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COMMENTARY

"The Prostitution Problem": Why Isn't Evidence Used to Inform Policy Initiatives?

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In their Target Article, Benoit, Smith, Jansson, Healey, and Magnuson (2018) provide a critical review of the two primary perspectives regarding the buying and selling of sexual services or, as it is also identified, the "prostitution problem." Those adopting the term "prostitution" argue that it is principally an institution of hierarchal gender relations that legitimizes the sexual exploitation of women by men. Those who see it as a form of exploited labor where multiple forms of social inequality intersect (including class, gender, and race) tend to refer to it as sex work.

Benoit et al.'s (2018) work is laudable with three major strengths. First, it is exhaustive and comprehensive, covering the major works on the sex industry published over the last three decades, both domestically and internationally. Second, they highlight the methodological difficulties related to conducting research on "hidden" populations. These are itemized—access to the population, sampling issues and sample diversity, distrust of outsiders (including researchers), use of a comparative lens—and the solutions identified are incorporated into their critique of the two perspectives. Third, they also advance the research agenda by adopting Östergren's (2017) prostitution policy typology—repressive, restrictive, and integrative—when comparing prostitution policies across, and within, countries. Doing so leads to a series of new research questions about the intent, instrumentation, and impact of each initiative on the industry and the people working in it.

Benoit et al. (2018) conclude that the current global tendency has been to adopt more repressive policies even though the strongest empirical support is for the "exploited labor" perspective and more integrative approaches. I find it difficult to disagree with this conclusion given that I have been up against this tendency since I began conducting research on the sex industry over three decades ago.

In the Interests of Full Disclosure

My use of language—the buying and selling of sexual services, sex work, the sex industry—reflects my own position on the "prostitution problem." After three decades of empirical research on the sex industry, involving fieldwork, in-depth interviews, community-partnered research, diverse samples, case study replications, and the examination of sex work from a comparative perspective, I conclude that our best option for addressing the "prostitution problem" is from a labor perspective: the position that prostitution is a form of exploited labor. As Benoit et al. (2018) argued here—and as I and others, including Benoit, have demonstrated elsewhere (Benoit, McCarthy, & Jansson, 2017; Ford, 1998; McCarthy, Benoit, & Jansson, 2014; POWER: Sex Workers Speak about Safety, Security and Well-being, 2012; Shaver, 2005)—sex workers have much in common with other marginalized and vulnerable workers such as hospital aids and orderlies, wait staff, coiffures, convenience store clerks, and taxi drivers.[1] The hazards and degradation involved are linked not to the buying and selling of sexual services, but to broader social problems that create and maintain social inequality (Shaver, 1988).

Given my positive evaluation of their Target Article and the contribution it will provide to the literature, my involvement with "team Benoit" must be acknowledged as well. Benoit and I have studied sex work together and separately for many years, and we have come to similar conclusions and made parallel recommendations about what is needed to improve the health and safety of people working in the industry. Our most recent

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[1] This was recognized by the Canadian Policy Research Networks (an Independent NGO) and the Law Commission of Canada (an independent commission that gave advice to the government) when they organized a Roundtable on Vulnerable Workers (Ottawa, Canada, June 17, 2003). Sex workers and several of their academic allies were among the invited participants.

collaboration was a multi-project, community-based study that involved a 360-degree examination of the sex industry in six Canadian municipalities. We interviewed sex workers, clients, spouses or intimate partners of sex workers, sex industry managers of escort services and massage businesses, people who provided social services related to the sex industry, and regulatory officials responsible for creating or enforcing laws and regulations. Benoit, the Named Principal Investigator, continues to build on the results from the various projects, as do I and the other team members.[2]

Finally, it is my own experience with policy makers that is driving my interest in the question I raise in the title, not the Target Article per se. It began 35 years ago with the advent of the Special Committee on Pornography and Prostitution (the Fraser Committee). Struck by the Liberals in June 1983, it was charged with reviewing prostitution law in light of the "nuisances" created by the expansion of street prostitution in many Canadian cities in the late 1970s and early 1980s.

At the time, I was working for The Advisory Council on the Status of Women (CACSW)[3] to help develop their publication on *Prostitution in Canada* (CACSW, 1984). It was to be the basis of their response to the Fraser Committee. CACSW and I parted ways when it became clear that they were more concerned about women neighborhood residents than women sex workers. Sensing that sex workers needed a "voice," I submitted an article to the Fraser Committee. Based on secondary data, I concluded with a recommendation for decriminalization in combination with broad social programs designed to offset much of the gender, class, and race discrimination in our society (Shaver, 1985).

The Fraser Committee included cross-country consultations involving 22 centers and hundreds of presentations from individuals and organizations. It also amassed a wealth of data: 16 commissioned reports, including 5 regional studies of prostitution and a national survey of public attitudes. Many of the submissions, especially the commissioned reports, included methodologically sound empirical data. The Committee took notice of the data. They recommended a full array of social policies to address the social determinants of prostitution and revisions to the law: a communicating section (s. 213) to replace soliciting and a modification to the bawdyhouse section (s. 210) to let 3–4 people work together in a bawdyhouse (Special Committee on Pornography & Prostitution [Fraser Committee], 1985). Unfortunately, the legislation enacted by the Conservative-dominated government in 1985 did not reflect the broader social and legal concerns of the Fraser Committee nor did it shift the focus away from the morality debates.

This was my first inkling that policy makers and politicians would be reluctant to set aside their moral positions when enacting social and legal policy, even in the face of strong empirical data undermining those positions. This experience stayed with me and is behind my interest in understanding why the global trend is to accept the first primary perspective (that prostitution legitimizes the sexual exploitation of women) when—as demonstrated in the Target Article—the most robust empirical support for the conclusion that prostitution is a form of exploited labor.

Evidence-Based Research Is Ineffective in Directing Policy

As I see it, there are two issues contributing to this inconsistency: first, the inability or unwillingness to separate moral values and opinions from the legal and policy positions adopted and, secondly, the tendency for many politicians, policy makers, and feminists to reject evidence-based research when enacting policy. What follows is an examination of the evidence for this in the Canadian context.

The First Issue: Conflation of Personal Moral Values with Legal and Social Policy Positions

Historically, there have been three types of sexual moralism in the discussions regarding the "prostitution problem" in Canada: (1) the overt moralism of Victorian crusaders, (2) the more covert moralism of contemporary crusaders, neighborhood residents, and legislators, and (3) the principled moralism of contemporary radical feminists (Shaver, 1994).

The Overt moralism of the Victorian feminists (1867-circa 1920)—the National Temperance Union, women's rights groups, and religious organizations—created and maintained a climate in which the evils of white slavery were front-and-center in the public domain. They wanted to abolish the "social evil" by implementing legal reforms that would punish the exploiters and rescue women and children from sexual exploitation in general and white slavery in particular (McLaren, 1986).

Covert moralism was in evidence in the rhetoric used by residents, legislators, and the public at large, to define prostitution and argue that it represented a nuisance. During this period

[2] The research was funded by the Institute of Gender and Health, part of the Canadian Institutes of Health Research.

[3] The Canadian Advisory Council on the Status of Women (CACSW) was established in 1973 by the federal government on the recommendation of the Royal Commission on the Status of Women. The CACSW advised the federal government and informed and educated the public about women's concerns. As an autonomous agency, the CACSW reported to Parliament through the minister responsible for the status of women, and retained the right to publish its views without ministerial consent. Until it was dismantled in April 1995 it was a leading publisher of research on women, and its recommendations prompted legislative change concerning constitutional reform, pensions, parental benefits, taxation, health care, employment practices, sexual assault, violence against women, and human rights.

(circa 1970–1990), most definitions referred to prostitutes as women and prostitution as "selling one's body." Notions of nuisance related to street-based sex work were embedded in a conflict over "land use" or linked to the rejection of sex as a form of economic exchange, recreation, or entertainment.

Principled moralism is most evident when examining the sexual conservatism of radical feminists (circa 1990–2018). Similar to the Victorian feminists, the radical feminists argued that prostitution should be abolished. They claim that prostitution is not like other work: Bodies, not services, are being sold; men are perpetrators; and women who choose to work in the sex industry harm the collectivity of women.

The social and legal initiatives related to each type of moralism failed on several levels. Further, all three types of moralism contributed heavily to our failure to adequately assess the nature of sex work. As a consequence, our ability to develop appropriate social and legal policies was severely restricted (Shaver, 1994). They also failed because laws should not be about personal morality (Shaver, 1985). In a pluralistic society such as ours, we must separate moral values from the legal and policy positions we take.[4] We have accomplished this with legislation governing birth control, abortion, homosexuality, and gay marriage. Why not with sex work (Shaver, 2014)?

Fortunately, many Canadians have already accomplished this separation of personal moral values and legal opinions with respect to sex work. In response to Bill C-36,[5] for example, ordained ministers and laity of various faith groups and denominations made it clear that—even though they "uphold marriage as an ideal and as the normative place for sexual relations" and have "great concerns about the commodification of sex"—they could not support the imposition of personal morality as reflected in Bill C-36 (Brown, 2014; Petrescu, 2014). Further, according to an Angus Reid Poll conducted at the time, Canadian women and men—who continue to hold significantly divergent views on the buying and selling of sexual services—do not extend these differences to their overall opinions of Bill C-36. Almost half (47%) say they oppose the proposed law, more than a third (35%) support it, and 18% say they aren't sure (Angus Reid Poll, 2014).

The Second Issue: The Rejection of Systematic Evidence-Based Research

Since the Fraser Committee there have been three key initiatives in response to the "prostitution problem": The Solicitation Subcommittee 2003, the *Bedford* Charter Challenge 2007 and 2013, and the hearings in response to Bill C-36 (the Protection of Communities and Exploited Persons Act).

The Subcommittee on Solicitation Laws was struck by the Liberal-dominated government in February 2003. Their mandate was to review the solicitation laws in order to improve the safety of sex workers and communities overall and to recommend changes that would reduce the exploitation of and violence against sex workers. The research available was comprehensive and systematic, including:

> …empirical research about sex work from a labour perspective—often involving field work, in-depth interviews, and a community-partnered approach. In addition to highlighting the sex industry's diversity, it brought to light the sex workers' vulnerability to assault, substandard and unsafe work conditions, the absence of appropriate health and social services to meet their needs, their marginalization or exclusion from mainstream social and community institutions, and the strategies they use to maximize their own safety, security and well-being. As a whole, the research provided an in-depth analysis of the shifts in sex work legislation and policy in Canada; highlighted the diverse and complex experiences of sex workers and their relationships with loved ones, colleagues, and clients; and acknowledged the rise of sex-worker resistance to the prohibitionist agenda (Lowman & Shaver, 2018, p. 343).

The evidence was unambiguous and clearly supported an integrative approach to the "prostitution problem." However, the report of the Solicitation subcommittee—written after the Conservatives came to power—was disappointing. It did not contain a single proposal for concrete legislative reform, even though this was the core of the Subcommittee's job (SSLR, 2006). Rather than suffer the policy questions with an eye to all the evidence, the subcommittee seemed to selectively pick their way through it: searching for studies that supported their position, while ignoring those that did not. I should not have been surprised: it was a repeat of the government's response to the Fraser Committee Report.[6]

The next opportunity to influence policy makers was the Charter challenge to Canada's prostitution laws (Bedford v Canada, 2010). It was brought to the Ontario Superior Court

[4] In addition, Justice Himel concluded—after reviewing several court decisions—that a "law grounded in morality remains a proper legislative objective *[only]* so long as it is in keeping with Charter values" (Bedford v Canada, 2010: para. 225, *my emphasis*).

[5] Bill C-36, the Protection of Communities and Exploited Persons Act (PCEPA), was tabled on June 4, 2014. The Bill effectively reintroduced the old laws while adding—for the first time in Canadian history—prohibitions on the purchase of sex and the explicit advertising of sexual services. Peter Mackay, the then Justice Minister opined: "Let us be clear about Bill C-36's ultimate objective: that is to reduce the demand for prostitution with a view toward discouraging entry into it, deterring participation in it and ultimately abolishing it to greatest extent possible" (The Canadian Press, 2014).

[6] This is not uncommon, nor particular to government reports. Research as early as 1975 from Stanford and elsewhere has shown that facts are unlikely to change our minds (Gorman & Gorman, 2016; Kolbert, 2017; Mercier & Sperber, 2017).

in 2007 by Teri Bedford, Amy Lebovitch, and Valerie Scott (two former sex workers and one current sex worker). They challenged the bawdyhouse law (s. 210), living on the avails (212[1][j]), and the communication law (s. 213[1]), arguing that they were not in keeping with the values of the Canadian Charter of Rights and Freedoms (1982).[7]

The Ontario Superior Court struck down all three provisions. In her judgment, Justice Himel carefully distinguished evidence that entered the "realm of advocacy" (para. 182), focused on "issues incidental to the case at bar" (para. 182), overgeneralized the findings (para. 98), used inflammatory language (para. 354), and that made "bold sweeping statements not reflected in their findings" (para. 357) from the empirical support found in more systematic reports (Bedford v Canada, 2010 ONSC 4264).

The federal government disagreed with the decision and appealed to the Ontario Court of Appeal. When making the announcement, Stephen Harper (the then Prime Minister) stated: "We believe that the prostitution trade is bad for society. That's a strong view held by our government, and I think by most Canadians" (Nguyen, 2012, p. A.11). Harper was wrong. Most Canadians do not believe that the prostitution trade is bad for society. Two-thirds of Canadians believe prostitution—defined as "the act or practice of providing sexual services to another person in return for payment"—should be legal between consenting adults (Angus Reid Poll, 2010).

The decision of the appeal court was split: Bedford and her colleagues won on the bawdyhouse provision, ended up with a variation of the procuring provision, and lost on the communicating provision. Both sides disagreed with this decision and it was appealed.

The case was heard in the Supreme Court of Canada (SCC) on June 13, 2013. The decision—released December 20, 2013—struck down the three prostitution laws that were challenged: communication, living on the avails, and the bawdyhouse law. In short, the SCC agreed with Himel's judgment regarding the evidence presented in the Ontario Superior Court decision (Canada (Attorney General) v Bedford, 2013 SCC 72: para. 60, 67, 72, 135, & 154). The SCC gave the government a year to respond.

Within 6 months, the federal Justice Minister tabled Bill C-36, the Protection of Communities and Exploited Persons Act (Bill C-36, 2014). The Bill effectively reintroduced the old laws while adding prohibitions on the purchase of sex and the explicit advertising of sexual services.

Two sets of hearings followed in the summer of 2014 to receive evidence and arguments about the proposed laws. One was hosted by the Standing Committee on Justice and Human Rights and another by the Senate Standing Committee on Legal and Constitutional Affairs. During the hearings, the hope of many was that elected politicians would engage in respectful, fair deliberations, and carefully weigh the evidence and arguments presented. They did not (Johnson, Burns, & Porth, 2017). The Standing Committee on Justice and Human Rights was particularly problematic. Just to mention a few issues reported in Johnson et al. (2017):

- There was a significant level of partisanship in both the selection and treatment of witnesses, particularly from big "C" Conservative committee members.
- Twice as many witnesses in favor of the government's position were invited to testify (37 in favor vs 18 against).
- In line with exclusion or criticism of sex worker rights advocates, committee members treated witnesses against the Bill with a glaring and unprofessional lack of respect on numerous occasions during the hearings.

Despite the wealth of research information about prostitution at its disposal, and the Canadian courts enlightened evaluation of conflicting research evidence claims in *Bedford,* the government relied largely on its own supporters and on the evidence the courts rejected to justify the imposition of demand-side prohibition on Canadians. It was distressing to watch but hardly surprising in light of the Harper government's attack on science more generally (Linnitt, 2013).

Conclusion

Benoit et al.'s (2018) Target Article makes a number of significant contributions. It is exhaustive and comprehensive. The elaboration of the methodological challenges of sex work research prepares the next generation of scholars with the tools to conduct systematic and critical analyses of sex work. It also advances the research agenda by adopting Ostergren's (2017) policy typology and asking new questions about the social consequences of sex work policies. By moving the research beyond the standard descriptive classification of prostitution policy, the authors demonstrate an appropriate and powerful objective of research: the asking of better informed and nuanced questions. Using the results and insights from asking "What are the policy options regarding sex work?", to a question asking "What are the social consequences of various policies?" Benoit et al. pointed to the importance of contextual conditions for those outcomes. We can anticipate that the research following from Benoit et al's new questions will guide and inspire novel investigations in the future. Among the questions that deserved attention are: "Why is evidence-based research so ineffective in directing policy?" "How can evidence-based research be made more effective?" and "Which aspects of sex work evidence are most likely to be integrated into policy?"

The Supreme Court's affirmation of the *Bedford v Canada* 2010 decision gives us hope that—in the long

[7] The bawdy house law (s. 210) was argued pursuant to s. 7 of the Charter (liberty, security); living on the avails of prostitution (212[1][j]) pursuant to s. 7 (liberty, security); and the communication law (s. 213 [1][c]) pursuant to s. 7 (liberty, security) and 2(b) (freedom of expression).

run—evidence-based arguments can influence policy decisions (Canada (Attorney General) v Bedford, 2013). In *Bedford v Canada*, Justice Himel pointed to the systemic and broad evidence of the defendant witnesses as an important deciding factor in her decision to reject the Crown's position. At the same time, she identified the legal conditions for acceptable evidence. Our legal system did its job, and in doing so, it affirmed the value of high-quality research. It was the legislative system that failed us by passing laws ignoring that research evidence.

If two of our main social change agents (the courts and public actors) have made effective use of research evidence, we can only hope that the third (legislators) will eventually follow suit—even if reluctantly. Understanding why robust empirical evidence is ignored is an important first step in this direction.

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