



Rethinking the Prostitution Debates: Transcending Structural Stigma in Systemic Responses to Sex Work¹

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Abstract

As legal authorities consider the constitutionality of the laws surrounding prostitution in Canada, we have the opportunity to rethink some of the fundamental assumptions that have been made about sex work and the socio-legal responses to it. In this article we draw on the concept of structural stigma to analyze the stigmatic assumptions inherent in the Canadian laws and briefly describe their effect—the civic exclusion of sex workers. We then consider the ways in which these same assumptions of risk and immorality are reproduced in end-demand (partial criminalization), legalized (regulatory) models, and decriminalization. While the decriminalization of sex work is the response that relies on the least stigmatic assumptions, even the celebrated New Zealand model is not absent of moralization and “othering” discourse. Further reflection is required to conceptualize a policy approach that transcends stigmatic assumptions so as to respect the human and civil rights of sex workers.

Keywords: prostitution, sex work, structural stigma, legalization, decriminalization, end-demand

Résumé

Tandis que les autorités judiciaires examinent la constitutionnalité des lois sur la prostitution au Canada, il est possible de revoir certaines hypothèses fondamentales ainsi que les mesures socio-juridiques envers le travail du sexe. Dans cet article, les auteures s'appuient sur la notion des inégalités structurelles afin d'analyser les suppositions stigmatisantes inhérentes à la réglementation canadienne et décrire brièvement leurs effets, spécifiquement l'exclusion civique des travailleurs du sexe. Par la suite, les auteures examinent comment ces mêmes hypothèses concernant le risque et l'immoralité sont reproduites dans les régimes de réglementation, soit la criminalisation partielle, les modèles réglementaires de légalisation, ou la décriminalisation réglementée. Bien que la décriminalisation du travail du sexe repose sur des suppositions qui sont moins stigmatisantes, même le populaire modèle de la Nouvelle-Zélande s'appuie sur un discours moralisateur ainsi que sur l'idée de « l'autre ». Il est nécessaire d'approfondir la réflexion afin de conceptualiser

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des politiques pouvant transcender de telles suppositions dans le but de respecter les droits humains et civils des travailleurs du sexe.

Mots clés : prostitution, travail du sexe, inégalités structurelles, légalisation, décriminalisation, criminalisation partielle

On September 28, 2010, Ontario Superior Court Justice Himel ruled that key sections of Canada's three principle prostitution laws (bawdy-house provision, living on the avails of prostitution, and communicating in public²) contravened section 7 of the *Canadian Charter of Rights and Freedoms* and were therefore unconstitutional.³ Appealed by the Attorneys General of Canada and Ontario, the ruling was partially overturned some 18 months later, on March 26, 2012, by the Ontario Court of Appeal (OCA).⁴ The appeal court justices were, like Justice Himel, "satisfied that the current legal regime, and specifically the challenged *Criminal Code* provisions, interferes with prostitutes' security of the person".⁵ Unlike the lower court's de facto (partial) decriminalization, however, the appeal court offered a more restrained verdict.

The appeal court accepted that *Criminal Code* (CC) s 212, which criminalizes "living on the avails of another's prostitution," was unconstitutional because it was "overbroad and its effects are grossly disproportionate to its objectives"⁶ and sought to remedy this by "reading in" the words "in circumstances of exploitation".⁷ Also accepting Justice Himel's ruling that the bawdy-house law (s 210) was grossly disproportionate,⁸ they deemed that the word prostitution should be removed from the s 197(1) definition of bawdy-house (as it applies to s 210).⁹ Finally, the decision on the law prohibiting communicating in public for the purposes of prostitution (s 213.1) was split 3–2. Writing as the majority, Justices Doherty, Rosenberg, and Feldman asserted that, while they were satisfied that s 213 "has enough of an impact on prostitutes to engage their s 7 rights to liberty and security of the person," they felt that Justice Himel failed to assign adequate weight to the legislative objective of preventing nuisance to the community.¹⁰ The majority conclusion was that, on balance, the court was not able to assert that the law was grossly disproportionate to the legislators' intent.¹¹ Writing for the dissent, Justice MacPherson offered

² *Criminal Code of Canada* RSC 1985, c 46, ss 210, 212.1(j) and 213(1). [*Criminal Code*]

³ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982* being Schedule B to the *Canada Act 1982* (UK), 1982, c 11. Section 7 guarantees the right to "life, liberty and security of the person."

⁴ *Canada (AG) v Bedford*, [2012] ONCA 186. [*Canada v Bedford*]

⁵ *Ibid.* at para 135.

⁶ *Ibid.* at para 256, reasoning that the "living on the avails" law was intended to protect sex workers from pimps yet criminalized all professional relationships (i.e., those with receptionists, security, drivers) that help and offer sex workers security.

⁷ *Ibid.* at para 327.

⁸ *Ibid.* at para 212.

⁹ Since "bawdy-house" as defined in *Criminal Code* s197 and not in s 210 is being revised (with the removal of the word "prostitution"), a significant grey area has emerged as "houses kept for the practice of acts of indecency" are still subject to criminal sanction.

¹⁰ *Canada v Bedford* at para 304.

¹¹ *Ibid.* at para 322.

seven arguments in support of upholding of Justice Himel's ruling, concluding with his regret that his colleagues, having ruled that the laws prohibiting living on the avails of the prostitution (s 212.1.j) and being an inmate or keeper of a bawdy-house were grossly disproportionate, did not "reach the same conclusion with respect to a third provision that has a devastating impact on the right to life and security of the person of the most vulnerable affected group, street prostitutes."¹²

The OCA ruling has pleased few—sex worker rights groups are outraged that a law that increases the vulnerability and violence experienced by the most marginal sex workers is, on balance with community nuisance, deemed constitutional,¹³ while religious groups and some feminist organizations are dismayed that prostitution appears poised to enter the normative landscape.¹⁴ The decision is being appealed and counter-appealed to the Supreme Court of Canada,¹⁵ and a growing number of groups, ranging from provincial health authorities to sex worker rights groups to Christian coalitions, are lining up to intervene. It is entirely possible, of course, that the issue will not be resolved in the courts but in Parliament. The appeal court's ruling on the unconstitutionality of s 210 was suspended for 12 months to "give parliament an opportunity to draft a *Charter*-compliant bawdy-house provision."¹⁶ The OCA justices repeatedly tossed the legislative ball to the government:

A *Charter*-compliant solution requires a full reconsideration of the purpose and effect of the criminalization of bawdy-houses. This is a task for Parliament. We should not be taken as holding that any bawdy-house prohibition would be unconstitutional. It would be open to Parliament to draft a bawdy-house provision that is consistent with the modern values of human dignity and equality as directed at specific pressing social problems, while also complying with the *Charter*.¹⁷

Thus, in Canada, we are at a precipice with seemingly endless possible responses to sex work before us. For example, with respect to the bawdy-house law, perhaps the government will endeavor to create *Charter*-compliant laws that criminalize indoor work; perhaps they will follow the lead of Sweden and criminalize only clients; perhaps they will legalize some forms of in-call work and implicitly/explicitly criminalize others; or perhaps, if some sex work is legalized, provincial and municipal governments will introduce regulation in the guise of health protection, zoning, and licensing. Of course, the decision might be resolved at the Supreme Court,

¹² Ibid. at para 373.

¹³ See, for example, Maggie's: Toronto Sex Workers Action Project. "Federal conservatives continue to jeopardize women's lives and neighbourhood safety," (April 26, 2012), http://maggiestoronto.ca/press-releases?news_id=89.

¹⁴ See, for example, REAL Women of Canada. "Prostitution Decision by Ontario Court of Appeal Attorney General of Canada and Bedford," (March 26, 2012), <http://www.realwomenca.com/page/mediareleases.html>; The Coalition for the Abolition of Prostitution. "Equality-seeking Women's Groups will continue to demand a change in the laws on prostitution" (March 26, 2012), <http://www.rapereliefshelter.bc.ca/sites/default/files/imce/Press%20Release%20-%20March%2026%202012.pdf>.

¹⁵ A Supreme Court ruling would be applicable to the nation and not just Ontario as is, at least in principle, currently the case.

¹⁶ *Canada v Bedford* at para 173.

¹⁷ Ibid. at paras 216–17. See also paras 183, 190, and 201.

which may overturn or uphold the decisions of the lower courts, opening up another range of possible scenarios, including decriminalization. At this pivotal moment it is essential that we give sober thought to what these potential policy configurations will mean for those most affected by the laws—sex workers.

In this paper we examine various international legislative responses to prostitution—Canada’s criminal-regulatory approach, legalization as implemented in Germany and Nevada (United States), Sweden’s end-demand partial criminalization, and New Zealand’s decriminalization model. Contributing to a growing body of literature that reads *across* policy models to illuminate destabilizing commonalities,¹⁸ we argue that, while emerging from radically different ideological positions and embodied in varying policy approaches, each of these responses is grounded in stigmatic assumptions. The laws reflect and reproduce risk discourses that contribute to structural stigma,¹⁹ legitimating risk-management tactics that exclude sex workers from full citizenship. It seems that a decriminalized model relies on the fewest stigmatic assumptions, but even New Zealand’s celebrated policy is regulatory in nature and reproduces structural and symbolic stigma.

Analyzing Policy Responses to Prostitution

Analyses of sex work policy have, for the most part, engaged in questions of what model is “best” according to the (often unarticulated) criteria of the author. It is only recently that a more profoundly critical approach has emerged that reads across and through policy models to disrupt aspirations toward a programmatic ideal type. Here we find researchers who endeavour to tease out commonalities in how apparently divergent approaches to sex work “play out” in the lives of sex workers; these authors assert that sex workers’ social and physical well-being will continue to be jeopardized as long as “prostitution issues are defined as a ‘problem’ amenable to state legislative and policy control.”²⁰ While not all cross-policy reviews have been uniformly pessimistic,²¹ they nonetheless affirm that stigma undermines sex workers’ ability to realize their social and human rights.²² Other scholars have reflected upon the paradox that “the frequently drawn distinctions between apparently diametrically opposed positions . . . is certainly less significant than is often assumed and may, in fact, be illusionary.”²³ In this vein, Laura Agustin challenges the modernist assumptions embedded in the widespread search by nation-states

¹⁸ See, for example, S. Davis and M. Shaffer, “Prostitution in Canada: The Invisible Menace or the Menace of Invisibility?” (1994), <http://www.walnet.org/csis/papers/sdavis.html>; J. Scouler, “What’s Law Got to Do With it? How and Why Law Matters in the Regulation of Sex Work,” *Journal of Law and Society* 37, 1 (2010), 12; F. M. Shaver, “Legislative Approaches to Prostitution: A Critical Introduction,” in *Reading Sociology: Canadian Perspectives*, 2nd ed., eds. L. Tepperman and A. Kalyta (Toronto: Oxford, 2012); B. Sullivan, “When (Some) Prostitution is Legal: The Impact of Law Reform on Sex Work in Australia,” *Journal of Law and Society* 37, 1 (2010), 85.

¹⁹ S. Hannem, “Theorizing Stigma and the Politics of Resistance: Symbolic and Structural Stigma in Everyday Life,” in *Stigma Revisited: Implications of the Mark*, eds. S. Hannem and C. Bruckert, Chapter 2 (Ottawa: University of Ottawa, 2012).

²⁰ J. Kilvington, S. Day, and H. Ward, “Prostitution Policy in Europe: A Time of Change,” *Feminist Review* 67, 1 (2001), 78 at 90.

²¹ See L. A. Jeffrey and B. Sullivan, “Canadian Sex Work Policy for the 21st Century: Enhancing Rights and Safety, Lessons from Australia,” *Canadian Political Science Review* 3, 1 (2009) at 64.

²² *Ibid.*; Sullivan, “When Some Prostitution is Legal.”

²³ Scouler, “What’s Law Got to Do With it?” at 12.

“for the most rational, most just, and least upsetting model”²⁴ to regulate commercial sex. After rendering the national morality underlying the “governmental impulse” visible, Agustin concludes that, in practice, “the endless debates about legal systems to control prostitution is bizarrely irrelevant, except for its symbolic value.”²⁵ More to the point is Jane Scouler’s examination of how the apparently divergent policy models of Sweden (criminalization of clients) and the Netherlands (legalization) play out in remarkably similar ways—increased marginalization of street-based sex workers and “a relative inattentiveness of many forms of indoor work.”²⁶ Unlike Agustin, Scouler de-centers (rather than dismisses) law and sheds much-needed light on the ways the regulation of sex work reflects and sustains neo-liberalism. Drawing on the insights of governmentality she demonstrates that, in practice, both models result in a complex and contradictory regulatory assemblage (both government at-a-distance and diffused governance) characterized by the valorization of self-governance, the expectation of self-regulation, and the responsabilization of sex workers. In this paper, we build on the insights of these authors and seek to contribute to this small body of emerging literature. By rendering visible the conceptual roots that underpin sex work regulation, and by drawing on the concept of structural stigma,²⁷ we excavate the question of *how and why* legislation contributes to civic and social marginalization of sex workers. To this end, we undertook an analysis of the legislation governing sex work in Canada, Germany, Nevada (United States), New Zealand, and Sweden to tease out embedded stereotypes and assumptions of risk/riskiness in legislation and policy. Recognizing that discourses are made real in their effects (albeit not transposed in a straightforward manner²⁸), we draw attention to how these legal frameworks condition and constrain social practice and manifest in the civic exclusion of sex workers. We argue that stigmatic assumptions of risk/riskiness are not merely an impediment to sex workers’ citizenship; they are the very foundation of these policy models.

Structural Stigma and Sex Work

The fact that it is easy to articulate a discourse about “the kind of person who is a sex worker” speaks to stigma. It is the mark of stigma that this singular trait comes to define the person so that what the individual *does* is read as who she²⁹ *is*. The stereotypes come to mind quickly; they are so pervasive that it would be difficult

²⁴ L. Agustin, “Sex and the Limits of Enlightenment: The Irrationality of Legal Regimes to Control Prostitution,” *Sexuality Research & Social Policy* 5, 1 (2008) at 74.

²⁵ Ibid.; Agustin, “Sex and the Limits of Enlightenment” at 74.

²⁶ Scouler, “What’s Law Got to Do With it?” at 13

²⁷ Hannem, “Theorizing Stigma.”

²⁸ Here we are drawing attention to the process of “translation”—how a policy is enacted will be conditioned by the institutions and individuals responsible for implementation tactics—what O’Malley, Shearing, and Weir (1996) refer to as the “messy actualities.” For example, police services exercise considerable discretion in enforcement practices. See B. Latour, “The Powers of Association,” in *Power, Action and Belief: A New Sociology of Knowledge*, ed. J. Law, 264–80 (London: Routledge & Kegan Paul, 1986); P. O’Malley, L. Weir, and C. Shearing, “Governmentality, Criticism, Politics,” *Economy and Society* 26, 4 (1997), 501.

²⁹ Male sex workers comprise an estimated twenty to twenty-five percent of the industry; see Parliament of Canada, *Report of the Standing Committee on Justice and Human Rights—The Challenge of Change: A Study of Canada’s Criminal Prostitution Laws*. (Ottawa: Government of Canada, 2006) at 10. However, in discourse this issue is highly gendered, and we use the female pronoun.

to avoid knowing them.³⁰ They are reproduced in, among others, the discourses of police services,³¹ in the media,³² and by neighbourhood associations.³³ Sex workers are believed to pose a risk to society—they are dirty and vectors of disease; they are immoral and threaten family values; they are drug addicts and a disruptive presence in neighborhoods. Other stereotypes position sex workers as “at risk”—they are vulnerable to being victimized by their clients, by “pimps,” and by “traffickers”; they are exploited³⁴ and in need of “saving.”³⁵ These paternalistic (or maternalistic) portrayals render victimhood a master status that erases sex workers’ agency and silences their narratives of resistance. The deeply embedded stigmatic assumptions of sex workers as at-risk and risky, simultaneously victim and victimizer, exist in tension; discourses that have little basis in fact come to be seen as true. Despite the reconfiguration of the contours of the sex industry³⁶ and the emergence of a vibrant sex worker rights movement with a clear and articulate counter-narrative,³⁷ the entrenched assumptions persist. Indeed OCA justices refer to such common knowledge, asserting that “*everyone knows* prostitution is a dangerous activity for prostitutes.”³⁸ They illustrate the extent to which ideas entrenched in “common knowledge” are reiterated in judicial reasoning, encapsulated in judicial-legal discourse, reified as truth, and ultimately embedded in case law—power/knowledge³⁹ in the making.

³⁰ For a discussion of sex workers’ perceptions of prevailing stereotypes, see C. Bruckert and F. Chabot, *Challenges: Ottawa-area Sex Workers Speak Out*. (Ottawa: POWER, 2010).

³¹ For a discussion of the stereotypes embedded in the discourse of the Ottawa Police Service, see C. Bruckert and S. Hannem, “To Serve and Protect? Structural Stigma, Social Profiling and the Abuse of Police Power in Ottawa,” in *Selling Sex: Canadian Academics, Advocates, and Sex Workers in Dialogue*, eds. E. Van der Meulen, E. M. Durisin, and V. Love, chapter 19 (Vancouver: UBC Press, 2013).

³² See L. A. Jeffrey and G. MacDonald, *Sex Workers in the Maritimes Talk Back*. (Vancouver: UBC, 2006); H. Haulgrimsdott, R. Phillips and C. Benoit, “Fallen Women and Rescued Girls: Social Stigma and Media Narratives of the Sex Industry in Victoria, B.C., from 1980 to 2005,” *Canadian Review of Sociology and Anthropology* 43, 3 (2006), 265, for discussions on the media’s reproduction of stereotypes.

³³ For a particularly egregious example, see Hintonburg Community Association, *Street-level Prostitution: Dispelling the Myths* (Ottawa: HCA, 2001).

³⁴ Of course, like all stereotypes, some of these things may be true of individual sex workers’ realities; however, to extrapolate from *some* to *all* workers takes us down a treacherous path. History is littered with instances where stigmatic assumptions were used to trample upon the human rights of a population.

³⁵ See Bruckert and Chabot, *Challenges*; Jeffrey and MacDonald, *Sex Workers Talk Back*; J. Lewis and F. Shaver, *Safety, Security, and the Well-Being of Sex Workers: A Report Submitted to the House of Commons Subcommittee on Solicitation Laws*. (Windsor: Sex Trade and Advocacy-STAR, 2006).

³⁶ See, for example, E. Bernstein, “Sex Work for the Middle Classes,” *Sexualities* 10, 4 (2007), 437.

³⁷ For example, the three plaintiffs in *Bedford v Canada* are members of Sex Professionals of Canada (SPOC, Toronto), and POWER (Ottawa) joined with Maggie’s (Toronto) to intervene in the OCA hearings.

³⁸ *Canada v Bedford*, at para 134, emphasis ours. When they assert “the acknowledged reality that prostitution is inherently dangerous in virtually any circumstances” (at para 117) they prioritize “common knowledge” over the volumes of expert testimony that Justice Himel ruled credible and which they implicitly they endorse when they defer to Justice Himel’s assessment (at para 130).

³⁹ M. Foucault, *Power/Knowledge: Selected Interviews and Other Writings 1972–1977*, ed. C. Gordon (New York: Pantheon, 1980).

Stigma was originally conceived by E. Goffman as an interactional phenomenon that played out in social judgment and stereotype-infused encounters between “normal” and stigmatized persons.⁴⁰ Although Goffman’s work was primarily micro-focused, and his analysis was rooted in the individualized effects of a discredited identity, we have argued previously that stigma can also be understood at the macro-level as embedded in societal structures and institutions and enacted on populations via regulatory and legal policy.⁴¹ Structural stigma takes hold when assumptions about risk (whether risk to self or to others) become attached to a discredited identity through institutionalized discourse; these notions are manifested in targeted interventions designed to manage the risk posed by the stigmatized group, irrespective of individual circumstances or attributes.⁴² Stigma, then, as a function of risk, is transformed from an individual experience of discredit to a collective experience of management and regulation. The interventions need not be intended as punitive; those who engage in the regulation of “risky” populations may believe that they are “helping” or acting in the best interests of those they define as victims. The discourse of risk management, even when constructed in a positive frame, provides legitimacy to the division of the “other” and the “normal” and reifies existing stereotypes and discredit.⁴³ In this article, we argue that the criminalized framework surrounding sex work in Canada is a clear example of stigma operating at the structural level, and that this structural stigma is also apparent in other international approaches to sex work regulation.

The social discredit and stigmatization of sex work emerges from deeply held beliefs about morality, rooted in religious and cultural mores. As J. McLaren and F. M. Shaver have each discussed,⁴⁴ the earliest constructions of prostitution and procuring laws in England and Canada reflected Victorian morality. The law provided a secular, criminal-legal framework for what was understood as a problem of “sin.” While more contemporary legislative discussions are couched in the language of public nuisance, community security, and risk, they do not question (and in fact, take as a given) the moral assumptions first made about sex work by the original legislators more than 150 years ago. The quasi-criminalization of sex work serves to reinforce underlying moral judgments, which assume that sex work is a literal and figurative pollution that is potentially damaging to communities; this discourse legitimates the removal of sex workers from public space. Laws that conceptualize sex workers as “at risk” (like the living off the avails legislation) code the discrimination against sex work as “immoral” work in terms that engage a seemingly protectionist stance for vulnerable women. Alan Hunt has argued that increasingly over the last century

⁴⁰ E. Goffman, *Stigma: Notes on the Management of Spoiled Identity* (Englewood Cliffs: Prentice-Hall, 1963).

⁴¹ Stacey Hannem and Chris Bruckert, eds., *Stigma Revisited: Implications of the Mark*. (Ottawa: University of Ottawa, 2012).

⁴² For a detailed theoretical discussion of the concept of structural stigma, see Hannem, “Theorizing Stigma.”

⁴³ Ibid.

⁴⁴ J. McLaren, “Chasing the Social Evil: Moral Fervour and the Evolution of Canada’s Prostitution Laws,” *Canadian Journal of Law and Society* 1 (1986), 125; F. M. Shaver, “The Regulation of Prostitution: Avoiding the Morality Traps,” *Canadian Journal of Law and Society* 9 (1994), 123.

morality has come to function through proxies . . . in and through other discursive forms, the two most important and closely related being the discourses of “harm” and “risk” . . . The moral dimension is not excluded, rather it becomes subsumed within discourses whose characteristics have a utilitarian guise.⁴⁵

Drawing on Foucault’s understanding of power/knowledge,⁴⁶ we can see how, in encoding moral judgment as a discourse of risk in law, those who supported the dominant religious framing of immorality surrounding sex work effectively silence alternative understandings and obscure the complex realities of sex workers’ everyday lives.

Criminalization of Sex Work in Canada

While the exchange of sexual services for financial or other compensation is not, and has never been, illegal in Canada, existing statutes undermine sex workers’ ability to labour without contravening the law. The statute most salient for street-based sex workers, *Criminal Code* s 213, was introduced in 1985 after significant lobbying by community associations who argued that street-based prostitution threatened the security of communities and children.⁴⁷ The law decrees that:

every person who in a public place⁴⁸ or in any place open to public view (a) stops or attempts to stop any motor vehicle; (b) impedes the free flow of pedestrian or vehicular traffic [...], or (c) stops or attempts to stop any person or in any manner communicates or attempts to communicate with any person for the purpose of engaging in prostitution...is guilty of an offence...⁴⁹

This, the most rigorously enforced of the prostitution statutes, draws on the notion that sex workers pose a risk to communities. As Chief Justice Dickson of the Supreme Court of Canada noted in 1990, the legislation:

clearly responds to the concerns of home-owners, businesses, and the residents of urban neighbourhoods. Public solicitation for the purposes of prostitution is closely associated with street congestion and noise, oral harassment of non-participants, and general detrimental effects on passers-by or bystanders, especially children.⁵⁰

The appeal court also evoked similar images of “risk seepage,” asserting that “street-prostitution is *associated with serious criminal conduct* including drug possession, drug trafficking, public intoxication, and organized crime.”⁵¹

⁴⁵ Alan Hunt, “Risk and Moralization in Everyday Life,” in *Risk and Morality*, eds. R. V. Ericson and A. Doyle, 165–92 (Toronto: University of Toronto, 2003).

⁴⁶ Foucault, *Power/Knowledge*.

⁴⁷ D. Brock, *Making Work, Making Trouble – 2nd Edition: The Social Regulation of Sexual Labour* (Toronto: University of Toronto, 2009).

⁴⁸ According to *Criminal Code* at s 213.(2), a “public place” includes any place to which the public have access as of right or by invitation, express or implied, and any motor vehicle located in a public place or in any place open to public view.”

⁴⁹ *Criminal Code* at s 213.(1).

⁵⁰ *Reference re ss 193 and 195.1(1)(C) of the criminal code (Man.)* [1990] 1 SCR. 1123, paras 15–16.

⁵¹ *Canada v Bedford* at para 307, emphasis ours. This issue was raised by Justice MacPherson writing for the dissent at 346: “It is not clear to me how street prostitution’s *association* with these other social ills increases the weight that ought to be assigned to the legislative objective” (emphasis in the original).

The very existence of specific laws to regulate the “nuisance” of street-based sex work speaks to structural stigma and the link between risk and morality. There are ample legal provisions to sanction the disruptive behaviours that may be characteristic of *some* street-based sex workers (and university students!). For example, public intoxication and trespassing are prohibited under provincial statutes; municipalities regulate littering and excessive noise; and causing a disturbance and loitering are prohibited under s 175 of the *Criminal Code*. If sex worker-specific laws are redundant, then they are ideologically significant—they position sex workers and their actions as inherently different from “normal” citizens and, in the process, reaffirm and legitimate that perceived difference.⁵²

While *CC* s 213 criminalizes sex workers’ communication for the purposes of prostitution in public and thereby inhibits their ability to solicit on the street, the bawdy-house law (s 210) is concerned with “a place kept or occupied, or resorted to by one or more persons, for the purpose of prostitution or the practice of acts of indecency.” Case law has deemed that “a place” may include homes, hotels, and parking lots that are used frequently or habitually. The law criminalizes “everyone who keeps a common bawdy-house,” or who:

- a) is an inmate of a common bawdy-house, (b) is found, without lawful excuse, in a common bawdy-house, or (c) as owner, landlord, lessor, tenant, occupier, agent or otherwise having charge or control of any place, knowingly permits the place or any part thereof to be let or used for the purposes of a common bawdy-house.⁵³

After reviewing case law and historical analysis Justice Himel concluded:

Although morality was clearly one of the original objectives of the bawdy-house provisions, the provisions were intended to address a number of concerns under the relatively broad objective of preventing common or public nuisance. These concerns included health, safety, and neighbourhood disruption or disorder, as well as the prevention of immorality.⁵⁴

Here moral legalism, intersecting with “community concerns” about nuisance and disorder, trumps the health and safety needs of sex workers; in practice these laws make it illegal for sex workers to access the protections afforded by an establishment (i.e., screening, bouncer) or to work in their own homes (alone or with a colleague), where they can have security measures in place.⁵⁵ As we have seen, the OCA recognized that the law denies sex workers the right to manage risk and make choices about safe working conditions and that this endangerment is not justified by the legislative intent.

While *Criminal Code* ss 210 and 213 are firmly rooted in a discourse of sex workers posing a risk to the “community,” s 212 conceptualizes sex workers as at-risk and vulnerable to exploitation and victimization. This law emerged in the context

⁵² N. Currie and K. Gillies, *Bound by the Law: How Canada’s Protectionist Policies in the Areas of Both Rape and Prostitution Limit Women’s Choices, Agency and Activities*. (Status of Women Canada, Unpublished Manuscript, 2006).

⁵³ *Criminal Code* at s 210(1).

⁵⁴ *Bedford v Canada (Attorney General)* [2010] ONSC 4264 at para 239. [*Bedford v Canada*]. See also *Canada v Bedford* at para 195.

⁵⁵ Lewis and Shaver, *Safety, Security and Well-being*.

of the progressive-era moral panic about the “white slave trade” perpetuated by dubious accounts of young women tricked and trapped into a life of prostitution.⁵⁶ Section 212(j) is a reverse onus offence that prevents sex workers from engaging in professional relationships when it criminalizes anyone who “lives wholly or in part on the avails of prostitution of another person.”⁵⁷ Section 212 further criminalizes third-parties such as managers, agents, or anyone who:

(a) procures, attempts to procure or solicits a person to have illicit sexual intercourse with another person . . . (h) for the purposes of gain, exercises control, direction or influence over the movements of a person in such manner as to show that he is aiding, abetting or compelling that person to engage in or carry on prostitution with any person or generally.⁵⁸

As both Justice Himel and the OCA Justices recognized, while there are no doubt, situations characterized by coercion, research has demonstrated the complexity and array of arrangements that sex workers have with bosses, managers, and others who coordinate, organize and/or supervise their labour or who workers hire to help them (i.e., drivers, web designers, receptionists). While some third parties take advantage of sex workers, others provide valuable services including equipment, advertising, and information as well as screening, protection, and security.⁵⁹ Indeed because section 212(j)—living on the avails—criminalizes relationships that help sex workers be safe (such as drivers/body guards, receptionists), the provision “increase[s] the harm to prostitutes.”⁶⁰ The appeal court sought to remedy this harm by reading into the law “in situations of exploitation” and thereby restricting its scope. Here the justices defined exploitation as “where the prostitute is dependent on the accused for drugs or because of youth, where the accused has not legal or moral claim to the prostitute’s earnings, or where the accused takes a portion of the prostitute’s earnings that is out of all proportion to the services provided.”⁶¹

While the appeal court’s nuance is important, there continues to be a presumption that relationships between sex workers and managers are inherently prone to exploitation. This is ironic at best—capitalism necessitates the purchase (at less than market value) of the labour power of those who do not own or otherwise have access to the means of production. Put in Marxian terms—economic exploitation. The economic exploitation of workers in Canada is limited by such regulatory law

⁵⁶ Socio-historical researcher Mariana Valverde asserts that “virtually no evidence was found of a traffic in Canadian women, either within or without Canadian borders.” M. Valverde, *The Age of Light, Soap and Water: Moral Reform in English Canada, 1885–1925*. (Toronto: McClelland & Stewart, 1991) at 93. Surprisingly, the appeal court justices refer to “the pressing social problem of so-called ‘white-slavery’”; *Canada v Bedford* at para 202. They also appear to accept the evidence of appellants’ witnesses when they assert that “frequently police investigating residential bawdy-houses have found vulnerable women brought in from abroad or under-age girls working as prostitutes” (at para 195).

⁵⁷ *Criminal Code* at s 212(j).

⁵⁸ *Criminal Code* at s 212 (a)(h).

⁵⁹ Currie and Gillies, *Bound by the Law*; Lewis and Shaver, *Safety, Security, and Well-being*; J. Lowman, “Violence and the Outlaw Status of (Street) Prostitution in Canada,” *Violence Against Women* 6, 9 (2000), 987; E. Van der Meulen, “Illegal Lives, Loves, and Work: How the Criminalization of Procuring Affects Sex Workers in Canada,” *Wagadu* 8 (2010), 217–40.

⁶⁰ *Canada v Bedford* at para 254.

⁶¹ *Ibid.* at para 270.

as the minimum wage, but in no other sector is it assumed that employees are so vulnerable that they cannot even make decisions about the conditions of their employment. In reality, sex workers are made vulnerable to labour exploitation *because* of the (quasi) legal status of their occupation. Unlike other workers, they are unable to turn to provincial labour legislation if they are not paid or if they are injured while at work. Prohibitive laws masquerading as protectionism have the effect of excluding sex workers, on the basis of their presumed vulnerability and incompetence as rational neo-liberal subjects, from the labour rights, security, and options afforded other Canadian workers. This contradiction renders visible the moral subtext and the deeply embedded paternalism of the laws.

Evidently the law, dating back to the 1800s,⁶² uses exceedingly sloppy brush strokes as it endeavors to “protect” sex workers by limiting their options. The same paternalism is evident in the legal treatment of sex workers’ personal relationships under section 212(j). Here, too, workers’ lived experiences are ignored. Their ability to evaluate their own circumstances and make decisions for themselves is implicitly denied when, based solely on their participation in the sex industry, intimate relationships are presumed—until proven otherwise—to be exploitative.⁶³ According to the Canadian HIV/AIDS Legal Network:

“Living on the avails” casts the shadow of possible criminal charges over anyone who regularly spends time with a sex worker, including a sex worker’s spouse or partner, family members, roommates or friends. This Section is also characterized by an unconstitutional “reverse onus”—instead of being presumed innocent until proven guilty, the person charged must prove that he or she is not living “parasitically” off the money the sex worker makes.⁶⁴

Indeed, the appeal court justices argue against wholly striking down section 212(j) precisely because it is a reverse onus offence and “the presumption that is intended to facilitate the prosecution of exploitative pimps would also fail.”⁶⁵ The justices maintain that there is a need to preserve the reverse onus provision that can be used to prosecute exploitative pimps when sex workers do not want to testify against them. Here we see the stigmatizing assumption that sex workers are at-risk and incapable of identifying, let alone operating in, their own best interests. These individuals are presumed to be women who are hyper-vulnerable to being taken advantage of by unscrupulous men and are therefore in need of protection by the state. One can almost hear the voices of self-righteous, middle class, moral reformers echoing through the decades: “Poor deluded creatures, their mentality is so stunted with sensuality, drink and sin, they do not realize the awful bondage they are subject to.”⁶⁶

⁶² Canada’s first *Criminal Code* (1892) prohibited “all persons from procuring the defilement of women under the age of 21.” In 1897, a new law was added that criminalized “the procuring of women for unlawful carnal connection,” and in 1913, in the shadow of moral panic about the “white slave trade,” the procuring provisions were revised to criminalize living on the earnings of another’s prostitution.

⁶³ Van der Meulen, “Illegal Lives.”

⁶⁴ Canadian HIV/AIDS Legal Network, *Not Up to the Challenge of Change: An Analysis of the Report of the Subcommittee on Solicitation Laws*. (Toronto: Canadian HIV/AIDS Legal Network, 2007) at 6.

⁶⁵ *Canada v Bedford* at para 277.

⁶⁶ As quoted in R. Rosen, *The Lost Sisterhood: Prostitution in America 1900–1918* (Baltimore: John Hopkins University Press, 1982) at 64.

It would appear that the state subjects sex workers to differential treatment and laws premised on their labour location, rendering the job a “master status.”⁶⁷ The laws negate all other identities and assess all actions and relationships through the lens of one activity (sex work). In addition to being stigmatizing, the procuring laws, like those that seek to control the nuisance of street-based sex work, are redundant. There are ample provisions in the Canadian *Criminal Code* to protect all citizens from criminal acts, including trafficking in persons,⁶⁸ physical assault,⁶⁹ sexual assault,⁷⁰ forcible confinement,⁷¹ and harassment.⁷² These generic laws could be used to address the harms experienced by sex workers without forcing them to labour in potentially unsafe ways.⁷³ The existing sex work-specific laws reify symbolic forms of stigma, rendering discrimination and civic exclusion acceptable public reactions to sex workers.

Civic Exclusion

The laws around sex work, so often framed as a means of “saving” sex workers from themselves and others, undermine their ability to draw on the legal and civic protections available to other Canadians. Sex workers are hesitant to report victimization to the police because they fear that they and/or their employer may be charged with prostitution-related offences. When sex workers are victims of assault that is not related to their work, such as domestic violence, they find that it is coded and responded to differently by police on the basis of their occupation. According to N. Currie and K. Gillies, rather than charging a sex worker’s abusive partner with assault, police routinely lay charges under *CC* s 212.1.(j) (living on the avails).⁷⁴ This charge results in the “outing” of the sex worker’s labour location and is a significant disincentive for women living in abusive relationships to turn to the police. As Currie and Gillies note, “generic criminal laws [would] [...] place the focus directly on the abusive activity itself; not on the woman’s occupation or relationship.”⁷⁵

As we have seen, criminalization and the failure to recognize sex work as a legitimate form of labour excludes sex workers from the protection of civil labour regulations. Similarly, ineligibility to contribute to Employment Insurance, parental leave programs, and the Canada Pension Plan constitute yet another form of civic exclusion. Further, the inability to demonstrate a source of legitimate income limits access to credit, the capacity to obtain a mortgage, or even to rent an apartment. To address the myriad of problems and discrimination that accompany existing sex work laws, advocates of legal change have proposed several different policy approaches. In the coming sections, we critically evaluate models of legalization,

⁶⁷ E. C. Hughes, “Dilemmas and Contradictions of Status,” *American Journal of Sociology* 50 (1945), 353–59.

⁶⁸ *Criminal Code* at s 279

⁶⁹ *Ibid.* at ss 265, 267, 268

⁷⁰ *Ibid.* at ss 271, 272, 273

⁷¹ *Ibid.* at s 279

⁷² *Ibid.* at s 264

⁷³ Lowman, “Violence and the Outlaw Status”; Lewis and Shaver, *Safety, Security and Well-being*; Currie and Gillies, *Bound by the Law*; Bruckert and Chabot, *Challenges*.

⁷⁴ Currie and Gillies, *ibid.*

⁷⁵ *Ibid.* at 55.

partial criminalization, and decriminalization for evidence of structural stigma and examine the implications for sex workers.

Legalization

Those who promote a legalized or regulatory approach to sex work are largely motivated to minimize the harms believed to accompany this “unfortunate,” albeit inevitable, social practice: organized crime, the nuisance of street-based work, “pimping,” and disease.⁷⁶ In principle, legalization facilitates the policing of the sex industry and gives workers access to criminal justice protection and redress, the security of labour laws, and a measure of legitimacy.⁷⁷ For example, German lawmakers argued that the 2002 *Prostitution Act* (which self-consciously proclaims that prostitution is *not* immoral) would improve the legal, labour, and social conditions of sex workers, while at the same time “the criminal activities that often surround prostitution... will have the ground cut from under them.”⁷⁸ In practice, stigmatic assumptions still permeate and result in a hyper-regulatory approach characterized by the layering of legislation (public health, federal or state law, and municipal regulation).

In Germany, under the federal *Prostitution Act*, sex workers who sign an employment contract have the right to sick pay, pension benefits, and labour protection. However, these rights, enshrined in federal law, are undermined by other federal, state, and municipal regulations premised on the same stigmatic assumptions we see in Canada. For example, municipal “exclusion zones” (enforced through criminal sanction) mean that in some cities, like Munich, street-based sex work is prohibited, while in other municipalities, it is restricted to very isolated and dark industrial areas of the city, where sex workers lack access to sanitation and security.⁷⁹

Although the German legal model of prostitution originated in a discourse of amorality and rights for sex workers, these legal changes have not erased stigma. A government-funded evaluation of prostitution in Germany speaks to the enduring legacy of symbolic and structural forms of stigma:

The question of immorality remains contentious . . . This has created legal uncertainty for prostitutes, owners/managers of prostitution businesses and government agencies. How prostitution is classified has remained subject to the various stipulations issued by state ministries and even the moral sensibilities of individual representatives of government agencies.⁸⁰

While sex workers in Germany are ostensibly empowered to make rational choices about their labour location(s) and activities, the continued conceptual linkage of sex work with criminal activity and the hyper-regulation at the municipal level

⁷⁶ F. M. Shaver, “Prostitution: A Critical Analysis of Three Policy Approaches” *Canadian Public Policy* 11 (1985), 493–503. See also Jeffrey and Sullivan, “Canadian Sex Work Policy,” at 63.

⁷⁷ J. Lewis and E. Maticka-Tyndale, “Licensing Sex Work: Public Policy and Women’s Lives,” *Canadian Public Policy* 26 (2000), 437; P. Eden, *Sex Industry Worlds: Massage Parlours, Escort Agencies and the Social Organization of Sex Work in Christchurch* (University of Canterbury, Department of Sociology, Unpublished MA thesis, 1997).

⁷⁸ Quoted in B. Kavemann and H. Rabe, *The Act Regulating the Legal Situation of Prostitutes—implementation, impact, current developments*. (Berlin: SoFFiE, September 2007), at 10, <http://www.cahr.uni-osnabrueck.de/reddot/BroschuereProstGenglisch.pdf>.

⁷⁹ *Ibid.*

⁸⁰ *Ibid.* at 27.

perpetuate symbolic stigma without acknowledging that moralization, sometimes masquerading as risk, underlies the policies.

Unlike Germany, the state of Nevada (United States) enforces a legalized model that is explicitly premised on regulating harm. Counties with fewer than 400,000 inhabitants may licence brothels under *Nevada Revised Statutes* s 244.345. However, the law remains preoccupied with the notion of public nuisance and containment; tight controls are maintained on zoning⁸¹ and the location of establishments.⁸² Further, a number of laws are premised on the assumption that sex workers pose a risk to public health. Workers are responsible for ensuring that their patrons use barrier protection during sex acts,⁸³ and they are tested weekly for STIs and prohibited from working if evidence of infection is found.⁸⁴ Moreover, they must regularly be tested for HIV⁸⁵ and can be criminally charged for engaging in prostitution following a positive test.⁸⁶

Other statutes reveal the presumption that sex work is associated with criminal activity and therefore needs to be regulated. Sex workers are subject to a police check⁸⁷ and must apply and pay for a license. Prostitution and soliciting are permitted only in licensed brothels; any sex work that takes place outside of this context is criminalized.⁸⁸ Thus, sex workers are prohibited from working independently; they are required to pay the brothel owner's percentage, the costs of room and board, and sometimes mandatory "tips" to support staff.⁸⁹ Although they must conform to the expectations and conditions of employment set out by brothel owners, sex workers in Nevada are classified as independent contractors. This means that, like erotic dancers and municipally licensed body-rub parlour attendants in Canada, they are legitimate workers who are outside of the protection of employment standards and labour laws.⁹⁰

It would appear that the same structural stigma we see in Canada's criminalized response permeates legalized models of prostitution as well. Laws are based on the assumptions that prostitution is disorderly, requiring regulation and police surveillance, and that sex workers are vectors of disease. This cluster of stigmatic assumptions is used to justify mandatory health testing, very restricted working options, and spatial segregation. Sex workers also continue to be positioned as conditional citizens and denied access to full social and civic inclusion. Moreover, while a legalized system allows *some* sex workers to work without contravening

⁸¹ *Nevada Revised Statutes* at s 201.380

⁸² *Ibid.* at s 201.390

⁸³ *Nevada Administrative Code*, at s 441A.805

⁸⁴ *Ibid.* at s 441A.800

⁸⁵ *Nevada Revised Statutes*, at s 201.356

⁸⁶ *Ibid.* at s 201.358

⁸⁷ *Ibid.* at s 201.356

⁸⁸ *Ibid.* at s 201.354

⁸⁹ B. Brents and K. Hausbeck, "State Sanctioned Sex: Negotiating Informal and Formal Regulatory Practices in Nevada Brothels," *Sociological Perspectives* 44 (2001), 307.

⁹⁰ C. Bruckert and C. Parent, "Le travail du sexe comme métier," In *Mais oui c'est un travail!* eds. C. Parent, C. Bruckert, P. Corriveau, M. N. Mensah, and L. Toupin (Montreal: Université du Québec, 2010); E. Van der Meulen and E. M. Durisin, "Why Decriminalize? How Canada's Municipal and Federal Regulations Increase Sex Workers' Vulnerability," *Canadian Journal of Women and the Law* 20 (2008), 289.

the law, legalization also creates a criminalized (and even more repressed) sector.⁹¹ Workers who cannot work within the confines of the legalized regime (i.e., they do not meet the criteria for licenses, have a criminal record, are irregular migrants) or do not want to do so (i.e., they wish to work independently or do not want the permanent stigma of having registered as a sex worker) are criminalized and subject to the same repression imposed by any criminalized system. The physical endangerment that was the subject of the Ontario *Charter* challenge is also a real and present concern for illegal sex workers in a legalized regime.

Partial Criminalization

As we have seen, the legalized and criminalized systems are principally concerned with managing risk to “communities” in the form of nuisance, social disorder, and disease. The end-demand (or Swedish) model of partial criminalization pivots on somewhat differently configured notions of risk/riskiness. This legal approach is rooted in the 1970s feminist rethinking of gender and patriarchy, in which prostitution (and pornography) were identified as the symbol of the social, sexual, and economic domination of women by men,⁹² and is informed by research that defines sex work as slavery⁹³ and rape.⁹⁴ In 1999, the Swedish *Violence against Women Bill* asserted that “one issue that was closely related to that of violence against women and a lack of gender equality was the issue of men who purchase sexual services, usually from women, namely, the issue of prostitution.”⁹⁵ In this conceptual context, sex workers are not merely “at risk” of exploitation; rather, sex work itself is a form of gendered sexual violence. Swedish activist Gunilla Ekberg is blunt:

In prostitution, men use women's and girls' bodies, vaginas, anuses, mouths for their sexual pleasures and as vessels of ejaculation, over and over and over again. Prostitution is not sexual liberation; it is humiliation, it is torture, it is rape, it is sexual exploitation and should be named as such. Consequently, males who use women and girls in prostitution are sexual predators and rapists.⁹⁶

⁹¹ See Sullivan, “When (some) Prostitution is Legal.”

⁹² See, for example, K. Millett, *The Prostitution Papers: A Candid Dialogue* (New York: Avon, 1972); J. James, “The Prostitute as Victim,” in *The Victimization of Women*, eds. J. R. Chapman and M. J. Gates (Beverly Hills: Sage, 1977); K. Barry, *Female Sexual Slavery* (New York: NYU Press, 1979); E. Wilson, *What is to be Done About Violence Against Women?* (Harmondsworth: Penguin, 1983); S. Jeffreys, “Prostitution,” in *Women Against Violence Against Women*, eds. D. Rhodes and S. McNeil (London: Onlywomen Press, 1985); M. O'Hara, “Prostitution: Towards a feminist analysis and strategy,” *ibid.*

⁹³ K. Barry, *The Prostitution of Sexuality: The Global Exploitation of Women*. (New York: NYU Press, 1995); V. Carter, “Prostitution and the New Slavery,” in *Not For Sale: Feminists Resisting Prostitution and Pornography*, eds. R. Whisnant and C. Stark (North Melbourne: Spifex, 2004). S. Jeffreys, “Prostitution as a Harmful Cultural Practice,” in *Not For Sale: Feminists Resisting Prostitution and Pornography*, eds. R. Whisnant and C. Stark (North Melbourne: Spifex, 2004).

⁹⁴ M. Farley, “Prostitution is Sexual Violence,” *Psychiatric Times* October (2004), 7; M. Farley, “‘Bad for the Body, Bad for the Heart’: Prostitution Harms Women Even if Legalized or Decriminalized,” *Violence Against Women* 10 (2004), 1087.

⁹⁵ Swedish Institute, *Selected Extracts of the Swedish Government Report SOU 2010:49: The Ban Against the Purchase of Sexual Services. An Evaluation, 1999–2008*. (Government of Sweden, 2010) at 5.

⁹⁶ Special Advisor on issues of prostitution and trafficking in women at the Swedish Division for Gender Equality, quoted in B. Wallace, *The Ban on Purchasing Sex In Sweden: The So-Called ‘Swedish Model’ of Prostitution Licensing Authority* (Queensland, 2011).

The 1999 Swedish *Sex Purchase Act* that makes it illegal to “obtain a casual sexual relation in return for payment”⁹⁷ is ideologically cohesive and symbolically powerful—it criminalizes the buyers (presumed to be men) but not the sellers (presumed to be women) of sexual services. That said, the same stereotypical tropes that underlie aspects of the Canadian legislation reverberate: sex workers are framed as “exploited women,” the possibility that “prostitution is a business transaction between two equal parties”⁹⁸ is dismissed, and sex workers’ assertions of agency are categorically negated. Indeed, their right to make such a choice is *irrelevant*:

Those who defend prostitution argue that it is possible to differentiate between voluntary and non-voluntary prostitution, that adults should have the right to freely sell and freely purchase sex, and that the ban on the purchase of sexual services represents an outdated position based on sexual morality. However, from a gender equality and human rights perspective . . . the distinction between voluntary and non-voluntary prostitution is not relevant.⁹⁹

This is structural stigma—discourses of risk (to self and to society) are used to justify and legitimate regulation. Here we see a stigma feedback loop—stigmatic assumptions and ascription of victimhood, inconsistent with sex workers’ subject position, are drawn upon to de-legitimate and then reproduced in order to rationalize talking over, and for, sex workers, denying their voice and negating their agency. Moreover, this “carceral feminism”¹⁰⁰ individualizes social problems, thereby justifying a reliance on state apparatus—the same institutions that deny the human and civic rights of sex workers.

These contradictions have played out in Sweden; researchers,¹⁰¹ Norwegian government investigators,¹⁰² and Swedish sex workers¹⁰³ assert that there is significant evidence that the law has resulted in negative consequences, including increased violence and greater social and civic exclusion. For example, street-based sex workers in Sweden are working in dark and isolated areas (since clients will not risk approaching sex workers where there are witnesses), the client base of good customers has been eroded, and workers are not taking the time to properly assess potential clients. Sex workers are at risk of losing housing since landlords are now vulnerable to sanction, and the police’s interpretation of possession of condoms as

⁹⁷ *Swedish Penal Code*, Chapter 6, section 11.

⁹⁸ Swedish Institute, *Selected Extracts*, at 3.

⁹⁹ *Ibid.* at 31.

¹⁰⁰ E. Bernstein, “Militarized Humanitarianism Meets Carceral Feminism: The Politics of Sex, Rights, and Freedom in Contemporary Anti-Trafficking Campaigns,” *Signs: Journal of Women in Culture and Society* 36, 1 (2010), 45.

¹⁰¹ Wallace, “*The Ban on Purchasing Sex*”; D. Kulick, “On the Swedish model.” Presented at the *Beijing Plus Ten Meetings* (2005), http://www.globalrights.org/site/DocServer/Don_Kulick_on_the_Swedish_Model.pdf; L. Agustín, “Big Claims, Little Evidence: Sweden’s Law Against Buying Sex,” *The Local* (July 23, 2010), <http://www.thelocal.se/27962/20100723>; S. Dodillet and P. Östergren, “The Swedish Sex Purchase Act: Claimed Success and Documented Effects.” (2011), <http://myweb.dal.ca/mgodyea/Documents/CSWRP/CSWRPEUR/The%20Swedish%20Sex%20Purchase%20Act.%20Claimed%20Success%20and%20Documented%20Effects%20Dodillet%20&%20Ostgren%20May%202011.pdf>.

¹⁰² Norwegian working group, *Purchasing Sexual Services in Sweden and the Netherlands*. (Norway: Ministry of Justice and the Police, 2004).

¹⁰³ P. Jakobsson, *A Swedish sex worker on the criminalization of clients*. Video. (2010), <http://www.youtube.com/watch?v=7D7nOh57-I8>; S. Rosinha, “On the Situation of Sex Workers in Sweden,” Presented at the Taipei Sex Worker Conference in Taiwan, 2001.

evidence of sex work is a significant disincentive to using barrier protection.¹⁰⁴ Perhaps most explicitly speaking to the imperviousness of criminalization, sex workers are videotaped and followed by police and required to testify against their clients; those who refuse to comply are criminally charged with obstruction.¹⁰⁵ The Swedish Institute, while supportive of the law, acknowledges that:

people who are currently being exploited in prostitution state that the criminalization has intensified the social stigma of selling sex. They describe having chosen to prostitute themselves and do not consider themselves to be unwilling victims of anything. Even if it is not forbidden to sell sex, they feel they are hunted by the police. They feel that they are being treated as incapacitated persons because their actions are tolerated but their wishes and choices are not respected.¹⁰⁶

Deep-seated moralism is brought into sharp focus when these authors not only dismiss sex workers' knowledge and experiences as "feelings" but go on to assert that the "negative effects of the ban that they describe *must be viewed as positive* from the perspective that the purpose of the law is indeed to combat prostitution."¹⁰⁷ Neoliberal ideology is implicated in celebrating those who "have extricated themselves from prostitution"¹⁰⁸ as "good choice makers" while accepting the denial of social and civic rights to those who are unwilling to make the prescribed *correct* choices. Those individuals, marginalized and dismissed as irresponsible (risky) neoliberal subjects, must suffer the consequences.¹⁰⁹ The complex realities of women navigating choices within economic, social, and personal constraints, which cannot simply be wished away, are rendered invisible.

Decriminalization

In 2003, New Zealand became the first nation in the world to wholly decriminalize sex work. Amid controversy, existing laws that criminalized communication for the purposes of prostitution, keeping or managing a brothel, and living off the earnings of another's prostitution were repealed and replaced by the *Prostitution Reform Act (PRA)*, which permits the commercial sale of sex by individuals over the age of 18.¹¹⁰ Explicitly, the *PRA* states that its purpose is to:

¹⁰⁴ Norway introduced an end-demand law in 2009. A 2012 *Farlige Forbindelser* report (<http://prosentret.no/wp-content/uploads/2012/06/FARLIGE-FORBINDELSER.pdf>), commissioned by the City of Oslo, concluded, based on interviews with sex workers, police and social service providers, that sex workers were more vulnerable to violence and had increased their reliance on third parties. See partial translation of report by Wendy Lyon, <http://feministire.wordpress.com/2012/07/01/the-oslo-report-on-violence-against-sex-workers/>.

¹⁰⁵ Wallace, *The Ban on Purchasing Sex*; Kulick, "On the Swedish Model"; Dodillet and Östergren, "The Swedish Sex Purchase Act"

¹⁰⁶ Swedish Institute, *Selected Extracts*, at 34.

¹⁰⁷ *Ibid.* at 34, emphasis ours.

¹⁰⁸ *Ibid.* at 10.

¹⁰⁹ T. Rose, *Powers of Freedom: Reframing Political Thought* (Cambridge: Cambridge University Press, 1999). See also Scoular, "What's Law Got to Do With It?" at 33. Scoular makes a similar link to neoliberalism when she argues, "those who act responsibly by adopting appropriate lifestyles via work and norms of sexuality are offered inclusion, those who do not or cannot and instead remain in sex work . . . are excluded."

¹¹⁰ G. M. Abel, L. J. Fitzgerald and C. Brunton, "The Impact of Decriminalisation on the Number of Sex workers in New Zealand," *Journal of Social Policy* 38 (2009), 515.

decriminalize prostitution (while not endorsing or morally sanctioning prostitution or its use) and to create a framework that—(a) safeguards the human right of sex workers and protects them from exploitation: (b) promotes the welfare and occupational health and safety of sex workers: (c) is conducive to public health...¹¹¹

Under the *PRA*, managed brothels employing more than four workers must apply and obtain a brothel operator certificate,¹¹² while small, owner-operated collectives of four or fewer workers are exempt.¹¹³ The law also sets out specific health and safety requirements that mandate the use of condoms or barrier protection for any sexual service involving vaginal, anal, or oral penetration; clients are also implicated in these regulations and subject to a fine if “all reasonable steps” are not taken to “minimize the risk of acquiring or transmitting sexually transmissible infections.”¹¹⁴ Sex workers in New Zealand can receive customers in their own small, secure establishments, are empowered to manage health risk by obliging clients to use condoms, and can draw on labour laws to negotiate working conditions with their employers.¹¹⁵

While the *PRA* responds to the harms and discrimination of previous legislation by prioritizing worker health and safety over moralistic concerns, remnants of stigma remain. The explicit disavowal of the endorsement and moral sanctioning of prostitution in the *PRA* cues us that moral judgment is not absent from the law and that it does *not* consider sex work as a job “like any other.” This framing is underscored by section 18, which states that a person’s entitlement to benefits under the *Social Security Act* and the *Injury Prevention, Rehabilitation and Compensation Act* is neither cancelled nor affected by refusal to work, or to continue working, as a sex worker. In section 16, inducing or compelling persons to become involved in the commercial sex industry through the misuse of authority, blackmail, threat of violence, or the provision or withholding of illicit drugs is also expressly prohibited. Once again, we see a set of provisions that are redundant in light of existing criminal laws prohibiting sexual assault, sexual exploitation, blackmail, assault, and drug trafficking; the protectionist intent of the law pivots on the acceptance of the prevailing discourses linking sex work with exploitation and drug use. The subtext of the law suggests that sex workers are “at risk” and hyper-vulnerable to exploitation. Moralization may also be read in legal restrictions on the advertising of commercial sexual services;¹¹⁶ however, in reality, these regulations are not overly onerous (advertising is allowed in classified sections of newspapers and on the internet) and are similar to the restrictions commonly

¹¹¹ *Prostitution Reform Act, 2003*, s 3(a)(b)(c).

¹¹² The certification of brothel-operators was intended to reduce the chance of organized crime or exploitive ‘criminals’ becoming involved in operating brothels and victimizing workers; see Prostitution Law Review Committee, *Report of the Prostitution Law Review Committee on the Operation of the Prostitution Reform Act, 2003* (New Zealand: Ministry of Justice, 2008).

¹¹³ *Prostitution Reform Act, 2003*

¹¹⁴ *Ibid.* at s 9(3).

¹¹⁵ G. M. Able, *Decriminalisation: A Harm Minimisation and Human Rights Approach to Regulating Sex Work* (Dunedin, New Zealand: University of Otago, Unpublished PhD Dissertation, 2010); Prostitution Law Review Committee, *Report*.

¹¹⁶ *Prostitution Reform Act*, section 11

placed on the advertising of liquor and cigarettes. The remainder of the act treats sex work as any other type of business, regulating its commercial practice through provisions that reinforce that sex workers are subject to the protections of the *Health and Safety in Employment Act*¹¹⁷; regulating the location of commercial sex establishments through zoning by-laws¹¹⁸; and specifying the health and safety obligations of managers and workers.¹¹⁹

Although decriminalization is by no means a panacea, there is significant evidence to suggest that, in New Zealand, it has created the conditions of possibility for sex workers to minimize the risks that they encounter and to act as “responsible” neo-liberal citizens. Research suggests that, if they are victimized, sex workers in New Zealand are now more likely to report the incident to police and to seek assistance.¹²⁰

Further, the minimal regulations surrounding sex work under this model, comparable to that regulating any other service business, serve to significantly reduce structural stigma by relying less on assumptions of inherent risk. However, symbolic stigma in the form of a moralizing discourse remains a feature of the act, and the redundant provision of “protections” for sex workers against procuring alerts us to the legacy of the “at risk” discourse. While interviews with New Zealand sex workers reveal that decriminalization has not significantly reduced the social and symbolic stigma that they encounter in their communities, the experiences of other marginalized groups suggest that the removal of regulation imbued with the structural stigma of risk may be a first step in breaking down symbolic and moral stigma.¹²¹

Discussion

We began this paper with the recognition that we are standing at the precipice of change in the Canadian legislative/legal response to sex work and, therefore, that reflection on what those changes will mean for those who labour in the sex industry is both timely and imperative. Drawing on the concept of structural stigma, we have examined international policy models and demonstrated that while criminalization, legalization, and end-demand are certainly divergent policy approaches, all are infused with moralistic presumptions, draw on the rhetoric of risk, and are premised on (virtually identical) stigmatic assumptions. In Canada, the criminalized model draws on contradictory discourses that portray sex workers as both passive victims of exploitation and active agents who pose a threat to the order and safety of communities. In either case, sex workers are assumed to be incapable of acting as responsible, neo-liberal citizens, and their labour is de-legitimized and excluded from civil protections. Partial criminalization (end-demand), as in Sweden, resolves the tensions inherent in framing sex workers as *both* at-risk and risky by

¹¹⁷ Ibid. s 10

¹¹⁸ Ibid. s 14.

¹¹⁹ Ibid. ss 8 and 9.

¹²⁰ Able, *Decriminalisation*; Prostitution Law Review Committee, *Report*.

¹²¹ While arguably still in flux, the experiences of gay and lesbian communities in North America may shed some light on the importance of removing structural stigma in order to facilitate a movement toward destigmatization.

bestowing the disempowered, objectified status of victimhood that denies even the possibility of sex workers' agency. The paternalism of the Swedish model once again denies sex workers the opportunity to engage as citizens and perpetuates labour conditions that render sex workers more vulnerable and marginalized. Underscoring both the Canadian and the Swedish models is a moralized framing, which suggests that sex can never be "work" in the sense of legitimate labour.

A legalized model, such as Germany's, does position sex work as work and provides sex workers with access to civil legal protections. However, despite an official discourse of amorality, the layering of state and municipal regulations excludes and marginalizes sex workers in many communities. In Nevada's legalized model, we see legislators drawing on the rhetoric of risk and portraying sex workers as the carriers of HIV and other sexually transmitted infections. Of course, one might consider regulations requiring HIV testing and the use of barrier protection as a means of empowering sex workers as responsible, neo-liberal citizens who exercise agency in protecting their own health and that of their clients. However, the targeted nature of this regulation suggests that a structural stigma is in operation that singles out sex work as uniquely "risky"; a food service worker infected with Hepatitis can easily pass the disease to many customers, yet regular testing for Hepatitis is not required in the restaurant industry. This suggests that food service workers are believed to either pose less of a risk to public health than sex workers or be more responsible in their labour practices and inclined to *voluntarily* act to protect the well-being of their customers. Decriminalization under the *Prostitution Reform Act* in New Zealand avoids the stigmatic assumption that sex workers are irresponsible by stipulating that workers must "take reasonable steps to minimize the risk of acquiring or transmitting sexually transmissible infections"¹²² and leaving the precise mechanisms to the discretion of individual workers. Although, as we have seen, New Zealand's celebrated model retains the echoes of risk and moralization, it is considerably more subtle and less intrusive in the everyday lives of individuals working in the sex industry.

As Canada's judiciary and legislators reflect on the options for change, fueled by neo-liberal agendas and in the context of profoundly embedded stigmatic assumptions, we would argue that any regulatory model risks reproducing the harms that Justice Himel identified and that researchers and sex workers have been arguing for years—violence, the denial of rights, and social and civic exclusion. This is a cautionary tale that speaks to the importance of transcending stigmatic assumptions of risky/at risk and positioning sex workers as legitimate labourers entitled to the same rights and protections as any other Canadian worker. Rather than importing any of these models wholesale, we call for a *Made in Canada* solution that takes its lead

¹²² *Prostitution Reform Act*, section 9.

from sex workers—the men and women who embrace the term “sex work”¹²³ precisely because it is an appropriate linguistic framing of their experience.

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¹²³ The term was famously coined by Scarlet Harlot.