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Decriminalization and the Dilemmas of Regulating Prostitution

SUSAN DEWEY

Since time immemorial and in nearly every country in the world, prostitution has been a matter of contention among policy makers, legislators, and a host of actors concerned with public health, social order, and behavioral norms. Prostitution remains a political lightning rod because it is an intrinsic part of wider debates about the role of the state in regulating sexual behavior. It raises profound philosophical questions about the limits of freedom and mutual respect in civil society. How are “normative” forms of adult sexual expression to be distinguished from others deemed “deviant”? What responsibilities does the state have to protect the vulnerable from sexual exploitation, while respecting people’s rights to bodily autonomy?

There are striking parallels between the global North and the global South in the broad array of ideological forces concerned with prostitution. Feminists, religious groups, and legislators all engage in debates about moral standards, sex trafficking, and related social questions. Each of these groups has different beliefs about what prostitution entails, who engages in it, and the rationales that inform their choices.

Those belief systems lend themselves to particular solutions to the “problem” of prostitution. Evangelical Christian groups regard prostitution as a sinful condition from which women need to be rescued. They support well-funded networks of safe houses for women leaving the sex trade. Radical feminists condemn prostitution as the ultimate form of patriarchal domination; they advocate for criminal justice solutions that rely on policing, arrest, and detention.

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Sex workers’ rights activists, for their part, view prostitution as a fundamentally economic issue. They argue that those who engage in sexual labor are entitled to protections under international human rights standards.

Sex workers throughout the world face centuries’ worth of stigmatization and discrimination enshrined in law, policy, and everyday practices. Women, men, and transgender people in the sex industry are treated as second-class citizens and left exposed to harassment and violence, with limited access to justice.

Yet sex workers’ rights groups all over the world have successfully mobilized—on their own and by working with community partners—to lobby for legislation that respects their rights to fair treatment under the law, equal access to health care services, and even long-term state support, such as pensions. These hard-won gains have almost always been made in political conditions that stigmatize and marginalize sex workers.

Sex workers’ rights groups have achieved these successes in conjunction with their near-universal advocacy for decriminalization. Decriminalizing prostitution is not just a matter of revoking laws that criminally sanction the exchange of sex for money between consenting adults. It requires integrating prostitution into existing legislative and regulatory frameworks, and treating it as a line of work like any other.

Sex workers’ rights advocates envision that decriminalization would enable anyone with the capacity to consent to exchanging sex for money to do so without being subject to criminal justice oversight. But laws would remain in place to protect minors and others who are unable to consent, and to punish third parties or customers who exploit or coerce them into prostitution. Zoning ordinances and other municipal regulations would

set the terms and locations for decriminalized prostitution, just as they do with other licit but stigmatized forms of trade on the margins of society, such as street vending, tarot-card reading, or small-scale money lending.

ENFORCEMENT APPROACHES

Decriminalization is one of the four approaches most commonly proposed for regulating prostitution, along with criminalization, legalization, and some mixture of the three. Criminalization, the globally predominant approach, makes prostitution illegal and dedicates considerable criminal justice resources to policing, arresting, sentencing, and incarcerating people who buy and sell sex. But women are far more likely to be arrested for selling sex than men are for buying sex. Poor, minority, and migrant women are consigned to the worst-paid forms of sex work, which makes them most likely to be assaulted by clients and arrested by police.

When sex work is criminalized, police often take a public order approach to street prostitution. Arrests usually occur only in response to nuisance complaints from neighborhood residents or aggressive soliciting in public, as when sex workers disrupt traffic by flagging down cars. Police sometimes stage undercover operations, posing as clients in order to investigate and arrest escorts who work indoors. These operations may be portrayed as a means of rescuing women from third parties who have forced or trafficked them into prostitution against their will. Yet sex workers' rights groups contend that such "rescue" efforts offer no feasible economic alternatives to prostitution and leave sex workers in an even more disadvantaged position.

Legalization, the second most common approach to regulating prostitution, paradoxically resembles criminalization in devoting considerable state resources to managing the sex industry. Operating a legal prostitution venue entails meeting extensive requirements for zoning, licenses, and registration. Such regulations favor establishments with more privileged owners, managers, and sex workers. Public health rules, taxes, and many other regulations can be difficult to navigate without extraordinary business acumen. Sex workers who are undocumented, underage, or otherwise unable to fulfill the requirements to operate legally, or who engage in prostitution in

unsanctioned areas, still face arrest and the possibility of criminal charges.

The third most common regulatory approach to prostitution involves some mixture of criminalization, legalization, and decriminalization. Each element is applied differently depending on a sex worker's identity and location, and on the clients' socioeconomic status. The same inequalities of sex, race, and class that pervade all aspects of life are particularly pronounced in the regulation of prostitution.

After spending nearly two decades immersed in sex workers' lives, I sometimes still find it difficult to convey the tremendous diversity of experiences under the sex industry's umbrella, and the equally diverse impacts that particular regulatory approaches have on sex workers. I have stood on a street corner with a shivering woman who was desperately in need of heroin—which many of the women in my long-term study called "medicine" because it would stave off potentially deadly withdrawal symptoms—and who was willing to get into a car with any passing motorist who would pay her as little as twenty dollars for a sex act. Yet I have also spent considerable time with brilliant, well-educated, and passionate women who regard sex work as a choice they have made from a varied menu of life options. Such women rarely face arrest.

Under criminalization, a drug-addicted woman working the streets will likely have weeks or even months in which police officers ignore her presence. This may resemble a de facto form of decriminalization. Yet those weeks or months will inevitably be punctuated by periods in which she is embroiled in the criminal justice system, though she is unlikely to remain incarcerated long enough to receive any kind of meaningful drug treatment, whether or not she wants it. Even with effective treatment, the lack of social safety nets in many countries makes it likely that she will fall back on substance abuse, and the prostitution that funds her habit, once she is released.

Nor does legalization leave a drug-addicted woman with a viable alternative. She will not meet the criteria to work in legal prostitution establishments. Like most workplaces, they require punctuality and adherence to rules and standards of appearance—expectations impossible for someone deep in addiction to meet.

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Unevenly applied approaches to regulating prostitution are also evident in the freedom from police surveillance enjoyed by well-paid escorts as well as from taxation and the scheduling restrictions imposed by most employers. They may earn a thousand dollars or more a night for their services, and spend the rest of their time on far less lucrative pursuits.

Some might believe that such an escort has an obligation to pay taxes and publicly register her status as a sex worker. Others may feel that the escort is engaging in immoral acts, or endorsing male privilege in problematic ways that society should not condone. Yet because she discreetly works indoors with wealthy clients who pay cash, she is unlikely to be arrested or serve jail time. Nor would she benefit from conducting her business in a third party–controlled environment, such as a brothel, that would require her to turn over more than half of her earnings to a manager, as is standard practice in such venues.

WHY DECRIMINALIZATION?

As anyone familiar with the criminal justice system's everyday operations knows, law enforcement practices vary tremendously even within single cities or regions. Policing of prostitution reflects the types of services, where they are performed, and the social-class status of both the sellers and the buyers of sex. The woman on the street is more likely to be arrested because she is in public and providing services predominantly to low-income men, whereas the escort is able to operate much more discreetly with higher-paying clients.

Decriminalization lessens these disparities by providing sex workers with equal protection under the law. It also removes the burden of a permanent record of sex industry involvement. Such records are compiled under both criminalization, through publicly available criminal records, and legalization, through mandatory registration and health checks.

Decriminalization—despite its relative rarity and frequent dilution by other laws that prohibit conditions necessary for prostitution to take place—has several primary benefits for sex workers and society at large. Yet it is by no means a panacea for the myriad problems that surround the regulation of prostitution.

First, decriminalization improves public safety by encouraging police officers and sex workers to be allies rather than adversaries and to share information that can help reduce crime. When sex

workers fear arrest, such cooperation is difficult, if not impossible. Avoiding arrest consumes a tremendous amount of sex workers' time and energy. It forces them to conduct business in areas that are poorly lit, isolated, and give a client control of the encounter, increasing the risk of violence. Decriminalization allows sex workers to exercise greater control over their encounters with clients, and to foster positive collaborative relationships with police and social services that can benefit communities. This leads to the reduction or elimination of harassment and violence by clients who target sex workers for abuse, believing that they can act with impunity because their victims are unlikely to file police reports due to mutual mistrust.

A second benefit is that decriminalization treats sex workers and their clients as equals by exempting prostitutes (like their clients) from mandatory health screenings and the potential for public exposure that legalization, and sometimes even criminalization, brings.

Another benefit of decriminalization is that it eliminates the financial and social costs of arresting and incarcerating women for prostitution, while keeping laws in place to prohibit sexual exploitation. Sex workers thus can become law-abiding, tax-paying citizens.

Decriminalization's supporters invoke workers' rights, human rights, and the principles of the public health strategy known as harm reduction. Many scholars and activists who support decriminalization argue that prostitution is a form of labor and should be respected as such, with the same workers' rights that apply to other industries.

The sex workers' rights movement emerged from the sociocultural revolutions that swept North America and Western Europe in the 1960s and 1970s. The American activist Carol Leigh (also known as "Scarlet Harlot") first coined the phrase "sex work" around 1980 to describe a broad range of sexual services exchanged for cash. In its early years, with its motto "Outlaw poverty, not prostitution," the movement emphasized that sexual labor is a livelihood for many women struggling to make ends meet, and argued that women should have the right to exercise autonomy over their bodies, including the choice to sell sex. That argument has since expanded to include sex workers of all genders and sexual orientations.

From the workers' rights perspective, sex work is a service industry. Consenting adults who are ca-

pable of contracting with one another for the sale and purchase of sex should be able to act at their own discretion without fear of arrest, prosecution, incarceration, or citation in a public record, which may constrain their future job prospects.

Human rights activists claim that the historical oppression of sex workers through state control is akin to colonial regimes that justified their systematic oppression with discourses of benign protection. A 2016 Amnesty International declaration in support of decriminalization argued that it reduces stigma, violence, and the socioeconomic disenfranchisement that sex workers face under both legalization and criminalization.

Today, the sex industry's most disadvantaged participants face intensified policing measures because of their status as rural-to-urban or cross-border migrants, or as impoverished minorities with limited alternatives. Such policing measures are often justified by invoking the ostensible need to protect migrants from sexual exploitation, even though many migrants enter the sex industry precisely because xenophobia or irregular citizenship status excludes them from other forms of work. The discrimination that sex workers face only compounds forms of stigma and marginalization associated with other aspects of their identities.

Harm-reduction advocates support decriminalization as part of their belief that prostitution, illicit drug use, and other related and equally stigmatized behaviors will continue to exist irrespective of prevailing public opinion—and that people who engage in such behaviors should not be further marginalized and stigmatized. Harm reduction emerged in the wake of the HIV/AIDS epidemic in the 1980s as a strategy to help those engaged in “risk behaviors,” such as having sex without a condom and sharing needles, alter some aspects of their practices in ways that can save their lives.

This means making clean syringes available at no cost, and providing condoms to sex workers along with information about how to stay safe. Rather than moralizing about the inherent evils of prostitution and drug use, and simply telling people to give up those activities, harm reduction's philosophy of “meeting people where they are at” aims to protect public health by providing them with the tools to make informed decisions in very difficult circumstances.

THE ABOLITIONIST CASE

Opponents of decriminalizing prostitution argue that it would reinforce the oppression of women, create insurmountable challenges for the criminal justice system, and fail to reduce the stigma associated with the sex industry. Supporters of decriminalization have often come into conflict with advocates of abolishing prostitution, who argue that the sex industry endorses violence against women. In the abolitionists' view, all women are degraded by the sex industry's continued existence, its inherent sexism, and the physical, emotional, and sexual abuse pervasive within it.

Advocates of abolition argue that it is immoral and discriminatory for the state to allow men to purchase sex from women. Decriminalization, they claim, would only further entrench a patriarchal labor system in which women earn less money than men for the same jobs and have less access to well-paid jobs and promotions. They argue that prostitution should not be regarded as a

legitimate form of work for poor and otherwise marginalized women—that doing so reinforces deeply rooted gender inequalities. Society has a responsibility to address prostitution as a byproduct of poverty, sexism, addictions,

and other deeply rooted social problems, rather than condone it, these advocates contend.

Opponents also contend that decriminalization is impractical from a criminal justice standpoint. In their view, women are more likely to be forced into prostitution when the state takes a *laissez-faire* approach to the sex industry.

Prostitution typically takes place in settings where questioning is difficult due to the sensory overload common in sex industry venues. Police officers encounter dim lighting, loud music, difficult-to-navigate building structures or street layouts, people under the influence of alcohol or illicit drugs, and a pervasive distrust of the police. On the streets, prostitution is often mixed in with illicit activities such as gambling and selling and using drugs.

Such settings make it difficult for police to distinguish women who are freely consenting to prostitution from victims of sexual exploitation. The power and control dynamic of the latter scenario is virtually identical to the dynamic between victims and perpetrators of intimate partner vio-

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lence, which makes it unlikely that victims will file a police report.

Opponents of decriminalization also assert that it does not aid sex workers because it often results in an untenable situation in which prostitution itself is not illegal but all the conditions necessary to carry it out remain criminalized, such as advertising and third-party involvement. Critics further observe that stigma and discrimination persist regardless of the type of regulatory approach taken to prostitution. If it were the case that legalization or decriminalization removed the stigma from prostitution, they argue, the sex industry would not be staffed almost entirely by poor and working-class people who have few other opportunities to earn a similar income.

NEW ZEALAND OR BRAZIL?

Despite provoking vibrant discussion and debate, the full decriminalization of prostitution under the law remains exceedingly rare internationally. New Zealand is the only country in the world to have decriminalized prostitution at the national level. But most national and local governments engage in some form of de facto decriminalization through tolerance zones and selective policing. This effectively amounts to decriminalization through inaction, leaving sex workers in limbo with a status somewhere between criminal, victim, and public nuisance.

The New Zealand Parliament voted to decriminalize prostitution in 2003. Many observers attributed this milestone to the country's small population (five million) and robust civil society. Decriminalization drew widespread support from sex workers' rights groups, churches, public health organizations, and women's groups. One former sex worker, Georgina Beyer, was a member of Parliament at the time and testified in support of decriminalization.

Under New Zealand's law, up to four sex workers can jointly operate from a venue without a license issued by the municipality. Venues with a greater number of sex workers must obtain a license, which is confidential and cannot be inspected by police. Sex industry venues operated by third parties also must be licensed, but otherwise are subject to the same laws and regulations as businesses in other sectors. More than fifteen years after decriminalization was implemented,

relations between sex workers and police are notably improved, sex workers have brought—and won—harassment cases in the courts, and their rights are enshrined in law and policy.

Decriminalization, like any policy, has complex layers that reflect the state of civil society, culture, and human rights in a given country. With the exception of New Zealand, all other extant forms of decriminalization at the national level are de facto and based on prevailing norms in the local cultural context.

Brazil is one example. Like New Zealand, Brazil has no laws prohibiting the exchange of cash for sex. Unlike New Zealand, however, laws remain in place to prohibit the operation of brothels and other forms of third-party involvement in prostitution that are often necessary for it to take place.

Yet brothels and other third-party operations are prevalent throughout Brazil. They are enabled by a cultural context in which the rule of law works very differently than in New Zealand. Brazilian police routinely take protection money from brothel

owners, whom they allow to operate under the pretext that such establishments are in the business of selling food and drink, and that what happens between sex workers and their clients is outside the management's purview.

Thailand criminalizes prostitution, yet its massive sex industry is internationally notorious. It first burgeoned during the Vietnam War and continues to generate enormous profits from foreign tourists and Thai men alike. Like many other countries, Thailand has de facto tolerance zones, such as Patpong in Bangkok, where the sex industry is concentrated and operates largely unregulated despite its illegality.

The reality in any country that criminalizes prostitution is that if police arrested sex workers every time they solicited a client, jails would be unmanageably overcrowded. Already-overburdened criminal justice systems would quickly collapse.

NOT A PANACEA

Decriminalization is a pragmatic, harm reduction-oriented, and human rights-centered approach to prostitution, acknowledging the reality of an economic activity that is likely as old as humanity. Yet more prevalent approaches to regulating prostitution are still reliant on forms of state control. Criminalization and legalization have es-

Advocates of abolition argue that decriminalization would only entrench a patriarchal system.

entially the same impact in terms of restricting sex workers' autonomy over their bodies and their labor.

Decriminalization is by no means a panacea for these problems. For millennia, and in many different cultures, sex workers have been targets for persecution stemming from a wide array of ideological, political, religious, and other social anxieties.

I spent nearly a decade immersed in research with Colorado women involved in street prostitution. They regularly cycled through jail, mandatory stays in detox centers (usually after an arrest for public intoxication) until their bodies were clear of drugs and alcohol, hospital emergency rooms (their primary health-care providers), the few drug treatment centers that accept Medicaid (the US government health-insurance program for the eligible poor), and halfway houses.

A few of the woman I knew had been arrested more than a hundred times in their years on the street. Some had served prison sentences for prostituting while HIV positive, a felony offense that went on the books in Colorado during the AIDS paranoia of the 1980s and remains in effect today because sex workers have few powerful legal advocates. Most of the women I knew had been "doing time on the installment plan," as they characterized their multiple months-long stints in correctional facilities, usually county jails, for prostitu-

tion and drug crimes. Most were struggling with addiction and had lived in extreme poverty long before taking to the street.

Working for years with so many women profoundly affected by mass incarceration complicated my support for decriminalization. I understood that the evidence shows that decriminalization has positive impacts on sex workers' health, safety, and overall well-being. I still believe strongly that decriminalization is a human rights issue. Yet as I contemplated how the lives of women I knew might change if prostitution were decriminalized, I realized that the laws in place that criminalize addiction and homelessness would still condemn them to frequent trips to jail and, for some women, prison sentences.

Prostitution is criminalized in most of the world. Where it is legal, the conditions in which it is practiced are subject to stringent restrictions that exclude many sex workers. They continue to be treated as criminals because they cannot participate in the legal economy.

Local governments worldwide must stop arresting, prosecuting, and incarcerating sex workers for actions they resort to because they are poor or lack the right to work legally. For the vast majority of sex workers, prostitution is an economic solution to economic needs. They are trying to pay the rent, to feed themselves and their children, and, just maybe, to have a better life. ■