TWO TIERED PROSTITUTION LAW: ABORIGINAL WOMEN IN THE SEX TRADE

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ABSTRACT / RÉSUMÉ

This article examines Canadian prostitution law and ancillary police approaches and how they might better protect the most vulnerable and overrepresented sex trade workers: Aboriginal women. The article canvasses the broader circumstances that make Aboriginal women particularly vulnerable in and to, the street sex trade. It considers possible legal reforms, including decriminalization and legalization of prostitution, with New Zealand and Sweden presented as case studies. It seeks to facilitate discussion on which approaches might begin to mitigate the sexual exploitation of Aboriginal women and girls and their exposure to sex trade related violence.

Cet article examine les dispositions législatives canadiennes sur la prostitution et les approches auxiliaires de la police dans le but de déterminer comment on pourrait mieux protéger les travailleurs du sexe les plus vulnérables et les plus surreprésentés : les femmes autochtones. Il traite les circonstances générales qui font que les femmes autochtones sont plus particulièrement susceptibles de se livrer à la prostitution de rue et qu'elles sont plus vulnérables dans ce milieu. Il examine les réformes juridiques possibles, notamment la décriminalisation et la légalisation de la prostitution, en s'appuyant sur des études de cas de la Nouvelle-Zélande et de la Suède. Il vise à faciliter la discussion pour trouver des pistes de solutions permettant d'atténuer l'exploitation sexuelle des femmes et des filles autochtones et leur exposition à la violence liée au commerce du sexe.

The legacy of missing Aboriginal and non-Aboriginal sex trade workers across Canada does not behoove our police agencies or our prostitution laws. The situation cries out for change, yet despite a recent three year parliamentary committee investigation into law reform (Canada 2006), Canada maintains the status quo. Perhaps most urgently, as this paper argues, reforms must address the situation of the most overrepresented and vulnerable sex trade workers: Aboriginal women.

OVERREPRESENTED AND MOST VULNERABLE

That the lives of Canadian sex trade workers are precarious is news to no one, particularly after the conviction of prostitute serial killer Robert Pickton in Vancouver, British Columbia. It is particularly risky for women who solicit on the streets. In a Vancouver study, one-third of the women reported having been attacked while working the street (Cler-Cunningham and Christensen 2001).

It shouldn't go unnoticed that Aboriginal women are disproportionately represented as street sex trade workers and as those murdered or disappeared. A 2001 study carried out in Vancouver found that of 183 women surveyed, 31.1% of street level sex trade workers were Aboriginal, although Aboriginal people then constituted only 1.7% of the greater Vancouver population (Cler-Cunningham and Christensen 2001). It is currently estimated that up to 40% of female and male sexually exploited youth and adults in Vancouver are Aboriginal (City of Vancouver 2007). Aboriginal women constitute at least a third of the more than seventy women who disappeared from Vancouver's Downtown Eastside (Amnesty International 2004). In Winnipeg the police service estimates that Aboriginal women make up 70% of street prostitutes (Canada 2006). In 2007, it was reported that Aboriginal women make up 60% of the long-term, unresolved cases of missing women in Saskatchewan (Amnesty International Canada 2008). In most large Canadian cities, a disproportionately high number of Aboriginal women are involved in street prostitution.

The increased risk of violence faced by women in the sex trade is often particularly acute for Aboriginal women, who are more likely to experience extreme poverty and engage in substance abuse. Amnesty International commented on the high numbers of Aboriginal women in the Canadian sex trade:

> The social and economic marginalisation of Indigenous women, along with a history of government policies that have torn apart Indigenous families and communities, have pushed a disproportionate number of Indigenous women into dangerous situations that include extreme poverty, homelessness and prostitution. (Amnesty International 2004)

Street sex workers are generally working for survival, and are often drug addicted and likely to be unwanted by indoor venues:

> Almost all of Victoria's outdoor sex workers are addicted, skinny and sick. More than half have mental-health diagnoses. Close to a third have Fetal Alcohol Spectrum Disorder, the life-altering brain damage caused by a woman drinking alcohol during pregnancy. Formal education levels are low – Grade 8 and 9 in many cases. *Aboriginal rates are high: twenty per cent in a region where the rate is two per cent in the overall population.* Some have mental disabilities; many others have chronic poor health from hepatitis-C, HIV and chronic staph infections. (Paterson 2006, 6)

In addition to poverty and substance abuse, Aboriginal women and girls are overrepresented in the visible sex trade as a consequence of colonization, the impacts of residential schools and general community breakdown (Sikka 2009). Aboriginal women's vulnerability to exploitation and violence is fuelled by social and economic marginalization and a history of colonialist government policies which have disrupted relations between Aboriginal men and women and eroded cultural identity (Mann 2005).

The overrepresentation of Aboriginal women as sex trade workers does not stand-alone; rather it is inextricably interconnected to and indivisible from the systemic and pervasive nature of Aboriginal women's inequality in Canadian society. Aboriginal women face race and gender discrimination, often further compounded by inequity due to poverty, ill-health, involvement in the sex trade, or other factors. Aboriginal women's unequal status in Canadian society results in their increased vulnerability to exploitation and violence.

CANADIAN LAW AND ENFORCEMENT

Prostitution is technically legal in Canada, however *Criminal Code* (1985) prohibitions on certain activities surrounding it create barriers. "Communicating" or negotiating services between sex worker and client is illegal (section 213) as is operating a "bawdy house" (section 210) and "procurement" (including human trafficking) and "living off the avails" of prostitution (section 212), better known as pimping. The result is that the sex trade worker, the pimp and the client are criminalized.

However, as noted in the 2006 federal government report of the Subcommittee on

Solicitation Laws, existing prostitution laws are unequally applied, enabling a:

> 'two tiered sex trade to emerge [where] more expensive licensed off-street prostitutes operate with virtual impunity,' while those already most vulnerable and marginalized — street-level prostitutes, particularly Aboriginal and transsexual/transgendered persons, as well as drug addicts — are routinely arrested. (Canada 2006, 86)

Street prostitution makes up only 5% to 20% of all sex trade related activities, yet has accounted for more than 90% of all prostitution-related incidents reported by

the police, indicating a clear bias in the application of laws (Canada 2006). And while broader socio-economic circumstances render Aboriginal women particularly vulnerable in and to, the sex trade, Canadian police have often failed to provide Aboriginal women with an adequate standard of protection, a situation often referred to as "over policed and under protected." Discrimination and Aboriginal women's inequality in society contribute to a perception that they are easy targets; discriminatory and sexist policing has all too often rendered this perception reality (Mann 2005). Police have been viewed as uncaring and inactive in the disappearances of both sex workers and Aboriginal women. As recently as November 2008, the United Nations called on the Canadian government to investigate why hundreds of deaths and disappearances of Aboriginal women remain unsolved, including whether racism played a role in failures to fully investigate (United Nations 2008).

Nonetheless, there has been progress in policing. In 2006, a resolution passed by the Canadian Association of Chiefs of Police acknowledged the high levels of violence experienced by Aboriginal women and called on all police services across Canada to adopt missing persons policies including specific measures to address the circumstances and needs of Aboriginal people (Amnesty International Canada 2008). Several innovative police/community initiatives have emerged in light of increased awareness of the problem.[1] One significant barrier to improved police/sex trade worker relations is the ongoing criminalization of the prostitute, who may be unwilling to turn to police or social services when they are engaging in criminal activity. Accordingly, calls for prostitution law reform in Canada range from total legalization or decriminalization to decriminalization only of the sex trade worker.

PROSTITUTION LAW REFORM

Debate rages not only in Canada, but internationally about how to best tackle the adult sex trade. Should it be criminalized, decriminalized, legalized? Is it the world's oldest profession or the world's oldest oppression? Yet despite the gross over-representation of Aboriginal women as street level sex trade workers and among the murdered and disappeared, discussion of prostitution law reform rarely focuses on how to mitigate their sexual exploitation and exposure to related routine violence. Regardless of how one views prostitution – immoral, socially constructed choice or valid career option – the safety and health of sex workers is worthy of protection.

Decriminalization and legalization are generally touted as a route to greater safety for the sex worker. Decriminalization refers to the repeal of adult prostitution-

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TABLE 1: Personal Characteristics of Survey Participants by Sector

ETHNICITY	TOTAL % (S.E.)	STREET WORKERS % (S.E.)	MANAGED INDOOR % (S.E.)	PRIVATE INDOOR % (S.E.)
Maori	31.7 (1.9)	63.9 (3.8)	27.9 (2.5)	23.8 (3.7)
NZ European	50.7 (2.1)	21.5 (3.2)	54.5 (2.7)	57.5 (4.4)
Pacific Island	5.1 (0.9)	9.4 (2.2)	5.1 (1.2)	3.0 (1.4)
Other	12.5 (1.5)	5.2 (1.8)	12.5 (1.9)	15.7 (3.4)

Source: Data from Abel, Fitzgerald, and Brunton 2007.

related provisions from criminal law, leaving other laws to apply as they would in any other context, while legalization refers to not only repeal of criminal laws, but also accompanying specific regulation of the sex trade. Allowing prostitutes to work indoors, off the streets, either alone or in group protected environments would render them less vulnerable to predators. Legalization and decriminalization would ostensibly also increase the sex trade worker's access to police, health and social services.

However, countries that have decriminalized and legalized prostitution (New Zealand, Australia, Germany and the Netherlands) have seen an increase in human trafficking, resulting from increased demand (Canada 2006). While both the *Criminal Code* (1985) and the *Immigration and Refugee Protection Act* (2001) contain provisions dealing with trafficking in persons, domestic trafficking in Aboriginal women and girls is a problem barely on the radar in Canada, interconnected with the drug trade and growth of Aboriginal gangs fed by high Aboriginal incarceration rates. Regardless of legalization/decriminalization, some sex workers will continue to be street-based, particularly those that are the most disadvantaged and/or considered less marketable. In that regard, both New Zealand and Sweden are noteworthy not only for their opposing approaches to prostitution law reform, but also for the impacts of these approaches on the most disadvantaged (streetworkers).

NEW ZEALAND

That Indigenous women are most disadvantaged has been borne out in New Zealand, where adult prostitution was decriminalized in 2003 (Prostitution Reform Act 2003). Impoverished New Zealand Aboriginals make up a disproportionate number of prostitutes working the streets, with the Prostitution Law Review Committee (PLRC)[2], concluding in 2007 that street-based workers were significantly more likely than managed or private workers to report some Maori ethnicity, identify as transgender, have started working in the sex industry before the age of 18 years and to have lower levels of education. They were also more likely than participants in other sectors to have worked in the industry for more than 10 years. Street-based workers were more likely than managed or private sex workers to report having been physically assaulted by a client, having been threatened by a client with physical violence, having been held against their will and having been raped in the last 12 months. Finally, few participants reported adverse incidents that had happened in the last twelve months to the police (Abel, Fitzgerald, and Brunton 2007).

One-tenth of all sex workers worked the street, with their numbers comparable to on-the-street estimates prior to decriminalization. Overall, half the sample population was New Zealand European, with a further third reporting Maori ethnicity.

While the 2007 government funded evaluation of the impacts of New Zealand's legislation notes the predominance of Maori ethnicity among street workers as indicated in the chart above (63.9%, while 31.7% of the total trade), their ongoing exposure to violence and their trepidation in going to police, little critique emerges pertaining to just who the legislation has benefited. It appears to have been beneficial for those workers who are managed indoor (i.e. a brothel) or private indoor, and those predominantly of New Zealand European descent.

These New Zealand results are an important consideration for Canadian prostitution law reform. Not all women will be "marketable" for indoor venues; even under legalization or decriminalization there will be street workers. Given current statistics we have every reason to believe Aboriginal women will be as vastly overrepresented in this group as are the Maori. Those committed to racial and gender equality might question the probity of a law that may benefit only the more advantaged in a class.

SWEDEN

In contrast, Sweden has taken a different approach to criminalization, being the first country to criminalize only the pimps and buyers of sex rather than sex workers in 1999. Purchasing sex is subject to penalties of a fine and up to six months in prison. Prostitution is officially seen as sexual abuse and an act of violence against women. Proponents of the Swedish legal system hope that by targeting the demand side of the sex industry, they may reduce or eliminate it altogether.

While some prostitution continues underground, advocates say prostitution and human trafficking have been drastically reduced in Sweden. It is estimated that before the law there were 2,500 to 3,000 individuals selling sexual services in Sweden with 650 on the streets.

Today there are approximately 1,500 persons selling sexual services with no more than 350 to 400 involved in street prostitution (in a total population of nine million) (Canada 2006). Due to enforcement, the number of clients has also dropped drastically: 914 males were reported under the law between January 1999 and March 2005, and 234 males were convicted of purchasing sexual services in the first five years of the law's application (Canada 2006).

Decriminalizing the prostitute facilitates the goal of making it more feasible for women to report bad dates and attacks to police, assuming police act and better police/sex worker relationships are forged. In Sweden, some individuals still selling sexual services indicated that they now feel more comfortable reporting crimes to the police (Canada 2006).

Clearly, at least some sex trade workers are victims; their criminalization only plays into the hands of those who seek to exploit them, while further jeopardizing their health and safety. Given Canadian statistics pertaining to the high and disproportionate percentage of street sex trade workers that are Aboriginal and the two tier enforcement of prostitution laws, it could almost be said that a subclass of criminalized Aboriginal women emerges via current prostitution laws.

In Canada, where both the prostitute and the client are criminalized, justice emerges once again as two tiered with the street worker on the bottom. Statistics on the use of section 213 (communicating) indicate a gender and role (client versus prostitute) imbalance, with respect to both findings of guilt and sentencing. While relatively equal numbers of men (generally clients) and women are charged with section 213 offences, prostitutes ultimately have higher conviction rates and face harsher sentences. In 2003-2004, 68% of women charged were found guilty under section 213, while 70% of charges were stayed or withdrawn for men charged under the same provision (Canada 2006). Further, as noted by the Subcommittee, in 2003-2004, upon conviction just under 40% of women were given prison sentences; whereas, while the prison sentence rate for men was just over 5%. Just under 40% of men convicted were fined; whereas 92% of those sentenced to prison for communicating offences in 2003-2004 were female (Canada 2006).

Resulting from their marginalization, prostitutes often face criminal records and harsher penalties than their clients; they may fail to appear in court, leading to more serious charges. What is not indicated by these statistics is the race or Aboriginality of many of these women.

MOVING FORWARD

The precariousness of sex trade workers' lives and the evident hypocrisy in the enforcement of prostitution laws all point to a society in which some women are deemed less worthy. Systemic racism, historical oppression and inequality have resulted in Aboriginal women sex trade workers being vastly overrepresented on the streets and among the murdered and disappeared. Social and economic marginalization combined with addictions and other factors, has fuelled Aboriginal women's overrepresentation as sex trade workers; racism compounds the threat to safety and security faced by all such workers (Mann 2005).

Statistics indicate that Canada's prostitution laws and their enforcement may be fostering a subclass of endangered and criminalized street sex trade workers; their face is often Aboriginal. Equally, the face of the street sex trade worker in New Zealand remains largely Maori, despite decriminalization. While it is clear that the law alone cannot provide the answer for those who are exploited in the sex trade and that programming expansion and policing reforms are necessary, prostitution law reform discourse in Canada has too often been carried out willfully blind to just who the decriminalization of the trade might benefit.

Decriminalization of the prostitute (as in Sweden) would ostensibly benefit all sex trade workers, and in fact be of greatest assistance to the most vulnerable – those working the streets, most in need of police services and most often convicted. However, decriminalization or legalization of the trade may only serve to benefit the more advantaged in the class of sex trade workers. Indeed, given the likelihood of a spike in demand, decriminalization could serve to fuel the domestic trade in marginalized Aboriginal women. Prostitution law reform is a complicated issue with convincing arguments for differing approaches. However, we must stop to question whether proposed legal reforms will serve and protect the most disadvantaged in an already marginalized class.

NOTES

[1] For example, the Joint Missing Women Task Force in British Columbia, and Project KARE in Edmonton, Alberta.

[2] Set up to evaluate the *Prostitution Reform Act 2003.*

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