



## Why Decriminalise Prostitution? Because Law and Justice Aren't Always the Same<sup>1</sup>

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### Abstract

Leigh Goodmark's work on domestic violence argues for alternatives to criminal justice to 'solve' issues of gendered violence. The criminalisation of sex work and prostitution is rarely discussed in this context—a rather odd omission given the increasing trend towards 'criminalising demand' and counter-calls for decriminalisation in this domain. In this article, we bring the two debates into conversation, using Goodmark's work to bring analytical clarity to the prostitution debate and *connect* sex work to wider social justice debates in feminist anti-violence circles. We aim to move the conversation beyond retribution and the view that law *is* justice to outline a vision of justice for sex workers grounded in the principles of rights, recognition and representation. By contextualising the decriminalisation of prostitution within the framework of a wider anti-carceral justice movement, we seek to build alliances for social justice that transcend the current divide.

### Keywords

Criminalisation; decriminalisation; radical feminism; sex work; social justice; policy.

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## Introduction

Leigh Goodmark's work is at the forefront of critical feminist scholarship that questions the utility of a singular criminal justice approach in tackling the harms associated with domestic violence (Bettison and Bishop 2015; Walklate 2008). Goodmark's work has situated the criminalisation of intimate partner violence in the US in the context of the 'neoliberal turn', a term describing the influence of economic ideas and policies that discourage state intervention in socio-economic problems through welfare provision, in favour of market-based solutions (Goodmark 2017: 64). One exception to the 'rolling back' of the state is the penal sphere, where states 'govern through crime' (Coker 2001: 803). Across several works, Goodmark (2017, 2018) analyses the effects of this 'carceral creep' that secures resources for sections of the women's movement operating within the criminal sphere. This comes at a price. Criminalisation fortifies the institutions whose arbitrary nature affects poor women of colour disproportionately, and fails to respond to structural inequalities that underpin their experiences of violence and criminalisation. Goodmark illuminates the law's inability to tackle violence against women (VAW), and questions whether governments should decriminalise domestic violence. Although recognising that this is unlikely to garner political support, she offers an alternative framework to criminalising domestic violence that could facilitate alternative responses across different institutions and communities, beyond criminal justice. This we argue, avoids framing law as justice, we resist attempts to frame the (de)criminalisation of prostitution as a zero-sum game for carceral or anti-carceral feminists, arguing instead that decriminalisation is the first step towards alternative policy options for sex workers.

The parallels between her work and other feminist scholarship, including our own that critiques the criminalisation of prostitution, are striking (FitzGerald and McGarry 2018; Scoular 2015). Yet, researchers have not integrated these debates well, inhibited by the epistemological and political disagreement that ensues when considering sex work and gendered violence. We aim to bring these perspectives—often sidelined as 'feminist disputes on prostitution'—into conversation with gendered violence and make three key epistemological contributions. First, we will show the centrality of criminal law in structuring feminist prostitution politics. Secondly, we will integrate sex work research within feminist critiques of carceral justice. To frame our argument and bring analytical clarity to the debate on criminalising prostitution, we utilise Goodmark's framework developed in her *Harvard Journal of Law and Gender* article, to help evaluate the relative merits of this policy approach. We structure our article as follows. In Part One, we draw on Goodmark's three tests—(i) harm, (ii) deterrence and (iii) cost-benefit analysis—to interrogate key theoretical justifications for criminalising prostitution. In Part Two, we use Goodmark's 'Balanced Policy Approach' (BPA), which 'argues for a shift in focus from punishment to prevention and considers laws and policies that would undergird that shift' (2018: 20), to outline an alternative vision of justice for sex workers.

## Harm and the Criminal Law

Punishing and preventing harm have been the central justifications for criminalising conduct throughout the modern era (Braithwaite and Pettit 1990; Feinberg 1984; Husak 2003). Emanating from John Stuart Mill's (1859) liberal moral and political philosophy, the 'harm principle' asserts that the state can only exercise its power over a citizen to prevent or punish serious harm to others. Thus, the private realm must be free from governmental interference. Feminists and others challenge the protection of the 'private' as a sphere of non-intervention as a dangerous ideology that legitimates ignoring many injustices, including VAW, which is minimised as just a 'domestic' rather than recognised as systemic and pervasive (Edwards 1989). Feminists have supported victims of this violence to recognise and report their experiences and seek protection and recognition for harm via the criminal law. Goodmark's work reflects on the efficacy of these engagements in the context of domestic violence. Her challenge to feminists' recourse to law raises key questions that are just as pertinent for those debating the role of the criminal law in the context of sex work.

### *Prostitution, Harm and the Criminal Law*

Feminists' legitimisation of criminalisation in response to the harm of gendered violence is less convincing when applied to prostitution. Generally, one can assume that for most acts forbidden by criminal codes, 'their harmful consequences are immediate and certain' (Feinberg 1984: 190). This certainly is the case with regards to domestic violence, where, as Goodmarks notes, 'even when imperfectly or inconsistently enforced, the criminal laws targeting domestic violence are intended to prevent and address potentially serious harm' (2017: 26). This assumption is problematic when applied to prostitution; not only does harm have a different trajectory in sex work regulation, but feminists contest what constitutes *the harm in prostitution* (Farley 2006; Pheterson 1993).

Harm features prominently in discussions around the legitimacy of laws to repress, restrict or integrate prostitution (Östergren 2017). We do not intend to rehearse these arguments here (for in-depth discussion, see Bernstein 2012, Kotiswaran 2014; Scoular 2015). Rather, we draw attention to the fact the lack of consensus around what constitutes harm in sex work means that, as Harcourt observed, the harm principle no longer provides 'a bright line' to signal a clear justification for the application of criminal sanctions (1999, 138).

### *Deterrence*

Deterrence—the belief in a causal relationship between criminalising an act and the decreased future occurrence—is for many the 'primary purpose of the criminal law' (Packer 1968: 16). While Goodmark does not dispute the rationale of deterrence in criminalising domestic abuse, she questions its effectiveness in preventing domestic violence. In the present context, we would argue that *both* the rationale *and* the effectiveness of criminalising purchasing sex are problematic contexts for arguments that suggest criminalising sex work operates as a deterrence. Neo-abolitionists and lawmakers appear to consider deterrence as a justification for criminalising sex purchase. Rather than presenting arguments in favour of criminalisation as a means of deterrence clearly, neo-abolitionists justify criminalising sex purchase to prevent the more generalised harm of commercial sex, by targeting and reducing demand and supply, or to prevent the remote harms of trafficking for the purposes of sexual exploitation (hereafter: sex trafficking), which some argue can be fairly implied to the activity of prostitution (Madden-Dempsey 2005). Below, we consider these claims in the context of our cost-benefit analysis of criminalising sex work. We query whether harm stems from/is intrinsic to the commodification of sex per se, as abolitionists attest, or if harm is a result of/the consequence of selling sex in the context of poverty, sexism, racism and statelessness without recourse to state protections. The latter perspective, which we would support, does not deny exploitation but rather draws attention to the role of wider social structures in its reproduction. The issue of deterrence become/is rendered much more complex in this wider context, as the role of the criminal law in addressing harm in these social contexts is questioned.

### *Criminalisation of purchasing as incursion into supply and demand*

Neo-abolitionists argue that criminalising sex purchase will reduce the number of buyers. This is hard to evidence because we lack consistent data and because individuals verify their claims using different sources such as arrest rates, visible numbers involved in sex work and even opinion polls. Northern Ireland is the one jurisdiction from which we have longitudinal data. Since 2015 it is a criminal offence to purchase sex in the jurisdiction. The driving force behind this new legislation was the belief that tackling the demand side of prostitution would automatically prevent sex trafficking. Research commissioned there by the Department of Justice noted that there were 15 arrests between 1 June 2015 and 31 December 2018, resulting in only two convictions. In neither case was the victim trafficked or a sex worker, making it difficult to assess the deterrent effects on sex trafficking. Both cases involved sexual harassment, one concerning a minor. In both cases, more appropriate and, indeed, more serious charges were possible (Ellison, Ni Dhonnail and Early 2019).

While several researchers have evaluated the Swedish *Prohibition of the Purchase of Sex Act* (1998) (hereafter: *Sex Purchase Act*) no longitudinal study of Sweden's reformed prostitution laws has been conducted (for discussion, see Holmström and Skilbrei 2017; Levy 2014). The *Sex Purchase Act* provoked

a debate that illustrated the ambivalence of the evidence supporting the law's positive effects (Kulick 2003). The debate indicates that, in Sweden, sex worker numbers have always been low. Thus, the much publicised and well-funded legal change would have had a noticeable impact on already low numbers of visible forms of sex work. Even though the law criminalised sex purchase irrespective of location, empirical work has found that the authorities have enforced the law selectively, with the main focus being on the visible spaces of street prostitution (Hubbard, Matthews and Scoular 2008). Although relatively small by international comparison, street sex work became 'the' target of media attention, public expenditure and police efforts, with seven million kronor (over £500,000) given initially to the police to enforce the law, leading to an initial (but probably only temporary) reduction in activity due to targeted enforcement. This led to a classic displacement, with a concomitant rise in 'hidden' forms of prostitution, evidenced by the increase in an expanding, yet little regulated, sex market accessed via the internet, pornographic magazines and informal networks. Hence, criminalisation addresses prostitution's public aspects but ignores its private dimensions by displacing 'hidden' forms of sex market (Hubbard, Matthews and Scoular 2008). This may mean that street workers are forced to relocate indoors, working in premises beyond support services' reach, largely unregulated by the authorities and often vulnerable to sexual exploitation, violence or intimidation (Kulick 2003).

Noteworthy here is how criminalising sex purchase is synonymous with the proliferation of technology in sex markets. Increased internet use is rarely discussed by advocates of the Swedish model. Sex is increasingly bought and sold online and is subject to little regulation (Jones 2015; Sanders et al. 2017). While internet facilitated sex work may be safer and more lucrative (for some) than street prostitution, there are hidden harms. Crucially, it intensifies the commodification of labour (Jones 2015), making workers visible while granting clients anonymity and protection from social stigmatisation and law enforcement activities (e.g., crackdowns on kerb-crawling). This may exacerbate sex workers' exploitation. Consequently, the gradual disappearance of on-street prostitution does not necessarily indicate that it has disappeared or that policymakers have eradicated exploitation but merely that the market has restructured and is operating beyond the gaze of the state and law (Scoular et al. 2019).

### *Trafficking*

Human trafficking features prominently on the international and domestic policy agenda. For example, European Union (EU) policymakers link it to illegal migration and transnational crime networks, representing it as a security threat to the Union (FitzGerald 2016). Allied to this, and perhaps where anti-trafficking policy achieves its moral authority, is the issue of sex trafficking. Most jurisdictions justify criminalising prostitution to tackle sex trafficking. This is based on reasoning similar to strict liability offences and offences by recklessness, respectively: (i) 'Accomplice Responsibility', where supply of sex feeds demand, as all buyers are aware of the harm associated with 'maintaining' this supply (i.e., largely through trafficking), and are complicit in this harm; and (ii) 'Endangerment', where, as buyers are aware of this harm, they are, at worst, the principal actors enforcing harm on women or they are *risking* this harm. This approach is justified as balancing collective harm against individual benefit and considers that an imposition on the autonomy or gratification of clients is insufficient to outweigh the potential severity of harm that could be inflicted upon women (i.e., rape) (Madden-Dempsey 2005).

Influenced by neo-abolitionist thinking, lawmakers and policymakers understand sex trafficking as 'modern-day sex slavery' and view 'victims' as women in need of 'rescue' from their enslavement in prostitution (Hoyle, Bosworth and Dempsey 2012). As we mentioned previously, this reductive approach is often based on unsubstantiated data. Critics have observed that Cho, Dreher and Neumayer (2013) use aggregate national human trafficking figures—that *combine* labour, sex and other kinds of trafficking to assess whether legal prostitution facilitates trafficking (Weitzer 2014). They assume that legalisation has a standard meaning and practice, ignoring the key issue of whether and how the authorities enforce prostitution laws (Holmström and Skilbrei 2017). This framing ignores the consequences of criminalisation for sex workers' safety. Conflating trafficking and prostitution leads to sweeping 'solutions' that eschew sex workers' rights (FitzGerald and McGarry 2018). This comes into sharp relief when we consider how anti-trafficking measures mask more racialised policy interventions. For example, in the UK, the police use brothel raids to target migrant sex workers by framing immigration control as anti-

trafficking measures (Hill 2016). Policies to 'prevent' trafficking, 'protect' victims and 'prosecute' traffickers play a minor role in regulating prostitution; but legitimise increased surveillance of geo-specific populations of migrants through repressive laws. By using sex trafficking thus, policymakers avoid addressing why women may be vulnerable to trafficking or choose to engage in prostitution (Vuolajärvi 2019). For women who are trafficked for the sex industry, 'being identified as potentially vulnerable to abuse and exploitation often appears to mean exposure to additional risks rather than an opportunity to access rights and protections' (O'Connell Davidson 2006: 6). As sex worker activists, Mac and Smith argue, 'the feminist movement should be sceptical of approaches to gender justice, rely on or further empower the police or immigration controls' (2018:16).

### *Analysing the costs and benefits of criminalising sex work and purchase*

Goodmark argues that criminalisation produces socio-economic costs that we must weigh against their potential benefits. Her approach parallels our previous work that assesses the effects of different governmental approaches, including criminalisation, on sex workers' rights and on law's governmental effects on subjects, norms, spaces and authorisations (FitzGerald and McGarry 2018; Scoular 2015). Using Goodmark's method offers us an analytical lens, one that is perhaps familiar to policymakers who favour utilitarian arguments, from which to consider the costs of criminalising prostitution.

#### *The costs of criminalising sex work*

Goodmark observes that poor and marginalised women bear the costs of criminalising domestic violence disproportionately because 'they are most likely to ... lack the resources to secure private representation ... that might prevent them from being incarcerated' (2017: 92). Although US arrest rates for domestic violence remain low, mandatory and dual arrest policies mean that 'arrest rates among women have increased significantly' (Goodmark 2018: 19). One of the unintended consequences of criminalisation is that the law's regulatory focus remains on *some* women and men, and that incarceration does not remove the regulatory focus from women.

Criminalising sex purchase has similarly damaging effects on women who engage in sex work due to poverty. Abolitionists claim that criminalising demand criminalises those who purchase sex only. Evidence has shown, however, that criminalising sex purchase means that sex workers and their labour are stigmatised and subject to governmental control through police raids and 'protective' interventions. The rationale may have changed from punishment to welfarism, however, the effects are similar, especially if the consequences are sex workers' deportation, arrest or punitive welfarism that ties social supports to sex workers' willingness to exit (Scoular and Carline 2014).

Statistics from UglyMugs.ie—an Irish app where sex workers can confidentially report incidents of abuse and crime—reveal that violent crime against sex workers is up by 92 per cent since 2017, when the Republic of Ireland criminalised sex purchase (Moore 2019). At the time of writing, there have been just three convictions for sex purchase in the jurisdiction. This suggests that criminalisation is not working. In the US, we observe a similar trend around sex trafficking where the law has 'been far more successful at criminalising marginalised populations ... based on the curtailment of prostitution than they have been at issuing any concrete benefits to victims' (Bernstein 2012: 57).

Figures from Sweden and elsewhere convey little about the social cost of legal intervention, but rather the rate at which the authorities enforce the law. Criminalising sex purchase to protect women has generated higher levels of risk to those most vulnerable to danger: street-based sex workers. Working in these harshest of environments, the personal cost of criminalisation is stark. There, stricter policing, a drop in custom leading to lower prices, less choice over clients and quick transactions compel sex workers to take risks that expose them to potential violence (Nord and Rosenberg 2001).

Despite these realities, the evidence seems not to resonate with policymakers. In Sweden, where gender equality is considered both a policy objective and a national trait (Liinason 2018), it is difficult to address the cost of criminalisation to sex workers (Levy 2014). The dominant view among abolitionists is that

prostitution undermines all women's equality, and social inclusion for sex workers is possible only when they exit prostitution. Yet, exiting does not uniformly serve women. A Swedish study focusing on women 'trapped' in prostitution based on a sample (n = 25) demonstrated varied exit experiences: for those loosely integrated into the milieu, exit was quick and executed primarily by the women themselves; others, 'for many years ... exploited in prostitution, had reached the limits of what was existentially bearable' (Månsson and Hedin 1999: 67). This focus group, which received considerable exit assistance, had variable outcomes. A third group found the transition to study and 'work' relatively easy, a third remained in treatment and a final number remained unemployed several years later, having 'long vacillated between temporary employment, vocational training, welfare dependency and periodic relapses into prostitution' (Månsson and Hedin 1999: 73). This led the researchers to conclude that, for some women, exiting represented a positive step; however, for others, 'exiting' prostitution signified a 'social death' (Månsson and Hedin 1999: 129).

Criminalisation and its flipside, exiting, fail to address prostitution's root causes (e.g., poverty or immigration status) and may oversimplify the complexities involved, reducing the 'problem' to that of individual morality (O'Connell Davidson 2006). This normative framework can only accommodate sex workers' 'victimhood'; therefore, any notion of the cost to their *in situ* rights or safety needs becomes incomprehensible. Consequently, sex workers' struggles go unrecognised. Criminalisation undermines efforts to reduce the structural violence and exploitation that exists *in* prostitution (and not simply at an ideological level) or nullifies attempts to create more egalitarian conditions for sex work. What the law does is render efforts to achieve a fairer distribution of power and money, and to improve workplace conditions for sex-working women impossible.

#### *The benefits of criminalising sex work*

Goodmark's thesis suggests that criminalising domestic violence may deter some abusers from offending or reoffending. It may offer individuals some protection through restraining orders and hold offenders accountable through arrest, prosecution and incarceration. Criminalisation has a symbolic function that sends the message that VAW will be punished. Extending this message to other forms of violence allows feminists to tap into mainstream anti-violence policies and access scarce resources. One of radical feminism's goals is to use the law's expressive function to problematise and mainstream prostitution as a form of VAW (Farley and Kelly 2000). Viewed thus, criminalisation offers policymakers a straightforward normative message that allows them to feel they have 'done something' in the face of mounting pressure to tackle violence.

Yet, extending the law's expressive function to cast prostitution as a form of VAW is problematic because prostitution and domestic violence have a different aetiology. While feminists agree about the 'wrongs' of VAW, there is no such agreement on the question of what is wrong with the commodification of sexual services. Perspectives range from moral outrage at the mixing of economy and intimacy to a more complex recognition of the inevitable interrelationship between markets and forms of social reproduction, and concern about the *structure* rather than the existence of commercial sex (Fraser 1993).

In ways that mirror Goodmark's observations of the anti-domestic violence lobby's turn to criminalisation, campaigns to criminalise prostitution are 'driven by and built around the norms and needs of white middle-class women' (2018: 7), and contains unquestioned racialised, class and gender assumptions about the status of all women. Arguing that criminalisation is necessary because prostitution affects all women's status equally, demonstrates neo-abolitionists' lack of consideration for what criminalisation does to people as they attempt to survive on the margins. Observing these discursive effects, we become aware of the power dynamics around how feminists determine 'what' constitutes justice for sex workers (FitzGerald and McGarry 2018). Feminists have gained political voice by casting prostitution as a special problem that they are uniquely qualified to address. Despite, or perhaps due to its shortcomings, radical feminism has become influential in campaigning where it provides an ally for a linear politics that uses the law to magnify vice and virtue. The collapsing of complex social issues into a linear story of 'good' and 'bad' sex—of victimised, docile women and bad men with evil intentions—appeals to policymakers wishing to simplify complex social issues. This is particularly the case for those policymakers who understand these

issues as gender equality and gender-based violence and who graft criminal justice solutions onto them (Bernstein 2012).

*Who bears the cost? Who derives the benefit?*

Goodmark observes that the cost of criminalising domestic violence, 'is borne mainly by those who commit crimes of intimate partner violence', but not exclusively (2017: 91). Those who benefit from criminalisation feel protected by the law. She noted that retribution requires that wrongdoers receive a punishment befitting their crime. Since it is the state alone that has the authority to administer retribution, then 'only the criminal legal system has the potential to meet the justice goals of those who define justice retributively' (Goodmark 2017: 67). Given funding priorities in this area, criminalisation benefits law enforcement and the non-government organisations that collaborate with them. Subjecting these claims to similar assessment in the context of prostitution is instructive.

Previously, prostitution law and policy were discriminatory, pathologising female sex workers as universal 'victims' and ignoring male clients (Rubin 1984). Because radical feminists attempt to change this; then, prompts us to pose the following question: Is the reversal of stigma equality? Criminalisation identifies male clients as the locus of the 'crime'. This framing focuses upon male clients' personalities, shifts 'the whore stigma' to another deviant group and makes them the object of legal interventions (O'Neill 2001). The message that male clients are incapable of appropriate conduct as free individuals (as they are a pathological species) invalidates measures to engage with clients and sex workers as rational actors. It constructs clients as psychologically disturbed—the possibility of acting ethically is impossible. Meanwhile, the social factors that construct these identities remain invisible. Responsibility for the harm of prostitution centres on clients' motives and individuals' sexual ethics, which the law pathologises rather than explains in relation to their historical specificity and the social and economic institutions that structure the relations of gender domination. Academic studies have shown that when the state acts through criminalisation or via the quasi-legal forums of John Schools<sup>2</sup> and 'name and shame' campaigns, it operates on 'a lower-tier of male heterosexual practices' or to 're-gender sexual stigma in certain middle-class fractions' (Bernstein 2001). This, allied to the fact that displacement and shame may simply lead to further displacement of commercial sexual activities and does not address the structure of the sex market, prompts us to ask further questions: (i) Does increasing men's criminalisation increase women's equality? (ii) Does this mean justice? (iii) If so, then justice for whom?

Research has demonstrated that sex workers, rather than clients, bear the burden of criminalisation (Scoular and Carline 2014). Despite claims that sex purchase bans tackle demand and protect sex workers, evidence shows that this is not the case (Hardy and Sanders 2013). Wendy Brown's (1995) notion of 'ressentiment' warrants application here. Ressentiment comprises feminists' appeal to the state for redress for an injured identity, which it ends up re-inscribing rather than neutralising. Such thinking conflates the subject with her oppression. Yet, the identity politics that inform how the law represents the sex worker's identity are fixed along a victim trajectory that eschews her agency and more complex accounts of her subjecthood (O'Neill 2001). This reifies an image of the prostitute as a sexual subordinate *and* it sustains the myths and norms of the sex industry—of potent men and submissive women—rather than transforming them.

Thus far, we have used Goodmark's thesis to discuss radical feminist-inspired neo-abolitionism to challenge its privileging of criminalisation. We have interrogated the criminal law and other structural harms that disadvantage sex workers. When we apply Goodmark's schema to prostitution, criminalisation fares even less well than it does in the context of domestic violence. This adds support for its decriminalisation. Core to our argument is that neo-abolitionists' use of a zero-sum (de)criminalisation frame perpetuates the harms for sex workers inherent in legal interventions. Below, we shift our focus to Goodmark's BPA to subject alternative prostitution policy options to scrutiny. Our argument hinges on the view that, because the law cannot respond adequately to sex workers' lived experiences of structural violence—the physical and psychological harms caused by society's socio-economic, legal and political systems—decriminalisation of prostitution is insufficient. Sex workers require *decriminalisation plus*. This

does not mean that the law is redundant but that, regarding prostitution, we can use the law's limitations to justify developing strong arguments for its decriminalisation.

### **From Punishment to a Politics of Rights, Recognition and Representation**

*The law and justice are not always the same.*  
(Goodmark 2015)

Goodmark insists that her BPA 'does not mean abandoning the idea of justice for people subjected to abuse' or, indeed, ignoring the criminal law (2018: 140). Rather, it decentres law from its position of authority in the anti-violence moment. She outlines tangible non-carceral solutions to address domestic violence. Her analysis highlights how focusing on economics, public health and community justice initiatives can 'allow for the consideration of goals other than punishment and avoid some of the harms of criminalisation' (Goodmark 2017: 105). Goodmark's ideas resonate with thinking in prostitution research around decriminalisation (Mac and Smith 2018). Sex work researchers do not support *laissez-faire* policies that promote non-intervention but rather seek multi-level solutions to eliminate the structural violence underpinning sex workers' lives (Hardy and Sanders 2013). To guide our discussion, we use Goodmark's BPA to explore *decriminalisation plus* to address sex workers' exposure to structural violence. Crucially, we take inspiration from the founder and co-director of the *Equal Justice Initiative*, Bryan Stevenson, who suggests that to create alternatives to universal criminalisation and imprisonment we must 'get proximate to the poor and the vulnerable' (Fortune Magazine 2018). Therefore, our call to 'get proximate' to sex workers and focus on *their* justice needs is a strategic intervention to highlight how prostitution policy focused on socio-economic, public health and community justice issues can be inclusive and lead to democratic moments of social change (FitzGerald and McGarry 2018).

#### **Economics**

Goodmark's framework identifies poverty and unemployment as the principal drivers of domestic violence in heterosexual relationships where the wider community is already challenged by social marginalisation. She recommends that to tackle violence's causes we must implement macro- and micro-economic strategies that 'put resources directly into the hands of people subjected to abuse' (Goodmark 2018: 123).

Poverty is the driving force behind many women's decisions to engage in prostitution; it is a survival strategy when other options are unavailable (O'Neill 2001). Yet, it would be inaccurate to claim that gender and economics operate similarly in domestic violence and sex work (Mac and Smith 2018). Although gender and poverty play key structuring roles in prostitution, ascribing these phenomena as the root cause of prostitution obscures both the structuring role of the economy and the roles that culture, 'race', class and context play (Zatz 1997). Hence, the VAW frame that drives dominant anti-domestic violence policy is insufficiently nuanced to capture the material forms of exploitation in prostitution. Goodmark's BPA's economic lens illuminates that a fragmented policy approach focused on gender, poverty, criminalisation and VAW as discrete rather than entwined issues is unhelpful and will not address—and may, indeed, amplify—sex workers' experience of structural violence.

Addressing this issue through an economic lens requires a change in current policies—shifting the focus away from the zero-sum game in which a carceral or non-carceral perspective wins or loses, and moving towards the distributional issues that surround prostitution. Eradicating prostitution through criminalisation does not solve poverty or the material basis of reproductive labour that creates the forms of exploitation in prostitution. To prevent women's 'desperate exchange' when they work means pivoting towards social justice—reading the economics of prostitution through a social justice lens focused on rights, recognition and representation (Fraser 2010) means automatically understanding the issues differently because we are reading them humanely. Taking social justice through proximity as our entry point for analysis, we can focus on 'struggl[ing] to improve the context in which such exchanges are made,



to create the conditions for a non-alienated sexuality' (Valverde 1989: 254). Rather than seeking to suppress sex work, we should strive to control the *conditions* in which it occurs.

Examining the conditions around transactional sex requires that we focus on the *work* and *not* the *sex* in prostitution (Mac and Smith 2018). This brings us to the vexed question of sex workers' labour rights, on which researchers are divided. Those at the liberal and materialist end of feminist prostitution politics have lobbied for sex workers' recognition as workers. For them, treating prostitution as labour facilitates sex workers' access to legal instruments designed to address workplace inequalities and discrimination (Hardy and Sanders 2012). We find evidence of the effective use of such strategies in India, where the sex worker movement has used collective bargaining and the law to give sex workers more say in how and when they work (Kotiswaran 2014). And yet, while materialist researchers are supportive of sex workers' labour rights, they have argued that sex workers' struggle for recognition must be situated within and informed by the socio-economic conditions in which they labour. This requires resisting radical feminists' compulsion to frame prostitution as distinct from other forms of commodified labour. In identifying sex as different from other bodily mediated activities—such as childcare, nursing or domestic activities that rely on unrecognised female labour—radical feminists ascribe a particular value to sex, which they use to argue against its commodification. Critics of this position are wary of this myopic focus on 'sex', arguing that, in our efforts to seek recognition of prostitution as labour and extend rights to sex workers, we must challenge the broader socio-economic systems and relations that confine sex workers to precarious working and living conditions (O'Connell Davidson 2006).

Drawing on approaches to democratising citizenship (Pateman 2004), a third way holds some potential for addressing the effects of structural violence in sex workers' lives. By creating the economic and personal stability for any citizen to participate as peers in social and political life, a Basic Income (BI)<sup>3</sup> would establish a strong foundation for sex workers to participate in society beyond waged labour or care (Cruz 2012). A BI is not simply about alleviating sex-working women's poverty. It would support those who wish to continue to work and provide a basis for seeking labour rights and protections. Finally, it could create the political conditions in which sex workers could refuse to work, exercise their informed consent regarding their work practice and demand the freedom to work without male brokerage. In social justice terms, freed from the daily grind of basic survival, a BI could allow sex workers' the opportunity to create other viable options by creating what Zatz (1995) calls 'barriers to degradation' to intervene in the organisation of economic distribution through inclusive citizenship.

### **Public Health**

The World Health Organization (WHO) has identified social justice as a core value of public health and a key resource for improving the health and wellbeing of all in society through the reduction of socio-economic inequalities (Gostin 2011). Goodmark argues that a public health framework offers options for dealing with the complex causes of violence and the effects of abuse, particularly among those who use violence.

Public health provides an important preventative framework that can re-orientate the focus on the context in which policy deliberations occur (Valverde 1989). Consequently, sex work and public health researchers use it to identify the links between poverty, structural violence and the effects of criminalisation of prostitution on the individual (Grenfell et al. 2016). Adopting a 'person-centred' approach to service provision, research and policymaking, researchers illuminate how policing, stigma and socio-economic inequalities interact with sex workers' health through their vulnerability to HIV, violence, lack of access to healthcare and justice (Platt et al. 2018).

Public health practitioners view community consultation and proximity to sex workers as critical to informed decision-making on complex issues (Armstrong and Abel 2020a). By building relationships of trust with sex workers, we can use that knowledge to generate beneficial action and capacity building at the community and institutional levels beyond criminalisation. Evidence of the effectiveness of a dual decriminalisation and public health model for addressing sex workers' health in New Zealand and New South Wales (NSW), Australia, is well documented (Armstrong 2017). For example, the Government of

New Zealand developed its health and safety guidelines for sex workers in consultation with the New Zealand Prostitutes Collective (NZPC). In NSW, the Australian Prostitutes Collective produced and submitted primary research findings to the Selective Committee of the NSW Legislative Assembly on Prostitution (Aroney and Crofts 2019). In both contexts, sex workers collaborated with governments to achieve social justice and law reform. Crucially, this has established the groundwork for sex workers to negotiate their work practices and manage their working conditions to minimise their exposure to health risks.

At the time of writing, we are experiencing a global pandemic caused by the COVID-19 virus. The pandemic has illuminated that health inequalities follow a gender, 'race' and class gradient, with the poor and people of colour experiencing the worst health outcomes (Golden 2020). Recent reports concerning the UK's National Health Service's (NHS) treatment of sex workers brings structural violence in healthcare provision into sharp relief. Commentators note that the NHS is sidelining sex workers' needs because they are a 'risky' group, mirroring their treatment during the 1980s HIV/AIDS epidemic (Howard 2020: 369). By framing sex workers as 'vectors for disease', the police feel justified in surveilling them 'for public health reasons through internet surveillance and property raids' (Howard 2020: 369). As the government does not recognise prostitution as work—and because much COVID-19 relief hinges on individuals' engagement with traditional work—opportunities to access the government's furlough scheme are closed to sex workers, with no recognition of the subsequent effects of economic hardship. Consequently, charities such as Umbrella Lane, Ugly Mugs and the Sex Worker Advocacy and Resistance Movement (SWARM) must raise money through crowdfunding and individual charitable donations to sustain their services.

Responses to the pandemic have also shown that recognising sex work and addressing societal inequalities through a human rights and social justice frame offers those on the margins the chance to survive and lead healthier lives. Contrast the UK's response to COVID-19 with current policy in New Zealand, where the NZPC work with the government to ensure that sex workers can apply for its emergency wage subsidy—available to all New Zealand workers just by providing a national identification number and basic personal information when their earnings fall by at least 30 per cent due to coronavirus (Armstrong and Abel 2020b; Sussman 2020).

Although the pandemic shows that New Zealand exceeds other nations in extending rights, recognition and representation to sex workers, lacunae persist. For example, sex workers who are not New Zealand citizens or are immigrants with a precarious legal status must work during the pandemic because they are not entitled to financial assistance (Armstrong and Abel 2020b; Sussman 2020). New Zealand's dual decriminalisation and public health approach to prostitution exemplifies how social justice and human rights principles can change institutional practice to realise practical and humane alternatives to criminalisation.

### *Communities*

This brings us to Goodmark's concept of community engagement as vital for better anti-domestic violence policy. Goodmark noted that, often, the abused do not wish the abuser to leave the relationship but simply want the behaviour to stop. Most marginalised people do not turn to police or state systems to solve their problems, if they use those systems at all. Instead, they look to friends, family and other community resources. She argued that alternative policies must engage communities more to protect the abused. To give her recommendations more concrete form, she described how community-based fora grounded in restorative justice principles could offer more context-sensitive, victim-centred and victim-driven interventions.

Community justice fora hold some potential for addressing sex workers' needs. Yet, as discussed earlier, responding to sex workers' complex lives is rarely straightforward. For example, while most people agree that domestic violence is heinous, people feel that it is sex workers' fault when they are abused because they insist on engaging in 'risky' behaviour (FitzGerald, O'Neill and Wylie 2020). The reality of stigma in prostitution means that sex workers deal constantly with institutional and societal bias, racism and sexism

that devalues them as people. Moreover, law and policy interventions sanitise public space through strategies of Zero Tolerance policing and crime control that serve to exclude sex workers from the body politic (Hubbard, Matthews and Scoular 2008). The material reality is that these institutional patterns of structural violence bleed into community life where sex workers are devalued further as 'throwaway people' (Mock 2017), as 'nuisance' or morally depraved 'others' (Aroney and Croft 2019). Structural violence becomes encoded in the very fibre of community life.

It seems clear that to apply Goodmark's thinking to sex workers' lived realities in the communities where they live, we will have to modify and extend her BPA. The first step would be to address the effects of social constructions that misrepresent sex workers' identities and trap them in a corpus of racialised, classed and gendered stereotypes based on identity thinking ('they are what they do') that stigmatises them (Scoular and O'Neill 2007). It is instructive, however, to return to Bryan Stevenson's notion of 'getting proximate' to sex workers to address inequality. Proximity humanises 'others'. To dismantle stigma as a barrier to inclusive citizenship in community life, we must create non-judgemental processes that include and recognise sex workers as people who have 'liveable lives' (Butler 2003).<sup>4</sup> We must afford those lives the respect and the right 'to live according to one's own way of being' through inclusive citizenship (Carline 2009: 29).

## Conclusion

This article has considered the merits and demerits of criminalising prostitution and recent legislative efforts to shift criminal sanctions and stigma from the seller to purchaser of commercial sexual services in the pursuit of 'equality'. As we reflect on this dynamic and consider whether these changes in law equate to justice for women, Goodmark's work on domestic violence offers us a useful parallel. Her analysis of the theoretical justifications for criminalisation—harm, deterrence and cost-benefit analysis—illuminates key issues that policymakers must consider when considering whether to (de)criminalise sex work. Throughout this article, we have argued that decriminalisation is the first necessary step in shifting from a politics of punishment based on injury or resentment (Brown 1995) towards a politics of prostitution based on social justice that can recognise and begin to redress (not consolidate) material inequalities via rights, recognition and representation (Fraser 2010). Finally, the point to be made is this: by linking two literatures, we attempt to move away from the abolition of prostitution to the abolition of criminal justice as the only viable form of intervention into prostitution (O'Neill and Laing 2018). Moving in that direction does not mean that we stop asking for justice—rather, it means we stop thinking the law *is* justice.

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<sup>1</sup> The subtitle refers to a previous work by Goodmark (2015).

<sup>2</sup> John Schools are diversion programs for people—usually men—arrested for soliciting sex workers' services or another related offence.

<sup>3</sup> A Basic Income is the idea that each citizen receives an unconditional and continuous income that is not dependent on past or future employment.

<sup>4</sup> Carline drew on Judith Butler's (1993) theorising of 'a livable life' for sex workers to argue that 'the recognition that one is vulnerable is dependent upon the norms of culturally intelligibility. Some bodies are constructed as bodies that do not matter and the vulnerability of these bodies is not seen as they are not recognised as being human' (2009: 31).

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