"The Obscenities of this Country"[1]: *Canada v. Bedford*[2] and the Reform of Canadian Prostitution Laws

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INTRODUCTION

In February 2002, following a search for illegal weapons that turned up the belongings of several missing women, the Vancouver Police Department laid charges of first-degree murder against Robert Pickton for the deaths of Sereena Abotsway and Mona Wilson, two Aboriginal women working as street-level prostitutes in Vancouver's Downtown Eastside.[3] Over the next three years, Pickton, a pig farmer from Port Coquitlam, British Columbia, would be charged with twenty-four additional murders, making his case the "largest serial killer investigation in Canadian history."[4] There is evidence, however, that Pickton may have committed even more murders – in 2002, he told an undercover officer posing as his cellmate that he "was gonna do one more, make it an even fifty," but was caught before he had the chance because he had become "sloppy."[5] At trial, prosecutors demonstrated that Pickton would travel into Vancouver, offer "money and drugs" to women working on the "low track[s]" of the Downtown Eastside, and then bring them back to his pig farm, where he would torture, kill, and dismember them.[6]

In the aftermath of the Pickton trial, various media outlets revealed that the Vancouver Police Department had badly mishandled investigations into the over 65 women who had gone missing in Vancouver over the past two decades. In

1. F. SIONIL JOSÉ, ERMITA: A FILIPINO NOVEL 44 (1988). The full quotation reads: "The obscenities of this country are not girls like you. It is the poverty which is obscene, and the criminal irresponsibility of the leaders who make this poverty a deadening reality. The obscenities in this country are the places of the rich, the new hotels made at the expense of the people, the hospitals where the poor die when they get sick because they don't have the money either for medicines or services. It is only in this light that the real definition of obscenity should be made."

2. All French translations are the author's. Throughout this paper, the words Aboriginal and Indigenous are used interchangeably to refer to the first peoples of Canada; that is, North American Indians, Métis, and the Inuit. First Nations refers exclusively to North American Indians.

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3. *See Horrors of Pickton farm revealed in graphic detail*, NAT'L POST (Feb. 20, 2007), http://www.canada.com/nationalpost/story.html?id=20941e5e-aae7-4c73-87bb-fbbb484e08d5&k=0 (giving an account of the evidence against Pickton).

4. Dara Culhane, *Their Spirits Live Within Us: Aboriginal Women in Downtown Eastside Vancouver Emerging into Visibility*, 27 AM. INDIAN Q. 593, 598 (2003).

5. *'I'm a legend': Pickton interview transcripts released*, NAT'L POST (Aug. 6, 2010), http://news.nationalpost.com/2010/08/06/pickton-interview-transcripts-released/.

6. Ken MacQueen, *How a serial killer slipped away: New revelations show why Robert Pickton was able to prey with such impunity*, MACLEAN'S, Aug. 23, 2010, at 22.

addition to "refus[ing] to say that a serial killer was at work, or even to speculate that the women were dead," police stayed attempted murder charges against Pickton in 1997 because his sex worker victim was deemed an "unreliable witness,"[7] and neglected to search his property in 1999 (a search Pickton consented to), even after receiving a tip "that Pickton had a freezer on his farm filled with human meat."[8] A report produced by Commissioner Wally Oppal revealed that "systemic bias" within the Royal Canadian Mounted Police ("RCMP") and the Vancouver Police Department was responsible for their "blatant failures" to investigate the disappearance of poor, predominantly Aboriginal women living in the Downtown Eastside.

While sex worker activists blamed the murders and the mishandled investigations on incompetent and biased policing, they also attacked Canada's scheme of prostitution laws. Though prostitution per se is not and has never been criminalized in Canada, the Criminal Code does penalize keeping or being in a common bawdy-house,[9] living on the avails of prostitution,[10] and communicating in public for the purpose of prostitution.[11] Activists argued that although these measures were created to protect women from exploitation by pimps and johns, they precluded women from protecting themselves.[12] For example, sex workers could not hire bodyguards or drivers to provide security, or work indoors in relatively safe spaces for fear that they would be charged with keeping a brothel.[13] Indeed, the city of Vancouver relied on the "bawdyhouse [sic]" provision to justify shutting down "Grandma's House," a space established by sex-trade activists to provide "food, condoms and safe rental rooms for sex workers"[14] during the Pickton spree, when one woman disappeared from the 2km^2 of the Downtown Eastside almost every month."[15] Sex worker activism, combined with public outcry in the aftermath of Pickton's trial and conviction, spurred the constitutional challenge to Canada's prostitution laws by former and current sex workers in *Bedford v. Canada*.[16] Their efforts succeeded when, in

7. *Id.*

8. Sandro Contenta, *Canada to legalize prostitution?*, GLOBAL POST (June 15, 2011), http://www.globalpost.com/dispatch/news/regions/americas/canada/110615/canada-legalize-prostitution.

9. Criminal Code, R.S.C. 1985, c. C-46, s.210.

10. *Id.* § 212(1)(*j*).

11. *Id.* § 213(1)(*c*).

12. *See* Factum of the Respondents/Appellants on Cross Appeal, para. 12, Canada (Attorney General) v. Bedford, 2013 SCC 72 (Can.) [hereinafter Bedford Factum] (explaining that taking greater safety precautions, such as hiring security, can result in "even greater criminal consequences").

13. *Id.*

14. Jeremy Hainsworth, *Former police chief testifies that he supported safe house raiding in 2000*, DAILY XTRA (Feb. 19, 2012), http://dailyxtra.com/vancouver/news/former-police-chief-testifies-supported-safe-house-raided-in-2000; *see also* Bedford Factum, *supra* note 12, at para. 9 (suggesting that women may have been saved had they been able to work in a secure indoor location, like "Grandma's House"); John Lowman, *Deadly Inertia: A History of Constitutional Challenges to Canada's* Criminal Code *Sections on Prostitution,* 2 BEIJING L. REV. 33, 41–42 (2011) (describing the connection between the closing of "Grandma's House" and the Pickton murders).

15. Avnish Nanda, *Op-Ed: From Bedford to the MWCI, Chronicling the Legal Consequences of Pickton*, CT (OSGOODE HALL LAW SCHOOL) (Jan. 8, 2014), http://www.thecourt.ca/2014/01/08/op-ed-from-bedford-to-the-mwci-chronicling-the-legal-consequences-of-pickton/.

16. Canada (Attorney General) v. Bedford (Bedford III), 2013 SCC 72 (Can.), *aff' g in part* Canada

December 2013, the Supreme Court invalidated the relevant sections of the Criminal Code on the grounds that they jeopardized the life, liberty, and security interests of sex workers and failed to comport with principles of fundamental justice.

The Supreme Court was clear that its decision did not preclude Parliament "from imposing limits on where and how prostitution may be conducted," as long as those limits did not violate the Charter rights of Canadian sex workers.[17] To permit Parliament to devise a novel approach to prostitution or leave Canada without any regulatory scheme in place - as was the case after the Court struck down Canada's abortion laws in *R. v. Morgentaler*[18] - the Court suspended the declaration of the provisions' invalidity for one year.[19] The Conservative federal government refused to decriminalize or legalize prostitution as in the Netherlands and Australia[20] and instead introduced Bill C-36 in June 2014.[21] Modeled on Swedish law, the bill purports to target the buyers of sex by criminalizing the purchase of sexual services. It also prohibits sex workers from discussing the sale of sex in areas where children are likely to be present and prevents newspapers and websites from knowingly advertising offers to provide sexual services, while retaining an exemption that protects sex workers who advertise themselves. Penalties included minimum cash fines and jail time.[22]

The bill also redrafted the original "avails" provision of the Criminal Code. Anyone who knowingly receives a financial or other material benefit that has been obtained through or derived by the sale of a sexual service may still be punished by up to ten years in prison, but the law now exempts those who have a legitimate living arrangement with a sex worker, those to whom the sex worker owes a legal or moral obligation, those who sell the sex worker a service or good on the same terms as to the general public, and those who offer a private, proportionately priced service to sex workers but do not counsel or encourage prostitution.[23] Alongside these reforms, the government "pledged $20 million dollars over five years . . . to help sex workers get out of the trade," though it is unclear if the money will be used (as have other governmental anti-prostitution pledges) to expand first-time offender, post-arrest or conviction programs or to target the systemic issues of poverty and oppression that often underpin street-level, violent sex work.[24]

(Attorney General) v. Bedford 2012 ONCA 186, *aff' g in part* Bedford v. Canada 2010 ONSC 4264.

17. *Id.* at para. 165.

18. R. v. Morgentaler, [1988] 1 S.C.R. 30 (Can.). For an extended discussion of the federal government's failure to legislate in this field following the *Morgentaler* decision, *see, e.g.*, CRISTINA M. RUGGIERO, JUDICIAL POWER IN A FEDERAL SYSTEM: CANADA, UNITED STATES AND GERMANY 123–192 (2012) (describing the role of the Canadian Supreme Court in shaping abortion policy in Canada).

19. *Bedford III*, at para. 169.

20. Mark Kennedy, *Tory government's new prostitution laws will likely target pimps, customers and sex-trade traffickers*, NAT'L POST (Apr. 27, 2014), http://news.nationalpost.com/2014/04/27/harper-governments-new-prostitution-laws-will-likely-target-pimps-customers-and-sex-trade-traffickers/.

21. Bill C-36: An Act to amend the Criminal Code in response to the Supreme Court of Canada decision in Attorney General of Canada v. Bedford and to make consequential amendments to other Acts, 41st Parl., 2d Sess.: Library of Parliament (2014).

22. *Id.*

23. *Id.* at sec. 286.2.

24. Josh Wingrove, *Canada's new prostitution laws: Everything you need to know*, GLOBE & MAIL

This paper therefore has three goals. Firstly, it will summarize the trial, appellate, and Supreme Court opinions in *Canada v. Bedford*. Secondly, it aims to situate *Bedford* and Canadian responses to sex work in a historical, political, and feminist context that highlights the parallels among moral reformist, radical feminist, and socially conservative discourses on prostitution. The analysis will reveal a prominent dichotomy between two types of discourses: that which emphasizes the place of the prostitute as a victim, and that which upholds prostitutes as subjective, autonomous citizens. Finally, this paper will discuss the problems with the Swedish legal scheme, including the increased stigmatization and endangerment of sex workers, as well as the inattention to impoverished geographic spaces and racial, colonized minorities. The paper will conclude with a proposal for alternative legal, social, and political solutions.

I. THE *BEDFORD* DECISIONS

Spurred by the images he saw of police officers "scouring the Pickton farm for the remains of the missing women,"[25] Osgoode law professor Alan Young joined with sex workers Terri-Jean Bedford, Amy Lebovitch, and Valerie Scott[26] in launching a Charter of Rights and Freedom challenge[27] against the federal government in 2007 in Ontario.[28] Their challenge was structured around four claims: 1) that the "bawdy-house", communication, and living on the avails provisions compromised their section 7 rights under the Charter to life, liberty, and security of the person; 2) that the violations did not comport with the principles of fundamental justice (that is, they infringed Charter rights in an arbitrary, overbroad, or grossly disproportionate way); 3) that the communication law violated their s.2(b) rights to freedom of expression; and 4) that these violations were not justifiable limits in a free and democratic society under s. 1 of the Charter.[29] The litigation produced a record of 25,000 pages: affidavits from people affected by prostitution, extensive expert evidence on the social, political, and economic dimensions of Canadian prostitution, government

(July 15, 2014), http://www.theglobeandmail.com/news/politics/canadas-new-prostitution-laws-everything-you-need-to-know/article19610318/.

25. Nanda, *supra* note 15.

26. Both Lebovich and Scott are on the board of Sex Professionals of Canada, an organization that campaigns for the rights of sex workers and the full decriminalization of prostitution. Canada (Attorney General) v. Bedford, 2013 SCC 72 (Can.) at paras. 12, 14.

27. Bedford v. Canada (Bedford I), [2010] ONSC 4264 (Can. Ont. Sup. Ct. J.).

28. In 2007 in British Columbia, the Downtown Eastside Sex Workers United Against Violence Society (SWUAV), which is comprised of street-involved women from the Downtown Eastside, along with a former sex worker, launched a challenge against Canada's prostitution laws. *See generally* Lowman, *supra* note 14, at 47–48. The plaintiffs also disputed Canada's procuring law (in addition to those attacked in *Bedford*) and made their claims on the basis of the Charter-protected right to freedom of association and equal protection under the law. *Id.* Due to contention over whether the plaintiffs had standing to bring constitutional claims, the case was not assessed on its merits (and, post-*Bedford* likely never will be). *See* Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society, 2012 SCC 45, para. 76 (Can.) (holding that both parties had public interest standing to contest the laws).

29. *Bedford I*, at para. 3. The plaintiffs also claimed that the communicating law infringed the right to freedom of expression under s. 2(b) of the Charter. *See id.* at para. 13 (describing the plaintiffs' argument that the law was not a "reasonable limit" under s.1 of the Charter).

studies, and evidence regarding the socio-legal experience of prostitution in foreign jurisdictions.[30]

Justice Himel of the Ontario Superior Court of Justice found that each of the impugned laws deprived the plaintiffs and other sex workers of their liberty and security of person, either through potential imprisonment or by enhancing their risk of injury. In reaching this holding, Justice Himel noted that although evidence suggests that "working in-call is the safest way to sell sex," prostitutes who attempt to do so face "criminal sanction."[31] She also recognized that the communication law hindered street workers, who are "largely the most vulnerable prostitutes," from screening clients, which placed them at "increased risk of violence."[32] All of the provisions also failed to comport with principles of fundamental justice in two respects. First, the "bawdy-house" provision was overbroad and its harms disproportionate to its aims, as it extended to "virtually any place" without regard for the community nuisances it was created to prevent. This was particularly true in light of the fact that "complaints about nuisance arising from indoor prostitution establishments are rare."[33] Second, the "living on the avails" provision encompassed not just exploitative pimps, but also virtually anyone who provided services to prostitutes. As a result, women were forced to work alone or exclusively with those prepared to break the law, thereby potentially *increasing* reliance on the very pimps the law purported to target.[34]

Lastly, by preventing sex workers from screening potential clients, the law "endangers them out of all proportion to the small social benefit it provides," while simultaneously infringing Charter guarantees of freedom of expression. Justice Himel's ultimate conclusion reflected the lessons of the Pickton trial: "While it is ultimately the client who inflicts violence upon a prostitute, in my view the law plays a sufficient contributory role in preventing a prostitute from taking steps that could reduce the risk of such violence."[35] She declared the "communicating" and "living on the avails" offenses unconstitutional, and struck the word "prostitution" from the definition of a "common bawdy-house."

The Attorneys General of Ontario[36] and Canada appealed. The majority opinion of the Ontario Court of Appeal, released in 2012, agreed with Judge Himel that the bawdy-house and living on the avails sections were unconstitutional for their violation of s.7's guarantee of security of the person. [37] On the one hand, the majority rejected the Attorney General's argument that the true objectives of the communication law were to "target[] the normalizing effect exposure to prostitution can have on children and promote[] the proper functioning of society and core societal values, such as human dignity and equality."[38] Nevertheless, they determined that the measure was not arbitrary,

30. *Id.* at para. 84.
31. *Id.* at para. 361.
32. *Id.*
33. *Id.* at paras. 401, 427.
34. *Id.* at para. 361.
35. *Id.* at para. 362.
36. The Attorney General of Ontario was an intervener in the Ontario Superior Court.
37. Canada (Attorney General) v. Bedford (Bedford II), [2012] ONCA 186.
38. *Id.* at para. 286.

since it had been effective in addressing the nuisance-related problems caused by solicitation.[39] Furthermore, after finding that the application judge had overstated the impact on the sex workers' security, the majority held that the harms these sex workers experienced were not grossly disproportionate.[40] Both the Attorneys General and the women appealed to the Supreme Court of Canada, which heard oral arguments on June 12, 2013 and released its decision on December 20, 2013.[41]

In a unanimous decision authored by Chief Justice Beverly McLachlin, the Supreme Court invalidated all three provisions of the Criminal Code on the grounds that they violated the liberty and security interests of Canadian sex workers. McLachlin disagreed with the Court of Appeals' statement that Justice Himel's findings on social and legislative facts were not entitled to deference,[42] and stressed instead the Supreme Court's "preference for social science" and "expert witness" evidence, most of which is available only at the trial level.[43] The Court found that the prohibitions did not merely restrict how prostitutes operated; rather, they imposed "dangerous conditions" on sex work by preventing those engaged in a "risky-but legal-activity" from taking steps to guard against risk.[44]

The Court therefore rejected the Attorneys Generals' argument that sex workers could avoid both the risks inherent to prostitution and those imposed under the laws "simply by choosing not to engage in this activity." [45] McLachlin noted that street prostitutes are a "particularly marginalized population," many of whom "have no meaningful choice" but to engage in sex work.[46] The Court noted further that even those who choose to enter the sex trade are choosing a lawful activity, drawing a parallel between the impugned provisions and a hypothetical law criminalizing the wearing of helmets while cycling – the choice of the cyclist to ride a bike "does not diminish the causal role of the law in making that activity riskier."[47] McLachlin also emphasized that the applicants were not asking the government to establish measures to make prostitution safe, but merely to strike down laws that affirmatively "aggravate the risk of disease, violence, and death." Finally, she asserted that it was immaterial that pimps and johns are directly responsible for the physical violence committed against prostitutes, as their acts "do[] not diminish the role of the state in making a prostitute more vulnerable to that violence."[48] The Court directly referenced Pickton in opining that a "law that prevents street prostitutes from resorting to a safe haven such as Grandma's House while a suspected serial killer prowls the

39. *Id.* at para. 289

40. *See id.* at para. 310, 316 (noting that the application judge did not "quantify the harm" prostitutes face because of the "communicating" law).

41. Canada (Attorney General) v. Bedford, 2013 SCC 72 (Can.)

42. *See id.* at para. 48 (noting that "appellate courts should not interfere with a trial judge's findings of fact, absent a palpable and overriding error.").

43. *Id.* at para. 53.

44. *Id.* at para. 60.

45. *Id.* at para. 79.

46. *Id.* at para. 86.

47. *Id.* at para. 87.

48. *Id.* at para. 89.

streets is a law that has lost sight of its purpose," and made it clear that while Parliament does have the power to regulate against nuisances, it may not do so "at the cost of the health, safety and lives of prostitutes."[49]

Chief Justice McLachlin's language is notable for two reasons. First, the opinion elevates the testimony of sex workers *over* that of the federal government, while rejecting the latter's paternalistic assertions that the Code's provisions serve a necessary protective function. Second, the opinion signals a (partial) shift away from a conceptualization of prostitutes as incapacitated victims toward a vision of sex workers as women capable of comprehending and managing their own risk. The following section examines the origins of this victim-autonomy dichotomy and the reasons underpinning its continued salience in Canadian socio-political discourse.

II. CONTEXTUALIZING THE DEBATE: MORAL REFORM, RADICAL FEMINISM, SEX WORKER RADICALISM, AND SOCIAL CONSERVATISM

A. The roots of the dichotomy: the history of Canada's prostitution laws

The rise of industrialization in the late Victorian period catalyzed a series of social problems and an attendant shift in the locus of Anglo-Canadian national values. John McLaren suggests that by the second half of the nineteenth century, social reformers began to feel that society was in need of salvaging and called for a strengthening of the family as a "pivotal social unit" that had been neglected by prevailing capitalistic doctrines.[50] An industrialized nation's self now resided in its women, whose virtue came to be valued in "proprietary terms."[51] In contrast to the quasi-sexual aggression that characterized (socially destructive) masculine approaches to commerce and imperialism, nineteenth-century Canadian society re-imagined women as figures prone to "sexual passivity and disinterest."[52] To that end, morality was perceived in abstract national terms, as the desire to shield women from sexual degradation became coextensive with the desire to protect Western society from *social* degradation.

The newly industrialized Canadian society often racialized these fears of moral contagion. For example, Irish immigrants were cast as a particularly moral threat, as middle-class Canadians viewed them as "uncivilized, unruly and excessively clannish."[53] Similarly, prevailing prejudices labeled visible minorities (Chinese, Japanese, black, and East Indian) as "sub-human and believed [them] to be the source of both physical and moral contagion."[54] Most strikingly, Aboriginal women were classified as "menaces to morality and

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49. *Id*. at para. 136.

50. John P.S. McLaren, *Chasing the Social Evil: Moral Fervour and The Evolution of Canada's Prostitution Laws, 1867-1917*, 1 CAN. J. L. & SOC'Y 125, 129 (1986).

51. *Id*. at 126.

52. *Id*. at 129.

53. John P.S. McLaren, *Recalculating the Wages of Sin: The Social and Legal Construction of Prostitution in Canada, 1850-1920* 5 (Univ. of Manitoba Can. Legal History Project Working Paper Series, Paper No. 92-4, 1992).

54. *Id*. at 27.

health,"[55] to the point that their very identity collapsed with that of the prostitute. Indeed, the efforts to control Aboriginal sexuality "so profoundly sexualized Aboriginal women that they were rarely permitted any other form of identity," such that "by default, Aboriginal women *were* prostitutes, or at best, potential concubines."[56]

Karen Dubinsky argues that in Canada, the association of "strong morality" with a "strong state" coupled with a desire to preserve Canada's "pure moral atmosphere", prompted a legislative campaign in favor of a "seduction law," which granted fathers a tort remedy against men who had slept with their daughters (thus damaging their property interest in the women).[57] This penalization of voluntary sexual activities between men and women is doubly revelatory. Firstly, it reflects an Anglo-Canadian realization that targeted "state intervention and regulation" could solve "social problems."[58] Criminal law accordingly structured the constant surveillance necessary to monitor female activity, as it represented a socially sanctioned intrusion into the domestic lives of the citizenry. Secondly, the seduction laws reveal an ideology that casts men as "sexual abusers and exploiters" of women and children.[59] In order to sustain the myth of the cultured, conscientious woman (coding for an impenetrable, civilized body politic) under attack from a brutal, rapacious man (understood as rapid and *undesirable* social change), sexual *desire* was constructed and legally codified as an exclusively male purview. To that end, women (rather than the accused men) were "interrogated" about their sexual past and the intensely high bar for prior purity accounted for the "low conviction rate."[60]

While early prostitution laws emerged through a loose collection of vagrancy offenses,[61] the moral reformist coalition succeeded in passing a series of vice provisions in the Criminal Code of 1892.[62] Guided by "Victorian morality" and considerably influenced by Christian tenets, lawmakers imagined the Code a nation-building project, based in a traditional conception of the family that prescribed separate spheres for men and women.[63] It embodied a "comprehensive system of offenses" aimed at protecting "young women and girls from sexual predators."[64] In addition to the extant vagrancy offenses of streetwalking, keeping or being an inhabitant or frequenter of a common bawdy-

55. Marie-Pierre Robert, *Le traitement de la diversité culturelle et religieuse par le Code criminel de 1892: Les exemples de la polygamie mormone et de la prostitution de la "femme sauvage"*, REVUE DE DROIT, UNIVERSITÉ DE SHERBROOKE 131, 142 (2013).

56. Jean Barman, *Taming Aboriginal Sexuality: Gender, Power, and Race in British Columbia, 1850-1900*, *in* IN THE DAYS OF OUR GRANDMOTHERS: A READER IN ABORIGINAL WOMEN'S HISTORY IN CANADA 270, 289 (Mary-Ellen Kelm & Lorna Townsend ed., 2006) (emphasis added).

57. Karen Dubinsky, *'Maidenly Girls' or 'Designing Women'? The Crime of Seduction in Turn-of-the-Century Ontario*, *in* GENDER CONFLICTS: NEW ESSAYS IN WOMEN'S HISTORY 27, 31-33, 35 (Univ. of Toronto Press Inc.1992).

58. *Id.* at 32.

59. *Id.* at 33.

60. *Id.* at 47, 50.

61. *See* An Act Respecting Vagrants, S.C. 1869, c. 28, s.1 (defining "vagrant").

62. *See* McLaren, *supra* note 53, at 18 (defining the Criminal Code of 1892).

63. Robert, *supra* note 55, at 134-35.

64. Graham Parker, *The Origins of the Canadian Criminal Code*, *in* 1 ESSAYS IN THE HISTORY OF CANADIAN LAW 249, 268 (David H. Flaherty ed., 1981).

house, and living on the avails of prostitution,[65] the Ministry of Justice added "procuring" offenses[66] and a more serious "nuisance" offense of keeping a "bawdy-house"[67] as offenses "against morality," while simultaneously raising the age of consent to sixteen.[68] The Code also made explicit reference to Aboriginal people (the only cultural group to be mentioned by name, apart from the polygamous Mormons[69]): it was an offense for the keeper of a house, tent, or wigwam to lodge an "unenfranchised Indian woman" if they knew or had reason to believe she intended to prostitute herself there.[70]

Despite their stated purposes, there is little evidence that the prostitution laws were actually invoked to protect women and children. [71] Police forces in Western Canada, who were "often undermanned and marginally trained," were content to tolerate prostitution, while in Toronto, the home of Canada's professional, reform-minded middle-class, the primary police objective was "containment, rather than suppression."[72] When the laws were enforced, women were the "primary target" of police attention – suspected prostitutes were subjected to long, "curative" prison sentences and young women were placed in reformatories and industrial schools "designed to inculcate virtue on a more systematic basis."[73] John McClaren observes that most of the charges in Vancouver and Calgary for keeping a common bawdy-house, "supposedly designed to get at institutional exploiters," were mostly brought against "single prostitutes" working in apartments, hotels, or rooming houses.[74] The laws were also applied in a discriminatory fashion,[75] as prostitution charges were almost exclusively brought against black, Irish-Catholic, and Aboriginal women[76] and in Toronto, brought exclusively in working-class districts.[77]

B. Women enter the debate: radical feminism and sex worker radicalism

In the modern era, the discourse of radical feminism has largely reproduced the rhetoric of harm to young women from the predatory sexual desires of men visible in the social reform efforts of the nineteenth and early twentieth centuries.[78] Radical feminists, who conceptualize sexuality as a social construct of

65. McLaren, *supra* note 53, at 18.
66. Criminal Code of Canada, S.C. 1892, c. 29, §§ 185–187.
67. *Id.* at § 198.
68. *Id.* § 283.
69. Robert, *supra* note 55, at 144.
70. Criminal Code of Canada, S.C. 1892, c. 29, § 190.
71. McLaren, *supra* note 53, at 16.
72. *Id.* at 20.
73. *Id.* at 17.
74. *Id.* at 49–50; *see also* J. McClaren & J. Lowman, *Enforcing Canada's Prostitution Laws, 1892-1920: Rhetoric and Practice*, *in* SECURING COMPLIANCE: SEVEN CASE STUDIES 21, 44–47 (M.L. Friedland ed., 1990) (noting that of the 378 arrests in Vancouver for keeping a bawdy-house between 1912 and 1917, at least 96 referred to hotel rooms, single occupancy apartments, and boarding house rooms).
75. Constance Backhouse, *Nineteenth-Century Canadian Prostitution Law: Reflection of a Discriminatory Society*, 18 HISTOIRE SOCIALE 387, 422 (1985).
76. Robert, *supra* note 55, at 149.
77. McLaren, *supra* note 53, at 50.
78. Left-wing radical feminists were also vocal in the 1910s; they articulated a class and gender

male power "defined by men, forced on women, and constitutive of the meaning of gender"[79], characterize prostitution as "a practice of sexual exploitation."[80] In their view, it is an abuse of human rights that must be completely abolished, rather than regulated, decriminalized or legalized. They hold that the ostensible "voluntariness" of the act is illusory; prostitution does not represent a free, informed, individual choice worthy of respect but an "absence of meaningful choices."[81] Though radical feminists view the state, law, and liberal subject as male, and therefore constructed to serve male interests, they have engaged in extensive legislative lobbying to reconstruct the law as a means of "seeking protection for women from sexual victimization."[82] Examples of their success in this area include the creation of legal remedies for sexual harassment, the upholding of criminal obscenity laws, the reform of sexual assault laws, and the implementation of the "Swedish" model of prostitution.[83]

In contrast to radical feminists, sex radicals emphasize the autonomy and human rights of sex workers in particular, rather than women in general. They look beyond the "liberal tolerance of sexual diversity to a positive embrace of sexual non-conformism with the idea that changing ideas about sex can change sex itself and with it the balance of power in society."[84] For radical feminists, sex work can never be simply another kind of labor; it is purely sex and therefore purely exploitative, the "separat[ion] of sex from the human being through marketing"[85] that is necessarily linked with all other sexual abuses of women and children.[86] In contrast, sex radical Gayle Rubin acknowledges the sexual character of prostitution, but imagines prostitution *within* an extant sexual hierarchy, and so treats "money as a variable of sex, rather than sex as a variable of labor."[87] Sex radicals thus reject the radical feminist (and Attorney Generals')[88] view that sex work is inherently exploitative. Instead, they argue that the conditions of criminalization *create* the "unsafe and unfair labor practices"[89] that render prostitution a dangerous occupation, and that sex work should be

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analysis of sexual vice that viewed all dependent women, especially prostitutes, as victims of the patriarchal system. *See* CAROL LEE BACCHI, LIBERATION DEFERRED: THE IDEAS OF ENGLISH CANADIAN SUFFRAGISTS, 1877-1915 35-36 (1983).

79. CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 128 (1989).

80. Catharine A. MacKinnon, *Trafficking, Prostitution and Inequality*, 46 HARV. C.R.-C.L. L. REV. 271, 299 (2011) [hereinafter MacKinnon, *Trafficking*].

81. *See, e.g.*,OFFICE OF THE INSPECTOR GENERAL, *The Federal Bureau of Investigation's Efforts to Combat Crimes Against Children, Audit Report 09-08* (Jan. 2009), *available at* http://www.justice.gov/oig/reports/FBI/a0908/chapter4.htm (reporting that the average age of entry into prostitution is 12).

82. Kate Sutherland, *Work, Sex, and Sex-Work: Competing Feminist Discourses on the International Sex Trade*, 42 OSGOODE HALL L.J. 139, 146 (2004).

83. *See* discussion *infra* part II(D).

84. Sutherland, *supra* note 82, at 144.

85. KATHLEEN BARRY, THE PROSTITUTION OF SEXUALITY 30 (1995).

86. *See* MACKINNON, *supra* note 79, at 113, 127 (describing sexual objectification).

87. Gayle Rubin, *Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality*, *in* PLEASURE AND DANGER: EXPLORING FEMALE SEXUALITY 267, 281, 286 (Carole S. Vance ed., 1984); Sutherland, *supra* note 82, at 149.

88. *See* discussion *infra* part I.

89. RICHARD JOCHELSON & KRISTEN KRAMAR, SEX AND THE SUPREME COURT: OBSCENITY AND INDECENCY LAW IN CANADA 83 (2011).

regulated like any other occupation susceptible to exploitative practice.[90] According to sex radicals, radical feminists underestimate the complexity of the individual's experience of sexuality – sexual activity can serve "simultaneously" as a site of exploitation and equality, of victimization and agency.[91] Indeed, one Canadian sex worker lamented:

> When you are a prostitute that says, "Well, I don't agree with the way you're interpreting my life. . .I don't feel exploited in the way that you're saying," they say things like "she's too blinded to her own oppression to see her experience for what it really is, and it really is the patriarchy."[92]

Rather than dismiss sex workers' perceptions as false consciousness, sex radicals emphasize their subjective experiences. Lisa Gotell has argued that the very primacy of subjectivity and multiplicity in sex radicals' storytelling has made it difficult for them to engage in group litigation and lobbying.[93] While sex radicals have formed coalitions focused on enhancing sex worker autonomy and safety, their impact on North American law, in comparison to radical feminism, has been minimal.[94] While their perspective was, to some degree, recognized in the *Bedford* decision, in the United States, sex radical campaigns to decriminalize prostitution in Berkeley[95] and San Francisco[96] in 2004 and 2008 respectively were unsuccessful.

Gotell suggests that this discrepancy may be attributable to the shared

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90. *See* Jo Bindman, *An International Perspective on Slavery in the Sex Industry, in* GLOBAL SEX WORKERS: RIGHTS, RESISTANCE, AND REDEFINITION 65, 67 (Kamala Kempadoo & Jo Doezema eds., 1998) (arguing that recognizing prostitution as work can lead to protection for sex workers under existing means that protect all workers from exploitation).

91. Sutherland, *supra* note 82, at 144.

92. *Realistic Feminists: An Interview with Valerie Scott, Peggy Miller, and Ryan Hotchkiss of the Canadian Organization for the Rights of Prostitutes (CORP), in* GOOD GIRLS/BAD GIRLS, at 204, 213 (Laurie Bell ed., 1987).

93. *See* Lise Gotell, *Towards a Democratic Practice of Feminist Litigation? LEAF's Changing Approach to Charter Equality, in* WOMEN'S LEGAL STRATEGIES IN CANADA 135, 152 (Radha Jhappan ed., 2002) (noting that there "are indeed significant obstacles that litter the pathways of participatory feminist litigation.") [hereinafter Gotell, *Democratic Practice of Feminist Litigation*].

94. Sutherland, *supra* note 82, at 146.

95. *See* Drake Hagner, *Prostitution and Sex Work*, 10 GEO. J. GENDER & L. 433, 454 (2009). Robyn Few, a former call girl and sex workers' rights activist, sponsored Measure Q in 2004, which would have "decriminalized prostitution in Berkeley, made it the lowest priority for police, and directed the city to lobby for the repeal of California anti-prostitution laws." *Id* Few stated that decriminalization would "allow prostitutes to unionize, report pimping, robbery, and violence without fear of arrest, and get prostitutes off the street and working indoors." *Id.* Though the measure captured only 36% of the vote, Few maintained that her underlying goal had been to "bring national attention" to the issue of violence against sex workers. Rebecca W. Turek, *Prostitutes' Rights Measure Defeated in Berkeley*, UC BERKELEY GRADUATE SCH. JOURNALISM ELECTION 2004 (Nov. 3, 2004), http://journalism.berkeley.edu/projects/election2004/archives/2004/11/berkeleyas_cont.html.

96. Sponsored by sex workers and workers' rights activists in 2008, Proposition K would have prohibited law enforcement from spending funds to enforce criminal laws, or applying for grants that use racial profiling" in counter-prostitution efforts. *See* Elizabeth Pfeffer & Angela Hart, *Proposition to Legalize Prostitution Strikes Chord in San Francisco*, OAKLAND TRIB. Oct. 20, 2008, *available at* http://www.insidebayarea.com/ci_10770854 (describing the content of the measure and various reactions to it). The measure was unsuccessful, garnering only 42% of the vote. *See* Marisa Lagos, *Election results for San Francisco propositions*, SAN FRANCISCO CHRON., Nov. 5, 2008 (comparing the election results of Proposition K and other propositions).

modernist foundations underlying law and radical feminism.[97] Radical feminists can make themselves intelligible in legal forums because their theory is rooted in the notion of a "coherent subject whose identity is tied to gender."[98] Thus, they are better positioned to make truth claims about female experience because they engage with truth as a "positivistic and categorical" phenomenon – *all* prostitution is exploitation, *all* female sexuality is subjugation.[99] By contrast, sex radicals view the sex industry as "multivalent and sophisticated;" they do not proffer a worldview to replace that of radical feminists, but merely seek to problematize their discourse of universal victimhood.[100] Sex radical arguments are necessarily rooted in "complexity and contingency" and so may be ill-suited for unitary legal determinations.[101] Moreover, radical feminism may benefit from its resonance with the values and goals of majority segments of the North American population,[102] a fact demonstrable through their recent ideological alliance with the Conservative Party of Canada.

C. Neo-liberals and social conservatives: The Conservative Party and the discourse of helplessness

The product of the merger of the Canadian Alliance and the Progressive Conservatives, the modern Conservative Party of Canada – led by current Prime Minister Stephen Harper since its inception – has fused neo-liberal strategies of governance emphasizing "individual freedom, limited government, and private enterprise" with traditional "values" conservatism. The party's brand of social conservatism places primacy on social order, respect for tradition and "personal self-restraint reinforced by moral and legal sanctions on behavior."[103] In recent years, the party has also welcomed the increasing visibility of Canadian Christian Right figures[104] and has deferred to religious-social conservative concerns on several occasions, including "re-evaluat[ing]" grants to Gay Pride organizations in 2009 in the wake of values conservatives' "outrage."[105] These

97. *See* Lise Gotell, *Litigating Feminist 'Truth': An Antifoundational Critique*, 4 SOC. & LEGAL STUD. 99, 113–14 (1995) [hereinafter Gotell, *Litigating Feminist 'Truth'*].

98. Sutherland, *supra* note 82, at 147.

99. *See* Gotell, *Litigating Feminist 'Truth'*, *supra* note 97, at 100–2 (describing a contextualized approach to Charter sexual equality, which places "sexual equality claims" in the context of "gendered relations of power").

100. Jochelson & Kramar, *supra* note 89, at 83.

101. *See* Gotell, *Litigating Feminist 'Truth'*, *supra* note 97, at 100–1.

102. *See, e.g.*, BRENDA COSSMAN ET AL., BAD ATTITUDE/S ON TRIAL: PORNOGRAPHY, FEMINISM, AND THE BUTLER DECISION 42 (1997) (arguing that while *R. v. Butler*'s obscenity laws, predicated on the work of Catherine MacKinnon, were ostensibly upheld on the basis of gender equality, it is more probable that the victory is attributable to the harmony between the radical feminist and the religious conservative visions of obscenity).

103. Dave Snow & Benjamin Moffitt, *Straddling the Divide: Mainstream populism and conservatism in Howard's Australia and Harper's Canada*, 50 COMMONWEALTH & COMPARATIVE POLITICS 271, 280 (2012) (citing Stephen Harper, *Rediscovering the right agenda*, CITIZENS CENTRE REPORT MAGAZINE, June 2003, at 74).

104. Jonathan Malloy, *Bush/Harper? Canadian and American Evangelical Politics Compared*, 39 AM. REV. CANADIAN STUD., 352, 360 (2009) (naming Charles McVety as an example of a "highly visible" Canadian Christian Right figure).

105. Michael D. Behiels, *Stephen Harper's Rise to Power: Will His "New" Conservative Party Become*

developments led M.D. Behiels to refer to the Conservatives as a "moderate version of the United States Republican Party."[106]

The strength of the socially conservative movement and the recent emphasis in Canadian socio-political culture on harm rather than autonomy took literal form in 2008. As part of an omnibus bill amending the Criminal Code,[107] Stephen Harper renamed the age of consent "the Age of Protection" and raised it from fourteen to sixteen in order to "stop adults from sexually exploiting vulnerable young people,"[108] thereby marking the first time the age of consent had been raised in Canada since 1890.[109] Throughout the age of consent debates, the Conservatives portrayed themselves as allies to concerned parents – the Minister of Justice framed the bill as a response to the fears of parents with a "huge moral and legal responsibility for their children,"[110] while eliding the fact that most predatory sex acts are committed not by strangers, but by people known to the child.

The significance of the change is thus twofold. Firstly, under the auspices of relieving police officers of the task of assessing whether a youth had been coerced into engaging in a sexual act or relationship, the law paints all youth as vulnerable victims and all adults (particularly all males) as sexual predators. Carol Dauda has argued that although this political strategy appears gender-neutral, it is aimed at regulating women's sexuality and at creating an identity of youth and young girls as "innocent and incompetent and. . .needing protection."[111] Indeed, throughout the debates on the bill, members of Parliament, Senators, and expert witnesses suggested that young girls specifically lacked the autonomy and responsibility to make decisions about their sexual activity,[112] thus inadvertently paralleling the discourse of both nineteenth century moral reformers regarding the seduction laws[113] *and* radical feminists regarding prostitution. Dauda suggests that by focusing on harm, Conservatives divert public attention "away from the issue of agency," while, by emphasizing protection, they eschewed issues of gender and sexuality to "reassert, by default,

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Canada's "Natural Governing Party" of the Twenty-First Century?, 40 AM. REVIEW OF CANADIAN STUDIES 118, 134 (2010).

106. *Id.* at 136.

107. TOM WARNER, LOSING CONTROL: CANADA'S SOCIAL CONSERVATIVES IN THE AGE OF RIGHTS 92 (2010) (citing *Tackling Violent Crime Act*, S.C. 2008, c.6, § 13).

108. CONSERVATIVE PARTY OF CANADA, STAND UP FOR CANADA: CONSERVATIVE PARTY OF CANADA FEDERAL ELECTION PLATFORM 2006 24; *see also* Warner, *supra* note 107, at 91.

109. Carol L. Dauda, *Sex, Gender, and Generation: Age of Consent and Moral Regulation in Canada*, 38 POL.& POL'Y 1159, 1160 (2010).

110. Hon. Rob Nicholson, Minister of Justice Hearing before the House of Commons Standing Committee on Justice and Human Rights, JUST-55, at 6 (2007).

111. Dauda, *supra* note 109, at 1160.

112. *See, e.g.,* MP Myron Thompson (CPC) Statement before the House of Commons Standing Committee on Justice and Human Rights, JUST (May 3, 2007) (Even if a young woman consents, she "does not truly understand what she has done."); Ronald Langevin, University of Toronto, Senate Standing Committee on Legal and Constitutional Affairs, LEGAL (Feb. 21, 2008) (The legislation will "protect that group of adolescents who are at a stage in life when they are flighty, have poor decision-making skills, are inexperienced and might be flattered by an older man who can take advantage of them.").

113. Fittingly, political scholars have noted that Stephen Harper appears to have a nineteenth-century conception of the state and Canadian federalism. Behiels, *supra* note 105, at 124.

a heterosexual norm" and reinforce "unequal relations" of gendered power.[114] Secondly, in expressing an ideological alliance with radical feminists, the law signaled that the Conservative Party was more than amenable to passing legislation aimed at the social protection of women *if* that legislation was couched in neo-liberal, socially conservative language directed toward greater intervention and control in sexual affairs.[115]

This emphasis on protection and victimhood is equally evident in the Conservative approach to adult prostitution. In the wake of the Pickton case, a parliamentary subcommittee came together in 2004 and 2005 to "review the solicitation laws in order to improve the safety of sex-trade workers and communities overall, and to recommend changes that will reduce the exploitation of and violence against sex workers."[116] From the beginning, Conservative MP and subcommittee member Art Hanger opposed decriminalization, aligning himself with social conservative groups like the Evangelical Fellowship of Canada[117] and advocating for the Swedish model, for a "crack down" on pimps, procurers, johns, and "drug pushers" (who he argued were often "one and the same" to pimps) as well as an "exit strategy" for those involved in prostitution through early education.[118] After extensive testimony from over 300 witnesses across Canada,[119] the majority report by the Liberal, Bloc Quebecois, and New Democratic Party "accepted the distinction between forced and voluntary prostitution"[120] and suggested a pragmatic approach that would increase services for those wishing to leave prostitution and address "underlying concerns of poverty and social inequality."[121] However, the report did not actually make any substantive recommendations for law reform, as there was "no consensus" on the question of the reform of prostitution laws. [122]

In their minority report, the Conservative representatives argued that prostitution should be prohibited entirely:

> Conservatives do not believe it is possible for the state to create isolated

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114. Dauda, *supra* note 109, at 1161.

115. *Cf.* JOCHELSON & KRAMAR, *supra* note 89, at 85 (arguing that the Supreme Court's harms-based test for gauging criminal indecency has been "re-branded in feminist friendly terms" by emphasizing female victimhood, rather than community damage, though the same results are achieved in the end).

116. Subcommittee on Solicitation Laws of the Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness. "The Challenge of Change: A Study of Canada's Criminal Prostitution," Government of Canada, Ottawa (2006) [hereinafter The Challenge of Change].

117. In their statement to the subcommittee, the EFC declared prostitution "violates human dignity by distorting human sexuality and commodifying human intimacy . . . which we believe are ordained by God for marriage, and treats them as services to be bought or sold, turning acts of sexual intimacy into commercial transactions." EVANGELICAL FELLOWSHIP OF CANADA, SUBMISSION TO THE SUBCOMMITTEE ON SOLICITATION LAWS OF THE STANDING COMMITTEE ON JUSTICE, HUMAN RIGHTS, PUBLIC SAFETY AND EMERGENCY PREPAREDNESS 1 (2005).

118. Evidence, Subcommittee on Solicitation Laws of the Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness, Government of Canada, Ottawa, May 18, 2005 (statement of Art Hanger).

119. Lowman, *supra* note 14, at 42.

120. *Id.* at 43.

121. The Challenge of Change, *supra* note 116, at 89.

122. WARNER, *supra* note 107, at 97.

> conditions in which the consensual provision of sex in exchange for money does not harm others. . . [A]ny effort by the state to decriminalize prostitution would impoverish all Canadians – and Canadian women in particular – by signaling that the commodification and invasive exploitation of a woman's body is acceptable . . . [B]ecause of the negative elements it attracts, prostitution is unacceptable in any location – commercial, industrial, or residential, including massage parlours and private homes. . .[123]

The minority report went on to suggest that perpetrators of crime should pay fines to fund the rehabilitation of the prostitutes they victimized, which would act as a "significant deterrent" to further solicitation.[124] It also distinguished between kinds of sex work, thereby accepting the distinction between voluntary and forced prostitution only for the purposes of punishment. "[F]irst-time offenders and those forced or coerced" would receive assistance to get out of sex work and avoid criminal records, while those who "freely [sought] to benefit" from prostitution would be criminally accountable for the "victimization which results from prostitution as a whole."[125]

The Conservatives echoed this position in the 2007 report of the Standing Committee on the Status of Women.[126] The majority report encouraged the Canadian legislature to adopt the Swedish model of prostitution law and to criminalize the purchase of sex but repeal all offenses relating to the activities of prostitutes themselves,[127] a recommendation John Lowman (who testified in *Bedford* at the Superior Court) suggests was primed in the choice of witnesses – researchers who presented evidence that questioned prohibitionist claims and data "were not invited to make submissions"[128] to the committee. The Bloc Quebecois filed a minority opinion expressing concern that the majority report made "value judgments" on prostitution and was "condescending" in its recommendation; they stated the Committee was "trying to do too much too quickly" and had overlooked the possibility that criminalizing the purchase of sex could "increase the risk of assault" to sex workers.[129]

Harper himself has been vocal in his opposition to the *Bedford* trial court ruling, asserting that the majority of Canadians[130] support the prostitution

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123. The Challenge of Change, *supra* note 116, at 90.

124. *Id.* at 91.

125. *Id.*

126. STANDING COMM. ON THE STATUS OF WOMEN, HOUSE OF COMMONS OF CANADA, TURNING OUTRAGE INTO ACTION TO ADDRESS TRAFFICKING FOR THE PURPOSE OF SEXUAL EXPLOITATION IN CANADA 3 (2007) [hereinafter Turning Outrage].

127. *Id.* at 14.

128. Lowman, *supra* note 14, at 45.

129. Turning Outrage, *supra* note 126, at 58.

130. Harper has attributed the Conservative intent to pursue socially conservative policies on sex to popular opinion on other occasions. For example, during the 2006 federal election campaign, Harper was the only leader of a federal political party to make a statement about the Supreme Court's decision in *R v. Labaye*, 2005 S.C.C. 80 [2005] which held that swingers clubs do not violate criminal indecency laws. Claiming that "a lot of Canadians [were] troubled by the decision", he promised that a Conservative government would attempt to "plug that loophole" created in the indecency laws. Gurdrun Schultz, *Only Harper Says His Gov't Would Address Swingers Club Ruling*, LIFESITENEWS.COM (Jan. 10, 2006), http://www.lifesitenews.com/news/only-harper-says-his-govt-would-address-swingers-club-ruling. As of May 2014, no amendment to the indecency laws has been

laws:[131] "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."[132] Multiple committee reports demonstrate that the Conservatives have been consistent in their admiration for the Swedish model over the past ten decades, and, in Bill C-36, have crafted a Canadian analogue that similarly seeks to criminalize and target (male) purchasers of sexual services.

D. Codifying victimhood: The Swedish model

Noted radical feminist Catharine MacKinnon has applauded the Swedish model, alternatively termed the Nordic model,[133] asymmetrical criminalization, or end-demand partial criminalization model, as "sex equality in inspiration and effect."[134] The legislative scheme is rooted in radical feminist ideology; indeed, its impetus came from a public speech made by MacKinnon and Dworkin in 1990 in association with the Swedish Organization for Women's and Girl's Shelters (ROKS). After the speech, which argued that law makers and activists could not effectively fight sexual subordination in prostitution by "assuming a symmetry that does not exist,"[135] ROKS held annual meetings with members of Parliament, lobbying for the criminalization of purchasers.[136] Finally, in 1998, the Swedish Parliament passed an omnibus bill on men's violence against women, translated as the "Women's Sanctuary or Women's Peace" bill.[137] It codified the arguments of activists like Gunilla Ekberg, who views female prostitutes as mere "vessels of ejaculation" for the male "sexual predators and rapists"[138] who solicit their services and argues that sex workers are not simply at "risk" of exploitation, but are constantly engaged in a "form of gendered sexual violence."[139] The law's legislative history indicates Parliament's findings centered on the fact that prostitutes often had "deprived childhoods, were neglected, and. . .deprived of a sense of self-worth"[140] and suffered sexual abuse as children.[141] Considering these "coercive preconditions"[142] and female social inequality, Parliament considered it "undignified and unacceptable that men obtain casual sex with

attempted.

131. *See* John Lowman & Christine Louie, *Public Opinion on Prostitution Law Reform in Canada*, 54 CAN. J. OF CRIMINOLOGY & CRIM. JUST. 245, 247 (2012) (noting how Harper's claim of Canadian support for prostitution laws led to his government's decision to appeal *Bedford*).

132. *Id.* at 255.

133. Gen. Civil Penal Code 21 Dec. 2005 nr. 19 § 202(a) (Nor.).

134. MacKinnon, *Trafficking*, *supra* note 80, at 301 (recounting the legislative history of the law).

135. CATHARINE MACKINNON, ARE WOMEN HUMAN? AND OTHER INTERNATIONAL DIALOGUES 101 (2006).

136. Max Waltman, *Sweden's prohibition of purchase of sex: The law's reasons, impact, and potential*, 34 WOMEN'S STUD. INT'L F. 449, 451 (2011).

137. *Id*.

138. Chris Bruckert & Stacey Hannem, *Rethinking the Prostitution Debates: Transcending Structural Stigma in Systemic Responses to Sex Work*, 28 CAN. J. L. & SOC. 43, 57 (2013).

139. *Id.*

140. Waltman, *supra* note 136, at 451.

141. *Id*. (indicating between 55% and 90% of prostitutes had been sexually abused as children, citing various international studies).

142. *Id.*

women against renumeration," a desire deemed "not consonant" with Sweden's "aspirations toward a gender equal society."[143]

The final 1999 *Sex Purchase Act* makes it illegal to "obtain a casual sexual relation in return for payment"[144] and mandates a fine or imprisonment for at most one year (raised from six months in 2011)[145] for convicted johns, while simultaneously providing aid to women who want to leave the sex industry.[146] The act operates alongside other provisions of the Swedish penal code, which criminalizes "promot[ing]" or "improperly financially exploit[ing]" sex work, an offense that also includes individuals who permit the use of their premises for sex work.[147] Proponents of the law credit it with reducing street prostitution by approximately 50%[148] or even further – Max Waltman argues that according to "published literature and other evidence in 2008," there appear to be approximately 300 women in street prostitution and 300 women and 50 men who advertise on the Internet, when in 1995 the Swedish Prostitution Inquiry estimated there were 2500-3000 prostitutes in Sweden, with 650 working on the street.[149] Swedish NGOs and government agencies claim prostitution "virtually disappeared" from the street after the law came into effect,[150] that "no information, empirical evidence, or other research" suggests sex workers have simply moved to the internet or indoor venues,[151] as it is "hardly likely that any prostitution would occur without being detected."[152] Moreover, the law enjoys considerable support among the population, with 79% of women and 60% of men favoring the law in 2008.[153]

III. CRITIQUING THE SWEDISH MODEL

Though the Attorney Generals in *Bedford* recognized the high correlation of street sex work with violence, drug abuse, and victimization, the government argued that these conditions are inherent to prostitution itself, rather than tied to the dislocation and poverty that compel women to enter and remain in the street-level sex trade. To that end, a hardline criminal justice perspective that

143. *Id.* (citing Proposition [Prop.] 1997/98:55 Kvinnofrid [Women's Sanctuary (alt. Women's Peace)] [government bill]).

144. BROTTSBALKEN (Criminal Code) 6:11.

145. Waltman, *supra* note 136, at 449.

146. *See* ROGER MATTHEWS, PROSTITUTION, POLITICS AND POLICY 113 (2008) (noting that the Swedish model focuses on exit strategies and recognizing that these need to be "well resourced and long-term").

147. Sandra Ka Hon Chu & Rebecca Glass, *Sex Work Law Reform in Canada: Considering Problems with the Nordic Model*, 51 ALTA. L. REV. 101, 105 (2013).

148. Sweden's prostitution law a success: report, LOC.: SWEDEN'S NEWS ENG. (July 3, 2010), http://www.thelocal.se/20100703/27580.

149. Waltman, *supra* note 136, at 458.

150. *Id.* at 459 (citing Annika Eriksson & Anna Gavanas, Socialstyrelsen [Nat'l Board of Health & Welfare] (2008b). *Prostitution in Sweden* 2007, Stockholm: Socialstyrelsen).

151. *Id.*

152. *Id.*

153. *Id.*; *see also* Melissa Farley, *Prostitution, Trafficking, and Cultural Amnesia: What We Must Not Know In Order to Keep the Business of Sexual Exploitation Running Smoothly*, 18 YALE J. L. & FEMINISM 109, 138 (2006).

criminalizes the activity of all pimps and johns, while failing to provide for prostitutes' greater needs is triply blind: it erases the class, racial, and geographic dimensions of prostitution; it ignores the economic pressures compelling women to enter and remain in prostitution; and it denies women actually involved in street-level sex work the opportunity to articulate solutions to the problems they face.

A. Endangering women: the constitutionality of the Swedish model

It is unlikely that Canada's version of the Swedish model, as codified in Bill C-36,[154] can withstand constitutional scrutiny in the aftermath of *Bedford*, as Justice McLachlin was clear that a proposed law could not sacrifice "the health, safety and lives of prostitutes"[155] for the sake of criminal regulation. Firstly, the "material benefit from sexual services" provisions of Bill C-36 too closely parallel the "living off the avails" and "bawdy-house" portions of the Criminal Code that were struck down, since they could prevent sex workers from working in groups or indoors, conditions that both Justice Himel and Chief Justice McLachlin recognized could improve the safety of street-level sex workers. Moreover, there is considerable evidence that the targeting of buyers of sexual services and prohibition on communication in places where children may be present will be deemed overbroad and unconstitutional. While supporters of the act argue it has caused a decline in prostitution, they are primarily referring to *visible* prostitution. For example, when contemplating the possibility that a 2008 study may have miscounted the number of prostitutes remaining in Sweden (estimated at 650), Waltman notes that it is "hardly likely that any extensive prostitution would occur without being detected" and dismisses suggestions prostitution has simply moved from the street to other venues as nothing more than "unfounded rumors."[156]

By contrast, Sandra Chu and Rebecca Glass report, after a systematic literature review, that Swedish sex workers have "moved indoors, online, and to neighboring countries."[157] Sex workers, who have been forced underground to protect patrons, have been simply rendered invisible. Women have also reported "increased risks and experiences of violence" as the fear of arrest has eroded any trusted, regular client base, creating "greater competition for clients and lower prices" and weakening women's bargaining power.[158] As a result, they are forced to take clients they would usually refuse: men who are drunk, pushy, fetish-oriented, or refuse to wear condoms.[159] Moreover, if communication is forbidden in open, public spaces, client negotiations must be conducted "rapidly" and in "more secluded locales," making it harder for women to assess

154. *See* discussion *infra* Introduction.

155. Canada (Attorney General) v. Bedford, 2013 SCC 72 (Can.) at para. 136.

156. Waltman, *supra* note 136, at 459.

157. Chu & Glass, *supra* note 147, at 105 (citing Jane Scoular, *What's Law Got to Do With it? How and Why Law Matters in the Regulation of Sex Work*, 37 J. L. & SOC. 12, 19 (2010)).

158. *Id.* at 106.

159. *See* Aziza Ahmed, *Feminism, Power, and Sex Work in the Context of HIV/AIDs: Consequences for Women's Health,* 34 HARV. J. L. & GENDER 225, 255 (2011) (explaining the adverse effects of how the Swedish model criminalizes the client without criminalizing the sex worker's activities).

whether clients are dangerous, alert others if they need assistance, or escape from abuse.[160] This isolation has made it difficult for sex workers to work together, to warn each other about abusive clients or to provide informal care and support.[161] Accordingly, in 2012, the Global Commission on HIV and the Law attacked the Swedish model, concluding that since its enactment in 1999, "the law has not improved – indeed, it has worsened – the lives of sex workers."[162]

This finding has been borne out on the Canadian landscape. The Montreal sex worker-led organization Stella has reported that the aggressive targeting of clients by police caused a "threefold increase" to their "Bad Tricks and Aggressors List" as well as a "fivefold increase" in knife assaults against sex workers,[163] which the women attributed to the displacement of their clients and the consequent necessary acceptance of rushed transactions, drunk or violent clients, and unprotected sex. Police crackdowns on johns also incentivize these men to seek out the youngest possible workers, since they are the least likely to be policy decoys.[164] Maya Seshia noted that in order to attract johns who fear solicitation laws, Winnipeg sex workers are "forced. . .into isolated industrial areas" within some of Canada's dangerous neighborhoods, worsening their "already marginalized spatial positioning" on the streets.[165] Out of fear of being caught, women literally "go into the darkness," despite the volume of research suggesting abusive johns (like Robert Pickton) are "more apt to target women working in secluded locations." [166] Indeed, one street-level sex worker even commented:

> The industrial areas are the most dangerous parts and that's where you'd experience violence most likely, is the industrial areas because nobody can hear anything, nobody can see you. . .You're fucked if you're in an industrial area. So I risk my chances every night I go in industrial areas that I work because I can be murdered anytime, without anybody even realizing or knowing. Yeah, I'd be another statistic of a missing person. [167]

When the law renders a prostitute invisible, it renders her unprotected and, worse, means her disappearance will go unnoticed. John Lowman has observed that a period of extreme violence targeting sex workers began during the 1980s, when social discourse deemed prostitution a public nuisance and called for its removal.[168] This "discourse of disposal" displaces prostitutes to the most

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160. Chu & Glass, *supra* note 147, at 106.

161. *Id*.

162. GLOBAL COMMISSION ON HIV AND THE LAW, RISKS, RIGHTS & HEALTH 38 (2012).

163. Chu & Glass, *supra* note 147, at 116117. Similarly, in Ottawa, a sex worker organization has observed that client sweeps result in "increased feelings of risks to personal security and feelings they cannot trust or turn to police for assistance." *Id*. at 117.

164. Mike Hager & Kim Bolan, *Sex trade workers still getting killed a decade after Pickton's arrest,* VANCOUVER SUN (May 13, 2014), blogs.vancouversun.com/2014/05/13/sex-trade-workers-still-getting-killed-a-decade-after-picktons-arrest/.

165. Maya Seshia, *Naming Systemic Violence in Winnipeg's Street Sex Trade*, 19 CANADIAN J. URB. RES. 1, 11 (2010).

166. *Id.*

167. *Id.* at 12.

168. John Lowman, *Violence and the Outlaw Status of (Street) Prostitution in Canada*, 6 VIOLENCE

isolated, poorly lit areas of dangerous and low-income neighborhoods where they are alienated from police and from each other,[169] thus creating a social milieu in which violence can flourish. Indeed, after the communication law was passed in 1985, there was a "large increase" in British Columbia of reported cases of sex workers being assaulted or murdered by customers.[170] This pattern describes the very harm recognized in Justice Himel's decision: the tendency of governments to sacrifice the health and physical safety of sex workers simply for the sake of reducing public nuisance.[171]

Despite being supportive of partial-criminalization, the Swedish Institute has acknowledged reports by prostitutes that criminalization has "intensified the social stigma of selling sex," recognizing that women may "feel . . . hunted" by the police.[172] Many women have informed the Institute that prostitution was, for them, a choice; they "do not consider themselves to be unwilling victims of anything" and "feel" they are treated like "incapacitated persons" whose wishes are not respected by the state.[173] Such rhetoric evinces the dangers of a protectionist approach to prostitution for two reasons. Firstly, paralleling the false consciousness claims of radical feminists (and indeed, the entire history of chauvinism), the Institute dismisses the women's legitimate concerns and experiences as mere "feelings." Secondly, despite their awareness of the existence of these "feelings," the Institute dismisses them, stating categorically that the "negative effects of the ban that [the women] describe must be viewed as positive from the perspective that the purpose of the law is indeed to combat prostitution."[174] To elide the subjectivity of these women in favor of the greater social good is both moralistic and dangerous – it evinces a legislative purpose that aims to impose particular standards of sexual morality (which the Ontario Court of Appeals affirmed is "no longer a legitimate objective for the purposes of Charter analysis")[175] and it exposes women to considerable risk in the service of eliminating a public nuisance.

It would be remiss of Parliament – not to mention unconstitutional – to simply replace one dangerous legislative scheme with another that, according to Lowman, fixes a "target" on the back of sex workers.[176] Far from ameliorating the conditions of street-level prostitutes, the Swedish model denies these women

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AGAINST WOMEN 987, 1003 (2000) [hereinafter Lowman, *Violence and Outlaw Status*] (connecting the discourse of "disposal" of prostitutes to violence against prostitutes).

169. *See, e.g.*, Becki L. Ross, *Outdoor Brothel Culture: The Un/Making of a Transsexual Stroll in Vancouver's West End, 1975-1984*, 25 J. OF HIST. SOC. 126, 126-27 (2012) (stating that street-level prostitution was confined to four main areas).

170. Lowman, *Violence and Outlaw Status*, *supra* note 168, at 1003.

171. Bedford v. Canada (Bedford I), [2010] ONSC 4264 (Can. Ont. Sup. Ct. J.) at para. 401.

172. SWEDISH INSTITUTE, SELECTED EXTRACTS OF THE SWEDISH GOVERNMENT REPORT SOU 2010:49: "THE BAN AGAINST THE PURCHASE OF SEXUAL SERVICES. AN EVALUATION 1999-2008" 34 (2010).

173. *Id.*

174. *Id.* This language is comparable to that of the British Columbia Secure Care Working Group, who argued that despite its negative inferences, confinement of youth involved in prostitution remained preferable to drug, alcohol, and sex abuse. *See* SECURE CARE WORKING GROUP, MINISTER FOR CHILDREN AND FAMILIES, PROVINCE OF BRITISH COLUMBIA, REPORT OF THE SECURE CARE WORKING GROUP 6 (1998).

175. Canada (Attorney General) v. Bedford, [2012] ONCA at para. 189.

176. Hager & Bolan, *supra* note 164.

control over their working conditions and hampers their ability to work in a safe and healthful manner.

B. Spaces of prostitution: the impact of geography in Canada's "poorest postal code"[177]

> "Just another Hastings Street whore
> Sentenced to death
> No judge, no jury, no trial, no mercy
> The judge's gavel already fallen
> Sentence already passed."[178]
>
> —From the diary of Sarah deVries, lambasting police and public indifference to the vanished women of Vancouver. DeVries disappeared in 1998 at the age of 28. Her DNA was eventually discovered in a freezer in Pickton's workshop.

In the media frenzy surrounding the Pickton trial, some attention came to be focused on the inner-city neighborhood where Pickton found most of his victims: Vancouver's Downtown Eastside. Adding to its reputation as "one of the poorest areas in North America,"[179] the *Vancouver Sun* portrayed the inner-city as an area of "mean streets," populated with "drug-addicted sex workers," coercive pimps, shadowy drug pushers, and "troubled, abused runaways."[180] Far more attention, however, was paid to Pickton: his family, his farm, his mental health, and the claims that he had ground up the bodies of his victims and fed them to the pigs that would be later sold. Each fact about Pickton combined to create a portrait of purely *individual* deviancy, ignoring any socio-economic or political factors that could have contributed to these women's deaths. In other words, Pickton's excoriation was the community's pardon.

Pickton's spree, however, represented only part of the violence endured by street-level sex workers and Aboriginal women in British Columbia and Western Canada as a whole. Indeed, while Pickton allegedly killed forty-nine women, approximately one hundred women in B.C. have gone missing in the past 35 years,[181] at least sixty-one of whom were from the Downtown Eastside.[182] In the Hazelton-Houston-Burns Lake corridor in the north of B.C. – also known as the "Highway of Tears" – at least 18 young girls, mostly Aboriginal, have been

177. Yasmin Jiwani & Mary Lynn Young, *Missing and Murdered Women: Reproducing Marginality in News Discourse*, 31 CANADIAN J. OF COMM. 895, 897 (2006).

178. MacQueen, *supra* note 6, at 2.

179. Melissa Farley et al., *Prostitution in Vancouver: Violence and the Colonization of First Nations Women*, 42 TRANSCULTURAL PSYCHIATRY 242, 257 (2005).

180. Jiwani & Young, *supra* note 177, at 897, 906.

181. *Id.* at 896.

182. Culhane, *supra* note 4, at 598. *See also* Jesse Ferreras, *Missing Women Inquiry: Downtown Eastside Vanished Represented*, HUFFINGTON POST (Dec. 16, 2012), http://www.huffingtonpost.ca/2012/12/16/missing-women-inquiry-downtown-eastside-vancouver_n_2313132.html (reporting that 18 women vanished from the Downtown Eastside between 1997 and 2002 alone).

murdered or gone missing since 1969.[183] Even in 2000, John Lowman recognized that rather than dealing with a single sociopathic murderer, or even several of them, the inner cities of Western Canada were locked in a "systematic pattern of violence against prostitutes perpetrated by many men, *some* of whom are serial killers," where murders merely represent the "extreme" end of a continuum of violence that lawmakers treat as unremarkable because its victims are sex workers.[184]

Widely considered "one of the most undesirable places in Vancouver," the Downtown Eastside is often used "metonymically" for urban poverty in Canada.[185] With a population of 18,477 in 2011,[186] the two kilometer square neighborhood has both one of the lowest life expectancies[187] and the lowest average household income in Canada,[188] despite being in Vancouver, North America's most expensive city.[189] Vancouver has also experienced a worsening housing affordability crisis over the past decade; in both 2013 and 2014, Vancouver was found to have the second-least affordable housing in the *world*.[190] Moreover, the Downtown Eastside has long been a home for drug users, the homeless, the mentally ill, and prostitutes. An estimated 6,000 residents are active drug users,[191] and between 1994 and 1998, there was at least one death by drug overdose per day in the neighborhood.[192] Intravenous drug use caused abnormally high levels of sexually transmitted diseases, leading the Vancouver Health Department to declare a public health emergency in 1997 after HIV infection rates in the Downtown Eastside "exceeded those anywhere else in the "developed" world."[193]

These factors have contributed to miserable working conditions for street-

183. Brittany Bingham et al., *Generational sex work and HIV risk among Indigenous women in a street-based urban Canadian setting*, 16 CULTURE, HEALTH & SEXUALITY 440, 448 (2014).

184. Lowman, *Violence and Outlaw Status*, *supra* note 168, at 998 (emphasis added).

185. Katherine Burnett, *Commodifying poverty: Gentrification and consumption in Vancouver's Downtown Eastside,* 35 URB. GEOGRAPHY 157, 157 (2014).

186. CITY OF VANCOUVER COMMUNITY SERVICES & CITY OF VANCOUVER PLANNING AND DEVELOPMENT SERVICES, DOWNTOWN EASTSIDE: LOCAL AREA PROFILE 2013 6 (2013), *available at* http://vancouver.ca/files/cov/profile-dtes-local-area-2013.pdf.

187. Katrina C. Duncan et al., *HIV Incidence and Prevalence among Aboriginal Peoples in Canada*, 15 AIDS BEHAV. 214, 224 (2011).

188. Lowman, *Violence and Outlaw Status*, *supra* note 168, at 993. *See also* Culhane, *supra* note 4, at 596 (noting that average annual incomes in the Downtown Eastside "hover far below the national poverty line at about $12,000").

189. *Vancouver Most Expensive City to Live in North America:* Economist, HUFFINGTON POST (Feb. 3, 2014), http://www.huffingtonpost.ca/2013/02/06/vancouver-most-expensive-city-to-live-economist_n_2631806.html.

190. *Vancouver housing named 2nd-most costly in world…again,* CTV NEWS (Jan. 21, 2014), http://bc.ctvnews.ca/vancouver-housing-named-2nd-most-costly-in-world-again-1.1649712.

191. Culhane, *supra* note 4, at 596.

192. Lowman, *Violence and Outlaw Status*, *supra* note 168, at 993.

193. Culhane, *supra* note 4, at 594. *See also* PATRICIA LEIDL, UNITED NATIONS POPULATION FUND, *VANCOUVER: PROSPERITY AND POVERTY MAKE FOR UNEASY BEDFELLOWS IN WORLD'S MOST 'LIVEABLE' CITY*, STATE OF WORLD POPULATION 2007: PRESS KIT (2007), *available at* http://www.unfpa.org/swp/2007/presskit/ (reporting that the HIV incidence rate of the Downtown Eastside (30%) is identical to that of Botswana).

sex workers in the neighborhood, many of whom are intravenous drug users[194] who cannot afford to work in off-street, safer environments, since Vancouver bylaws charge "exorbitant fees" for escort services or massage parlors and "severely limit[]" the number of licenses issued.[195] The prices women charge in the Downtown Eastside are the "lowest in the street hierarchy," ranging from $80 to $20 or less.[196] While the death rate of women in prostitution is approximately forty times higher than in the general population,[197] it is particularly egregious in Vancouver – Cler-Cunningham and Christenson's 2011 study of Vancouver street-level prostitution found a 36% incidence of attempted murder.[198]

This research suggests that merely adding to or strengthening Canada's criminal prostitution scheme will have little effect in areas like the Downtown Eastside, where, as in the nineteenth century, police simply choose not to enforce extant laws. Police make "[f]ew, if any" [199] arrests for drug possession, drug trafficking, or solicitation for the purposes of prostitution.[200] In the East End of Winnipeg, street prostitutes have complained that when they bring allegations of abuse to law enforcement, they are simply told that violence "comes with the streets."[201] Local activists have recognized this enforcement inequity and criticized the Vancouver Police Department for regarding sex workers as "throwaway people" and failing to properly investigate their murders.[202] In 1999, family members of prostitutes and local prostitutes' rights groups lobbied the police department to offer rewards for information about the dozens of missing women in Vancouver, efforts that increased when $100,000 rewards were posted for information about a series of suburban home robberies. The police department responded that it was "unlikely" that a serial killer was at work and that street sex-workers often lack close family ties and choose to disappear for many reasons, despite clear evidence that many of the women were mothers with "well-established social networks" and bank accounts.[203] Vancouver mayor Phillip Owens went further, telling the women's families that the municipal government was not prepared to expend money on a "location service for prostitutes."[204] Such comments exemplify how the country's politicians and middle-class populace have treated the Downtown Eastside like a

194. Lowman, *Violence and Outlaw Status*, *supra* note 168, at 993.

195. Elaine Craig, *Sex Work By Law:* Bedford's *Impact on Municipal Approaches to Regulating the Sex Trade*, 16 REV. OF CONST. STUD. 97, 119 (2011). For example, the licensing fee for a body rub parlor in Vancouver is $8,108 per year, although "the fee for virtually every other business license in Vancouver is under $300." *Id.* at 114.

196. Lowman, *Violence and Outlaw Status*, *supra* note 168, at 994.

197. Farley et al., *supra* note 179, at 244.

198. *Id.*

199. Culhane, *supra* note 4, at 594.

200. Ironically then, the outcome parallels that of Sweden, where the Sex Purchase act has rarely been enforced because of the "low penal value of this type of offense." Chu & Glass, *supra* note 147, at 105.

201. Seshia, *supra* note 165, at 10.

202. Lowman, *Violence and Outlaw Status*, *supra* note 168, at 995.

203. *Id.* at 996.

204. *Id.*; Culhane, *supra* note 4, at 598.

"containment"[205] or "dead"[206] zone: a space beyond help, a place of "moral culpability that should be feared,"[207] and a place where its residents are either invisible or the objects of spectacle.

In addition to incidents like the Pickton trial, which offer an "exotic and spectacular" representation of drugs, sex, violence, and crime over the "ordinary and mundane brutality of everyday poverty,"[208] the neighborhood is a favorite among academics, artists, and writers, who flock to Vancouver to catalogue and commodify the squalor, to "market the dramatic and photogenic spectacle of social suffering."[209] Such a stigmatizing portrayal of the Downtown Eastside has perpetuated a brutal cycle: the only images disseminated depict it as an "unhealthy and tainted space,"[210] and so normalize that reputation by implying corruption and moral turpitude are inevitable in the neighborhood. As a result, police lack incentive to enforce extant laws and punish violence, which subsequently leads to more deaths, more addiction, and more lurid images in the mass media.

C. "A Crisis of National Proportions"[211]: Violence, Aboriginal Women and Street Sex Work

> "We are Aboriginal women. Givers of life. We are mothers, sisters, daughters, aunties, and grandmothers. Not just prostitutes and drug addicts. Not welfare cheats. We stand on our Mother Earth and we demand respect. We are not there to be beaten, abused, murdered, ignored."[212]
>
> – From a flyer distributed at the Downtown Eastside's Valentine's Day Memorial March in 2001 in honor of neighborhood women who have been killed or who have disappeared.

In the Downtown Eastside, even violence, death and disease are distributed unequally. Melissa Farley et al. have observed that the vulnerabilities of race, class, and gender, which form "multiplicative risk factors" for HIV, simultaneously act as risk factors "for prostitution."[213] In Canada, this triad of marginalization has the most severe impact on poor Aboriginal women in the inner cities of the Prairie Provinces and Western Canada, who find themselves at the "bottom of a racialized sexual hierarchy in prostitution itself."[214]

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205. Culhane, *supra* note 4, at 594.
206. Burnett, *supra* note 185, at 157.
207. *Id.* at 160.
208. Culhane, *supra* note 4, at 595.
209. *Id.* at 594.
210. Burnett, *supra* note 195183, at 160. (TF: R. 16.9(b)).
211. *See* John Borrows, *Aboriginal and Treaty Rights and Violence Against Women*, 50 OSGOODE HALL L. J. 699, 699 (2013) (referring to the epidemic of violence against indigenous women).
212. Culhane, *supra* note 4, at 593.
213. Farley et al., *supra* note 179, at 257.
214. *Id.*

There is an "immense overrepresentation"[215] of Aboriginal women in Western Canada's street-level sex trade,[216] to the point that Aboriginal youth constitute "90% of the visible sex trade"[217] in some Western Canadian communities. While Vancouver's Aboriginal population is estimated to be only 2%,[218] 70% of Vancouver's female sex workers are Aboriginal. Bingham et al.'s study found that of their sample of 225 street-level sex workers in Vancouver, 107 were indigenous (47.5%),[219] while Farley et al., reported 52% of their 100 interviewees self-reported as First Nations.[220] Similarly, an estimated 70% of individuals in the street-level sex trade in Winnipeg are Aboriginal.[221] Further, while the Aboriginal population of Victoria is approximately 2%, 15% of the women working as escorts are believed to be First Nations.[222] Moreover, Aboriginal women account for almost three times more AIDS cases than non-Aboriginal women – between 1998 and 2006, Aboriginal women accounted for 48% of positive HIV tests in Canada.[223] Out of the 107 Aboriginal women interviewed by Bingham et al., 41% had used heroin in the past six months, 64% reported daily crack use, and 34% were HIV positive.[224] Moreover, these women's experiences of sex work are racialized – women interviewed by Maya Seshia in Winnipeg reported being called "squaws" and "dirty Indians" by johns who told the women that the "only job. . .Indians have. . .is selling [them]selves."[225]

This overrepresentation cannot be divorced from Canada's legacy of colonization and the country's construction as a white settler nation at the expense of indigenous culture and self-determination. The history of colonial violence in Canada has been well-documented. Dispossession from land and resources, confinement to reserves, and the implementation of a residential school system have contributed to the political, economic, social, and spatial marginalization of Canada's First Nations. The residential school system, for example, took over 150,000 children from their families between 1874 and 1986, subjected them to physical and sexual abuse, and used "regimented behavior, corporal punishment and strict discipline"[226] to "kill the Indian in the child"[227] by

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215. *Id.* at 245; *See also* Bingham et al., *supra* note 183, at 441 (finding that up to 70% of the sex workers in Downtown Eastside are Aboriginal women).

216. Even Waltman noted that small prostitution operations continue in Sweden in "closed ethnic communities." Waltman, *supra* note 136, at 459.

217. Farley et al., *supra* note 179, at 245.

218. SHELLY MILLIGAN, STATISTICS CANADA, 2006 ABORIGINAL POPULATION PROFILE FOR VANCOUVER IN 2006 ABORIGINAL POPULATION PROFILES FOR SELECTED CITIES AND COMMUNITIES (Marie-France German, ed. 2006), *available at* http://www.statcan.gc.ca/pub/89-638-x/2010004/article/11085-eng.htm.

219. Bingham et al., *supra* note 183, at 445.

220. Farley et al., *supra* note 179, at 249. Other studies have noted that up to 70% of street sex workers on the Downtown Eastside are Aboriginal, in their early-20s and mothers. Bingham et al., *supra* note 183, at 441.

221. Seshia, *supra* note 165, at 4.

222. Farley et al., *supra* note 179, at 256.

223. Bingham et al., *supra* note 183, at 441.

224. *Id.* at 445.

225. Seshia, *supra* note 165, at 9.

226. Bingham et al., *supra* note 183, at 442.

teaching children to be ashamed of their culture, language, and Aboriginal identity. An official apology from the Canadian government[228] has done little to mitigate either the destructive coping mechanisms adopted by the approximately 80,000 remaining Aboriginal survivors and their descendants,[229] or the pervasive conditions of inequality Aboriginal people continue to endure.

In 1996, the Royal Commission on Aboriginal Peoples wrote: "Aboriginal people are more likely [than non-Aboriginal people] to face inadequate nutrition, substandard housing, and sanitation, unemployment and poverty, discrimination and racism, violence, inappropriate or absent services, and subsequent high rates of physical, social and emotional illness, injury, disability, and premature death."[230] The long-term effects of poverty, racism, and cultural loss have contributed significantly to the high rates of "interpersonal violence, depression, suicide, and substance abuse" among the First Nations.[231] Further, fetal alcohol syndrome is disproportionately high among Aboriginal children,[232] and suicide among Aboriginal people is three times higher than among non-Aboriginal Canadians and six times higher for youth between fifteen and twenty-four years of age.[233]

Colonial dislocation has had a particularly traumatic impact on Aboriginal women. In addition to confronting systemic racism through the process of colonization, Aboriginal women were forced to contend with the imposition of "European patriarchal values and structures"[234] on indigenous societies, which elevated male power in First Nations communities[235] and displaced women from traditional positions of leadership and respect. Similarly, two-spirited people were forced to conform to the rigid sex and gender categories prescribed by Europeans.[236] The implementation of the Indian Act caused Aboriginal women who married non-Aboriginal men to lose their tribal status (a loss that was not rectified until 1985), which placed indigenous women in a "precarious position"

227. Statement of Apology from the Right Honorable Prime Minister Stephen Harper to former students of Indian Residential Schools, on behalf of the Government of Canada (June 11, 2008), *available at* https://www.aadnc-aandc.gc.ca/eng/1100100015644/1100100015649.

228. *Id*.

229. *See* Bingham et al., *supra* note 183, at 442 ("Many individual survivors of residential schools adopted destructive patterns of behaviour and many died an early death as a result of suicide, violence or alcohol-related causes. The patterns of behaviour learned in residential schools were often brought back to families and communities, creating a cycle of violence and abuse impacting future generations of children") (internal citations omitted).

230. Farley et al., *supra* note 179, at 245.

231. *Id*.

232. J.M. Aase, *The fetal alcohol syndrome in American Indians: A high risk group*, 3 NEUROBEHAVIOR, TOXICOLOGY & TERATOLOGY 153, 153 (1981); *see, e.g.*, G.C. Robinson et al., *Clinical profile and prevalence of fetal alcohol syndrome in an isolated community in British Columbia*, 137 CANADIAN MED. ASS'N J. 203, 205 (1987) (identifying 14 of 116 children as having FAS in a single Aboriginal community in B.C.). Sereena Abotsway, one of Pickton's victims, also suffered from FAS. *The lives behind the missing faces*, GLOBE & MAIL (Dec. 18, 2012), http://www.theglobeandmail.com/news/british-columbia/the-lives-behind-the-missing-faces/article6504374/.

233. Farley et al., *supra* note 179, at 245.

234. Culhane, *supra* note 4, at 600.

235. Farley et al., *supra* note 179, at 258.

236. *See generally* WALTER L. WILLIAMS, THE SPIRIT AND THE FLESH: SEXUAL DIVERSITY IN AMERICAN INDIAN CULTURE (1997) (providing a detailed history of "two-spirited" people).

relative to indigenous men. [237] Namely, indigenous women were prohibited from living or owning property on reserves, participating in political affairs or accessing long-standing kinship networks.[238] These chronic historical burdens have combined to render Aboriginal women among the "poorest subgroups of the Canadian population,"[239] placing them at enhanced risk for drug abuse, poor health, and involvement in sex work.

For example, 84% of Aboriginal households on reserves "[do] not have sufficient income to cover housing."[240] Homelessness has been widely recognized as a "primary risk factor for prostitution,"[241] and indeed, housing instability drives young women to migrate to Canada's urban centers – Aboriginal residents even refer to the Downtown Eastside as the "urban reserve"[242] – where they are vulnerable to prostitution. These patterns are chronic and continuous; Aboriginal women are three times as likely as non-Aboriginal women to participate in generational sex-work, irrespective of other risk factors.[243] The displacement of poor, rural, Aboriginal women from the reserve to the city thus functions as a kind of domestic trafficking – movement from the First Nation to the Canadian nation for the purposes of prostitution.[244]

Most troubling, however, is the startlingly high rate of violence perpetrated against First Nations women, which has reached "epidemic proportions" in the last ten years.[245] In 2010, the Native Women's Association of Canada reported 582 cases of missing or murdered Aboriginal girls and women, [246] and the death rate from homicide among Aboriginal women is "four times greater" than that among non-Aboriginal women.[247] Aboriginal women experience violence at rates three and a half times higher than other Canadian women,[248] and the violence they suffer is "extremely brutal" compared to other Canadian women.[249] First Nations women also experience intimate partner violence, incest, and rape at "much higher rates" than any other women,[250] while childhood sexual abuse is reported "significantly more often" by Aboriginal women.[251] Moreover, Aboriginal people are "vastly overrepresented" in the criminal justice system, particularly in Canadian Prairie urban cities, where in 2009, 75% of all federal female prisoners were indigenous.[252]

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237. *See* Culhane, *supra* note 4, at 600 (noting that even since 1985, other factors made returning to the reserves "more a disappointment than a reality").

238. Borrows, *supra* note 212, at 702 n.14.

239. Duncan et al., *supra* note 187, at 224.

240. Farley et al., *supra* note 179, at 245.

241. *Id.*

242. *Id.* at 257.

243. Bingham et al., *supra* note 183, at 447.

244. Farley et al., *supra* note 179, at 261.

245. *Id.* at 246.

246. Bingham et al., *supra* note 183, at 448.

247. Farley et al., *supra* note 179, at 245.

248. Bingham et al., *supra* note 183, at 441.

249. Borrows, *supra* note 212, at 700.

250. *Id.*; *see also* Farley et al., *supra* note 179, at 258.

251. Farley et al., *supra* note 179, at 253.

252. Gillian Balfour, *Do law reforms matter? Exploring the victimization-criminalization continuum in the sentencing of Aboriginal women in Canada*, 19 INT'L. REV. OF VICTIMOLOGY 85, 86 (2012).

In light of these findings, the Swedish model seems inadequate to address the socio-economic factors that compel women – particularly those who are low-income, Aboriginal, and living in Western Canada's inner cities – to engage in street-level sex work. The Criminal Code already criminalizes the activities of johns and pimps. There is no reason to believe that introducing a legislative scheme that maintains those offenses, but decriminalizes the sale of sex, will alter the negligent or racist policing attitudes (or alter sex workers' negative perceptions of police) that place women in so much danger. Studies of the treatment of Aboriginal people by police, courts, and prison officials have repeatedly revealed a "systemic racism embedded in all aspects of the criminal justice system."[253] Even when Aboriginal women bring sexual assault charges, "racialized or gendered narratives" control the proceedings, with trial judges often viewing Aboriginal women as "deserving of rape" because of their alcoholism or involvement in sex work, or perceiving rape as "innate to Aboriginal communities and the immoral conduct of Aboriginal peoples."[254]

Moreover, law reforms do little to tackle the complex intergenerational social problems[255] that buttress violence and poverty in the Aboriginal community for two primary reasons. Firstly, these reforms are "top-down" models. In imposing a legislative schema, they both minimize the experiences and requests of actual sex workers (or, in the case of radical feminists, dismiss them as false consciousness) and fail to involve Aboriginal communities as stakeholders. For example, although commissions of inquiry have been established to examine issues related to violence against Aboriginal women in British Columbia and Manitoba, the governments' limited focus, failure to include Aboriginal partners, and delegation to police forces (objects of distrust in many Aboriginal communities) has meant that the commissions "generally failed to generate support for [and in] the most affected Indigenous communities."[256] In a continuance of the Canadian government's treatment of Aboriginal people as childlike and incapable of true self-governance, Aboriginal community leaders lack jurisdiction over this field of criminal law and so are constitutionally prevented from undertaking legislative reforms to combat violence against women. Similarly, the political conversation between the federal government and First Nations has largely been dominated by land ownership conflicts "to the exclusion of other human rights issues," [257] thus drawing already scant attention and resources away from the structural inequalities plaguing Aboriginal women on and off reserves.

Secondly, there is no indication reforms to Canada's prostitution laws will

253. *Id*. at 89. Notably, Balfour found that Aboriginal men and women convicted of violent offenses were "more likely to receive a provincial or federal term of imprisonment than a non-custodial sentence." *Id*. at 91.

254. *Id*. at 95.

255. *Id*. at 89–90.

256. Borrows, *supra* note 212, at 713.

257. *Id*. at 703. *See also* BRUCE GRANVILLE MILLER, *Foreword* to DAVID MILWARD, ABORIGINAL JUSTICE AND THE CHARTER: REALIZING A CULTURALLY SENSITIVE INTERPRETATION OF LEGAL RIGHTS xvii (2012) (noting "public attention and the attention of Aboriginal leaders" has recently been focused on proposed oil pipelines through First Nations lands, inadequate water supplies, and clashes over land).

be matched by increased spending to address either the specific issues that motivate Aboriginal and low-income women to enter prostitution, or the conditions that render sex work so dangerous. Indeed, over the past several years, organizations that work to prevent violence against women have suffered "across-the-board cuts" to their public funding.[258] Welfare has also experienced drastic cuts – between 2002 and 2005, as part of a push toward "workfare", the Liberal B.C. government pushed 107,000 people off welfare and re-named the Ministry of Human Resources the Ministry of Employment and Income Assistance.[259] Multiple studies have found that these former welfare recipients likely became homeless; indeed, some of the women pushed off welfare engaged in prostitution to earn money, with four women reporting that their decision to perform survival sex work "was a direct result of reductions in their assistance."[260] In Ontario, welfare rates have "not kept up with inflation" and continue to fall considerably below the province's poverty line of about $20,100 a person[261] – indeed, a 2005 study revealed each of the sixty five interviewees found it "difficult, or impossible, to survive on welfare" in Ontario.[262]

At the federal level, in 2012, the Harper government cut all funding to the National Council of Welfare, an independent, federally-appointed body that had been in existence since 1962 to advise the Minister of Human Resources and Skills Development on poverty, analyze social assistance across the country, and produce special topic reports on Aboriginal children and youth, social services, and childcare.[263] In that same budget, the government cut funding to Aboriginal Affairs and Northern Development Canada (AAND) by $165 million and revoked all funding for the National Aboriginal Health Organization (NAHO), forcing the organization to close.[264] The budget also maintained a 2% cap on increases for on-reserve spending, which Aboriginal leaders have blamed for their "deteriorating standard of living"[265] There is every reason to believe these cuts will continue – as part of the Conservatives' "austerity program," the 2014 budget created significant cuts in federal spending in an attempt to decrease the $17.9 billion federal deficit, which in turn "reduced the size of the Canadian state

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258. Borrows, *supra* note 212, at 712.

259. Monte Paulsen, *Opinion: A Welfare 'Savings' Boomerang*, TYEE (British Columbia) (May 1, 2008), http://thetyee.ca/Views/2008/05/01/Boomerang/.

260. *Id.*

261. Laurie Monsebraaten, *Ontario welfare reforms roll out this month*, TORONTO STAR, Sep.2, 2013, *available at* http://www.thestar.com/news/gta/2013/09/02/ontario_welfare_reforms_roll_out_this_month.html.

262. Janet E. Mosher, *Welfare Reform and the Re-Making of the Model Citizen*, *in* POVERTY: RIGHTS, SOCIAL CITIZENSHIP AND LEGAL ACTIVISM 124 (Margot Young et al. eds., 2007).

263. Laurie Monsebraaten, *Federal Budget 2012: Ottawa axes National Council on Welfare*, TORONTO STAR, Mar. 30, 2012, available at http://www.thestar.com/news/canada/2012/03/30/federal_budget_2012_ottawa_axes_national_council_on_welfare.html.

264. *Federal. Budget Impacts to Aboriginal Health*, NAT'L COLLABORATING CTR. FOR ABORIGINAL HEALTH (Apr. 2012), http://www.nccah-ccnsa.ca/338/Federal_Budget_Impacts_to_Aboriginal_Health.nccah.

265. Gloria Galloway, *Tories trim Aboriginal Affairs budget but find cash to boost education*, GLOBE & MAIL, Sept. 6, 2012, http://www.theglobeandmail.com/news/politics/tories-trim-aboriginal-affairs-budget-but-find-cash-to-boost-education/article4098936/.

almost to record low levels relative to the Canadian economy."[266]

There have been some allotments – $11.9 million in 2012 to address family violence on reserves and $330 million over two years to improve water systems, whose conditions on reserves have been called "the worst of the developing world."[267] However, these grants have been piecemeal and are unaccompanied by any kind of collaborative, national poverty strategy or attempts to educate service providers, police officers, or healthcare workers about the structural inequalities facing low-income, Aboriginal, urban women. It is unlikely, therefore, that the mere alteration of the prostitution laws and continued reliance on federal and provincial governments to provide social assistance will remedy the exploitation and misery described by the Attorney General in *Bedford*.

IV. RECOMMENDATIONS FOR POLICY CHANGE

Many of the obstacles facing street and indoor sex workers (including the lack of access to pensions, social security benefits, and healthcare) arguably would be removed if the Canadian government were to pursue a policy that refrains from relying on assumptions of inherent violence and immorality in sex work, and instead, empowers sex workers to minimize the risks they encounter. Full decriminalization or legalization, as in the Netherlands, Australia, and New Zealand, may be such a policy. For example, in 2003, New Zealand wholly decriminalized sex work through the *Prostitution Reform Act* (PRA), which permitted the commercial sale of sex by individuals over the age of 18,[268] and sought to create a framework that "safeguards the human rights of sex workers and protects them from exploitation, promotes the welfare and occupational health and safety of sex workers, and is conducive to public health."[269] Accordingly, the law treats sex work "as any other type of business."[270] It promotes employee health by requiring the use of barrier protection for any penetrative sexual service and encourages sex workers to draw on labor laws to "negotiate working conditions" with their employers.[271] Moreover, in contrast to the Swedish model, where women reported "aggressive policing, police harassment, police persecution, and overall mistrust of police,"[272] research suggests sex workers in New Zealand are now "more likely to report [a violent] incident to police and seek assistance."[273]

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266. Les Whittington, *2014 Canadian budget expected to keep 'starving the beast'*, TORONTO STAR (Jan. 17, 2014), http://www.thestar.com/news/canada/2014/01/17/2014_canadian_budget_expected_to_keep_starving_the_beast.html.

267. Galloway, *supra* note 266.

268. Gilliam M. Abel et al., *The Impact of Decriminalization on the Number of Sex Workers in New Zealand*, 38 J. SOC. POL'Y 515, 516 (2009).

269. Prostitution Reform Act, 2003, s.3 (a)(b)(c).

270. Bruckert & Hannem, *supra* note 138, at 61.

271. *Id.* at 60.

272. Chu & Glass, *supra* note 147, at 106.

273. PROSTITUTION LAW REVIEW COMMITTEE, REPORT OF THE PROSTITUTION LAW REVIEW COMMITTEE ON THE OPERATION OF THE PROSTITUTION REFORM ACT 2003, at 57, (Ministry of Justice, N.Z. 2008), *available at* http://www.justice.govt.nz/policy/commercial-property-and-regulatory/prostitution/prostitution-law-review-committee/publications/plrc-

Unfortunately, despite the negative initial reviews of Bill C-36, with only 35% of Canadians in favor of the bill and 47% opposed,[274] the Harper government has made it clear that decriminalization is not a legislative option. Of course, the Conservatives will not remain in power forever, and the Liberals, NDP, and Bloc Quebecois have all demonstrated a greater willingness to at least consider the possibility of decriminalization, as evidenced in the 2006 subcommittee report.

Nevertheless, Canadians should consider three primary recommendations for engaging with the endemic violence (particularly against those of Aboriginal descent) endured by women working in the street-level sex trade: (1) the implementation of harm-reduction (rather than criminal justice-oriented) supports; (2) the collaboration of Aboriginal and Western health and community service providers; and (3) the granting of jurisdictional powers to First Nations communities make legislation regarding violence against women.

A. What are women asking for?: Health and human rights approaches to prostitution

Considering the Conservative-radical feminist emphasis on the harm done to women through prostitution, neither faction has considered responding to the needs that female sex workers have actually expressed, most of which involve violence reduction, safety, and health. These requests parallel global calls from WHO, UNAIDS, and the Global Commission on HIV and the Law to "move away from a criminal justice approach to human rights and public health approaches" in order to prevent harm to and among sex workers.[275] Such an approach requires both provincial and federal governments to contend with one of their greatest obstacles, especially following the dismantling of the National Council on Welfare: the lack of information regarding what represents the norm and the deviation in prostitution. In contrast to the positions of the radical feminists, most researchers admit that "there is quite simply no such thing as a representative sample of women selling sex" and that any results they obtain are often skewed because they have access "only to people prostituting on the street" who are visible and willing to speak.[276] Before creating a system of service provision, provincial and local governments should conduct research into the demographics of street-level sex work in their particular jurisdiction, in order to that any proposed regulatory scheme will be able to account for the vectors of race, sex, class, and disability.

Many of the services prostitutes have requested are relatively low-cost and can be administered on a municipal or community level. For example, a Toronto study of 30 prostitutes emphasizes their need for mental health services, including drop-in crisis centers open at night, as well as hotlines staffed by

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report/documents/report.pdf.

274. Campbell Clark, *Canadian prostitution laws a no-win, poll shows*, GLOBE & MAIL (June 11, 2014), http://www.theglobeandmail.com/news/politics/canadian-prostitution-laws-a-no-win-poll-shows/article19110502/.

275. Bingham et al., *supra* note 183, at 448.

276. Farley et al., *supra* note 179, at 260.

peers.[277] In Seshia's 2010 study, participants focused on solutions that could "enhance immediate safety," including longer outreach hours, a 24-hour safe house where women could bring johns, and a confidential sexual assault telephone line.[278] Out of the 100 women interviewed by Farley et al, women requested drug or alcohol addiction treatment (82%), a home or safe house (66%), individual counseling (58%), self-defense training (49%), health-care (41%), peer support (41%), and childcare (12%).[279] These requests also varied by race – evidencing the importance of demographic research in crafting services – as First Nations women indicated a significantly greater need for self-defense training, job training, peer support, and individual counseling.[280]

Multiple witnesses, including Calgary's police chief, have observed that the federal government's pledged $20 million for exit strategies is "woefully inadequate."[281] Instead, by allocating greater public money to local community organizations (including shelters, sexual assault centers, and addiction clinics) rather than using victim-oriented programs ranging from "john schools"[282] to secure care,[283] Canada can ensure that services are tailored to the immediate safety needs of area sex workers. However, such programs must go hand-in-hand with larger, structural initiatives. These could include access to well-paying alternative employment,[284] measures to combat homelessness – when asked what they need, almost all street sex workers list housing first[285] – and provision of better healthcare to mitigate the malnutrition, chronic stress and premature aging endemic to life in neighborhoods like the Downtown Eastside.[286]

B. Wellness and self-governance: integrating Aboriginal communities in a

277. *Id.* at 259.

278. Seshia, *supra* note 165, at 12.

279. Farley et al., *supra* note 179, at 253.

280. *Id.* at 254.

281. Tonda MacCharles, *Erase criminal records of all prostitutes, says one Bill C-36 recommendation*, TORONTO STAR, July 10, 2014, *available at* http://www.thestar.com/news/canada/2014/07/10/erase_criminal_records_of_all_prostitutes_says_one_bill_c36_recommendation.html.

282. *See* Scot Wortley, *Vice Lessons: A Survey of Prostitution Offenders Enrolled in the Toronto John School Diversion Program*, 44 CAN. J. CRIMINOLOGY 369, 391 (2002) (reporting that in a study of all men who participated in Toronto's "john school" (an educational program focused on the harms caused by prostitution) between March 2000 and March 2001 in order to avoid a criminal record, the program had "no impact on the anticipated behavior of seven out of every ten respondents" and while 13.1% of the men were less likely to purchase sex after the program, "17.5% were apparently more likely to use prostitutes.").

283. For example, in Alberta, the *Protection of Children Involved in Prostitution Act* empowers police officers and child welfare officials to detain youth, without prior judicial authorization, in "protective confinement" if they have reasonable and probable grounds to believe their life and safety is "serious and imminently endangered because they are engaging in prostitution or attempting to engage in prostitution" and they "will not voluntarily end their involvement in prostitution." Steven Bittle, *When protection is punishment: Neo-liberalism and secure care approaches to youth prostitution*, 44 CAN. J. CRIMINOLOGY 317, 319 (2002).

284. Farley et al., *supra* note 179, at 259.

285. *Id.* at 245.

286. *Id.* at 257 (noting that one neighborhood center even classified anyone over the age of 40 as a senior citizen).

national strategy

The government's first step in aiding Aboriginal women in particular must be to simply acknowledge their presence and pain, to undo the "marked invisibility of Aboriginal people, and women in particular"[287] that pervades Western Canada's inner-city neighborhoods, and to recognize the "near fatal lack of resources" for dealing with violence on reserves[288] that has enabled harm to so many indigenous women. To that end, it is essential that any strategy for combating violence provides "greater consultative resources" between First Nations communities and the criminal justice system,[289] while engaging these communities as equal partners in crafting strategies of care and culturally relevant interventions that fit indigenous concepts of well-being. Whether allocating money to provincial, municipal, or community organizations, the government should always ensure providers are culturally competent, that they recognize differences between First Nations in culture and language, and that they are acquainted with other community services and anti-violence resources[290] on and off reserves.

This perspective, which prioritizes decolonization, well-being and harm-reduction, echoes that of government agencies, academics, and Aboriginal leaders over the past twenty years. Even in 1996, the RCAP recommended a general health strategy for First Nations people that would involve "equitable access to health services, holistic approaches to treatment, Aboriginal control of services, and diverse approaches" and so respond to cultural priorities and community needs.[291] More recently, the Peguis First Nations community in Manitoba have suggested that a combination of traditional and western healing approaches have proved especially effective for those Aboriginal youths and adults who suffer from emotional difficulties, including those related to alcohol and drug abuse, violence, and suicide.[292]

Finally, it is important to note that all of these recommendations highlight the leadership role that Aboriginal communities must assume in matters of health, community support, and positive identity formation. However, leadership in these fields is not enough. While improvements in these areas are vital, they are insufficient to engage with the pervasive sexual and physical violence experienced by women on and off reserves that drives them into (or exists in tandem with) street-level sex work. This paper echoes the recommendation of John Borrows – argued elegantly in "Aboriginal and Treaty

287. Culhane, *supra* note 4, at 593.

288. Borrows, *supra* note 212, at 701 n. 10.

289. Balfour, *supra* note 253, at 99.

290. Farley et al., *supra* note 179, at 259.

291. *Id.* at 258.

292. *Id.* at 259. Farley et al. also indicate that cultural moderators of trauma promote healing based on "family/community support, traditional spiritual practices and medicine and a positive indigenous identity" and that a study of the needs of Vancouver prostitutes underscores these recommendations. *Id. See also* Balfour, *supra* note 253, at 98 (recommending a colonial trauma response model, a "theoretical and empirical approach to understanding historical and contemporary trauma responses to collective and interpersonal events that organizes individual, familial and community life.").

Rights and Violence Against Women" – that the judiciary or federal government should grant Aboriginal communities the legislative authority to close the enforcement gap that persists in crimes of violence against women.

Currently, Aboriginal approaches to justice are severely circumscribed; they emanate primarily from the *Indian Act*, which grants an Aboriginal justice of the peace jurisdiction over a "limited number of summary offenses,"[293] the *Gladue* ruling, which allows for consideration of Aboriginality in sentencing,[294] and section 35(1) of the Constitution, which recognizes and affirms the "existing aboriginal and treaty rights of the aboriginal peoples of Canada."[295] This constitutional grant has been narrowly interpreted to include only inherent Aboriginal rights (determined on the basis of history), land title, and treaty rights.[296]

Borrows argues that courts should apply living tree jurisprudence (the "dominant mode of constitutional interpretation in Canada")[297] or the doctrine of continuity[298] to interpret s.35(1) as granting indigenous communities (at least) "shared constitutional responsibility"[299] for addressing crimes of violence against women. Borrows contrasts the failure of provincial endeavors to combat the epidemic (attributable at least partially to their lack of legitimacy in Aboriginal eyes), to the United States, where recognizing indigenous jurisdiction over violence against women has "at least partially counteract[ed]" elements of gendered discrimination within Aboriginal communities.[300] When indigenous governments have assumed responsibility, there has been "significant political mobilization."[301] Several tribal governments have created domestic violence codes that outline the problem on reserves in considerable detail while providing context to "set the tone for discussion and action" relating to violence against women,[302] while Title IX of the American *Violence Against Women Act* grants tribes jurisdiction over non-Aboriginals who commit violent crimes women on First Nations lands.[303]

The salience of this model for Canada cannot be understated. In addition to combating the endemic violence on reserves, a constitutional jurisdictional grant would also empower Aboriginal tribes to address violence *off* reserves. Additionally, Title IX enhances data gathering programs across the United States

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293. DAVID MILWARD, ABORIGINAL JUSTICE AND THE CHARTER: REALIZING A CULTURALLY SENSITIVE INTERPRETATION OF LEGAL RIGHTS 26 (2012). *See also* Indian Act, S.C. 1985, c. I-5 (stating that "An Aboriginal justice of the peace has jurisdiction over very few summary offenses, including trespassing on reserves (section 30), removing certain cultural artifacts (section 91), and removing natural resources" (section 93)).

294. *See* R. v. Gladue, [1999] 1 S.C.R. 688 (Can.) at para. 98.

295. Constitution Act, s. 35(1), 1982, *being* Schedule B to the Canada Act, 1982, c.11 (U.K.).

296. MILWARD, *supra* note 294, at 32.

297. Borrows, *supra* note 212, at 729-30.

298. *Id.* at 734. This approach regards "broad jurisdictional Aboriginal rights claims as pre-dating the creation of Canada and continuing through to the present day." *Id.* at 733.

299. *Id.* at 704.

300. *Id.* at 716.

301. *Id.* at 717.

302. *Id.* at 718.For examples, *see id.* at 718 n.96.

303. *Id.* at 720–721.

to "better understand and respond to the sex trafficking of Native women."[304] In light of the closure of the National Council on Welfare and the (relative) dearth of reliable information about Aboriginal women in prostitution, a comparable Canadian program would permit Aboriginal people to work with municipal, provincial and federal governments in collating information on the hundreds of missing First Nations women across the country.

CONCLUSION

Although the Pickton murders represent one of the most poisonous and traumatic events in Canadian history, the very horror of these killings fostered a solidarity and spirit of advocacy among sex worker coalitions, who had access to a national platform to campaign for better policing, better healthcare, and better laws. Their efforts have been rewarded – the York Chief of Police has stated that York police have not laid any solicitation charges against sex workers over the past five years,[305] while the Vancouver Police Department has pledged to hire community liaisons and change the name of the squad charged with policing prostitution from "vice" (as they have recognized its "archaic. . .moral implications") to "counter-exploitation."[306] In 2013, the department implemented new sex worker guidelines, which make enforcement of the laws against prostitutes or johns a "last-resort tool", as police have come to recognize that enforcement could "inadvertently displace sex workers" and force women to engage in "riskier behavior" to avoid detection by the police.[307] Moreover, while the *Bedford* decision is not perfect – as it invalidated extant laws without articulating any positive rights for sex workers – and the Conservative-Nordic plan is even more flawed, the case nonetheless represents a watershed moment in the Canadian civil rights movement that can continue to empower sex workers and better their lives in three crucial ways.

Firstly, as discussed above, *Bedford* provides sex workers with the constitutional tools to challenge any provisions of the Conservative plan that hinder their section 7 rights in arbitrary, overbroad, or grossly disproportionate ways. Sex workers can also use *Bedford* in challenging restrictive municipal bylaws that charge exorbitant licensing fees, stipulate onerous conditions, and attempt to zone sex work establishments out of business,[308] on the grounds that they make it punitively burdensome to engage in the safer practice of indoor sex work. Secondly, by simply acknowledging the complex, creative histories of women like Amy Leibovitch, Valerie Scott, and Terri-Jean Bedford, by judicially *seeing* and so validating the experiences of sex workers in rendering a decision, the case signaled a first step toward undoing the pervasive invisibility of Canadian sex workers. Finally, in humanizing prostitution, *Bedford* signaled an allegiance with health and human rights approaches to sex work that lawmakers may adopt if the courts deem the Swedish model unconstitutional, or if another

304. *Id.* at 721.
305. MacCharles, *supra* note 282.
306. Hager & Bolan, *supra* note 164.
307. *Id.*
308. Craig, *supra* note 195, at 114.

party assumes federal office. In contrast to the partial-criminalization model, these approaches are not overbroad, as they do not "catch" the estimated 80-95%[309] of women working in indoor prostitution, or those who are empowered, happy, and safe in their work. They do not assume a colonial stance toward Aboriginal governments by leaving them at the mercy of budget allocations or by belittling or ignoring their unique position; rather, they engage with these communities as equal partners and stakeholders. Finally, unlike the moral reformers of the nineteenth century and the social conservatives and radical feminists of the twenty-first, these approaches do not rely upon moral or social dichotomies of victim and savior, predator and prey. Instead, they recognize the complex economic, political, social, and cultural valences that inform the decisions of different women to enter prostitution and aim to mitigate the conditions that make prostitution – for *some* women – the most dangerous profession in Canada.

309. BENJAMIN PERRIN, *Oldest Profession or Oldest Oppression?: Addressing Prostitution After the Supreme Court of Canada decision in* Canada v. Bedford 2 (MACDONALD-LAURIER INSTITUTE COMMENTARY SERIES 2014). *See also* Shawna Ferris, "*THE LONE STREETWALKER*": *Missing Women and Sex Work-Related News in Mainstream Canadian Media*, 41 WEST COAST LINE 14, n.2 (2007) ("While there are no statistics regarding the numbers of people who work in the sex industry, those who work closely with sex workers through their research such as Cecilia Benoit and Alison Millar, John Lowman and Katrina Pacey…estimate that street-level sex work constitutes only 20% of the sex trade as a whole.").