

ARTICLE

MALE VIOLENCE AGAINST WOMEN IN PROSTITUTION: WEIGHING FEMINIST LEGISLATIVE RESPONSES TO A TROUBLING CANADIAN PHENOMENON

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[E]very hierarchy needs a bottom and prostitution is the bottom...
– Andrea Dworkin¹

INTRODUCTION

Although prostitution² is a divisive issue,³ the Canadian government may soon have to revisit reforming the legislation relating to it. Prostitution predominantly operates “under-

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1. Andrea Dworkin, “Prostitution and Male Supremacy,” in *Life and Death: Unapologetic Writings on the Continuing War Against Women* (New York: Free Press, 1997); see also Andrea Dworkin, “Prostitution and Male Supremacy” (31 October 1992) at 2, online: No Status Quo <<http://www.nostatusquo.com/ACLU/dworkin/MichLawJourl.html>>.

2. Prostitution is a gendered phenomenon. Although men and transgendered persons are also prostitutes, this paper focuses on adult women in prostitution since they make up the vast majority of prostitutes in Canada. This paper does not focus on the sexual sale of girls or boys, which is “sexual exploitation” rather than prostitution. Also, I have chosen to use the term “prostitution” rather than “sex work” because I find the commercialization and commodification of women's embodied sexuality problematic, as I discuss in this paper. Prostitution is heavily imbued with violence and I view it as a concrete extension of the greater phenomenon of the feminization of poverty and gender, race, and class hierarchies, among others, within society. I find the label of “sex work” problematic because I fear that it will minimize and obscure the realities of violence and hierarchy that inform prostitution and, instead, legitimate prostitution as a reasonable and/or rational choice for poor women.

3. Recently, the Subcommittee on Solicitation Laws attempted to reform the prostitution laws in Canada, but were unable to reach consensus on how to do so. The Subcommittee noted that, although they heard from approximately 300 witnesses, reaching consensus was stalled by the diverging philosophical views of witnesses

ground” in Canada, with an estimated 80 to 95 percent of it occurring indoors and hidden from public view,⁴ yet its realities are slowly coming to light. The gruesome violence to which prostitutes are all too often subjected became apparent when Robert William Pickton, a pig farmer from Coquitlam, British Columbia, was charged for the murder of over 20 prostitutes and convicted for the second degree murder of six of the women, who were all from the Downtown Eastside of Vancouver (the “DTES”).⁵ What was originally the “50 Missing Women’s Case” soon swelled to over 65,⁶ with the mass disappearance and death of survival-sex prostitutes from the DTES finally making the headlines once their quantum grew too large to ignore any longer.⁷ The fact that it took close to 50 female prostitutes, many of whom were Aboriginal and lived in abject poverty, to go missing to spur a media frenzy is indicative of the lack of concern prostitutes are generally afforded by society. Surely media and police attention would have been engaged, yet earlier and far more appropriately,⁸ if 50 middle-class, white, non-prostituted women had gone missing.

In a plethora of ways, prostitutes do not enjoy the same privileges, protections and human rights that many Canadians take for granted. Rather, they are exposed to stigma, male violence and gender-biased criminalization⁹ within Canada. Prostitutes, particularly street prostitutes, are perhaps the most marginalized women in society, often intersectionally-dis-

and of the Subcommittee’s members. The first of the two diverging philosophies and accompanying models is “The Swedish Model,” which views prostitution as a form of violence and is predominantly the abolitionist feminist approach; this approach was ultimately recommended by Conservative Party’s members. Second, the “Model to Take Consensual Adult Prostitution Out of the Criminal Context” by decriminalization or legalization/regulation is supported by decriminalization feminists; it was ultimately recommended by the Liberal, New Democratic, and Bloc Québécois Parties’ members. See Canada, Subcommittee on Solicitation Laws, *The Challenge of Change: A Study of Canada’s Criminal Prostitution Laws* (Ottawa: Standing Committee on Justice and Human Rights, 2006) [*Challenge of Change*] at 71-84, 89-92.

4. *Ibid.* at 5.
5. Robert William Pickton was convicted of second-degree murder for six of the 26 women he was charged with murdering. See “Pickton found guilty on 6 counts of 2nd-degree murder” *CBC News* (9 December 2007), online: *CBC News* <<http://www.cbc.ca/canada/story/2007/12/09/pickton-verdict.html>>.
6. Lori Culbert “Missing women’s resting place marked” *The Vancouver Sun* (11 December 2007), online: *Canada.com* <<http://www.canada.com/vancouver/features/pickton/story.html?id=36d59ccf-9272-4101-b307-82eb9f01443d>>.
7. The police were informed that female prostitutes were going missing as many as five years prior to actually treating the women’s disappearances as a murder case. See “Robert Pickton Murder Trial Begins with Gruesome Testimony” *CityNews* (22 January 2007), online: *CityNews* <http://www.citynews.ca/news/news_7107.aspx>.
8. Even when the media and the public were told that a police task force of nine officers were investigating, most of the officers were actually part-time or working two jobs. See Lindsay Kines, Kim Bolan & Lori Culbert, “How the police investigation was flawed, Too few officers, police infighting and lack of experience undermined first probe into disappearances” *The Vancouver Sun* (22 September 2001), online: *Vanished Voices* <<http://www.vanishedvoices.com/ArticleSunSept22.html>>.
9. Under the communicating law, s. 213 of the *Criminal Code*, R.S.C. 1985, c. C-46 [*Criminal Code*], the conviction rates are higher and the sentences are harsher for female prostitutes. See *Challenge of Change*, *supra* note 3 at 52-53. Even though this law can be equally enforced against prostitutes and johns, up until recently, enforcement of the law was sexist, with “approximately three prostitutes [being] charged to every trick”: John Lowman, *Street Prostitution: Assessing the Impact of the Law* (Vancouver: Communications and Public Affairs for the Department of Justice, 1990) [*Street Prostitution*] at 196. As well, for the bawdy house offences, ss. 210 and 211 of the *Criminal Code*, operators of bawdy houses often escape charges by pleading ignorance to illicit activities occurring on their premises and instead shifting blame to prostitutes. See *Challenge of Change*, *supra* note 3 at 55. Fran Shaver contends that a “double sexual standard exists” that targets those selling sexual services rather than those purchasing them. See Fran Shaver, “Prostitution: A Female Crime?” in Ellen Alderberg & Claudia Currie, eds., *Conflict with the Law: Women and the Canadian Justice System* (Vancouver: Press Gang Publishers, 1993) 153 at 164-65.

advantaged along race, class and ability lines;¹⁰ their status as prostitutes further entrenches their stigmatization and otherization. The prostitutes who are most visible, street prostitutes, are treated as a nuisance, their lived realities rarely engaging public concern. Furthermore, routine and extreme forms of male violence pervade prostitution, whether occurring indoors or out.¹¹

Yet, prostitutes are often thwarted from accessing the state protection they require. Reporting violence at the hands of a john or pimp reciprocally exposes a prostitute to criminal penalties.¹² As well, prostitutes who do report male violence are often blamed by police, as well as the public; they are told that “they asked for it” and are regarded as casualties of their own choices.¹³ The Vancouver Police Department has been routinely criticized for systemically ignoring prostitutes’ victimization.¹⁴ Not surprisingly, the gender-biased criminalization of prostitutes and their distrust of police encourages adversarial relations between the two groups.

In many ways, the existing prostitution laws and their gender-biased enforcement within Canada serve to make prostitutes more vulnerable. Lowman suggests that, in particular, the communicating law, s. 213 of the *Criminal Code*,¹⁵ encourages “a discourse of disposal” that, along with prostitutes’ alienation from police protection, enables predatory, sexist men to perpetrate violence and even murder against prostitutes, and feel justified in doing so.¹⁶ Of course, it is not the laws, but rather certain men, who are ab/using, raping and murdering prostitutes. Yet, these laws, and the adversarial relations they create between prostitutes and police, leave prostitutes more vulnerable to bearing the brunt of misogyny and extreme male violence that stems from gender hierarchy and is amplified, and targeted, because of their stigmatized status.

Given that prostitutes are arguably the most marginalized women in society, prostitution is an obvious women’s issue. Yet, paradoxically, it polarizes feminists. This philosophical di-

10. Prostitutes, particularly street prostitutes, are often intersectionally-marginalized along gender, race, class, and ability lines. For example, in Vancouver, as Lee Lakeman asserts, “It is Aboriginal women in the streets and Asian [immigrant] women in the massage parlours.” See a video clip at <http://www.workingtv.com/prostitution2010.html>. Racialized and intersectionally-disadvantaged women are particularly exposed to the feminization of poverty: “[i]n 2003, 49.4 percent of all unattached women and 58.8 percent of single mothers were living below the poverty line.... In 1996, 73 percent of Aboriginal single mothers were living below the poverty line. In 1998, 85.4 percent of single mothers under twenty-five were living in poverty.” See Gwen Brodsky & Shelagh Day, “Women’s Poverty is an Equality Violation” in Fay Faraday, Margaret Denike, & M. Kate Stephenson, eds., *Making Equality Rights Real: Securing Substantive Equality under the Charter* (Toronto: Irwin Law, 2006) 319 at 321.

11. Male violence in the form of verbal, physical, and sexual abuse and murder is perpetrated against prostitutes, particularly street prostitutes, at alarming rates. See *Challenge of Change*, *supra* note 3 at 17-21. For example, over only a six year span, from 1992 to 1998, more than 86 prostitutes from across Canada were murdered. See John Lowman, “Violence and the Outlaw Status of (Street) Prostitution in Canada” (2000) 6 *Violence Against Women* 987 at 988. I also discuss the lived realities and dangers imbued within prostitution in Part I of this paper.

12. PIVOT Legal Society, *Voices for Dignity: A Call to End the Harms Caused by Canada’s Sex Trade Laws* (Vancouver: The Law Foundation of British Columbia, 2004) at 40-41 [Voices], online: PIVOT <<http://www.pivotlegal.org/Publications/Voices/index.htm>>.

13. *Ibid.*

14. Lowman, *supra* note 11 at 995-97. See also notes 7 and 8.

15. *Criminal Code*, R.S.C. 1985, c. C-46, s. 213 [*Criminal Code*].

16. See Lowman, *supra* note 11. Pickton allegedly wrote to his pen pal in prison that he was “brought into this world” to “change this world of [their] evil ways.” See Lori Culbert, “Pickton said he fought world’s ‘evil’: let-ters” *National Post* (10 December 2007), online: National Post <<http://www.nationalpost.com/rss/story.html?id=156913>>.

vide has played an unfortunate role in stalling the progress of much needed legislative reform to the prostitution laws in Canada.¹⁷ In response to failed attempts by Parliament to change the current laws, two *Charter* challenges were launched in Canada to interrogate the constitutionality of ss. 210 to 213 of the *Criminal Code*.¹⁸ If the laws are struck down, legislative reform will likely be revisited and Canada will be faced with some significant decisions about what legal changes should be made. Regardless, the current laws, which expose prostitutes to violence and murder, as I will discuss, necessitate immediate legal reform.

In this paper, I argue that in order to effect meaningful change, a theoretical reframing of feminists' approaches to prostitution is necessary to find some middle ground in the seemingly irreconcilable debate between feminists. By focusing instead on feminists' common goals and problematizing the concept of "choice," I argue that the best way to move forward is by embracing the most advantageous legislative model now available: the Swedish model, which criminalizes the buyers rather than the sellers of sexual services. By incorporating Margaret Jane Radin's commodification theory, I argue that a more appropriate approach to the market alienability of sexuality via prostitution, which often involves the commodification of society's most vulnerable members, should be one of incomplete commodification and asymmetrical criminalization, as I will soon discuss. Furthermore, I argue that this approach best upholds the purposes behind prostitution legislation (i.e., lessening both nuisance and exploitation), accepted understandings of contested commodities in Canada as reflected in the *Assisted Human Reproduction Act*¹⁹ (the "AHRA") and Canada's commitment to substantive equality under the *Charter* more generally.

In Part I, I canvass the current state of prostitution in the Canadian context, discussing the current laws and analyzing how, in particular, the gender-biased over-enforcement of s. 213 of the *Criminal Code* has made prostitutes more vulnerable and failed to lessen nuisance and exploitation. Further, I explore disturbing narratives of male violence against prostitutes within Canadian case law to render more tangible the lived realities and dangers im-

17. *Challenge of Change*, *supra* note 3.

18. In British Columbia, Katrina Pacey of PIVOT and Joseph Arvay, Q.C. have launched a challenge to ss. 210, 211, 212(1) except for subsections (g)(i), 212(3), and 213 of the *Criminal Code* on behalf of the Downtown Eastside Sex Workers United Against Violence Society ("SWUAV"), alleging that these provisions constitutionally infringe ss. 2(b), 2(d), 7, and 15 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11 [*Charter*]. SWUAV's Statement of Claim is available online: PIVOT <<http://www.pivotlegal.org/pdfs/FiledPleadings.pdf>>. However, the challenge was dismissed by Mr. Justice Ehrcke of the B.C. Supreme Court on the basis that the plaintiffs lacked both private and public interest standing: *Downtown Eastside Sex Workers United Against Violence Society v. Attorney General (Canada)*, 2008 BCSC 1726. SWUAV is appealing this decision and its Notice of Appeal and Factum are available online: PIVOT <<http://www.pivotlegal.org/pdfs/2009-05-27-SWUAV-Notice-of-Appeal-and-Factum.pdf>>. In Ontario, Terri Jean Bedford, a former dominatrix, Amy Lebovitch, a current prostitute, and Valerie Scott, a former prostitute and current Executive Director of Sex Professionals of Canada, have launched a s. 7 *Charter* challenge to ss. 210 and 212(1)(j) of the *Criminal Code* and a s. 2(b) and s. 7 *Charter* challenge to s. 213(1)(c) of the *Criminal Code*: *Bedford v. Canada (Attorney General)* (23 April 2007), Superior Court of Justice, Toronto Court File No. 07-CV-329807PD1; the pre-trial decisions regarding intervenor applications are *Bedford v. Canada (Attorney General)*, [2009] O.J. No. 2739, 2009 CanLII 33518 (Ont. S.C.J.), rev'd 2009 ONCA 669, [2009] O.J. No. 3881.

19. *Assisted Human Reproduction Act*, S.C. 2004, c. 2 [AHRA]. The AHRA came into force on April 22, 2004, with the exception of certain sections; to date, ss. 12, 14-19, 24(1)(a), (e), (g), 40-59, 76 of the AHRA are still not in force. For more details of the legislative and regulatory history of the AHRA, see *Quebec (Attorney General) v. Canada (Attorney General)*, 298 D.L.R. (4th) 712, 2008 CarswellQue 9848 (C.A.) at paras. 3-16. The constitutionality of the regime has recently been put in doubt since the Quebec Court of Appeal in *Quebec (Attorney General) v. Canada (Attorney General)* held that ss. 8-19, 40-53, 60, 61, and 68 of the AHRA were *ultra vires* the jurisdiction of the Parliament of Canada to enact. The case has been appealed to the Supreme Court of Canada.

bued within prostitution. For these reasons, I argue that immediate action and legal reform are necessary.

In Part II, I foreground the feminist debate regarding prostitution and attempt to depolarize the “coercion/consent dichotomy”²⁰ by suggesting instead that “choice” should be viewed as a spectrum or continuum, rather than a rigid binary. Informing this continuum of choice are the varied reasons for entry into, and types of, prostitution. However, I will argue that it would be reminiscent of the failures of second-wave feminism not to center the interests of the most marginalized women, whose choices are most greatly circumscribed. Thus, I advocate for something similar to the abolitionist²¹ feminist approach to prostitution, with a reframed articulation of “choice.” Last, I turn to the common goals of feminists — eliminating stigma, violence and empowering women in prostitution — arguing that these, as well as the amelioration of the most disadvantaged prostitutes, should primarily inform feminist struggle for change.

In Part III, I turn to Radin’s conceptualization of sexuality as a contested commodity and advocate her assertion that “prostitution should be governed by a regime of incomplete commodification.”²² By adopting Radin’s assertion that “justice under nonideal circumstances, pragmatic justice, consists in choosing the best alternative now available to us,”²³ and grounded in an understanding that sexism and violence against women are still apparent within Canada, I explore the extra-jurisdictional models currently in place: legalization, decriminalization and asymmetrical criminalization (i.e., the Swedish model). Ultimately, I find decriminalization more desirable than legalization, yet still imbued with the same drawbacks. Thus, I argue that asymmetrical criminalization, informed by the Swedish model, is the best legal framework to adopt in Canada.

In Part IV, I explore how adopting the Swedish model would best promote the purposes behind our current legislation and common feminist goals. Not only does the Swedish model appropriately shift the focus from prostitutes to the men driving demand, it is also consonant with substantive equality and the treatment of similarly contested commodities in Canada. I explore how these contested commodities are treated under the *AHRA* and argue that a similar recognition of the need to protect society’s most socio-economically vulnerable members from commodification should be affected by asymmetrically criminalizing prostitution in Canada. Finally, I explore how asymmetrical criminalization is consonant with substantive equality and affirmative action under s. 15 of the *Charter*, as recently rearticulated in *R. v. Kapp* (“*Kapp*”).²⁴

In my conclusion, I suggest that legal reform alone will not be enough to truly achieve feminists’ goals or the purposes that underpin prostitution laws. To be most effective, legislative change must be buttressed by better social services, education regarding prostitution,

20. Bertha E. Hernández-Truyol & Jane E. Larson, “Sexual Labor and Human Rights” (2005) 37 Colum. Hum. Rts. L. Rev. 391 at 391.

21. While we may be a long way from “abolishing” prostitution, certainly it can be lessened. Although I do not entirely side with the abolitionist belief that all prostitution, in and of itself, is violence against women, I do think that it is imbued with violence and a circumscription of choice such that it can often be experienced as violence. Making prostitution safer while practiced is necessary, but it should not supersede lessening prostitution and helping women to exit it more generally.

22. Margaret Jane Radin, “Market-Inalienability” (1987) 100 Harv. L. Rev. 1849 at 1921.

23. *Ibid.* at 1915.

24. *R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483 [*Kapp*].

exit programs and better policing strategies. These supports will ensure the laws are effectively implemented and women's rights and substantive equality are upheld within Canada.

I. PROSTITUTION IN THE CANADIAN CONTEXT

A. The Current Legal Framework in Canada

Although prostitution is “technically legal in Canada,”²⁵ certain activities related to it are regulated indirectly via ss. 210 to 213 of the *Criminal Code*;²⁶ the purposes behind these laws are to target prostitution-related nuisance and exploitation.²⁷ Sections 210 and 211 of the *Criminal Code* are the “bawdy house laws,” which relate primarily to indoor prostitution.²⁸ Sections 212(1) and (3) of the *Criminal Code*, the “procuring laws,” relate to offences involving the procurement of adult prostitution, including enticing someone to become a prostitute or living off the avails of prostitution.²⁹ Section 212 specifically targets exploitation and those who live parasitically off prostitutes, namely pimps.³⁰ Cory J., writing for the majority of the Supreme Court of Canada in *R. v. Downey*, notes that s. 212(1)(j) is aimed at remedying the social problem of abuse inflicted by pimps upon prostitutes, whom he rec-

25. John Lowman, “Prostitution in Canada” *Canadian Criminology: Perspectives on Crime and Criminality* (Toronto: Harcourt Brace, 1991) 113 at 118. See also *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123 at 1162, [1990] 4 W.W.R. 481 [*Reference re*], aff’d by Lamer C.J. for the majority in *R. v. Corbeil*, [1991] 1 S.C.R. 830 at 835, 64 C.C.C. (3d) 272 [*Corbeil*], where he stated “prostitution itself is not illegal in Canada.”

26. *Corbeil*, *ibid.*; and *Reference re*, *ibid.*

27. *Challenge of Change*, *supra* note 3 at 37. In regards to nuisance, see *Reference re*, *supra* note 25. In regards to exploitation, which can also be described as parasitically living off the avails of prostitution, see *R. v. Downey*, [1992] 2 S.C.R. 10, 90 D.L.R. (4th) 449 [*Downey*]; *R. v. Grilo* (1991), 2 O.R. (3d) 514, 64 C.C.C. (3d) 53 (C.A.) [*Grilo*].

28. *Criminal Code*, *supra* note 15, ss. 210 and 211. Section 197(1) of the *Criminal Code* defines a “common bawdy-house” as “a place that is (a) kept or occupied, or (b) resorted to by one or more persons, for the purpose of prostitution or the practice of acts of indecency.” Section 210(1) makes “keep[ing] a common bawdy-house” an indictable offence punishable by imprisonment for up to two years. In *R. v. Milberg*, Robins J.A. of the Ontario Court of Appeal stated that in “each case the Crown must prove a frequent and habitual use of the premises for the purposes of prostitution”: *R. v. Milberg* (1987), 20 O.A.C. 75, 35 C.C.C. (3d) 45 (C.A.), affirming *R. v. Patterson*, [1968] S.C.R. 157, [1968] 2 C.C.C. 247. For example, a hotel, house, parking lot, or massage parlour where sexual services are provided would be a “bawdy-house” if prostitution regularly occurs there: *Challenge of Change*, *supra* note 3 at 45; and *R. v. Ng*, 2007 BCPC 204, [2007] B.C.J. No. 1388. To be convicted of keeping a bawdy-house under s. 210(1) of the *Criminal Code*, the accused would have to 1) have some degree of control over the care and management of the premises and 2) participate to some extent in the “illicit” activities there: *Corbeil*, *supra* note 25 at 834 (cited to S.C.R.). Section 211 of the *Criminal Code* makes knowingly transporting someone to a bawdy-house a summary offence.

29. *Criminal Code*, *supra* note 15, ss. 212(1) and (3). These are indictable offences punishable by imprisonment for up to ten years.

30. Section 212(1)(j) of the *Criminal Code*, *supra* note 15, relates to living off the avails of prostitution and is aimed at those who live exploitatively or parasitically off prostitutes, namely pimps: *Downey*, *supra* note 27. Section 212 will not criminalize those who can adduce evidence that they have “non-parasitic, legitimate living arrangements with prostitutes”: *Downey*, *supra* note 27 at 36-39 (cited to S.C.R.). In *Downey*, Cory J. held for the majority of the Court that s. 212(3) of the *Criminal Code* infringed s. 11(d) of the *Charter*, but was upheld under s. 1. Section 212(3) states that “[e]vidence that a person lives with or is habitually in the company of a prostitute or lives in a common bawdy-house is, in the absence of evidence to the contrary, proof that the person lives on the avails of prostitution.” Cory J. held that s. 212(3) was not an unreasonable inference; it was a rebuttable presumption that an accused could easily displace by providing evidence to the contrary. Although this reverse onus infringed an accused’s right to be presumed innocent under s. 11(d) of the *Charter*, it was upheld under s. 1 of the *Charter* given Parliament’s recognition that evidence would otherwise be difficult to obtain since prostitutes are often unwilling to testify against a pimp because of fear of violent reprisal. However, someone who has a personal relationship with a prostitute, such as a romantic partner or roommate, can live with a prostitute without committing an offence: *Grilo*, *supra* note 27 at paras. 25-27.

ognizes as “a particularly vulnerable segment of society.”³¹ Thus, profiting from the commercial sale of a person’s sexuality is considered exploitative and illegal within Canadian law. Unfortunately, these sections, which target indoor and exploitative prostitution, are the most under-enforced of the prostitution laws.

In contrast, s. 213 of the *Criminal Code* accounts for “90% of all prostitution-related offences reported by police,”³² which makes it the most implemented provision of the prostitution laws by far. Section 213 of the *Criminal Code*, the “communicating law,” makes it an offence for a person “in a public place” to stop or communicate with any person for the purpose of engaging in prostitution.³³ The provision is targeted at lessening or preventing the social nuisance caused by the public solicitation of prostitutes and johns;³⁴ thus, it focuses primarily on eliminating street prostitution. This means that street prostitution is targeted by law enforcement far more than indoor prostitution. Furthermore, it also means that the enforcement of prostitution laws is skewed in terms of targeting nuisance, rather than exploitation.

Yet, the communicating law has largely failed to lessen nuisance. According to a census conducted in Vancouver from 1982 through 1993, although street prostitution “abated for a few months after the introduction of the communicating law in December 1985, by the latter half of 1986 the number of [prostitutes] visible on the street had returned to the level of the summer before, and has been rising ever since.”³⁵ Thus, the prostitution laws have failed to achieve their objectives of lessening nuisance and exploitation. Rather, cumulatively, they have simply made prostitutes more vulnerable.

B. The Communicating Law: Exposing Prostitutes to Violence and Murder

Unfortunately, not only has the communicating law failed to lessen street prostitution and its associated nuisances, but it is also gender-biased: it more harshly criminalizes female street prostitutes rather than male johns. This gender bias is made clear if we consider recent statistics:

Within the statistics on the use of s. 213, a gender and role imbalance (client versus prostitute) quickly emerges, both in terms of guilty findings and sentencing.... [I]n 2003-2004:

68% of women charged were found guilty under section 213, while 70% of charges were stayed or withdrawn for men charged under the same provision;

Upon conviction, just under 40% of women were given prison sentences, while just under 40% of men convicted under the same provision were fined, and the prison sentence rate for men was just over 5%;

31. Downey, *supra* note 27 at 39 (cited to S.C.R.).

32. *Challenge of Change*, *supra* note 3 at 52.

33. *Criminal Code*, *supra* note 15, s. 213. This offence is punishable on summary conviction,

34. In *Reference re*, *supra* note 25 at 1134-35 (cited to S.C.R.), Dickson C.J. characterized the legislative objective of s. 213(1)(c), which was then s. 195(1)(c), as “address[ing] solicitation in public places and, to that end, seek[ing] to eradicate the various forms of social nuisance arising from the public display of the sale of sex.... the legislation is aimed at taking solicitation for the purposes of prostitution off the streets and out of public view.”

35. “An Award-winning Criminology Professor Issues a Challenge to the Politicians of Canada. The Issue He Wants Them to Tackle: The Hypocrisy of Prostitution Laws” *The Province* (28 September 1997) A47.

92% of those sentenced to prison for communicating offences in 2003-2004 were female.

Because of the marginalized environment in which they live, prostitutes often face criminal records and harsher penalties than their clients.... By contrast, statistics indicate that clients walk away with lighter penalties and fewer convictions than prostitutes under section 213. Clients usually manage to avoid full prosecution and jail sentences by attending “john school”, upon completion of which they receive a stay of charges or the charge is withdrawn.³⁶ [Emphasis added.]

This sexist criminalization of female street prostitutes both reflects and perpetuates gender inequity. The gender-biased criminalization and imprisonment of female prostitutes is indicative of an aberrant and systemic sexism operating within the criminal justice system that needs to be remedied. This gender bias is even more egregious since it is the most intersectionally-marginalized prostitutes who are disproportionately criminalized and imprisoned. The statistics indicate that the most vulnerable women involved in prostitution, female street prostitutes who are often racialized and living in poverty, must bear the blunt force of the criminal law. Criminal charges and imprisonment adversely affect women in street prostitution, many of whom are single mothers who are separated from their children while incarcerated, sometimes losing child custody as a result. Not only are street prostitutes over-incarcerated and disparately impacted by the criminal justice system, they are further affected by conditions placed on them upon release from prison.

Judges often place conditions of release on female street prostitutes and these conditions play an active role in making prostitutes more vulnerable to male violence. In particular, the communicating law causes street prostitutes to disperse and become more susceptible to violence and even murder. Prostitutes that are charged with communicating often disperse because they want to avoid being charged again and are usually given “area restrictions” that prohibit them from returning to the stroll³⁷ where they were arrested.³⁸ Dispersal also entails a separation from other prostitutes one may have been working alongside and a movement into areas where one has less of a chance of being noticed and arrested. The areas that Vancouver street prostitutes often move to are in the DTES, where they “spread out over a five-block area, standing alone in poorly lit back alleys and usually working alone.”³⁹ These areas do not allow for protective networks to be formed with other working prostitutes. Therefore, this dispersal allows a man to “easily stop ..., pick up a woman, and drive away without ever being seen.”⁴⁰

Clearly, the disproportionate criminalization of prostitutes and their exposure to male violence must be remedied; a legislative overhaul of the prostitution laws is necessary and pressing. Although it may seem exaggerated to claim the communicating law is killing women, the law is certainly rendering prostitutes far more susceptible to male violence. By causing prostitutes to disperse, alienating them from the police and rendering them

36. *Challenge of Change*, *supra* note 3 at 52-53.

37. A “stroll” is known within the prostitution community to be an area that one frequents.

38. Lowman, *Street Prostitution*, *supra* note 9 at 198.

39. Lowman, “Violence and the Outlaw Status of (Street) Prostitution in Canada,” *supra* note 11 at 994.

40. Dan Gardner, “Courting Death (Part 1): The Law has Hounded Hookers Out of Safe Areas and Into Dark Alleys, Making Them Easy Prey for Murderers” *The Ottawa Citizen* (15 June 2002) B1.

more vulnerable to predatory men, the communicating law has led to a sharp increase in the number of prostitutes murdered.⁴¹

C. All Forms of Prostitution are Imbued with Violence

Violence is pervasive in all forms of prostitution. Although off-street prostitutes are generally subject to less violence, violence occurs in all types of prostitution, from street prostitution, to massage parlours, to escort agencies.⁴² The different types of abuse and violence range from “whistles and insults to assault, rape and murder.”⁴³ Again, stigmatization exposes prostitutes to violence as they are predominantly “regarded as criminals and second-class citizens, [such that] some people feel justified in humiliating them, harassing them, throwing things at them and even physically abusing them.”⁴⁴ Thus, the abuse and violence prostitutes experience ranges from humiliation and degradation to horrifically sadistic murder. I agree with Lowman, who states that “violence against prostitutes ought [also] to be understood as part of a continuum of violence against women more generally.”⁴⁵ Yet, violence against prostitutes is particularly severe since it is targeted at them and amplified given their stigmatized status.

Canadian case law abounds with narratives of the extremely sadistic, misogynistic brutality and murder that prostitutes are subject to, simply because of their status as prostitutes. In *R. v. Palma*, an Ontario man picked up and fatally shot three women (two of whom were transgendered) within the span of an hour; his murderous rampage was targeted solely at street prostitutes.⁴⁶ In *Jones v. Smith*, Jones disclosed to a forensic psychiatrist his detailed plans to murder prostitutes from Vancouver’s DTES. Luckily, he was caught before successfully completing his “trial run.” He disclosed that he had deliberately chosen a small prostitute who he could easily overwhelm, and had planned to kidnap her, take her back to his home and use her as a “sex slave” before shooting her in the face to erase her identity. He had taken time off work and carefully prepared his apartment to execute his plan. Fortunately, he was unsuccessful.⁴⁷

Despite the violence prostitutes are subjected to, *R. v. Evans* is testament to the resilience and will to survive against all odds of women engaged in prostitution. In this horrific case, a woman was unlawfully confined in a car and driven by two men to a remote locale, where she was sexually and physically assaulted by them, stabbed in the side of her throat, and left to die. By feigning death and then inserting her thumb and forefinger into her knife wounds, she managed to cease the flow of blood and travel on foot to a farmhouse a third

41. John Lowman documents that since the communicating law was enacted and entered into force in 1985, there has been a sharp increase in the number of prostitutes found killed. In British Columbia alone: from 1975-1979, three prostitutes were murdered; from 1980-1984, eight prostitutes were murdered; from 1985-1989, 22 prostitutes were murdered; from 1990-1994, 24 prostitutes were murdered; from 1995-1999, 50 prostitutes were murdered: *Challenge of Change*, supra note 3 at 19. Furthermore, it should be noted that, except for the statistics from 1995-1999 that also factored in the missing women believed to be murdered, these are the number of prostitutes found murdered in these years. Thus, Pickton is surely not alone in his murderous violence towards prostitutes.

42. *Ibid.* at 17.

43. *Ibid.*

44. *Ibid.* at 20.

45. Lowman, supra note 11 at 1006.

46. *R. v. Palma*, [2001] O.J. No. 3283, 2001 CarswellOnt 3384 (Sup. Ct.) at paras. 16-19 (QL).

47. *Jones v. Smith*, [1999] 1 S.C.R. 455, 169 D.L.R. (4th) 385 at paras. 36-39 and 88.

of a kilometre away. After a tracheotomy and 11 days in hospital, she lived to see both men brought to justice.⁴⁸ Of course, many prostitutes have not been as lucky and their male attackers continue to enjoy anonymity.

I use these three cases to illustrate the misogyny and violence that is often directed at prostitutes. In each case, the stigma and dehumanization that flow from the label of “prostitute” are rendered all too real as they manifest in extreme violence. By the act of murder, these men violently dehumanize their victims, obliterating their identities as they callously and senselessly take their lives. The case law all too vividly depicts the danger of extreme violence imbued within prostitution. Clearly, something must be done to protect prostitutes from similar, tragic ends. Since the prostitution laws have failed to achieve their objectives and have only made prostitutes more vulnerable to violence and murder, I argue that legal reform is essential and pressing.

II. FINDING COMMON GROUND WITHIN THE FEMINIST DEBATE

How best to affect legal reform is a divisive issue, particularly among feminists.⁴⁹ One way to understand this polarization of feminists over the issue of prostitution is to consider the magnitude of what is at stake: women’s safety and lives. Yet, this feminist divide must be overcome; it has already contributed to an ideological impasse in 2006, when the Canadian federal government reconsidered the prostitution laws but could not reach the consensus needed to affect legal change.⁵⁰ I argue that in order for this feminist divide to be overcome, we need to reframe the debate. In this section, I first present the two opposing feminist positions and then attempt to rearticulate the concept of “choice” so central to the divide between feminists, viewing “choice” as a continuum rather than a binary. Ultimately, I do advocate the abolitionist approach, which I argue most appropriately re-centres prostitutes at the most disadvantaged end of the continuum and upholds feminists’ common goals for prostitution: lessening stigma, ending violence and empowering prostitutes. I will now begin by foregrounding the two opposing feminist positions: those of “full-decriminalization”⁵¹ and “abolitionist” feminists.

A. The Full-Decriminalization Feminist Position

Full-decriminalization feminists “seek... tolerance and legitimation” of what they term “sex work,” arguing that “some prostitution and trafficking... is a free choice by an autonomous individual, and one often made out of economic necessity.”⁵² Thus, they conceive of the sex-worker as an agent and assert that “difficult choices made under constrained conditions are still choices.”⁵³ Furthermore, full-decriminalization feminists view consensual adult sex work as “a legitimate form of labour” that, therefore, necessitates “the same labour and

48. *R. v. Evans*, [1990] O.J. No. 517, Action No. DCOM 2628/88 (Dist. Ct.) (QL).

49. *Challenge of Change*, *supra* note 3.

50. *Ibid.*

51. I should note that various other names are attributed to these two positions. What I term “full-decriminalization” feminists have also been termed sex radicals, autonomists, pro-prostitution advocates or simply decriminalization feminists, while the term “abolitionist” has also been referred to as the radical feminist position. I use the term “full-decriminalization” feminists to avoid confusion with abolitionist feminists who also advocate decriminalization, yet only for prostitutes.

52. Hernández-Truyol *et al.*, *supra* note 20 at 402.

53. PIVOT, *Voices*, *supra* note 12 at 8.

human rights protections” that other workers enjoy.⁵⁴ While they desire sex work to be treated the same as other employment, they also “advocate the establishment of an effective support network and exit strategies for those who are exploited or have not freely chosen to be where they are.”⁵⁵ Viewing the sex-worker as agent, establishing a protective framework and attempting to empower prostitutes are obviously worthy aims. Yet, I argue that full-decriminalization feminists’ attempt to do so within a larger context of gender, race and class inequity is somewhat misguided.

Full-decriminalization feminists advocate a libertarian approach that views government interference with sex work as an encroachment on liberty and freedom of expression.⁵⁶ In terms of decriminalization, full-decriminalization feminists agree with abolitionists that the criminalization of prostitutes must end since it simply renders prostitutes more vulnerable. Yet, they want most or all of the provisions of the *Criminal Code* relating to prostitution, ss. 210 to 213, to be repealed or struck down. Although some suggest that s. 212 “could be kept to protect children and prostitutes from exploitation,” others believe that it should also be removed from the *Criminal Code*.⁵⁷ Full-decriminalization feminists believe these changes will reduce harms to women in prostitution since women will be able to run their own brothels and co-operatives, “have better control over their physical surroundings and transactions with male buyers,”⁵⁸ be able to enter into employment contracts and have their rights protected by employment and labour standards like other workers.⁵⁹

Although these are all worthy goals, the effect of repealing these provisions of the *Criminal Code* is that the laws that also apply to johns, pimps and prostitution industrialists will be removed,⁶⁰ and, thus, a more neo-liberal approach will cause the sex trade to grow and flourish. Decriminalization advocates suggest that since “the *Criminal Code* is replete with provisions that can already be used to effectively protect all adults and children from [physical and sexual] abuse... the prostitution-related provisions are redundant.”⁶¹ Yet, although these other provisions can be used, they often are not;⁶² this is not likely to change in the absence of prostitution laws. Also, the removal of laws that criminalize the coercive, commercial exploitation of prostitutes will surely have detrimental effects long-term.

54. PIVOT, *Beyond Decriminalization: Sex Work, Human Rights and a New Framework for Law Reform* (Vancouver: The Law Foundation of British Columbia, 2004) [*Beyond Decriminalization*] at 12, online: PIVOT <<http://www.pivotlegal.org/pdfs/BeyondDecrimLongReport.pdf>>.

55. *Challenge of Change*, *supra* note 3 at 77.

56. Shelagh Day, “Prostitution: Violating the Human Rights of Poor Women” *Action ontarienne contre la violence faite aux femmes* (June 2008) at 14, 15, online: Francofemmes <http://www.francofemmes.org/aocvf/documents/Prostitution_v.angl_FINALE_WEB.pdf>.

57. *Challenge of Change*, *supra* note 3 at 77. There is concern amongst some full-decriminalization feminists that s. 212 could be used to criminalize a prostitute’s own children or partner who she lives with, although the case law suggests that this is unlikely: *supra* note 30. Some want to decriminalize s. 212 since it limits sex workers’ ability to “create safer working conditions” by not permitting referrals from one sex worker to another and criminalizing anyone who runs a bawdy-house as a procurer or someone who is living off the avails of prostitution: PIVOT, *Voices*, *supra* note 12 at 23. Thus, some full-decriminalization feminists believe that all of the provisions of the *Criminal Code* relating to sex work should be repealed.

58. Shelagh Day, *supra* note 56 at 14.

59. PIVOT, *Beyond Decriminalization*, *supra* note 54 at 145-8.

60. Day, *supra* note 56 at 9.

61. *Challenge of Change*, *supra* note 3 at 77.

62. For example, in *R. v. Seaboyer*; *R. v. Gayme*, [1991] 2 S.C.R. 577 at 649, L’Heureux-Dubé J. notes that, in the context of sexual assault, despite the fact that, “by all accounts, women are victimized at an alarming rate... The prosecution and conviction rates for sexual assault are among the lowest for all violent crimes.”

B. The Abolitionist Feminist Position

In contrast, abolitionists believe that the legitimation and expansion of prostitution will do little to protect women from the violence that is inherent in all its forms. Abolitionists oppose full-decriminalization, which they assert will only expand the sex trade and, as an organization of abolitionist ex-prostitutes stated, “put more power into the hands of the men who abuse... [prostitutes] by telling them that they are ... entitled to do so.”⁶³ Instead, they believe that the laws that criminalize prostitutes should be removed, but the laws relating to johns, pimps and profiteers should remain intact. They believe this approach will deter buyers, decreasing the purchase of sexual services and making markets less lucrative, which in turn will decrease prostitution and trafficking.⁶⁴

Abolitionists refuse to describe prostitution as “work,” instead arguing that “force or coercion—albeit tacit or circumstantial—is always present wherever prostitution is found.”⁶⁵ They argue that women are “coerced into prostitution by various factors: poverty, racism, a history of previous sexual abuse, drug addiction [and] lack of housing.”⁶⁶ Statistics and demographic profiles of prostitutes largely support these contentions.⁶⁷ Furthermore, given that abolitionists view prostitution as largely informed by coercion that negates “choice,” they view prostitution as an act of violence against women and “the most extreme and crystallized form of all sexual exploitation.”⁶⁸ As well as gender, abolitionists view prostitutes as victimized by the race, ability and/or class hierarchies that circumscribe “choice” so severely that the sale of one’s embodied sexuality even seems a viable option. Thus, they view prostitutes as having been in/directly oppressed and coerced, or as having internalized gender hierarchy such that prostitutes “come to acquiesce in their own subordination.”⁶⁹

63. Ex-Prostitutes Against Legislated Sexual Servitude (X-PALSS), “NO Legal Brothel in Vancouver” (December 2007), online: Sisphe.org <http://sisphe.org/article.php3?id_article=2830>.

64. Gunilla Ekberg, “The Swedish Law That Prohibits the Purchase of Sexual Services: Best Practices for Prevention of Prostitution and Trafficking in Human Beings” (2004) 10 *Violence Against Women* 1187 at 1193-94, 1199-1201.

65. Cynthia Meillón, “References to Trafficking in the Beijing + 5 Document” in Cynthia Meillón & Charlotte Bunch, eds., *Holding onto the Promise: Women’s Human Rights & the Beijing + 5 Review* (New Jersey: Center for Women’s Global Leadership, 2001) at 156.

66. Day, *supra* note 56 at 19.

67. The federal Standing Committee found that most people enter prostitution as only a temporary measure and while “[s]ome people are forced by a third party, others do it to make ends meet, pay the rent or buy groceries, or to cope with a drug habit or a life marked by violence, incest, rejection”: *Challenge of Change*, *supra* note 3 at 10-11. Melissa Farley found in her study of 100 prostitutes in or near Vancouver’s DTES, that at least 57 percent of participants were racialized, 54 percent entered prostitution before the age of 18, 86 percent experienced current or previous homelessness, and 73 percent and 84 percent had been physically and sexually abused as children, respectively: Melissa Farley et al., “Prostitution and Trafficking in Nine Countries: An Update on Violence and Posttraumatic Stress Disorder” (2003) 2 *Journal of Trauma Practice* 33 at 37-38, 40, 43. Of the participants, 91 percent had been physically assaulted and 76 percent had been sexually assaulted during prostitution, with 95 percent stating they needed to leave prostitution: *ibid.* at 43, 51.

68. Kathleen Barry, *The Prostitution of Sexuality* (New York: New York University Press, 1995) at 296.

69. Kate Sutherland, “Work, Sex, and Sex-Work: Competing Feminist Discourses on the International Sex Trade” (2004) 42 *Osgoode Hall L.J.* 139 at 142.

C. Choice: The Abolitionist Position

Because some abolitionists view prostitutes as victims and refuse to support the sale of women's bodies, they are critiqued as "paternalistic."⁷⁰ Yet, this critique misses the ideological underpinnings of abolitionist's unwillingness to see anything less than full, meaningful, voluntary consent as "choice" in prostitution. This viewpoint needs to be re-examined and "choice" reframed such that abolitionists are no longer viewed as negating prostitutes' agency.

Abolitionists predominantly conceive of "choice" in a positive liberty rather than a negative liberty sense. Positive liberty entails empowering a person to reach their full potential. Thus, this positive view of liberty sets as a minimum that "choice" not include the voluntary assumption of risks that would infringe or endanger proper self-development, human dignity, equality, security of the person and/or life. Prostitution, as an inherently violent and often dehumanizing and degrading transaction, may give women money, but it often, given coerced circumstances, in no way gives them a sense of self-betterment or satisfaction. Thus, although abolitionists do not necessarily oppose the "amelioration of [prostitutes'] working conditions," "abolitionists historically have been wary of any compromise that might suggest the legitimization of prostitution or trafficking"⁷¹ by articulating prostitution as something that is chosen.

Abolitionists critique full-decriminalization feminists' neo-liberal notions of "choice" or contractual consent as well-intentioned, yet de-contextualized and misguided. Abolitionists express concern that espousing that prostitution is "choice," even if constrained, will effectively obscure the contextual constraints themselves. As Wanda A. Weigers states, "to attach normative significance to choice without regard to its social context can systematically obscure and impair our understanding of the conditions and pervasive effects of social inequality."⁷² Thus, the focus on prostitution as a discrete instance of "choice" detracts from a focus on the larger context of oppression informing that choice. This does little to lessen stigma, but instead renders "less visible the social conditions that make prostitution a palatable choice for many women."⁷³ As a result, the underlying conditions of inequality remain largely unexamined and unchallenged. As well, on an individual level, reducing prostitution to a single contractual exchange in which a woman exercises voluntary, rational "choice" allows a man to further stigmatize her for that choice and ignore the depth of her human identity as well as her disadvantage within the monetary transaction. Further, there is a concern that the rhetoric of "choice" may be misappropriated by men rationalizing their lack of empathy for, and violence against, prostitutes.

The full-decriminalization, neo-liberal concept of free, voluntary "choice" is viewed as misguided by abolitionists since, over time, it may obscure or even preclude "victims" within the exchange. As autonomous agents, prostitutes will be "presumed to have enhanced their welfare or to have consented to risk."⁷⁴ Therefore, any negative impacts that may flow from prostitution, including violence or emotional trauma, will be minimized. Through legiti-

70. Iain McDonald, "Criminalizing 'Punters': Evaluating the Swedish Position on Prostitution" (2004) 26(2) *Journal of Social Welfare and Family Law* 195 at 197.

71. Hernández-Truyol *et al.*, *supra* note 20 at 401.

72. Wanda A. Weigers, "Economic Analysis of Law and 'Private Ordering': A Feminist Critique" (1992) 42 U. Toronto L.J. 170 at 198.

73. *Ibid.* at 196.

74. *Ibid.* at 192.

mation and a focus solely on the positive benefits that presumptively flow from “chosen” contracts between rational actors seeking to better their lot, prostitution may even be encouraged as an option or a “rational choice for poor women.”⁷⁵ Therefore, as has occurred in Nevada, to “the extent that prostitution is seen as a legitimate choice, women on welfare and unemployment insurance may also be encouraged or required to turn to it.”⁷⁶

D. The Crux of the Feminist Divide: Depolarizing the Consent/Coercion Dichotomy

The polarization of feminists largely involves whether, in constrained circumstances, the concept of “choice” should be viewed as coercion or consent and, consequently, prostitutes should be seen as victims or agents, respectively. As well, abolitionists and full-decriminalization feminists support very different models of legislative reform. Personally, I believe that a middle-ground approach to choice is possible. I find merit in both positions and think that, instead of viewing choice as a rigid binary of choice/coercion or prostitutes as either agent/victim, we should instead understand choice as a continuum along which prostitutes, as victims, agents or victim-agents, are aligned. However, I also believe that we should strive for an understanding of choice that engages a positive view of liberty. “Choice” should only be viewed as such if consent is meaningful, free and voluntary, rather than coerced. This is also consistent with Canadian contract law since duress, undue influence and the unconscionable exploitation of an inequality of bargaining power between parties vitiates consent. Thus, I argue that choice, although possible, should not and cannot be *presumed* in a context where women’s choices are so heavily circumscribed. We need a different presumption and starting point.

The variety of reasons for entering into, as well as types of, prostitution illustrate the continuum of choice. Often women enter into prostitution due to a lack of economic alternatives, but this is not always the case. Prostitution (at least certain kinds) has been suggested to be “probably the one job where women earn more than men” besides modelling.⁷⁷ Thus, surely there are white, middle-class women who enter prostitution as “high-end escorts” because prostitution gives them “the opportunity to meet interesting people, work flexible hours and earn decent wages.”⁷⁸ However, these women are surely a minute minority. On the other hand, there are also women at the other end of the continuum, those who are Aboriginal, impoverished, sexually abused as children and entering into prostitution as minors,⁷⁹ mentally-ill and addicted to hard drugs, which they began to consume because

75. Day, *supra* note 56 at 13.

76. Weigers, *supra* note 72 at 196.

77. Frances Shaver, “The Regulation of Prostitution: Avoiding the Morality Traps” (1994) 9 Can. J.L. & Soc. 123 at 144; Naomi Wolf, *The Beauty Myth* (Toronto: Vintage Canada, 1997) at 50.

78. *Challenge of Change*, *supra* note 3 at 12.

79. Does “choice” ascribe to a sexually-exploited girl when she reaches the age of consent? Annabel Webb of Justice for Girls raises a significant weakness in the argument of full-decriminalization feminists who claim that women who were sexually-abused at home and/or sexually exploited as children in prostitution gain the ability to “choose” prostitution when they turn 18 years old. Certainly, we would never view a girl under the age of 18 as exercising “choice” in entering prostitution, which we term instead “sexual exploitation.” Yet, this is what some believe when the same young woman reaches the age of majority. Given that most female prostitutes enter prostitution as minors and become trapped in prostitution, this is a noteworthy critique. Although studies conflict, “the average age for women entering prostitution is sixteen, although the number of nine-, ten-, and eleven-year-old girls in the industry is on the rise.” See Sarah Wynter, “WHISPER: Women Hurt in Systems of Prostitution Engaged in Revolt” in Frederique Delacoste & Priscilla Alexander, eds., *Sex Work* (London: Virago Press, 1988) 266 at 268. When I worked at Justice for Girls, one young woman told me that she entered into

they could not stand the feeling, emotionally and physically, of men entering them over and over and over again.⁸⁰ This is a woman that the streets of Vancouver know all too well; she is the forgotten face of Vancouver's DTES. This woman may desperately want to leave prostitution, view herself as a victim of a white supremacist, capitalist and colonialist patriarchy, and fervently tell you she in no way "chose" this life, but rather it chose her. However, there may also be a woman who had the same constrained set of choices but who views herself as an agent or a victim-agent. Who is right? Whose perspective do we privilege? I argue we must view choice within prostitution as a continuum, yet privilege the most disadvantaged woman along it.

One critique of second-wave feminism was that the simplifying of experience and centring of viewpoints and voices of more privileged feminists, whether intentional or not, silenced those who spoke from the margins.⁸¹ A central tenet of feminism is envisioning and striving for a better world, in which women can be fully-actualized, equal, autonomous and empowered. Abolitionist feminists cannot tell women who assert that they have "choice" that they do not since this would be demeaning, even if such women's choices are coerced and constrained. Similarly, full-decriminalization feminists cannot tell a woman who says that she did not choose prostitution that, in fact, she did. The greater socio-cultural context of sexism, racism and classism, which often makes prostitution the only choice besides homelessness or starvation, can isolate a woman in a place where she feels like she has no choice at all. As long as women exist who can plausibly claim they have no choice,⁸² I argue they should be centred as our starting point. Centring this woman does not negate the other voices that claim they do have choice and agency, but it centres the person who is most disadvantaged on the continuum: the self-identified victim.

E. A New Starting Point Within the Law

Given that some women say their experience of prostitution is devoid of choice, and most want to leave it, I argue that full, meaningful and voluntary choice should not be a presumption within prostitution. Rather, I assert that full, meaningful and voluntary choice should be seen as *an exception* to a general assumption that consent and choice are often absent within prostitution. This needs to be the basic starting point for legal reform. Rethinking the use of "choice" in this important debate ensures that the most marginalized people on the continuum of choice are centred. In the rest of my analysis, I centre the woman from my city, Vancouver, who is the most marginalized on the continuum of choice and claims she did not choose prostitution: the Aboriginal, street prostitute, living in poverty on the DTES, who self-identifies as a victim of colonialism, capitalism and patri-

prostitution at the age of 15 because her boyfriend's father introduced her to and made her addicted to crack cocaine; he then forced her to prostitute herself if she wanted to continue to live with them.

80. Most prostitutes who are addicted to drugs did not enter prostitution as addicts. In one study, it was found that only "forty-percent [of prostitutes addicted to drugs] were addicted before prostitution." Most prostitutes begin taking drugs because they find prostitution so physically and emotionally taxing. See Priscilla Alexander, "Prostitution: A Difficult Issue for Feminists" in Frederique Delacoste & Priscilla Alexander, eds., *Sex Work* (London: Virago Press, 1988) 184 at 202.

81. See bell hooks, *Feminist Theory: From Margin to Center* (Cambridge: South End Press, 2000).

82. Sarah-Maria, Ramona and hermoine magdelene of PEERS, *Stories from the Margins* (Victoria: PEERS, 2003) at 14, 37, online: PEERS <<http://www.peers.bc.ca/storieswrite.html>>.

archy (the “centred woman”).⁸³ By centering her in my analysis, I hope to destabilize the victim/agent dichotomy and instead envision a legal framework that more readily enables her to transition from victim, to victim-agent and ultimately to agent.

As a final point in this section, the common goals of feminists should be stressed. First, feminists agree the stigma ascribed to prostitutes must be lessened for them to live in greater dignity, equality and safety. Second, and related to lessening stigma, feminists most importantly want the violence against and murder of prostitutes to end. Third, feminists want prostitutes to be empowered to leave prostitution if they wish, or to engage safely in prostitution if they stay. These three feminist goals— lessening stigma, ending violence and empowering prostitutes— as well as the amelioration of the most disadvantaged prostitutes will inform my analysis as I analyze how best to approach legislative reform within Canada. First, however, I explore one additional concern, commodification, which I argue should also inform legal reform.

III. RADIN, INCOMPLETE COMMODIFICATION AND LEGAL MODELS

In addition to the concept of the centred woman and the idea that full, meaningful and voluntary choice should be presumed absent within prostitution, it is important to explore what else may be at stake in turning sexual services into market-alienable commodities. By exploring the legal theory of Margaret Jane Radin, I argue that we can come to a more complete understanding of the anxiety and stigma that often attaches to the sale of sexual services. Furthermore, I argue that Radin’s approach, which is grounded in women’s realities, particularly those of the centred woman, also enables “human flourishing”⁸⁴ such that we do not “foreclose progress to a better world of more equal power (and less susceptibility to the domino effect of market rhetoric),”⁸⁵ as I will explain. With this theoretical lens, I again stress that criminalizing the sellers of sexual services must cease and then examine other extra-jurisdictional models in place: legalization, decriminalization and asymmetrical crim-

83. The Aboriginal Women’s Action Network (AWAN) has this message: “We, the Aboriginal Women’s Action Network, speak especially in the interests of the most vulnerable women — street prostitutes, of which a significant number are young Aboriginal women and girls. We have a long, multi-generational history of colonization, marginalization, and displacement from our Homelands, and rampant abuses that has forced many of our sisters into prostitution. Aboriginal women are often either forced into prostitution, trafficked into prostitution or are facing that possibility. ...The Aboriginal Women’s Action Network opposes the legalization of prostitution, and any state regulation of prostitution that entrenches Aboriginal women and children in the so-called ‘sex trade.’ We hold that legalizing prostitution in Vancouver will not make it safer for those prostituted, but will merely increase their numbers. Contrary to current media coverage of the issue, the available evidence suggests that it would in fact be harmful, would expand prostitution and would promote trafficking, and would only serve to make prostitution safer and more profitable for the men who exploit and harm prostituted women and children. Although many well-meaning people think that decriminalization simply means protecting prostituted women from arrest, it also refers, dangerously, to the decriminalization of johns and pimps. In this way prostitution is normalized, johns multiply, and pimps and traffickers become legitimated entrepreneurs.” Read more of AWAN’s message: AWAN, “Inteligenta Indigena: Aboriginal Women’s Action Network Statement Against the Plans for Vancouver Brothel” *Fire Witch Rising* (20 February 2008), online: <http://fire-witchrising.blogspot.com/2008/02/inteligenta-indigena-aboriginal-womens.html>.

84. Margaret Jane Radin conceives of “human flourishing” in a positive liberty sense. She describes a “positive view of freedom ... in which the self-development of the individual is linked to pursuit of proper social development, and in which proper self-development, as a requirement of personhood, could in principle sometimes take precedence over one’s momentary desires or preferences”: Radin, *supra* note 22 at 1905.

85. *Ibid.* at 1924.

inalization (i.e., the Swedish model). Ultimately, I advocate asymmetrical criminalization as the best alternative available, and perhaps the same one envisioned by Radin.

A. Radin: Stigma and the Slippery Slope to Market Domination

In her article, “Market-Inalienability,” Radin explores the anxiety and stigma that often attach to the commodification of sexual services. First, she adeptly articulates people’s often indefinable feelings of anxiety that arise in regard to the market-alienability of “contested commodities,” such as babies, surrogacy and sexual services.⁸⁶ Some argue that conceiving of attributes that are “integral to the self,” such as sexuality, as “monetizable or detachable from the person... is to do violence to our deepest understanding of what it is to be human.”⁸⁷ Thus, an anxiety arises around the selling of such personal attributes, such as sexual services. As well, since the sale of one’s embodied sexuality implicates in an entirely literal way one’s bodily integrity, some people feel discomfort or insult, or a fear of degradation or loss of value, in considering sexuality to be a “fungible object;”⁸⁸ they may also feel that such considerations are “intuitively wrong.”⁸⁹ To feel that selling sex is “wrong” gives rise to stigma. When viewed through this lens, the position of abolitionist feminists becomes more complicated. Of course, abolitionist feminists do not wish to stigmatize prostitutes for their need to sell their bodies. Rather, they view prostitution as intuitively wrong because of concerns that “commodification will exacerbate, not ameliorate, oppression and powerlessness [as well as] the social disapproval connected with marketing one’s body.”⁹⁰ Also, as Radin suggests, commodifying women’s bodies may cause a “domino effect” or “a slippery slope leading to market domination” and a fundamental transformation such that women’s bodies are sold at such a dystopian scale that everyone’s discourse and views of sexuality, particularly women’s, suffer tremendously.⁹¹ I agree with Radin that these are real concerns and, thus, that the commodification of women’s bodies should be approached cautiously to preclude and deter such market domination.

In an ideal world, abolitionist feminists would not want women’s bodies to ever be considered “for sale,” or market-alienable, particularly not the centred woman. However, as Radin asserts, “we are situated in a nonideal world of ignorance, greed, and violence; of poverty, racism and sexism.”⁹² Thus, “[i]n spite of our ideals, justice under nonideal circumstances, pragmatic justice, consists in choosing the best alternative now available to us.”⁹³ Radin views the crossroads that feminists are at, and prostitution more generally, as a dilemma she calls the “double bind”: to commodify women’s bodies may entrench oppression and do violence to their personhood values, but to disallow women from commodifying themselves means “forc[ing] women to remain in circumstances... worse than becoming sexual commodity-suppliers.”⁹⁴ The criminalization of prostitutes “exacerbates

86. *Ibid.* at 1856.

87. *Ibid.* at 1906.

88. *Ibid.* at 1881.

89. *Ibid.* at 1880.

90. *Ibid.* at 1916.

91. *Ibid.* at 1912, 1922.

92. *Ibid.* at 1915.

93. *Ibid.*

94. *Ibid.* at 1916-17.

the double bind” for it harms their personhood by rendering them more marginalized, stigmatized and vulnerable.⁹⁵

B. Circumventing the Double Bind: Incomplete Commodification

To circumvent the double bind, Radin suggests “incomplete commodification” in the context of prostitution.⁹⁶ She seems to contemplate a regime quite similar to the one in place in Sweden:

I think we should now decriminalize the *sale* of sexual services in order to protect poor women from ... degradation and danger.... At the same time, in order to check the domino effect, we should prohibit the capitalist entrepreneurship that would operate to create an organized market in sexual services even though this step would pose enforcement difficulties.⁹⁷ [Emphasis added.]

Radin concludes her article with a recognition that legal models must rest “on our best conception of human flourishing,” but must also dialectically evolve.⁹⁸ I interpret this to mean that we must choose as a starting point the best legal regime for prostitution in Canada now available. Yet, we must allow this regime to alter as the conditions of disadvantaged groups are ameliorated and power shifts, or as we find a way to regulate the regime in a manner that does not endanger human flourishing. Still, our starting point and aim must be the most ideal approach available, despite non-ideal circumstances, so that we do not “foreclose progress to a better world.”⁹⁹

By adopting Radin’s theoretical lens and focusing on common feminists goals, the centred woman and the purposes behind prostitution legislation (lessening nuisance and exploitation), I now evaluate the different extra-jurisdictional models in place: legalization, decriminalization and asymmetrical criminalization.

C. Legalization

Prostitution has been legalized in the Netherlands and Victoria, Australia. In both jurisdictions, not all forms of prostitution are legal: child prostitution, trafficking and some aspects of street prostitution remain criminalized.¹⁰⁰ Legalization often involves removing criminal laws relating to adult prostitution and regulating prostitution through licensing, health and safety regulations.¹⁰¹ Although legalization has some benefits since it does not criminalize prostitutes and attempts to support their well-being, it unfortunately has multiple drawbacks.

95. *Ibid.* at 1921-22.

96. *Ibid.* at 1921.

97. *Ibid.* at 1924 [emphasis added].

98. *Ibid.* at 1937.

99. *Ibid.* at 1924.

100. Julie Bindel & Liz Kelly, “A Critical Examination of Responses to Prostitution in Four Countries: Victoria, Australia; Ireland; the Netherlands; and Sweden” *Routes Out Partnership Board* (2003) at 12, online: Network of Sex Work Projects <<http://www.nswp.org/pdf/BINDEL-CRITICAL.PDF>>.

101. *Challenge of Change*, *supra* note 3 at 82.

In both jurisdictions, legalization has spurred a marked growth in the sex industry.¹⁰² For example, in Victoria, legal brothels more than doubled over a span of 11 years: “the number of legitimate brothels grew from 40 in 1989 to 94 in 1999.”¹⁰³ This growth of the sex industry is linked directly to increased demand, which stems from the legitimation and accessibility of prostitution domestically, and these countries’ increased popularity as sex tourist destinations.

With an increase in demand, there has been an increase in the legal and illegal, underground forms of the trade.¹⁰⁴ Demand must be met with a supply of bodies, and a variety thereof, to be made available for male sexual consumption. Thus, demand has resulted in an increase in the exploitation of women and children who are trafficked or otherwise forced to enter prostitution.¹⁰⁵ In the Netherlands, there has been a disturbing increase in child sexual exploitation, with a growth of 11,000 children in the sex trade since 1996, mainly trafficked from other countries.¹⁰⁶ As Anne-Marie Lizin of Belgium has stated, “You cannot say you’re fighting the trafficking of people and at the same time legalise (brothels) because you open the market.”¹⁰⁷ This seems to be a sound argument since, in the Netherlands, approximately 80 to 85 percent of prostitutes are non-Dutch¹⁰⁸ and thus have voluntarily relocated or been trafficked from other countries to work in locations like Amsterdam. In this way, prostitution, trafficking and child sexual exploitation should be viewed as inextricably linked. For these reasons, it is not surprising that the Mayor of Amsterdam recently announced that a third of the red light district will be shut down since, not only did legalization not bring the Dutch what they had “hoped and expected,” but it increased organized crime, exploitation and trafficking.¹⁰⁹

As well, in jurisdictions with legalization, an increase in legal indoor prostitution has increased illegal street prostitution rather than moving women in off the streets,¹¹⁰ thus allowing the nuisance associated with prostitution to linger or worsen. Of course, this is not surprising since legalization does not ameliorate the basic conditions of disadvantage that keep women— particularly the centred woman— poor, homeless and on the street to begin with. Overall, legalizing prostitution has not decreased nuisance or exploitation, but has largely exacerbated them.

Legalization has also failed to lessen the stigma and extreme violence associated with prostitution. In Amsterdam, known internationally for its open-minded attitudes toward the sex industry, legalization has not minimized the stigma attributed to prostitutes.¹¹¹ Instead, as

102. Bindel *et al.*, *supra* note 100 at 13; *Challenge of Change*, *supra* note 3 at 82.

103. Bindel *et al.*, *ibid.*

104. Judith Kilvington, Sophie Day & Helen Ward, “Prostitution Policy in Europe: A Time of Change?” (2001) 67 *Feminist Review* 78 at 86; Bindel *et al.*, *supra* note 100 at 14; *Challenge of Change*, *supra* note 3 at 82.

105. Mary Sullivan, “What Happens When Prostitution Becomes Work?: An Update on Legalisation of Prostitution in Australia”, online: (2005) Coalition Against Trafficking in Women at 3 <action.web.ca/home/catw/attach/Sullivan_proof_01.pdf>; Bindel *et al.*, *supra* note 100 at 15; *Challenge of Change*, *supra* note 3 at 82.

106. Bindel *et al.*, *supra* note 100 at 15; *Challenge of Change*, *supra* note 3 at 83.

107. Bindel *et al.*, *ibid.* at 29.

108. *Challenge of Change*, *supra* note 3 at 83.

109. “Mayor unveils plan to clean up Amsterdam’s red-light district” *CBC News* (18 December 2007), online: *CBC News* <<http://www.cbc.ca/world/story/2007/12/17/amsterdam-district.html>>; “Amsterdam to cut back on brothels” *BBC News* (21 September 2007), online: *BBC News* <<http://news.bbc.co.uk/1/hi/world/europe/7005768.stm>>.

110. Sullivan, *supra* note 105 at 4; Bindel *et al.*, *supra* note 100 at 14.

111. *Challenge of Change*, *supra* note 3 at 82-83.

businesswomen, “accountants, banks and health insurance companies want nothing to do with [prostitutes].”¹¹² This stigma may relate to Radin’s recognition that many feel unease and disapprobation at a person commodifying their sexuality. Not surprisingly, just as stigma remains, violence also still pervades and is a recognized reality within the legalized sex industry, even though indoors.¹¹³ As one brothel owner in Amsterdam stated, “[y]ou don’t want a pillow in your room. It’s a murder weapon.”¹¹⁴ Some even suggest that violence has increased, particularly for those who work in the illegal sectors and, thus, are still alienated from police protection.¹¹⁵ A further concern is that violence has been legitimated and normalized as simply a “workplace hazard” that prostitutes must accept and prepare for.¹¹⁶ In some locales, panic buttons are affixed in rooms and prostitutes are encouraged to undergo hostage negotiation training.¹¹⁷ These precautions indicate that violence remains a serious, alarming and consistent risk.

Yet another drawback of legalization is that it has generally not empowered prostitutes to get out of the sex trade if they wish nor enjoy better working conditions. In the Netherlands, only four percent of prostitutes have registered with authorities¹¹⁸ to access the health and safety regulations, pension benefits and employment rights available. Therefore, only a small proportion of prostitutes have bettered their legal status in the system, and even then they are still subject to social stigma and violence. The prostitutes in the Netherlands who refrain from the legalized regime do so for many reasons: fear of the stigma and repercussions that would flow from being officially recognized as a prostitute,¹¹⁹ ineligibility because of age or illegal immigrant status,¹²⁰ and unwillingness to declare a commitment to work they view as temporary. Thus, even in jurisdictions where prostitution is legalized, a large proportion of the sex trade still operates illegally and underground, unable to benefit from the legalized regime in place. As well, most prostitutes have not been empowered to “move indoors” and enjoy “better” working conditions or exit the trade since the same socio-economic reasons that put them on the street remain.

For these many reasons, very few people suggested legalization or regulation to the 2006 Standing Committee as an approach to adopt in Canada.¹²¹ Furthermore, both sides of the feminist debate strongly discourage legalization. Clearly, the centred woman would largely not benefit from legalization: she would be excluded from the legal regime as a street prostitute and the stigma, violence and disadvantage that informs her life would likely not abate.

D. Decriminalization

Instead of legalization, full-decriminalization feminists advocate “decriminalization” as separate from, and more advantageous than, legalization. The jurisdiction that full-de-

112. Bindel *et al.*, *supra* note 100 at 17. See also *Challenge of Change*, *supra* note 3 at 82-83.

113. Bindel *et al.*, *ibid.* at 16.

114. Suzanne Daley, “New Rights for Dutch Prostitutes, but No Gain” *The New York Times* (21 August 2001), online: *The New York Times* <<http://www.nytimes.com>>.

115. Bindel *et al.*, *supra* note 100 at 16; *Challenge of Change*, *supra* note 3 at 83.

116. Sullivan, *supra* note 105 at 23.

117. *Ibid.* at 22.

118. *Challenge of Change*, *supra* note 3 at 83.

119. *Ibid.* at 82-83.

120. Kilvington *et al.*, *supra* note 104 at 84.

121. *Challenge of Change*, *supra* note 3 at 81.

criminalization feminists usually refer to as a success is New Zealand, which adopted a decriminalized regime in 2003. Decriminalization in New Zealand is similar to legalization in Victoria, Australia and the Netherlands in terms of enabling prostitutes to access better working conditions via employment contracts, lessened stigma and better relations with law enforcement officials. New Zealand differs from legalized regimes in that street prostitution has been decriminalized and child sexual exploitation has been more seriously criminalized. These are both commendable improvements over legalization regimes. Also, there is less of a division between the il/legal sex trade for workers in terms of in/out-door prostitution given the decriminalization of street prostitution. Yet, it is still illegal for immigrants to be sex workers and access the labour and employment benefits of legal workers. Despite the advantages of decriminalization over legalization and an optimistic report from the New Zealand Prostitution Law Review Committee (the “Committee”), many problems still remain and “progress [has been] slower tha[n] may have been hoped.”¹²²

Violence, stigma, nuisance, exploitation, poor working conditions, low rates of reporting of violence and a normalization of prostitution making it more difficult for women to exit are all apparent in New Zealand and cited within the report,¹²³ even if they differ from the Committee’s optimistic conclusions. What is most apparent in the report is the dismissal of concerns relating to an increased “visibility” of street prostitution. First, even though vastly different approaches were implemented to count the number of prostitutes in 2003 and 2008 and the Committee conceded that reliable figures were “difficult to obtain,” the Committee still made an estimate that numbers went from 5,932 to 2,332 over five years.¹²⁴ Thus, it concluded that the number of people in prostitution had not increased and that although there was much greater visibility of street prostitutes, this should not necessarily be attributed to “growth of that industry.”¹²⁵ Thus, the Committee made conclusions based on questionable methods of numerical comparison and was dismissive of citizens’ concerns regarding the increased visibility and nuisance of street prostitution.

Second, the Committee claimed that the media had created an “exaggerated impression of the numbers involved” in child prostitution, suggesting instead that these children were not necessarily street prostitutes, but might simply be “hanging around.”¹²⁶ Thus, it was similarly dismissive of concerns that a large number of youth were being sexually exploited. Based on the questionable and perhaps overly optimistic conclusions drawn in the report, it is not surprising that the Committee has been critiqued for having five out of eleven members with a “clear vested interest” in maintaining the regime.¹²⁷ Others contend that the report actually shows that the New Zealand laws are failing to accomplish their objec-

122. “Report of the Prostitution Law Review Committee on the Operation of the Prostitution Law Reform Act” *Ministry of Justice* 14 May 2008 at s. 14, online: <<http://www.justice.govt.nz/policy-and-consultation/legislation/prostitution-law-review-committee/publications/plrc-report/report-of-the-prostitution-law-review-committee-on-the-operation-of-the-prostitution-reform-act-2003>> [Report of the Prostitution Law Review Committee NZ].

123. *Ibid.*

124. *Ibid.* at s. 2.7.

125. *Ibid.*

126. *Ibid.* at s. 7.

127. “NZ Prostitution Law Review Committee: Report” *The Humanitarian Chronicle* (23 May 2008), online: *The Humanitarian Chronicle* <<http://www.humanitarianchronicle.com/2008/05/nz-prostitution-law-review-committee-report/>>.

tives.¹²⁸ Furthermore, as in legalized regimes, there has been a clear normalization of prostitution in New Zealand: only two of all the local authorities in the country told the committee that they had done “anything to assist sex workers to exit the industry.”¹²⁹ This was also minimized by the Committee, which expressed uncertainty about how many prostitutes actually wanted to exit, although they acknowledged “that it is difficult to exit.”¹³⁰

E. Legalization and Decriminalization Are Not Suitable in the Canadian Legal Context

In her article, “Prostitution: Violating the Human Rights of Poor Women,”¹³¹ Shelagh Day clarifies the decriminalization/legalization distinction and takes full-decriminalization feminists’ arguments for a labour and employment rights regime to their logical conclusions, suggesting them to be incompatible with human rights legislation in Canada. First, she argues that decriminalization and legalization only vary in terms of the extent of regulation, and that both would expand prostitution.¹³² Although the two regimes are presented as different by full-decriminalization feminists, Day asserts “this does not seem to be the case.”¹³³ Rather, both regimes cause an increase rather than a decrease in trafficking and child prostitution.¹³⁴ Thus, given the questionable and counterintuitive findings of the New Zealand Committee, and decriminalization’s similarities to legalization, I agree with Day that decriminalization will probably not produce different results from legalization.

What largely results from legalization or full-decriminalization is that the sex trade expands, causing legal and illegal aspects of the trade to increase commensurately (in particular, child prostitution, trafficking and illegal immigrant prostitutes finding themselves unable to benefit from the legal regimes available). Furthermore, under both models, violence may diminish slightly but still persists, stigma continues and prostitution is “normalized” such that women who want to exit are often unsupported. As well, under either a legalization or full-decriminalization regime, poor working conditions continue, particularly for street prostitutes, whose most immediate needs are not addressed. These negative effects make legalization and full-decriminalization undesirable in the Canadian context.

Another reason why full-decriminalization and legalization are not suitable in Canada is that the expectation that prostitutes will be able to have their labour and employment rights protected is perhaps overly optimistic and unfounded: such rights arguably conflict with Canadian human rights legislation, which no employer or collective agreement can contract out of. This conflict is apparent in three key ways. First, Day points out that unionization will be difficult since many prostitutes want to maintain anonymity or view prostitution as only temporary employment.¹³⁵ Second, Day argues that prostitution cannot conform to human rights legislation since it depends upon discrimination on the basis

128. Maxim Institute, Media Release, “Report Shows Prostitution Reform Act is Failing to Accomplish its Objectives” (23 May 2008), online: Scoop – New Zealand News <<http://www.scoop.co.nz/stories/PO0805/S00385.htm>>.

129. Report of the Prostitution Law Review Committee NZ, *supra* note 122 at s. 5.

130. *Ibid.*

131. Day, *supra* note 56.

132. *Ibid.* at 16.

133. *Ibid.* at 15.

134. Gunilla Ekberg, “The Swedish Law that Prohibits the Purchase of Sexual Services” (2004) 10 *Violence Against Women* 1187 at 1189, 1210.

135. Day, *supra* note 56 at 33-34.

of gender, age, race and ability.¹³⁶ For example, Day states that “[i]t is well established in human rights jurisprudence that an employer discriminates if he permits a customer to exercise a preference about whom he is served by on the basis of sex, race, age, disability.”¹³⁷ Third, prostitution is problematic since it is tantamount to “consent to sexual harassment,” which women in other workplaces are legally protected from.¹³⁸ Thus, Day persuasively concludes that prostitution cannot “fit within the framework of anti-discrimination law”¹³⁹ in Canada.

For the reasons discussed, full-decriminalization and legalization are questionable in terms of fulfilling the common feminist goals and objectives behind Canada’s current legislation. They will surely expand the sex trade by readily turning women’s embodied sexuality into commodities advertised, bought and sold, regardless of whether this is the intent of full-decriminalization feminists. This expansion of the trade will allow violence and stigma to continue for prostitutes and cause women’s sexuality, equality and dignity to be negatively impacted more generally. Rather than keep women safe or empower them, legalization and decriminalization predominantly expand the trade, which only exposes more women to stigma, violence, largely unacceptable working conditions and murder. Surely the equality, well-being and dignity of women, particularly the centred woman, require us to set our sights for change higher.

F. Asymmetrical Criminalization: The Swedish Model

Based on the starting assumption previously discussed (that women should not be presumed to be freely, voluntarily and meaningfully consenting to or choosing prostitution) and given the reasons postulated by Radin for making sexuality incompletely commodified rather than a market-alienable commodity, I will now argue that the Swedish model is the best alternative for Canada. Instead of encouraging the sex trade to increase, the Swedish model decriminalizes prostitutes since it recognizes their often marginalized and vulnerable position, while also targeting the demand side of the sex trade such that prostitution decreases. The law has had favourable results since it was passed in Sweden in 1999, as I will now discuss.

The Swedish approach, which asymmetrically criminalizes prostitution, decriminalizes those selling sexual services while still criminalizing those who buy, attempt to buy, or exploitatively encourage others to sell sex. Thus, it targets and criminalizes demand, not supply. Specifically, the law targets the johns, pimps, traffickers and profiteers in the sex industry. The rationale behind decriminalizing prostitutes in Sweden is that “it is not reasonable to punish” prostitutes since “in the majority of cases, this person is the weaker partner who is exploited.”¹⁴⁰ In Sweden, prostitutes are viewed as victims of male violence since “pimps, traffickers, and prostitution buyers knowingly exploit the vulnerability of the victims caused by high rates of poverty, unemployment, discriminatory labour practices, gender inequalities, and male violence against women and children.”¹⁴¹ The law is also

136. *Ibid.* at 34.

137. *Ibid.*

138. *Ibid.* at 35.

139. *Ibid.*

140. Ekberg, *supra* note 134 at 1188.

141. *Ibid.* at 1189, 1208.

premised on the assumption that prostitution is inextricably linked to human trafficking and child prostitution.¹⁴² Thus, the objective behind the legislation is to deter prostitution by making markets less lucrative and, in effect, encouraging traffickers and sex tourists to view the country as an unprofitable and undesirable destination.¹⁴³

Since the law was implemented in Sweden in 1999 and backed up by a well-funded law enforcement regime,¹⁴⁴ the country has reported excellent results and a majority of the Swedish public, approximately 80 percent, are still in support.¹⁴⁵ The law's success is based on several factors. First, the law has significantly reduced prostitution: the number of women involved in street prostitution has decreased by an estimated 30 to 50 percent, prostitution in general has dropped approximately 40 percent and recruitment has become almost non-existent.¹⁴⁶ Second, some suggest that men have been significantly deterred from purchasing sexual services.¹⁴⁷ Third, the market has become far less lucrative and, as a result, prostitution, child sexual exploitation and trafficking have been deterred.¹⁴⁸ Fourth, the law has significantly reallocated stigma to the buyers of sexual services instead of prostitutes,¹⁴⁹ who are regarded as "victims"¹⁵⁰ rather than criminals. Fifth, the law has given prostitutes the upper hand over abusers since they can now report instances of violence, exploitation, or even simply prostitution to the police. Lastly, Sweden's regime is buttressed with social services, exit programs, and drug and alcohol rehabilitation,¹⁵¹ allowing prostitutes to access support and leave prostitution if they wish.

The Swedish model has also been critiqued. Critics suggest that the decrease in prostitution, particularly street prostitution, is exaggerated, arguing that the sex trade has simply moved "underground" and is now occurring primarily over the internet and indoors.¹⁵² Yet, this argument fails to recognize that women are often involved in street prostitution precisely because they lack the economic ability to move indoors. Furthermore, even if some street prostitutes have moved indoors, the same critics recognize prostitution is safer there. The movement indoors and reduction in prostitution generally both surely mean that fewer women are subject to violence. As well, the demand and exploitative side of indoor and underground prostitution can be targeted by law enforcement. Although admittedly resource intensive, this different approach would be more beneficial since it would target exploitation, trafficking and organized crime.

142. *Ibid.* at 1189, 1210.

143. *Ibid.* at 1187, 1200-01, 1210; Karl Ritter, "Sweden prostitution law attracts world interest" *USA Today* (16 March 2008), online: *USA Today* <http://www.usatoday.com/news/world/2008-03-16-sweden-prostitution_N.htm>.

144. Approximately \$4.1 million over three years was granted to Swedish police to combat prostitution and trafficking: Ekberg, *supra* note 134 at 1193. Between January 1999 and April 2004, 734 men were reported under the law: *Ibid.* at 1195.

145. Bindel *et al.*, *supra* note 100 at 26-27; Ekberg, *supra* note 134 at 1208; André Anwar, "Prostitution Ban Huge Success in Sweden" *Spiegel Online* (8, November 2007), online: *Spiegel Online* <<http://www.spiegel.de/international/europe/0,1518,516030,00.html>>.

146. Ekberg, *supra* note 134 at 1193, 1204; Ritter, *supra* note 142.

147. The approximate number of purchasers of sexual services has "decreased by 75% to 80%": *Ibid.* at 1193-94.

148. Ekberg, *supra* note 134 at 1194, 1199, 1202, 1209.

149. Bindel *et al.*, *supra* note 100 at 25, 27; Ritter, *supra* note 143.

150. Bindel *et al.*, *supra* note 100 at 25.

151. *Ibid.* at 27.

152. McDonald, *supra* note 70 at 199; Anwar, *supra* note 144.

Another concern with the Swedish regime is that the “good” johns have been deterred and the frequency¹⁵³ of more violent johns has increased.¹⁵⁴ Although this may unfortunately be true, surely these violent johns were already in existence, yet now are more exposed. As well, regardless of the legal regime adopted, prostitutes will likely always be susceptible to violence. Thus, the primary focus should be on getting street prostitutes off the street and out of the trade, which can only be done by alleviating the poverty that put them there in the first place. Lastly, there has been criticism that Sweden has not provided enough support services for prostitutes; this has been improving and now some of the Swedish legislation’s most avid critics feel it has been beneficial overall.¹⁵⁵

Ultimately, I think that the Swedish model, in comparison to legalization and decriminalization, has yielded the most beneficial results. Rather than normalizing prostitution, asymmetrical criminalization still problematizes prostitution and thus does not support the view that it is a legitimate option for poor women with few, if any, options. Thus, there can be a greater focus on enabling women who want to leave prostitution to do so. Although violence is still a problem associated with prostitution in Sweden, as it is wherever prostitution is found, at least Sweden is moving in the direction of minimizing the number of women exposed to it by minimizing prostitution and the number of prostitutes. Since the Swedish model reduces prostitution by making the market for the sex trade and sex tourism less lucrative, and additionally decreases trafficking, child prostitution and stigma, I argue it is the best model to incorporate within the Canadian context.

IV. THE SWEDISH MODEL IN CANADA

Ultimately, the Swedish model will best promote the objectives behind Canada’s current legislation — lessening nuisance and exploitation — as well as the common feminist goals of lessening stigma, violence and empowering women in prostitution. The Swedish model is also consistent with Canada’s approach to similarly “contested commodities” in the *AHRA* and substantive equality under the *Charter*. Thus, I argue it is the best approach for Canada.

The Swedish model upholds the common feminist goals of lessening stigma and violence and empowering prostitutes. First, as in Sweden, the decriminalization of prostitutes and criminalization of johns, pimps, traffickers and profiteers will appropriately shift the stigma attributed to the sale of sexual services from prostitutes to the demand and exploitative side of prostitution. This asymmetrical criminalization will emphasize that most women engage in prostitution because they lack economic alternatives, for which they should not be criminalized. Prostitutes often do the best they can with limited options; to penalize them is unjust and only renders them more vulnerable. Second, since decriminalizing prostitutes will likely lessen their stigma and vulnerability, this will hopefully lessen violence. Although violence will likely always be present in prostitution, the Swedish model, by decreasing the number of prostitutes, will cause fewer women to be exposed to it. Decreasing street prostitution may also enable prostitutes to leave the trade or, if full-decriminalization feminists are correct about Sweden, move indoors and be relatively safer. Furthermore, the decrimi-

153. It is important not to confuse my use of the term “frequency” with the term “number.” I am not implying that the *number* of violent johns has increased in Sweden; rather, I mean that their *frequency* has increased or grown larger within the now smaller pool of johns generally.

154. Anwar, *supra* note 145.

155. *Ibid.*

nalization of prostitutes will lessen their adversarial relations with police, allowing them to more readily report violent johns, exploitation and human trafficking. Asymmetrical criminalization may also ameliorate prostitutes' disadvantaged position in the exchange. Since prostitutes gain a legal advantage over criminalized johns, pimps and profiteers, this enables them to more readily report abuse. This legal advantage may elicit more care for prostitutes; those criminalized will have a vested interest in ensuring prostitutes' contentment in the exchange to ensure that they are not reported.

In terms of the objectives behind the current legislation, lessening nuisance and exploitation, the Swedish model seems to be the best way to achieve these ends in Canada. First, there has been an obvious decrease in street prostitution in Sweden due to a decrease in prostitution more generally and support for women working in street prostitution to exit. Therefore, public nuisance has also decreased. Second, exploitation by pimps, traffickers and profiteers living off the avails has also decreased under the Swedish regime since these individuals and johns are targeted and more subject to legal repercussions, causing less demand for sexual services. This decreased demand makes the sex market less lucrative, which in turn lessens the economic incentive to view prostitution as profitable. Therefore, as a model of deterrence and prevention, the Swedish model, backed up by adequate enforcement, could cause a marked decrease in prostitution, which would in turn affect a decrease in nuisance and exploitation also.

The Swedish model's treatment of embodied sexuality, by criminalizing the demand rather than supply side, is also consonant with the treatment of other "contested commodities," such as ova, sperm, embryos and services like surrogacy, in Canada. The *AHRA* regulates these "contested commodities" by prohibiting, or acting as an intermediary in, their purchase, yet it does not criminalize their sale.¹⁵⁶ If these prohibitions relating to purchase are violated, penalties include incarceration and/or hefty fines.¹⁵⁷ Similarly, the Swedish model criminalizes the purchase of, or acting as an intermediary (i.e. a pimp or profiteer) in the purchase of, sexual services. Thus, the Swedish model can be seen as seamlessly adopting the same asymmetrical approach to the criminalization of contested commodities already embodied under the *AHRA* in Canada.

The *AHRA* and the Swedish model also reflect Radin's suggested approach to selling personal attributes in a nonideal world. In terms of the *AHRA*, the asymmetrical criminalization of "contested commodities" is informed by "ethical concerns" about the commercial exploitation and commodification of reproductive capacities, expressed in s. 2(f) of the *AHRA*, which states that the "Parliament of Canada recognizes and declares that trade in the reproductive capabilities of women and men and the exploitation of children, women and men for commercial ends raise health and ethical concerns that justify their prohibition."¹⁵⁸ These "ethical concerns" are analogous to anxieties surrounding the commercialization and commodification of women's embodied sexuality. Radin would likely assert that these anxieties attach to reproductive capacities as well as sexuality because their sale implicates bodily integrity and raises concerns that a "slippery slope" to market domination could result. Radin's resolution of incomplete commodification, embodied in the *AHRA* and the Swedish model as asymmetrical criminalization, "protect[s] poor women from [the] degradation

156. *AHRA*, *supra* note 19 at ss. 6 and 7.

157. *Ibid.* at s. 60.

158. *Ibid.* at s. 2(f).

and danger” they would otherwise be exposed to by criminalization, while also “check[ing] the domino effect”¹⁵⁹ and increased commercial exploitation that would arise from making these personal attributes monetizable within the capitalist market.

Furthermore, the Swedish model and the *AHRA* are both attuned to Radin’s concern of the “double bind” such that those most willing to commodify their bodies — individuals marginalized along race, class and gender lines — are not criminalized or commercially exploited by purchasers and profiteers. Thus, the Swedish model and *AHRA* are both worthy approaches in the Canadian context for they attempt to remedy inequality, rather than entrench it further. Therefore, the Swedish model is consonant with another aspect of contested commodities articulated in the *AHRA*: the need to protect society’s most socio-economically vulnerable members. This parallel further justifies incorporating the Swedish model in Canada since the policy direction under the Swedish model is consistent with the policy direction embodied in the *AHRA*.

The Swedish model also attempts to remedy the inequality of prostitutes in keeping with substantive equality under s. 15 of the *Charter*. Although the criminalization of the purchasers rather than sellers of sexual services may be viewed as “reverse discrimination” against purchasers or adverse effects discrimination against men, substantive equality “does not necessarily mean identical treatment”¹⁶⁰ for those involved in the prostitution exchange. Rather, substantive equality recognizes that promoting equality in a context of inequality sometimes requires treating differently-situated people differently in order to affect justice and equality. The Swedish model, which shifts the balance of power in the prostitution exchange and works to ameliorate the stigma, gender-biased criminalization and extreme forms of violence that prostitutes are exposed to by society and our current laws, will surely be constitutionally valid as affirmative action law in Canada.¹⁶¹ As Abella J. stated in *Kapp*, the “law ... may be experimental. If the sincere purpose is to promote equality by ameliorating the conditions of a disadvantaged group, the government should be given some leeway to adopt innovative” laws.¹⁶² The Swedish model is precisely the type of innovative legal model that could promote women in prostitution’s substantive equality in Canada.

CONCLUSION AND ADDITIONAL SUGGESTIONS FOR CHANGE

As in any approach to prostitution, women will not be empowered to leave prostitution unless the needs that drew them into it are met. Since most of the reasons women enter prostitution stem from poverty and disadvantage, there must be better social services to address these realities for anything to be fundamentally altered. As well, exit programs are absolutely essential in enabling women to leave prostitution. Hopefully women’s lives will be viewed as valuable enough that the provincial and federal governments appropriately allocate funding to such programs and assist those most in need by providing a better social welfare regime. Furthermore, education about the reasons women enter prostitution, as is commonly done in john schools, is necessary to raise social awareness of the disadvantage and violence that prostitutes are subject to, such that stigma and discrimination against

159. Radin, *supra* note 22 at 1924.

160. *Kapp*, *supra* note 24 at para. 15.

161. A “purpose-driven approach” is adopted in assessing an affirmative action law under s. 15(2) of the *Canadian Charter of Rights and Freedoms*: *Ibid.* at para. 47.

162. *Ibid.*

prostitutes are ended. Also, policing strategies targeting trafficking, exploitation, child prostitution and violent johns are essential.

A middle-ground approach is still possible between the full-decriminalization and abolitionist approaches to law reform: the Swedish model does not necessarily preclude the existence of certain exceptions to the starting point that full, voluntary and meaningful consent is presumed absent in prostitution. For those who claim they have chosen prostitution, exemptions could be given to prostitute-run, non-profit co-operatives such that prostitutes could safely self-regulate; ensuring that prostitutes keep the full consideration they are paid would mean third party exploitation is precluded. I understand this modification is a concession that most abolitionists will disagree with, but it is perhaps the best way to achieve a middle ground between the two feminist positions and ensure that prostitution, when it does occur, happens in a safe, non-exploitive environment that still precludes a booming sex trade. Sweden's "zero tolerance"¹⁶³ approach to prostitution, in which no exemptions are permitted, is perhaps too rigid in a context where we agree that some prostitutes can choose prostitution. As well, co-operatives could still be regulated by the government to deter abuse. Of course, it is imperative that any change to the laws should be informed by consultation with prostitutes.

In a speech entitled "Prostitution and Male Supremacy" and in response to her own rhetorical query, "Prostitution: what is it?", the late Andrea Dworkin stated that prostitution "is the use of a woman's body for sex by a man, he pays money, he does what he wants. The minute you move away from what it really is, you move away from prostitution into the world of ideas."¹⁶⁴ In this basic sense, prostitution is not so much about women. Rather, prostitution is about the men who pay to be sexually serviced; it is about the money that women need; and it is about the larger context of hierarchy and gender inequity that make prostitution even an option. However, if we are to focus on women in prostitution, then as long as we remain in the "world of ideas", we must also strive to honour the women involved in prostitution and the reality that their lives are at stake.

If keeping women engaged in prostitution alive and if lessening stigma, deterring violence and empowering prostitutes are to be part of that focus, then the Swedish model— combined with exit programs as well as an adequate social welfare and law enforcement regime— is the most desirable starting point from which to engage in further conversations about how to move forward. Ultimately, the Swedish model, with the presumption that full, meaningful and voluntary consent and choice are often absent in prostitution, serves as the best starting point for legal reform. Not only does the Swedish model incorporate the legislative objectives of our current prostitution laws (lessening prostitution-related nuisance and exploitation), it also ensures that another significant policy direction, the protection of society's most socio-economically vulnerable members, is implemented also. Such a model upholds the well-being and dignity of the centred woman, our Canadian commitment to substantive equality, and yet does not forestall progress to a better society for prostitutes and women more generally.

163. Ekbert, *supra* note 134 at 1187.

164. Dworkin, "Prostitution and Male Supremacy", *supra* note 1 at 1.