organising a transaction carries a criminal penalty. Activities such as soliciting, living off the earnings of prostitution, child prostitution, trafficking of human beings for the purposes of prostitution and owning or running a brothel are all covered by criminal law in each part of the UK. In most cases, legislation regulating these activities are invoked through 'old laws' (Hancock, 1991), a legacy of which is the harshest of legal sanctions that targets street-based sex workers and clients seeking sexual services.

Campaigns that largely followed from gentrification and a desire to see the streets cleared of commercial sex work brought a review of Scottish prostitution-related legislation in 2005. The focus remained on street sex work, with various measures being recommended by the then Scottish Executive (2004). A zero tolerance approach became inextricably linked to the notion of sex workers as victims. Commitments made in the 2005 report culminated in the current policy framework. This governs the broader context of prostitution in Scotland, set out through 'Safer Lives: Changed Lives' (Scottish Executive, 2009) and 'Equally Safe' (Scottish Executive, 2014). The policy framework and discourses invoked were firmly set within a 'prostitution as violence against women' agenda. Campaigners translated the harms associated with prostitution as underpinned and driven by male violence and patriarchal relations in the selling and buying of sex. Structural inequalities facing women engaged in sex work such as discrimination, stigma, poverty, racism and marginalisation were absent in deliberations. Consequently female sex workers continued to be regulated in Scotland from a paradoxical and contradictory harm reduction and criminal justice rhetoric and approach (Ryan, 2019).

Empirical documentation of the way that female sex workers experience this legal and policy framework in Scotland is expanding (Ryan, 2019; Scoular & Carline, 2014; Smith, 2015). Whilst interventions into the lives of women who engage in sex work are presented as policies and practices of welfare, they are often

experienced as intrusive, coercive and punitive (Ryan, 2019). Mechanisms of control, enforcement and surveillance enforce gendered expectations and notions of good behaviour, rewarding with social inclusion those women who exit the sex industry and continued exclusion of those that remain involved. For women in the latter category, this legal and policy approach led to further criminalisation and marginalisation (Ryan, 2019; Scoular & O'Neill, 2007).

Harm Minimisation in the Context of a Decriminalised and Human Rights-based Legal Framework | New Zealand

Activists and advocates of sex workers' rights premised their campaigns in Scotland on lessons learned from the model of decriminalised sex work introduced in New Zealand (see Urquhart, 2015). Historically, New Zealand's regulation of the sex industry followed the criminalisation/regulatory approach of the UK and other Commonwealth countries. This was critiqued by reform lobbies on the basis of double standards: whilst female sex workers were targeted both indoors and outdoors, men purchasing sexual services remained outside the scope of the criminal law. The inequities implicit in this approach, and the devastating impact of prostitution-related convictions became a shared concern for a reform lobby that was galvanised by the New Zealand Prostitutes Collective and which included women's groups, feminist academics and some politicians.

Advocates for legal changes argued that convictions related to prostitution offences created barriers to a person's ability to exit sex work should they desire to do so (Healy, Bennachie, & Reed, 2010). The long campaign to decriminalise sex work emphasised the state's obligation to protect and promote the human and labour rights of sex workers, enabling them to challenge a range of vulnerabilities including coercion, exploitation, violence and abuse in their working places and within working arrangements. Reform was advocated from a harm minimisation model – in which the health and safety of sex workers, their clients and the public were the key concern (Abel, 2014). The harms associated with sex work were problematised as exacerbated by criminalisation, an approach that created a climate of impunity for those who targeted sex workers to commit violence, coercion and exploitation.

The campaign for legal change culminated in the repeal of the criminal laws regulating sex work through the Prostitution Reform Act (PRA) of 2003. This established that adult, consenting sex work is employment, and should be regulated like any other contractual employment. The legislation and accompanying Occupational Safety and Health Guidelines, signified a paramount shift in the legal and policy construction of sex work and sex workers. The PRA shifted the problematisation of sex work from a deviant, immoral behaviour. Sex workers were recognised as persons deserving equal protection by the law, and endowed with other necessary rights and protections specific to the industry they worked in (Abel, Fitzgerald, & Healy, 2010). For Scambler and Scambler (1997, p. 185) decriminalisation removes:

the anomaly of a gender-biased body of legislation exclusive to a particular area of work and prepare[s] the ground for de-marginalizing women sex workers and restoring basic citizenship and other rights to them.

Other research supports this assertion, evidencing broad positive impacts of the legal reform for sex workers in all sectors of the industry (Abel, Fitzgerald, & Brunton, 2007; Armstrong, 2011, 2014, 2016; Mossman & Mayhew, 2008; Prostitution Law Review Committee, 2008; Ryan, 2019).

Whilst the benefits of decriminalisation cannot be understated in the lives of sex workers in New Zealand, critical voices argue that structural conditions and factors that govern women's choices in relation to prostitution are not addressed in the legal framework (Ryan, 2019). For example, the decision to enter and/or to remain in sex work is made within the context of individual circumstances. These impact and influence women differently and are mediated by factors of race, class, levels of autonomy and need (Matthews, 2008; Phoenix, 2000, 2006; Rosen & Venkatesh, 2008).

Ideas of resistance and resilience have become pivotal parts of sex workers' narratives (Ryan, 2019). The campaign to decriminalise sex work in New Zealand was foregrounded in an analysis of sex work as labour. This politics of recognition sat in tension with an equally needed narrative and politics of redistribution (Ryan, 2019). In order to reenvision an agenda for real change for women at the margins, social justice would address the gendered and oppressive structural forces that shape and sustain the marginalisation of women in sex work.

Beyond the Recognition–Redistribution Divide | Decriminalisation as Only a First Step in Promoting Social Justice for Women at the Margins

In illuminating the diversity of women's experiences at the margins, including women who do sex work and/or women who use drugs, a lens of social justice as rights, redistribution, recognition, respect and inclusion becomes useful (Bauman, 2001; Fraser, 1997; Sanders & Campbell, 2007; Young, 1990). Exploring the impact of various legal and policy frameworks in enabling or constraining sex workers' access to justice highlights that recognition as a politics of justice is only one necessary part of the process to alleviate the oppression, vulnerability and exclusion of women (Gewirtz, 1998, p. 482). It encourages exploration of justice for oppressed communities by asking *how and to what extent* do laws, policies and frameworks support, interrupt or subvert exploitative relationship, processes of marginalisation, the effects of powerlessness, practices of cultural imperialism and experiences of violence. The ways that comparative legal and policy frameworks play out in the lived experiences of female sex workers and women who use drugs are manifold. They illuminate the many ways in which laws, policies and frameworks support, interrupt or subvert women's experiences of oppression beyond criminalisation, which is only one mode of the regulation of women's lives, work and choices.

The governance and legal reforms to sex work in New Zealand can be identified with liberal and neoliberal discourses that prioritise economic growth, individualism and self-regulation. Freedom of choice becomes the ideal of fairness (Abel, 2017). In this construct, a sex workers' rights discourse recognises sex work as an occupation and thus worthy of protections and freedoms similar to those

of other forms of employment. This does not engage with structural inequalities that constrain and influence sex work decision making. Similarly, those liberal feminist perspectives that deem sex work a choice for women that should not be denied through non-recognition of human, civil and employment rights (Abel, 2017; O'Connell Davidson, 1998). Neoliberal economic strategies in New Zealand (Briar & Cheyne, 1998; Jordan, 1999) have led to an entrenchment of inequalities, exclusion and poverty, rendering some groups more disadvantaged than others (Blakely, 2012). In this context, Kelly (2010) likens the neoliberal state agenda to that of a traditional pimp.

New Zealand's sex work legislation and policy approach prioritised recognition politics. The re-distributional element of women's injustice is sidelined (Ryan, 2019) in this shift of claims-making and claims granting from redistribution to recognition (Nash & Bell, 2007). The New Zealand government has distanced itself from issues relating to unequal distribution of money, power and opportunity that continues to structure women's entry into sex work. In being granted rights through a politics of recognition, New Zealand female sex workers become emblematic of Fraser's (2010) argument that in the redistribution–recognition divide, these two elements of justice can sit in tension with one another. In New Zealand, social justice for sex workers requires attention to the structural underpinnings of sex work and attention to the structural inequalities that can motivate initial entry to sex work and maintain it thereafter (O'Neill, 2010).

Neoliberalism and fiscal austerity in Scotland have produced a similar widening of inequalities and disadvantage but resulted in a contrasting legal and policy framework on sex work/prostitution. Social justice was a key term that came to be used in 1999 by the newly formed Labour-Liberal Democrat administration in Scotland. The new Scottish Executive recognised that material inequality/poverty, combined with group identity, can bring about powerful process of social exclusion but also saw it as a way of gathering and incorporating the voices of poor and other disadvantaged groups (Mooney & Johnstone, 2000). The incoming Scottish Nationalist Party administration maintained a focus on social justice, but shifts in the governance of sex work failed to translate to a legal or policy agenda that addressed the economic and cultural injustices experienced by female sex workers (Ryan, 2019; Smith, 2015).

Social justice theories explain how, in coming from a similar neoliberal governing perspective, governance of sex work in New Zealand and Scotland arrived at contrasting positions. Whilst in New Zealand liberal feminist thought dominated (Abel, 2017; Laurie, 2010), in Scotland debates on sex work were heavily influenced by a neo-abolitionist agenda. This framed prostitution as violence uniformly experienced by women sex workers, who were constructed as a homogeneous entity. The result is a monolithic construction of sex workers in current Scottish government policy, evident in key policy documents 'Safer Lives: Changed Lives' (Scottish Executive, 2009) and more recently 'Equally Safe' (Scottish Executive, 2014).

Groups that advocate for the abolition of prostitution were influential in framing a discourse in which women engaged in prostitution are unstable, traumatised, passive and exploited (Farley, 2004; Jeffreys, 2008; Raymond, 1998). These

pathologisations are seen as *resulting in* their sex selling (and undermining their agency exercised in a ‘decision’ to sell sex), and as *resulting from* their apparently traumatising and violent sex work (Levy, 2014). Lack of agency attributed to those who engage in sex work deems them marginal from the political sphere and excluded from participating fully as peers in policy settings and debates. This leads to ‘ordinary-political injustices’ (Fraser, 2010, p. 19). Female sex workers remain victim to the patriarchal economic injustices many women in Scotland face in the context of systematic disadvantage based on class, gender and culture (Young, 1990).

For Fraser (2010) this political dimension of justice, named as ‘representation’ becomes pivotal. Analytically separate from ‘redistribution’ (economic injustices) and ‘recognition’ (cultural injustices) (Fraser, 2007) the principle characteristic of Fraser’s political injustice paradigm is misrepresentation. This holds two distinct injustices: misframing and meta-political misrepresentation. These can both be recognised in the Scottish context. Misframing relates to ‘the boundary-setting aspect of the political’ (Fraser, 2010, p. 147). Injustice arises when ‘partitioning of political space blocks the poor or despised from challenging those who oppress them’. Institutional hierarchies of cultural value deny people, like sex workers, the social status to interact with dominant groups as equals: ‘the result can be the denial of political voice to those who are cast outside those who “count”’ (Fraser, 2010, p. 147). Consequently, they suffer status inequality or ‘misrecognition’ (Fraser, 2010, p. 16).

Misframing the ‘problem’ of prostitution is not a random political act (FitzGerald & McGarry, 2016). It is a frame-setting tactic, determining where ‘legitimate’ political debate occurs and who is included/excluded ‘from the universe of those entitled to consideration within the community in matters of distribution, recognition and ordinary-political representation’ (Fraser, 2010, p. 19). Thus Fraser’s (2010) political dimension of justice illuminates both the nature and cyclical cause of injustice for female sex workers in Scotland. Whilst abolitionists were influential and presented as experts in Scotland’s debates on sex work governance, women sex workers were denied participation in policy and media spaces where they could challenge the misrepresentation of their lives, experiences and needs. This resulted in a different type of victimisation – one based on misrecognition and status inequality.

Conclusion

Current drug policy debates are configured around a binary. On the one hand punitive approaches that target users of drugs as a public risk, and public health approaches that entail narratives of women using drugs as being ‘at risk’. This is particularly evident in UK parliamentary debates (Scottish Affairs Committee, 2019). On the other hand, the comparative study findings presented in this chapter highlights the need for more nuanced analysis based on engagement and voice by women with lived experience. This can only take place when women at the margins are granted political parity and status recognition as experts in their own lives.

A platform of social justice – rights, redistribution, respect, inclusion and recognition – extending from decriminalisation as a first step, has the potential to avoid the trap of a welfarist approach that creates new forms of intervention in the lives of women traditionally marginalised, stigmatised and criminalised. Being able to openly challenge structural oppression, particularly as it relates to women's lives, is essential in campaigns for reform and to ensure the equally important process of de-stigmatisation and de-marginalisation of women who sell sex and/or women who use drugs. Only in a decriminalised setting are these reforms possible and a holistic form of social justice for women can be realised.