

**Protection of Communities and Exploited Persons Act: Safety Implications and the
Stigmatization of Sex Workers**

HONOURS THESIS FINAL DRAFT

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Date: April 24, 2016

Parliament has the power to regulate against nuisances, but not at the cost of the health, safety and lives of prostitutes.

- Chief Justice Beverly McLachlin in *Canada v. Bedford*

Conflicting views of how best to understand and legislate sex work in Canada has led to disagreements between differing feminist groups. The debate between pro and anti-prostitution approaches have created a binary choice on how best to deal with prostitution, and have left sex workers' voices almost non-existent within legislative reform. This binary vision of sex work ignores a plurality of important and valuable ideas, as well as vast individual experiences within prostitution. Putting women's safety and lives at the center of legislative reform is needed to institute positive legal change as both pro and anti-prostitution groups collectively agree that safety is often compromised in prostitution.

Canada's most recent legislation governing prostitution focuses on criminalizing the buyers of sexual services and decriminalizing the sellers. This new legislation arose in 2014, and was a response to the unsafe working conditions sex workers experienced while abiding by the previous law. The previous law was found to violate sex workers' s.7 rights to life, liberty and security of the person. Unfortunately, Canada's newest legislation also fails to address these safety concerns. The need to centralize women's safety will be explored within this paper through several lenses including violence, stigma, nuisance, and patriarchal views of women's sexuality. These explorations will be used to argue that current Canadian law fails to address the violation of sex workers' s.7 rights found in the previous law.

Violence is often found in prostitution within its current forms. It is found in both street-based and indoor work. Although this is the case, assuming violence is an inherent factor of prostitution has damaging consequences. The current Canadian legislation regarding prostitution

aims at abolishing prostitution, but in turn ignores the safety concerns of sex workers. The current legislation also entitles certain groups, these groups being the “community” and the “exploited”, to safety and protection while leaving out individuals who do not fit within these categories. Because prostitution is a long standing profession, as well as dependent on social and economic factors surrounding sex workers lives, it is highly unlikely that it will ever cease to exist. Accordingly, this paper will argue that centralizing a safety approach to sex work is needed in order to protect sex workers within the profession. As well, resources that can allow individuals who wish to leave the sex trade should be supported.

This paper will first provide a historical and legal context of prostitution law in Canada to understand the issues and inability of the law to protect sex workers. Violence in prostitution will be discussed using statistics of violence located in both street-based and off-street sex work to determine that while violence is undeniably a part of sex work, it is not always present. Violence statistics and information from sex workers themselves will be used to conclude that sex workers’ experiences vary remarkably, resulting in the inability to generalize all sex workers into one category. The pro and anti-prostitution debate will be discussed using ideological ideas from both abolition and decriminalization arguments. Safety arguments and the right to choice for sex workers from the decriminalization perspective will be used to highlight the importance of sex workers’ decisional autonomy, along with the need to protect vulnerable groups from an abolitionist approach. An analysis of these ideas will be used to conclude that both provide valuable ideas, and should be synthesized in order to create beneficial legislation regarding the safety of sex workers.

This paper will use Anderson’s expressive theory of rational choice to understand that every sex workers’ experience is different, and their choices to enter into prostitution are as such.

Ultimately, expressive theory recognizes that there is no “right” choice regarding sex work. Expressive theory highlights the inadequate social norms surrounding prostitution. If these social norms can be improved, sex workers will then be able to express their needs through proper vehicles of expression. In the end, this paper understands that safety can be a new social norm of sex work. Currently, sex workers’ expression is limited by stigma. In order to create new social norms, the stigma surrounding sex work must be diminished.

The stigmatization of sex workers is an important concern. The stigmatic assumptions about sex workers as either a “risky” or “at risk” population are deeply embedded within society and legal institutions. Sex workers are positioned as either victims in need of saving, or a dangerous population that engages in risky behavior by choosing to enter into prostitution. Viewing sex work as a nuisance also has drastic implications on the stigmatization of sex workers as it positions sex workers outside of community involvement and protection. This paper understands that viewing sex workers as both a nuisance and a risk to themselves and the community has drastic implications on the stigma they experience. This stigma renders sex workers’ community involvement, political involvement, and safety non-existent.

The connection between sex workers’ safety, legalization approaches and stigma will be explored through studying the stigmatization of sex workers in countries such as Germany, New Zealand, Sweden, Netherlands, and America. Legislation governing prostitution in these countries includes legalization, partial criminalization, and decriminalization. While this essay will be focusing on Canadian law, considering different legal prostitution regimes within these countries will help discover whether the stigma around sex work can be lessened through various legalization approaches. This paper will also be looking at the stigma implications of Vancouver’s prostitution policy, which criminalized the buyers of sexual services before

Canada's newest prostitution legislation was implemented. Although decriminalization may be the legal framework most capable of reducing stigma related to sex work, stigma may still be present within a decriminalized sphere. This paper will also explore how women's safety may be compromised within a world where their sexuality is defined through a male perspective, such as that in prostitution. Therefore, the patriarchal undertones of society cannot be ignored.

The idea of prostitution as a nuisance problematizes sex workers' safety. This paper will analyze Canada's latest prostitution legislation, *Protection of Communities and Exploited Persons Act* (referred to throughout this paper as the *Protection Act*), in order to understand how prostitution is conceived as a nuisance within society and through legal framework. Accordingly, this paper will also explore the implications of viewing sex workers' as either "risky" or "at risk" within the *Protection Act*. While the *Protection Act*'s purpose is to help "exploited" individuals out of the trade, this paper will argue that this cannot be done through the criminalization of prostitution. Ultimately, this paper understands that positioning prostitution as a nuisance is a main obstacle in improving sex workers' safety. It also disallows sex workers who do not see themselves as exploited to protection.

Sex workers involved in prostitution are involved due to social and economic factors that cannot be legislated away. Accordingly, policies that promote programs involved in aiding sex workers who wish to leave the trade through financial and emotional support are needed. These policies support a safety-based approach to sex work. In the end, limiting the ability of women to choose sex work is also a harm. An understanding that sex workers must be able to participate in research and the formation of legislation surrounding prostitution will be used to conclude this paper, as they are the ones genuinely affected by it. Sex workers understand the safety

implications surrounding legislation. Therefore, they need to be able to make knowledgeable decisions about their lives and their work.

Canadian Historical and Legal Context of Prostitution

Historically, prostitution has been characterized as a “nuisance”, something that is unwanted and ignored by governments and society alike.¹ Canada’s first prostitution laws followed British common law into Canada and viewed sex work as a form of public immorality and vagrancy.² These laws dealt with nuisances brought by “nightwalkers” and bawdy houses,³ and criminalized “suspected prostitutes” if they did not provide adequate information about themselves when asked.⁴ In the latter part of the 19th^h century, the view of women “came to be seen as moral guardians of the family deserving protection from licentious men”.⁵ These views were full of moral issues related to prostitution, and viewed prostitution as a particular “social evil”.⁶ These negative understandings of prostitution were part of the so-called “social purity” movement, which viewed prostitution as both morally wrong and exploitative to women and children.⁷ Accordingly, the movement effectively lobbied for a collection of criminal laws, which “prohibited procuring, living on the avails of prostitution of another person, and the expansion of the bawdy house laws.”⁸ The requirement of prostitutes to provide information about themselves when asked was found to pressure prostitutes into self-incrimination, which in turn questioned the provision’s credibility. Thus, in 1960, the provision was found to be in

¹ Angela Campbell, “Sex Work’s Governance: Stuff and Nuisance” (2015) 23 Fem Leg Stud 27 at 27 [Campbell].

² John Lowman, “Deadly Inertia: A History of Constitutional Challenges of Canada’s *Criminal Code* Sections on Prostitution” (2011) 2 Beijing Law Review 33 at 34 [Lowman].

³ *Ibid* at 34.

⁴ *Criminal Code* 1970, RSC 1970, c C-34 at s. 175(1)(c).

⁵ Lowman, *supra* note 2 at 34.

⁶ Lowman, *supra* note 2 at 34.

⁷ Lowman, *supra* note 2 at 34.

⁸ Lowman, *supra* note 2 at 34.

violation of the *Canadian Bill of Rights* as set out in s.2 (d) concerning the protection against self-incrimination.⁹

The provision concerned with requiring suspected prostitutes to provide information about themselves was replaced by the offence of soliciting in a public place for the purpose of prostitution.¹⁰ This provision was seen as ineffective as the persistent communication between sex workers and their clients imposed too high of a burden on the court system and police officers.¹¹ The provision also positioned the focus of police on sex workers and ignored buyers within transactions.¹² In 1983, the Special Committee on Prostitution and Pornography (The Fraser Committee) recommended a “legislative approach to sex work focusing on the social and economic factors conducive to the practice”.¹³ The Fraser Report encouraged the licensing and regulation of sex establishments, as well as promoted heavier penalties for solicitation offences.¹⁴

After the Fraser Report was issued the *Criminal Code* was amended, making it an offence to offer, provide and obtain sexual services for consideration within a public place or place open to public view by stopping or attempting to stop any motor vehicle, by impeding the free flow of pedestrians or traffic, and communicating in a public place for the purpose of prostitution.¹⁵ The 1985 amendments (known as Bill C-49) were apparently intended to “protect ordinary law abiding citizens” and remove the opportunity for sex workers to “carry out their business in

⁹ Campbell, *supra* note 1 at 30; *Canadian Bill of Rights*, SC 1960, c. 44.

¹⁰ Campbell, *supra* note 1 at 30.

¹¹ Campbell, *supra* note 1 at 30.

¹² Campbell, *supra* note 1 at 30.

¹³ Campbell, *supra* note 1 at 31.

¹⁴ Campbell, *supra* note 1 at 31.

¹⁵ *Criminal Code*, RSC 1985, c C-46, s 213.

public”.¹⁶ These justifications reflect the continuing ambition to regulate the “nuisance” of sex work away from the public sphere.

In light of the *Canadian Charter of Rights and Freedoms* [1982]¹⁷, Bill C-49 was subject to criticism and held unconstitutional on two occasions. One of those occasions was the *Prostitution Reference* [1990].¹⁸ In the *Prostitution Reference*, the *Criminal Code* provisions prohibiting communication in a public place for the purpose of prostitution (ss. 193(1)(c), and the keeping of a common bawdy-house (ss.195.1 (1)(c) were challenged as a violation of the right to freedom of expression found under s.2 (b), and a violation of life, liberty and security of the person under s.7 of the *Canadian Charter of Rights and Freedoms*.¹⁹ The Supreme Court concluded that the bawdy-house provision did violate freedom of expression and the life, liberty and security of the person, but was justified under s. 1 of the Charter.²⁰ Accordingly, the Supreme Court also upheld the constitutionality of the prohibition of communication provision, with the majority concluding that it did not even violate s.7.²¹

The prohibition of communication was justified under s. 1 because the offence was aimed at maintaining community order and safety by eliminating the sale of sexual services from public view, while also “eradicating the dangerous and dehumanizing act of prostitution”.²² The prohibition of communication is most relevant to this paper as it exemplifies the legal system’s

¹⁶ Campbell, *supra* note 1 at 31.

¹⁷ *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being schedule B to the *Canada Act 1982* (UK), 1982, c 11[Charter of Rights].

¹⁸ *Reference re ss 193 &195.1(1)(c) of the Criminal Code*, [1990] 1 SCR 1123 [Reference]

¹⁹ *Ibid.*

²⁰ Reference, *supra* note 18. Section 1 of the *Canadian Charter of Rights and Freedoms* states: The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. See *Charter of Rights*, *supra* note 17 at s. 1.

²¹ Reference, *supra* note 18.

²² David Schneiderman, “The Prostitution Reference: Sexual Communication and the Streets” (2011) online: <https://ejournals.library.ualberta.ca/index.php/constitutional_forum/article/viewFile/11903/9057>.

view of prostitution as a “social nuisance” arising from the public display of the sale of sex.²³

The Supreme Court’s decision within the *Prostitution Reference* clearly illustrates the importance of community interest over the safety of sex workers.²⁴

On December 13th, 2013, the Supreme Court of Canada unanimously ruled in *Canada v Bedford* that multiple sections of the *Criminal Code* regulating aspects of prostitution infringed individuals’ s.7 Charter rights.²⁵ These sections included s. 210, which made it an offence to keep or facilitate in a bawdy house; s. 212(1)(j) which prohibited living on the avails of prostitution; and s. 213(1)(c) which prohibited communicating in public for the purpose of prostitution.²⁶ Before the ruling, prostitution itself (the selling and buying of sexual services) was not illegal in Canada, however, the criminal restrictions surrounding prostitution made it difficult for sex workers to “do their work in a lawful, safe, and business-like way”.²⁷ The three applicants, all sex workers, argued that the *Criminal Code* engaged the s.7 right to security of the person because of the dangers the provisions created for sex workers attempting to comply with the law.²⁸ The court agreed with the applicants and stated the provisions “prevent people engaged in a risky –but legal – activity from taking steps to protect themselves from the risks.”²⁹

The court concluded that the bawdy-house provision confined sex workers to street prostitution and out calls, prohibiting sex workers from working indoors in safer environments.³⁰

²³ Reference, *supra* note 18.

²⁴ The bawdy-house provision later changed to s. 213 (1)(c), and the prohibition of communication provision later changed to s. 210. See Maria Powell, “Moving beyond the prostitution reference: *Bedford v. Canada*” (2013) 64 *University of New Brunswick Law Journal* 187 at 189.

²⁵ Section 7 of the *Canadian Charter of Rights and Freedoms* states: “Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice”. See *Charter of Rights*, *supra* note 17 at s.7.

²⁶ *Canada v Bedford*, 2013 SCC 72 at para 165[*Bedford*].

²⁷ Hamish Stewart, “*Bedford* and the Structure of Section 7” (2015) 60:3 *McGill LJ* 575 at para 2 [Stewart].

²⁸ *Ibid* at para 4.

²⁹ *Ibid* at para 4.

³⁰ *Ibid* at para 5.

The offence of living on the avails of prostitution of another disallowed sex workers from paying for services that could provide safety, such as bodyguards, drivers, and receptionists.³¹ Lastly, the offence of communicating for the purpose of prostitution forced street negotiations with clients to be conducted hastily and in hidden places in order to avoid arrest. This prevented sex workers from screening their clients, from informing co-workers where they were going, and from having the option to refuse a transaction.³² Furthermore, the court confirmed that the provisions were “primarily concerned with preventing public nuisance” and did not protect sex workers’ dignity and safety.³³ The Court was unable to find justification under s. 1 of the Charter for any of these s. 7 violations, and held all three provisions unconstitutional.³⁴ The Court also suspended the declaration of invalidity for all three provisions for one year, giving Parliament time to reconfigure the *Criminal Code*’s provisions regarding sex work in Canada.³⁵

A little less than six months after the Supreme Court ruling, the new bill *Protection of Communities and Exploited Persons Act* (Protection Act) was introduced into parliament as an answer to the unconstitutionality of the previous legislation governing sex work.³⁶ Parliamentary debates about the proposed law continued and on November 6, 2014, the *Protection Act* received royal assent.³⁷ The *Protection Act* was created after the Nordic model, a piece of legislation passed in Sweden in 1999 which ultimately aims at abolishing sex work through questionable

³¹ *Ibid* at para 5.

³² *Ibid* at para 5.

³³ Bedford, *supra* note 26 at para 4. ; Campbell, *supra* note 1 at 32.

³⁴ Stewart, *supra* note 27 at para 12.

³⁵ Campbell, *supra* note 1 at 32.

³⁶ The *Protection Act* was introduced into parliament on June 14th, 2014. See Department of Justice, *Technical Paper: Bill C-36, Protection of Communities and Exploited Persons Act* (Ottawa: Department of Justice 2015) [Department of Justice]. ; Campbell, *supra* note 1 at 32.

³⁷ Department of Justice, *supra* note 36.

partial criminalization framework that this paper will argue jeopardizes sex workers' safety.³⁸ For the first time ever in Canadian history, the *Protection Act* criminalized the purchase and advertising of sexual services, while also stating that living on the avails of prostitution is only disposed to prosecution if exploitation is present.³⁹ Additionally, the *Protection Act* modifies the communication laws by prohibiting "communication for the sale of sex near school grounds, playgrounds or daycare centers."⁴⁰ Sex workers, then, would not be prosecuted for communication in other public areas, nor for the sale of sexual services.

The Department of Justice argued that its proposed law, the *Protection Act*, was a "significant paradigm shift away from the treatment of prostitution as a 'nuisance', as found in the Supreme Court of Canada in *Bedford*, towards treatment of prostitution as a form of sexual exploitation that disproportionately and negatively impacts women and girls."⁴¹ The *Protection Act* relied on research that explained that the majority of individuals who sell sexual services are women and girls, and that the demand for prostitution was the cause for their exploitation.⁴² Therefore, the new *Protection Act* targets only the buyers of sexual services, and not the sellers, as it sees them as victims of the sex trade.⁴³

Despite arguments to the contrary, the *Protection Act* perpetuates sex work as a nuisance through positioning 'community safety' above the safety of sex workers, as well as perpetuating unsafe working conditions. The *Protection Act* also wishes to create a safer approach to sex work, but in turn promotes unsafe working conditions through the criminalization of buyers. The

³⁸Sandra Ka Hon Chu & Rebecca Glass, "Sex Work Law Reform in Canada: Considering Problems with the Nordic Model" (2013) 51:1 Alta L Rev 101 at para 1 [Hon Chu & Glass].

³⁹ Campbell, *supra* note 1 at 33.

⁴⁰ Campbell, *supra* note 1 at 33.

⁴¹ Department of Justice, *supra* note 36.

⁴² Department of Justice, *supra* note 36.

⁴³ Department of Justice, *supra* note 36.

implications of the *Protection Act* on sex workers' safety and stigmatization will be discussed later in this paper. For now, this paper will explore why the safety of sex workers is such an important matter.

The Relationship between Violence and Prostitution

A safety-based approach to prostitution is necessary. Sex workers run the risk of experiencing both physical and emotional violence and are more likely to contract sexually transmitted infections in sex work than any other form of labor.⁴⁴ Violence can be found in all forms of prostitution such as massage parlors, escort agencies, and street prostitution.⁴⁵ As well, violence can be graphically seen within Canadian case law such as in *R v Pickton*. Pickton was a British Columbian pig farmer charged with the murder of over 20 prostitutes, and found guilty on six counts of second-degree murder.⁴⁶ An understanding that violence may often be present within the sex industry demands that sex workers be protected from possible violence. Research related to violence in prostitution has however gathered questionable evidence that may not encompass all experiences of sex workers. There is no denying that violence transpires within prostitution, however using the experiences of some sex workers to stand in for all sex workers can lead to inadequate policy solutions regarding the safety of sex workers. Studies and academic writing vary remarkably when stating victimization rates of sex workers, and this begs the question of which best represent the varied experiences of sex workers?

⁴⁴ Shelagh Day, "Prostitution: Violating the Human Rights of Poor Women" *Action ontarienne contre la violence faite aux femmes* (June 2008) at 4, online: CASAC <<http://casac.ca/sites/default/files/Shelagh%20Day%202008%20Prostitution.pdf>> [Day].

⁴⁵ Corinne Longworth, "The Male Violence Against Women in Prostitution: Weighing Feminist Legislative Responses to a Troubling Canadian Phenomenon" (2010) 15 *Appeal* 58 [Longworth].

⁴⁶ *R v Pickton*, 2010 SCC 32.

An authoritative 9-country study conducted by Farley, a clinical psychologist, interviewed 854 women currently and recently in prostitution.⁴⁷ Of the Canadian women participants, 75% reported being injured during prostitution.⁴⁸ The Canadian part of Farley's study was conducted in and around Vancouver's Downtown Eastside, a well-known and very dangerous area for street-based workers.⁴⁹ While Farley's study does not verify if the Canadian sex workers interviewed were street-based or indoor workers, those sex workers interviewed in other countries were street-based, which suggests that the sex workers from Vancouver were street-based as well.⁵⁰ On the contrary, a study published in 2007 by O'Doherty, which included a "...three-year exploratory project on women's experiences in the off-street or indoor sex industry in Vancouver, British Columbia", found that of the 39 indoor workers surveyed, 67% had never experienced any violence related to their sex work.⁵¹ Research conducted on street-based prostitution stands in great contrast to indoor prostitution, with rates of street-based violence reported as high as 98%.⁵²

Continually, Canadian and American studies have reported high rates of underage entry into prostitution and histories of child abuse among sex workers.⁵³ A study on sex workers by Bagley and Young in Canada found 73% of 45 women interviewed had been sexually abused as

⁴⁷ Day, *supra* note 44 at 4.

⁴⁸ Day, *supra* note 44 at 4.

⁴⁹ Melissa Farley, "Prostitution and Trafficking in Nine Countries: An Update on Violence and Posttraumatic Stress Disorder" (2003) 2 *Journal of Trauma Practice* 33 at 38.

⁵⁰ *Ibid* at 38-39.

⁵¹ Tamara O'Doherty, "Criminalization and Off-Street Sex Work in Canada" (2011) 53 *Canadian Journal of Criminology and Criminal Justice* 217 at 218 [O'Doherty].

⁵² *Ibid* at 218.

⁵³ John Lowman, "Identifying Research Gaps in the Prostitution Literature" Research and Statistics Division (March 2001) at 4, online: Justice < http://www.justice.gc.ca/eng/rp-pr/csj-sjc/jsp-sjp/rr02_9/rr02_9.pdf > [Lowman].

a child.⁵⁴ Lowman, however,⁵⁵ states that these high levels of abuse stand in contrast to his own findings within the Netherlands, where out of the 130 sex workers interviewed, a little over 15% reported sexual abuse by a family member or acquaintance before the age of 16.⁵⁶ These cases of abuse were generally severe, however, Lowman specified that this “picture is by far not as grim as the one sketched by Bagley and Young”.⁵⁷

In 2014 during the debate surrounding the proposal of Canada’s *Protection Act*, Tímea Nagy, a former sex slave and victim of human trafficking who supported the *Protection Act* made the assertion that the average age into prostitution is 14.⁵⁸ Lowman countered Nagy’s claim with this statement: “That is a preposterous claim. There is only one piece of research that supports it. It is a study of juveniles that excluded adults. If you look at research which includes both juveniles and adults, the average age is generally 18 or well above that.”⁵⁹ These issues outline the problems with overgeneralizing violence and abuse statistics concerning sex workers.⁶⁰

While street-based prostitution is generally unsafe as seen in the statistics above, it is precarious to assume that violence is an inherent factor of prostitution. Street-based prostitution forms the minority of sex workers within Canada, while off-street prostitution constitutes for 80-90% of sex work.⁶¹ Many street-based sex workers do experience violence, drug addiction, and

⁵⁴ *Ibid* at 5.

⁵⁵ John Lawman is a Professor of Criminology at Simon Fraser University in British Columbia. He has conducted research on various aspects of the sex industry within Canada for over 30 years. See Lowman, *supra* note 59.

⁵⁶ Lowman, *supra* note 53 at 5.

⁵⁷ Lowman, *supra* note 53 at 5.

⁵⁸ Laura Payton, “Former sex workers make their cases in prostitution debate”, *CBC News* (7 July 2014) online: <<http://www.cbc.ca/news/politics/former-sex-workers-make-their-cases-in-prostitution-bill-debate-1.2698425>>.

⁵⁹ *Ibid*.

⁶⁰ Ronald Weitzer, “Prostitution: Facts and Fictions” (2007) 6 *American Sociological Association* 26 at 28 [Weitzer].

⁶¹ Tamara O’Doherty, “Victimization of Off-Street Sex Industry Work’ (2011) 17(7) *Violence Against Women* 944.

childhood abuse. They are also more vulnerable to rape, robbery and being killed.⁶² This is the population that is most exploited in sex work.⁶³ On the other hand, indoor sex workers, who account for the greatest amount of industry workers within Canada, experience much less violence as seen in O'Doherty's statistics.⁶⁴ Street-based prostitution receives the greatest amount of attention within research and academic writing, creating the perception that violence is inherent within prostitution. Unfortunately, this practice leaves indoor sex workers unaccounted for and their safety needs ignored.

Understanding Sex Workers: Everyone's Experience is Different

To understand how best to deal with the safety of sex workers, the complexity and multiplicity of sex workers' experiences must be understood. O'Doherty, commenting on sex work in Vancouver, states that:

The experience of sex work varies remarkably across venue and jurisdiction. In fact, the only conclusion that can be safely generalized across the industry is that there is a great deal of variety in all aspects of prostitution: the people involved, the types of services offered, the expectations related to the transaction, the reasons people sell sexual services, and the impact on their personal lives.⁶⁵

The experiences of sex workers cannot be sorted by a binary model. Many indoor sex workers make mindful decisions to enter the trade, and research has shown that many also do not feel oppressed, victimized, or find their work degrading.⁶⁶ Many sex workers also feel empowered and validated by their work,⁶⁷ as seen in sex work advocate groups

⁶² Weitzer, *supra* note 60 at 28.

⁶³ Weitzer, *supra* note 60 at 28.

⁶⁴ O'Doherty, *supra* note 61.

⁶⁵ O'Doherty, *supra* note 61 at 221.

⁶⁶ Weitzer, *supra* note 60 at 29.

⁶⁷ Weitzer, *supra* note 60 at 30.

such as SPOC (Sex Professionals of Canada)⁶⁸ and Triple-X (Workers' Solidarity Association of B.C.).⁶⁹

While many indoor sex workers feel positive about their occupation, there are sex workers on the lower end of the spectrum who are exploited and victimized by the industry. Street-based sex workers are continually faced with poor working conditions and high levels of violence as previously discussed.⁷⁰ Although indoor sex work is much safer than street-based sex work, it is not inherently safe. There are “persons recruited by force or fraud and trafficked into brothels, who are at high risk for subsequent exploitation and abuse”.⁷¹ In the end, violence transpires much more frequently in street-based than indoor sex work.

Sex trafficking, known as coerced or forced prostitution, does exist within Canada.⁷² Many indoor sex workers operate safely. However, there is a risk of experiencing exploitation in indoor sex work. Evidence of indoor human trafficking can be seen within Canadian case law, wherein 2009, Laura Emerson pled guilty to prostituting three teenage girls through assault, threats, drug dependencies and forcible

⁶⁸ SPOC is a Toronto based volunteer activist organization completely run by sex workers. They stand for the decriminalization of all forms of sex work and maintain that sex work is a valid occupation. They also argue that sex workers have the capacity to choose and their experiences are diverse. Amy Lebovitch and Valeria Scott, two of the three applicants in the Bedford decision, are part of SPOC. See Sex Professionals of Canada, online: SPOC <<http://www.spoc.ca/index.html>>.

⁶⁹ Triple-X is a sex worker advocate group located in Vancouver, British Columbia. They advocate for the decision of sex workers to improve their lives, while also combatting discrimination faced by sex workers. They wish to enhance job satisfaction and advocate for better jobs in the sex industry. See Purpose of Triple-X, online: Triple-X: Workers' Solidarity Association of B.C. <<http://www.triple-x.org/about/purpose.html>>.

⁷⁰ O'Doherty, *supra* note 61 at 218.

⁷¹ Weitzer, *supra* note 60 at 29.

⁷² In 2013, the Canadian Women's Foundation conducted a national survey of community service providers, “who reported helping a total of 2,872 trafficked girls and women in one year.” See The Facts About Sex Trafficking in Canada, online: Canadian Women's Foundation <<http://www.canadianwomen.org/facts-about-sex-trafficking-in-canada#Countries>>.

confinement.⁷³ Referring specifically to trafficked indoor sex workers, Benjamin Perrin, a trafficking expert and author stated: “We’ve documented cases of massage parlors in Canada being used essentially for debt bondage.” Debt bondage involves women who are brought to Canada and told they cannot leave the sex industry until they pay off an “inflated debt” to the trafficker, this debt can range anywhere from \$50,000 and up.⁷⁴ While indoor sex workers do face a lower level of violence than street-based sex workers, these examples of sex trafficking within Canada provide evidence that not all sex workers who engage in indoor prostitution are free from exploitation. Accordingly, indoor sex work is not always safe.

Aboriginal women are greatly overrepresented in street-based sex work.⁷⁵ It has been estimated that 70% of street workers in the Downtown Eastside of Vancouver, an area known for drug use and lower earning sex work, are Aboriginal.⁷⁶ The socioeconomic inequalities faced by Indigenous populations have led to a heightened vulnerability to violence and HIV among street-based sex workers,⁷⁷ supporting the idea that these sex workers are clearly exploited by the sex industry. Indigenous women, especially those in the sex industry, are also targeted for violence. The Native Women’s

⁷³ Katrin Roots, “Trafficking or Pimping? An Analysis of Canada’s Human Trafficking Legislation and its Implications” (2013) 28.1 Canadian Journal of Law and Society 21 at 34.

⁷⁴ Holly Moore & Joanne Levasseur, “Human traffickers going unpunished in Canada, experts say”, *CBC NEWS* (25 March 2014) online: CBC <<http://www.cbc.ca/news/canada/manitoba/human-traffickers-going-unpunished-in-canada-experts-say-1.2584944> >.

⁷⁵ Brittany Bingham, Diane Leo, Ruth Zhang, Julio Montaner & Kate Shannon, “Generational sex work and HIV risk among Indigenous women in a street-based urban Canadian setting” (2014) 16.4 *Culture, Health & Sexuality* 440 at 441 [Bingham].

⁷⁶ *Ibid* at 441.

⁷⁷ *Ibid* at 441.

Association of Canada (NWAC)⁷⁸ recorded 582 cases of missing and murdered Aboriginal women and girls as of 2010.⁷⁹ While not all of these missing and murdered women were participants in the sex industry, the NWAC affirmed that prostitution significantly related to these cases.⁸⁰ Their data shows an urgent need to respond to the missing reports involving women in prostitution, and a need for greater protection on behalf of women involved in sex work.⁸¹ It is clear that prostitution contains a level of violence, especially involving overrepresented Aboriginal women working in the sex industry within impoverished communities and conditions.

These immensely different experiences in sex work are polar opposites, with other experiences of sex workers ranging in between. Therefore, sex workers' experiences cannot be generalized. The diversity of sex workers must be taken into account, as when this is done, representative samples of sex workers can produce much more accurate results.⁸² In order to avoid peddling stereotypes of sex workers, a true representative sample of differing experiences is needed.⁸³ An indoor sex worker located in Vancouver expressed her thoughts about exposing the reality of sex work: "Let's not say, all women are abused, all women are this, all women are that. It ends up hurting women."⁸⁴ A realistic approach to sex work in Canada is needed in order for responsive law reform,

⁷⁸ The Native Women's Association of Canada (NWAC) is a non-profit organization incorporated in 1974. They seek to promote, enhance, and foster the social, economic, cultural and political well-being of First Nations and Metis women in Canada. *See About Us*, online: Native Women's Association of Canada <<http://www.nwac.ca/>>.

⁷⁹ *Fact Sheet: Missing and Murdered Aboriginal Women and Girls*, online: NWAC <http://www.nwac.ca/wp-content/uploads/2015/05/Fact_Sheet_Missing_and_Murdered_Aboriginal_Women_and_Girls.pdf>.

⁸⁰ *Ibid.*

⁸¹ *Ibid.*

⁸² Lowman, *supra* note 53 at 5.

⁸³ Lowman, *supra* note 53 at 5.

⁸⁴ O'Doherty, *supra* note 61 at 229.

law reform that will truly promote the safety of all sex workers.⁸⁵ Instead of focusing on a single collection of sex workers' experiences, a polymorphous model can be used to "recognize multiple structural and experiential realities" of sex work.⁸⁶ To do this, a variety of feminist models must be incorporated in order to create an intersectional approach to sex work in Canada.

The Decriminalization and Abolitionist Debate: Considering Them Both

The feminist debate on how best to deal with prostitution has been longstanding and challenging. Two models dominate the debate: decriminalization and abolition. The decriminalization position has generally been in favor of the full decriminalization of prostitution and supports the sex workers' rights movement.⁸⁷ On the contrary, the abolitionist position argues that prostitution is inherently exploitative and violent. Ultimately, abolitionist seek to end all forms of prostitution.⁸⁸ Both decriminalization and abolitionist models contain valuable points with regards to sex work, and this section will consider them both. The feminist debate between these models arose from the sex worker's rights movement in the 1970s.⁸⁹ Before this, sex workers were not acknowledged as being capable of speaking for themselves.⁹⁰

The concept of choice is important for full decriminalization feminists, who wish to remove all criminal laws relating to sex work. They argue that sex workers are autonomous agents and emphasize that "difficult choices made under constrained conditions are still

⁸⁵ O'Doherty, *supra* note 61 at 229.

⁸⁶ Weitzer, *supra* note 60 at 30.

⁸⁷ Lacey Sloan & Stephanie Wahab, "Feminist Voices on Sex work: Implications for Social Work" 15.4 *AFFILIA* 457 at 467 [Sloan & Wahab].

⁸⁸ Weitzer, *supra* note 60 at 28.

⁸⁹ Sloan & Wahab, *supra* note 87 at 466.

⁹⁰ Sloan & Wahab, *supra* note 87 at 466.

choices”.⁹¹ Feminist advocates of sex work believe prostitution is an occupational choice, and that sex workers should also enjoy the right to sexual self-determination and the freedom of financial autonomy.⁹² Many of these advocates reject the assumption that sex workers are oppressed and victimized, in contrast to abolitionist feminists.⁹³ As well, decriminalization feminists believe consensual adult sex work is a legitimate form of labor that should be afforded “the same labor and human rights protections that other workers enjoy”.⁹⁴ Valerie Scott, a sex worker advocate stated in a Ted Talk interview: “I hope to have sex work recognized as the legitimate occupation that it is, and for people to understand that the service we provide is actually valuable to society.”⁹⁵ This statement by Scott, a former sex worker herself, genuinely speaks to the goals of the decriminalization and pro-sex work movement.

Continually, proponents of decriminalization have argued the *Criminal Code* contains provisions that can actively protect all adults and children without redundant specific prostitution offenses.⁹⁶ For adults, these pre-existing provisions include “assault, sexual assault, kidnapping, forcible confinement, intimidation, uttering threats, robbery, theft, extortion, and trafficking in persons.”⁹⁷ Communities also have pre-existing protections within the *Criminal Code* such as prohibitions against “causing a disturbance, loitering, common nuisance, criminal harassment, indecent exhibition, and organized crime.”⁹⁸ This decriminalization argument wishes to prove that there is no need for specific provisions like that of communication offenses related to sex

⁹¹ Longworth, *supra* note 45 at para 24.

⁹² Sloan & Wahab, *supra* note 87 at 467.

⁹³ Sloan & Wahab, *supra* note 87 at 467.

⁹⁴ Longworth, *supra* note 45 at para 24.

⁹⁵ *TedXToronto Women: Sex Worker and Advocate Valerie Scott*, online: She does the City <www.shedoesthcity.com>.

⁹⁶ House of Commons, Standing Committee on Justice and Human Rights, *The Challenge of Change: A Study of Canada's Criminal Prostitution Laws* (December 2006) at 77 (Chair: Art Hanger) [House of Commons].

⁹⁷ *Ibid* at 77.

⁹⁸ *Ibid* at 77.

work, as the harms faced by sex workers and the community can be rectified through already existing *Criminal Code* provisions.

Along with abolitionists, decriminalization feminists also wish to protect exploited persons and those forced into sex work with effective support networks⁹⁹ and exit strategies.¹⁰⁰ Ultimately, sex work advocates and decriminalization feminists argue that their approach is based on the “view that prostitution will never disappear”.¹⁰¹ As well, they argue that “some individuals do choose to enter into the trade, and that there is nothing intrinsically wrong with the adult exchange of sex for money provided that there is no exploitation involved”.¹⁰²

In contrast to the decriminalization approach, abolitionists believe that exploitation, abuse, and violence are inherent factors of prostitution.¹⁰³ Abolitionists believe that decriminalization would only serve to expand the sex trade and “put more power into the hands of the men who abuse prostitutes by telling them that they are entitled to do so.”¹⁰⁴ Abolitionists argue that prostitutes should not be criminalized themselves, however, the criminalization of johns, pimps and profiteers is an effective means to decrease prostitution and ultimately put a stop to it.¹⁰⁵ This partial criminalization framework is seen within the *Protection Act*, the current legislation governing sex work in Canada.¹⁰⁶ As well, abolitionists refuse to refer to prostitution as “work”, unlike that of decriminalization feminists.¹⁰⁷ Ultimately, they argue the presence of “poverty, racism, a history of previous sexual abuse, drug addiction [and] lack of housing” create

⁹⁹ *Ibid* at 77.

¹⁰⁰ Longworth, *supra* note 45 at para 24.

¹⁰¹ House of Commons, *supra* note 96 at 77.

¹⁰² House of Commons, *supra* note 96 at 77.

¹⁰³ Weitzer, *supra* note 60 at 28.

¹⁰⁴ Longworth, *supra* note 45 at para 27.

¹⁰⁵ Longworth, *supra* note 45 at para 27.

¹⁰⁶ Longworth, *supra* note 45 at para 27.

¹⁰⁷ Longworth, *supra* note 45 at para 28.

the willingness of women to engage in sex work. Thus, their participation in the trade is coerced.

¹⁰⁸ One of the key differences between the abolitionist and decriminalization positions is the extent to which sex workers exercise real choice, or are coerced into sex work. An understanding of the multiplicity of differences within sex work is needed when discussing whether coercion exists in sex work.

Abolitionists view “choice” as severely limited by economic and social structures including race, class and gender hierarchies that make it appear as though selling oneself is a viable option.¹⁰⁹ Longworth explains that an abolitionist approach seeks to protect society’s most socio-economically vulnerable members, as seen within the Nordic model.¹¹⁰ Accordingly, Longworth identifies commodification and exploitation concerns in sex work. The commodification of women’s embodied sexuality through sex work may endanger bodily integrity. It also raises concerns regarding market domination.¹¹¹ By not allowing the sale of personal attributes, Longworth believes vulnerable members of society can be protected.¹¹² Looking at the push to sell sex due to the commodification of the body, an economically impoverished woman would likely sell her body over a woman who is economically stable, resulting in class exploitation. An abolitionist would agree that the commercialization of one’s body harms women’s equality as it further exploits disadvantaged individuals, whereas a supporter of decriminalization would argue the commodification of one’s body is a choice and not a social harm.

¹⁰⁸ Longworth, *supra* note 45 at para 28.

¹⁰⁹ Longworth, *supra* note 45 at para 28.

¹¹⁰ Longworth, *supra* note 45 at para 68.

¹¹¹ Longworth, *supra* note 45 at para 67.

¹¹² Longworth, *supra* note 45 at para 68.

Longworth's example of socioeconomic exploitation through prostitution is a valuable point in understanding the need for law to protect the most disadvantaged individuals involved in sex work. However, from a decriminalization position, the ability to choose also deserves protection. Generalizing the meaning of choice cannot be done without generalizing all sex workers. It is also important to note the patriarchal undertones of society and their continued impact on gender discrimination and inequality.¹¹³ The use of both abolitionist and decriminalization ideas can create a perception of choice that resonates with a wide variety of sex workers and not just a few.

Looking at Prostitution and Choice: Expressive Theory

As previously discussed, the main differentiation between both feminist positions involves the ideas of consent and coercion.¹¹⁴ The issue of whether the choice to enter prostitution is coerced or of free consent has been at the forefront of feminist debates regarding prostitution. Longworth believes that finding a middle ground between these two approaches to choice is possible, as defining choice by way of a rigid binary between agent and victim cannot be done due to the vast array of experiences within sex work.¹¹⁵ Because of the wide variety of reasons for entering into sex work, Longworth claims prostitution "illustrates a continuum of choice". However, while Longworth believes choice should be thought of on a continuum, she also argues for the need to focus on the most disadvantaged women along it in a real response to

¹¹³ Gender/race discrimination and inequality within Canada can be seen in the average annual income of individual groups. In 1996, the average income for all Canadian men was \$31,117. While the average income for all Canadian women was \$19,208. Minority's income gap is even greater. See *Women's experience of racism: How race and gender interact*, online: CRIAW < <http://www.criaw-icref.ca/en/product/womens-experience-of-racism--how-race-and-gender-interact>>. For up to date information on the gender gap in Canada, see *The Global Gender Gap Report*, online: World Economic Forum < http://www3.weforum.org/docs/GGGR14/GGGR_CompleteReport_2014.pdf>.

¹¹⁴ Longworth, *supra* note 45 at para 33.

¹¹⁵ Longworth, *supra* note 45 at para 33.

prostitution.¹¹⁶ Looking at this choice continuum, some middle-class women choose to enter prostitution as high-end escorts because it gives them the opportunity to earn decent wages and meet interesting people, whereas others enter prostitution because they have no other option.¹¹⁷ Longworth acknowledges the critiques of second-wave feminism as centering more privileged women to support her argument that disadvantaged sex workers' experiences need to be centered when developing a legal response to prostitution.

Second-wave feminism was known for “simplifying experiences and centering viewpoints and voices of more privileged feminists, whether intentional or not”, and silencing “those who spoke from the margins”.¹¹⁸ This idea is valuable in understanding sex work through an intersectional approach. Longworth believes that centering the disadvantaged woman, a woman who is for example “Aboriginal, impoverished, addicted to hard drugs, and sexually abused as a child” results in legal reform that relies on an abolitionist approach.¹¹⁹ Longworth’s idea of using the Nordic model to protect disadvantaged individuals ignores the safety of sex workers who do not see themselves as exploited and victimized, and in turn silences sex workers’ ability to help legislators understand their experiences and safety concerns. The Nordic model, as seen in the *Protection Act*, attempts to use this framework in centering the most vulnerable group by criminalizing buyers of sexual services and decriminalizing sex workers. However, this protection from criminalization buyers is accompanied by unsafe working conditions and no protection from violence.¹²⁰ While privileging the most disadvantaged group

¹¹⁶ Longworth, *supra* note 45 at para 34.

¹¹⁷ Longworth, *supra* note 45 at para 34.

¹¹⁸ Longworth, *supra* note 45 at 35.

¹¹⁹ Longworth, *supra* note 45 at 35.

¹²⁰ Department of Justice, *supra* note 36.

within legal framework sounds as if it would provide safety for all, the way in which this framework is used can have negative effects on the safety of sex workers.

This idea is promising, but the way in which Longworth frames these ideas within the Nordic Model is problematic. This approach of centering safety around the most vulnerable group of sex workers may bring safety for all, but this legal framework must be used carefully. Although Longworth argues that the Nordic model will reduce harm to sex workers, this paper will analyze the effects of the *Protection Act* on safety, showing that the Nordic model does not lead to the protection of sex workers. Accordingly, this paper does not seek to ignore the most disadvantaged workers within the sex trade, it seeks to understand the individual experiences of each sex worker and promote their safety no matter the reason for their engagement in the sex trade.

Looking at different branches of feminists' approaches to choice, it is not possible to just focus on one. This paper will now explore two opposing feminist approaches to choice: dominance theory and liberal theory. Dominance feminists believe women are not autonomous as they cannot be truly autonomous under male domination.¹²¹ Patriarchal powers of society continually disallow authentic decisions due to existing hierarchies, resulting in options chosen because of patriarchy itself.¹²² While dominance theory relates to an abolitionist approach, on the other hand, liberal feminists believe women are inherently autonomous agents.¹²³

Furthermore, liberal feminists believe women's subordination stems from an unequal distribution of choice rather than a lack of power. To solve this, women need to be provided with

¹²¹ Erin Nelson, "Reconceiving Pregnancy: Expressive Choice and Legal Reasoning" (2004) 49 McGill L.J. 593 para 40 [Nelson].

¹²² *Ibid* at para 40.

¹²³ *Ibid* at para 41.

the same choices men have always had.¹²⁴ However, liberal feminists fail to consider the individual situations of sex workers by solely focusing on the agent making the choice. Dominance theory allows for situational exploitation to be taken into consideration, something that liberal feminists fail to address. Erin Nelson develops these two theories through the example of choices made around medical treatment in pregnancy, however, this paper will relate these theories to prostitution and choice. Nelson claims that for both of these theories, the bottom line is that “the pregnant woman must be the one to decide what will be done and to her body.”¹²⁵ Therefore, liberal ideals such as decisional privacy and autonomy are essential and need to be safeguarded in pregnancy. Ensuring that women continue to retain authority and autonomy with respect to their bodies are also important.¹²⁶ For sex workers this claim resonates clearly, as well as within both abolitionist and decriminalization approaches. Considering individual cases of exploitation in sex work from a dominance perspective is also a valuable and important idea.

Decisional autonomy is strongly supported through a decriminalization approach, where the right to choose sex work should be available.¹²⁷ Unfortunately, decisional privacy and autonomy are questioned within an abolitionist approach. Abolitionists believe the choice to enter into prostitution is the product of coercive elements, such as poverty and patriarchal undertones of society.¹²⁸ Looking at sex workers’ choices through an abolitionist lens may lessen the legitimacy of sex workers’ choices to enter the trade, creating harmful stereotypes that threaten to delegitimize sex workers’ autonomous choices. These stereotypes may even threaten

¹²⁴ *Ibid* at para 41.

¹²⁵ *Ibid* at para 41.

¹²⁶ *Ibid* at para 41.

¹²⁷ Sloan & Wahab, *supra* note 87 at 467.

¹²⁸ Longworth, *supra* note 45 at para 28.

sex workers' ability to contribute to future legislation. Therefore, the contribution of both liberal and decriminalization approaches to choice must be allowed as they provide helpful framework in maintaining sex workers' decisional privacy and autonomy.

While both dominance and liberal theories alone fail to understand choice, abolitionist and decriminalization arguments alone also do not fully capture the wide landscape of choice. This paper now turns to the idea of an “expressive theory of rational choice”, developed by Anderson to see whether it can provide adequate framework for understanding the decisions of sex workers. Anderson “rejects consequentialist models of rational choice who reject the recognition of a plurality of goods and how we value these goods”.¹²⁹ This idea of a plurality of options can be observed within this statement:

People experience the world as infused with many different values. Friendships can be intimate, or merely convenient, charged with sexual excitement, or mellow. A subway station can be confining, menacing and dumpy, or spacious, welcoming and sleek. When people attribute goodness or badness to something, person, relationship, act or state of affairs, they usually do so in some respect or other: as dashing, informative, or tasty, delightful, trustworthy or honorable, or as corrupt cruel, odious, horrifying, dangerous, or ugly. Our evaluative experiences, and the judgments based on them, are deeply pluralistic.¹³⁰

Here, Anderson represents the multitude of different experiences of individuals, allowing for a plurality of reasons and values that would inform the choices of sex workers. Additionally, Anderson claims that the way goods are valued is “incommensurable and not comparable in ordinal fashion”, meaning that the way goods are valued can only be measured qualitatively and not quantitatively, resulting in no right answer.¹³¹ This idea can be used to help us understand that there is no “right way” sex workers choose and participate in prostitution, resulting in more

¹²⁹ *Ibid* at para 47.

¹³⁰ *Ibid* at para 47.

¹³¹ *Ibid* at para 47.

attention being put towards improving the safety of sex workers. This understanding of pluralistic choices can be used as a means to interweave the two opposing approaches of abolitionist and decriminalization together. When choice is seen as a plurality, it can be disconnected from risk. This idea of risk is connected to the choices sex workers make when entering prostitution. For example, “You chose a risky profession, too bad for you.”¹³²

Abolitionist’s ideas of protecting disadvantaged individuals, along with an understanding that gender and class hierarchies do exist within society, can help approach sex work in exploitative situations critically.¹³³ On the other hand, a decriminalization perspective can help us understand that choice must be respected in order to protect sex workers’ rights, along with women’s rights in general.¹³⁴ It disconnects specific choices from socially expected outcomes.

Anderson further claims that an expressive theory of choice gives an “alternative basis for ranking actions besides their value of consequences because it recognizes actions have dual ends”.¹³⁵ These dual ends of expressive theory include: (a) it brings about a state of affairs and (b) it can be done for the sake of people and things individuals rationally care about.¹³⁶

Expressive choice theory is concerned with other reasons why someone may make a decision, such as a sex worker may enter the trade for a number of reasons. Their reasons may include to support their children, to support their drug habit, or possibly because they enjoy it. Anderson allows us to explore choice theory beyond the sphere of contract and beyond the sphere of liberalism and dominance ideologies.

¹³² See *infra* footnote 170.

¹³³ Longworth, *supra* note 45 at 28.

¹³⁴ Sloan & Wahab, *supra* note 87 at 467.

¹³⁵ Nelson, *supra* note 121 at para 51.

¹³⁶ Nelson, *supra* note 121 at para 51.

Another important area of expressive choice theory to consider is that Anderson claims our valuations are socially mediated and are dependent on social norms.¹³⁷ In other words, in order for something to be valuable to an individual, an individual must participate in the social process of valuation.¹³⁸ Anderson believes if an individual values something, they govern the way they act to express that value through social norms in order to communicate meaning towards others. While Anderson argues that social norms are a way of communicating values, she does not endorse all existing norms, but rather, acknowledges that this link between social norms and values provides a vehicle for criticizing norms that “do not provide adequate vehicles of expression”.¹³⁹ This inadequate vehicle of expression can be seen in sex workers’ inability to express their needs. These needs cannot be expressed due to society’s inability to hear them because of the stigma associated with their profession, resulting in limited potential for expression.

On the contrary, there are also problems with values being placed on patriarchal norms within the sex trade. Within the sex industry, sex workers have predominantly been female, while buyers have predominantly been male throughout history.¹⁴⁰ Does the act of women selling sex to men represent sexual freedom? Or do the underlying patriarchal norms that have continually viewed women as sex objects mitigate sex workers’ true autonomy?¹⁴¹ These are important questions regarding the stigmatization of sex workers that will be discussed later in this paper.

¹³⁷ Nelson, *supra* note 121 at para 47.

¹³⁸ Nelson, *supra* note 121 at para 47.

¹³⁹ Nelson, *supra* note 121 at para 48.

¹⁴⁰ Rochelle L. Dalla, Lynda M. Baker, John DeFrain & Celia Williamson, *Global Perspectives on Prostitution and Sex Trafficking*, (Plymouth: Lexington Books, 2011) at 280.

¹⁴¹ Jeffrey Gauthier, “Prostitution, Sexual Autonomy, and Sex Discrimination” (2011) 26.1 *Hypatia* 166 at 180 [Gauthier].

Normative ideals that stigmatize sex work need to be diminished in order to provide sex workers the ability to express their ideas and become a true member of society. Sex workers are continually stigmatized as immoral, as victims, and as a nuisance to society. Whether they're choosing sex work for reasons that fit with their own values, or whether they have been coerced into sex work or chosen it out of desperation – no matter which reason, the stigma needs to be lessened so society can hear their reasons. Once this is allowed, the stigmatization of sex work may cease to exist and sex workers may then be able to experience safety guaranteed to other citizens in which they are excluded from.

Both Longworth's idea of choice on a continuum and Anderson's expressive theory provide framework that can help us understand the various reasons why sex workers choose prostitution. Each theory of choice allows for a wide range of ideas, experiences, and beliefs. Anderson's theory ultimately allows us to fully understand that individual's actions may have dual ends, and those dual ends can result in a plurality of outcomes. Understanding that there is no "right choice" will allow us to focus on defending sex workers' lives and their rights to community involvement and protection. As well, it can also allow the use of both decriminalization and abolitionist approaches to sex work. In order to begin looking at sex work this way, the sources of stigma surrounding sex work must be discovered and diminished.

Why Stigma is Important and Why it's a Limit

Self-expression can be characterized through "finding the self in production or activity", and can be discovered through the distancing of one's self from the created product.¹⁴² The concept of self-expression has been used to both support and deny the idea of legitimizing sex

¹⁴² *Ibid* at 170.

work as a form of labor. Self-expression has a legitimating role in the claims that sex work is an expression of one's sexual autonomy. It has also been argued that other forms of labor such as writing and dancing contain elements of intimate embodied services like that of prostitution.¹⁴³ This paper will now look at both Gauthier and Anderson's theories. Gauthier argues that sex workers surrender their self-expression to the buyer who then takes control of the transaction, leaving no room for the sexual self-expression of the sex worker.¹⁴⁴ Anderson argues that there is no right way to value decisions and, importantly, that inadequate social norms hinder individuals' self-expressive abilities.¹⁴⁵ Using Anderson's expressive theory, this paper will argue that Gauthier's theory does not take into consideration the plurality of sex workers' experiences due to the inadequacy of social norms surrounding sex work. Ultimately, this paper puts these two theories together in order to show how stigma limits social understanding of decisions sex workers make from their own perspectives.

Gauthier challenges arguments that sex work is an expression of sexual autonomy and an example of sexual expression by analyzing the authentication of expression in sex work. Gauthier states that professionals involved in embodied services must have a creative say in their work.¹⁴⁶ This creative work is closely tied to the professional's self-expressive character as it is a product of one's self.¹⁴⁷ Often this self-expression is hijacked and taken control of by the patron within professional settings. An example of this is women in the service industry who are often under control and directed by patrons.¹⁴⁸ Gauthier argues that while some services do require a surrender of self-direction essential to the social values of such activities, what the patron wants

¹⁴³ *Ibid* at 168.

¹⁴⁴ *Ibid* at 180.

¹⁴⁵ Nelson, *supra* note 121 at para 48.

¹⁴⁶ Gauthier, *supra* note 141 at 171.

¹⁴⁷ Gauthier, *supra* note 141 at 171.

¹⁴⁸ Gauthier, *supra* note 141 at 174.

from the prostitute must be specifically looked at.¹⁴⁹ Some have argued that prostitution patrons have a “...extraordinary degree of self-deception” in believing they are desired by the prostitute, although others have asserted that the desire of the patron is simply to degrade and dominate the prostitute.¹⁵⁰ On the other hand, prostitutes are often expected to be “into it” and display sexual interest in the patron creating a semblance of sexual self-expression.¹⁵¹

Understanding the difficulties in categorizing sexual expression with all bodily expression is important to contemplate and is paramount in considering sex work within the same category as other forms of labor. Gauthier argues that the act of surrendering sexual self-direction engages discriminatory beliefs and stereotypes regarding women’s sexual freedom, enacting a false sense of female sexual freedom that plays on male desires.¹⁵² Conforming to male desires without regards for the sex worker’s own sexual desires, Gauthier argues, limits female sexual expression for the purpose of fulfilling male desires.¹⁵³ Ultimately, Gauthier claims sexual expression cannot be used to distinguish between exploitation and sexual agency in conditions of prostitution.¹⁵⁴

Anderson’s expressive theory of choice is useful in understanding how these vehicles, vehicles being the lens of stigma and exploitation found in Gauthier’s argument, are not adequate vehicles of expression for sex workers. Remembering Anderson’s theory, social norms play a role in how individuals view other’s choices and are vehicles for expression, including sexual self-expression.¹⁵⁵ Because social norms surrounding prostitution are inadequate at reproducing

¹⁴⁹ Gauthier, *supra* note 141 at 173.

¹⁵⁰ Gauthier, *supra* note 141 at 173.

¹⁵¹ Gauthier, *supra* note 141 at 173.

¹⁵² Gauthier, *supra* note 141 at 179.

¹⁵³ Gauthier, *supra* note 141 at 179.

¹⁵⁴ Gauthier, *supra* note 141 at 180.

¹⁵⁵ Nelson, *supra* note 121 at para 54.

the “diversity of values engaged by women’s choices” within sex work, harmful stereotypes continue to place all sex workers within a degrading category.¹⁵⁶ In general, the constructs surrounding expression within sex work are inadequate and are the difficulty in placing sexual self-expression within the same category as other types of professional entities based on bodily expression.

Borrowing from Schwazenbach, “What distinguishes a professional performance from mere exploitation is not the medium of expression, but the limitations on the performance”.¹⁵⁷ The social norms, constructs, and stigma are the limitations on performance that create exploitation in sales of sex because they are inadequate vehicles of expression for decisions and choices to engage in sex work. What if sex workers had the full capacity to choose what services they offered and had the ability to always say no? Would this allow them to have full capacity over their sexual self-expression? These limitations also restrict sex workers from expressing the wide range of views they hold and silence the meaning for their choices and their values. For example, a woman may enter prostitution because she is desperate and needs to care for her children. Even these sex workers, workers who do not wish to work as prostitutes cannot receive the help they need to leave the profession because of the social norms and stigma that surround prostitution. Ultimately, stigma limits everyone from understanding the meaning of the choices from the perspective of the person making them.

In the end, social constructs of female sexuality are inadequate vehicles surrounding prostitution that limit self-expression due to male sexual desires controlling the transaction between patron and sex worker. The constructs of stigma surrounding prostitution further limit

¹⁵⁶ Nelson, *supra* note 121 at para 64.

¹⁵⁷ Gauthier, *supra* note 141 at 170.

understanding of the meaning of the choices to those making them (i.e. sex workers). Stigma limits understanding choices because it disallows proper vehicles of expression as previously discussed. The issues of harming female sexuality and the inability of sex workers to express themselves during transactions due to domination by the patron, Gauthier argued, may become non-existent once stigma is erased. This means that erasing stigma may be the key to ending exploitation. Providing sex workers with other vehicles of expression can only be accomplished once stigma is challenged and removed. Society and the law must begin to look at the social norms attached to sex work differently in order to understand that they have historically looked at prostitution the wrong way.¹⁵⁸

Risk

Before the stigma of sex work can be challenged and removed, the stigma surrounding sex work must be uncovered and understood. Historically, prostitution has signified sin in Judeo-Christian religious traditions.¹⁵⁹ This harmful identity continues to be present in Western Culture, resulting in sex workers being placed at the bottom of the “sex hierarchy”.¹⁶⁰ It is very easy to come up with an idea about the kind of person a sex worker is, resulting in a clear indication of the stigma attached to sex work.¹⁶¹ These ideas about sex work are then reproduced through many different mediums including police services, the media, and neighborhood associations.¹⁶² The two deeply embedded stigmatic assumptions that remain prevalent despite the development of the sex worker rights movement and counter-narratives include the “at risk” and the

¹⁵⁸ Nelson, *supra* note 121 at para 64.

¹⁵⁹ Juline A Koken, “Independent female escort’s strategies for coping with sex related stigma” (2012) 16 *Sexuality and Culture* 209 at 209 [Koken].

¹⁶⁰ *Ibid* at 209.

¹⁶¹ Chris Bruckert & Stacey Hannem, “Rethinking the Prostitution Debates: Transcending Structural Stigma in Systemic Responses to Sex Work” (2013) 28 *Canadian Journal of Law and Society* 43 at 47 [Bruckert & Hannem].

¹⁶² *Ibid* at 48.

“risky”.¹⁶³ The authors Bruckert and Hannem rely on “risk” as a problematic variable in the stigmatization of sex workers. This paper will use risk along with the idea of nuisance as contributing factors to stigma.

The “risky” refers to sex workers deemed to pose a threat to society by being dirty vectors of disease with drug addictions and a disruptive presence in neighborhoods.¹⁶⁴ They are also positioned as immoral and a threat to family values.¹⁶⁵ The “at risk” pertain to vulnerable sex workers who are victimized by their clients, their “pimps”, and their “traffickers”.¹⁶⁶ These sex workers are positioned as exploited and in need of “saving”.¹⁶⁷ The violence associated with sex work, for instance human trafficking and physical/sexual assault, also play a large role in the idea that sex workers are “risky” by choosing to participate in prostitution.¹⁶⁸ Both the “at risk” and “risky” stereotypes associated with sex workers, which have little basis in fact, come to be seen as true and in turn erase sex worker’s agency and silence the wide range of narratives associated with sex workers.¹⁶⁹

Nuisance

Along with the idea of risk, the notion of sex work as a nuisance plays a large role in the stigmatization of sex workers. Historically, public nuisance of sex work has been a key issue in Canadian legal response since the nineteenth century.¹⁷⁰ Legislative initiatives have continually pushed sex work away from public view, with *Criminal Code* provisions placing community

¹⁶³ *Ibid* at 48.

¹⁶⁴ *Ibid* at 48.

¹⁶⁵ *Ibid* at 48.

¹⁶⁶ *Ibid* at 48.

¹⁶⁷ *Ibid* at 48.

¹⁶⁸ See *supra* section 'The Relationship Between Violence and Prostitution'.

¹⁶⁹ Bruckert & Hannem, *supra* note 161 at 48.

¹⁷⁰ Campbell, *supra* note 1 at 29.

interest over the safety of sex workers.¹⁷¹ An example of this is the continued criminalization of sex workers who work in public view.¹⁷² The invisibility of sex workers brought forth by Canadian legislation through ideas of nuisance also has implications on the stigmatization of sex workers. Pushing sex work out of public view, in turn, pushes it out of community discussion, resulting in immoral, distasteful and harmful ideas about sex work.¹⁷³ Because sex work is criminalized when conducted in public, community members internalize the harmful stigma of sex work. Sex workers can internalize this harmful stigma as well, resulting in community disengagement.¹⁷⁴ Looking at sex work as a nuisance isolates workers from their communities, creating psychological and physical harm. The *Protections Act*, Canada's most recent prostitution legislation, was constructed on this idea of nuisance, creating further implications for the stigmatization of sex workers.

How Stigma Works

Goffman referred to stigma as an “attribute that discredits an individual or a group, diminishes them and renders them trained and discounted, abject and inferior.”¹⁷⁵ Goffman believed stigma was an interactional phenomenon between “normal” and stigmatized persons, his work being primarily focused on micro-level individualized interactions and individually discredited identities.¹⁷⁶ For the purpose of looking at the effects of stigmatization and sex work, understanding stigma on a macro-level is essential.¹⁷⁷ On a macro-level, stigma can be seen

¹⁷¹ Campbell, *supra* note 1 at 33.

¹⁷² See *supra* section ‘Canadian Historical and Legal Context of Prostitution’.

¹⁷³ Campbell, *supra* note 1 at 39

¹⁷⁴ Campbell, *supra* note 1 at 39

¹⁷⁵ Myles Balfe, Ruairi Brugha, Ermer O’Connell, Hannah McGee, Diarmuid O’Donovan & Deirdre Vaughan, “Why don’t young women go for chlamydia testing? A Qualitative study employing Goffman’s stigma framework” (2010) 12 *Health, Risk & Society* 131 at 132.

¹⁷⁶ Bruckert & Hannem, *supra* note 161 at 49.

¹⁷⁷ Bruckert & Hannem, *supra* note 161 at 49.

embedded in social structures and institutions, enforced through regulation and legal policy throughout society.¹⁷⁸ This can be referred to as “structural stigma”, and can be observed through Canada’s current and historical laws concerning prostitution.

Structural stigma initiates when risk, whether it be from risk to self or others, becomes “attached to a discredited identity through institutionalized discourse; these notions are manifested in targeted interventions designed to manage the risk posed by the stigmatized group, irrespective of individual circumstances or attributes.”¹⁷⁹ Stigma operates as a function of risk to discredit individual experiences of sex workers through the collective experience of management and regulation.¹⁸⁰ Interventions, laws in this case, may be constructed in a “positive” way.¹⁸¹ For example, individuals who participate in the regulation of “risky populations” (i.e. sex workers) may believe they are “helping” or acting in the best interest of the population they identify as victims.¹⁸² Ultimately, even when regulation and intervention are constructed through positive framework, they continually provide legitimacy to the division of “normal” and “other”, reproducing and rectifying stigmatization of the “at risk” and “risky”.

Structural stigma can also initiate from legal institutions’ continued idea of sex work as nuisance. As previously discussed, this concept of nuisance has profoundly impacted legal discourse surrounding prostitution policy as a method to rationalize the criminalization of sex work that had historically been viewed as immoral.¹⁸³ Narratives regarding the protection of communities from the harmful presence of prostitution have allowed the criminalization of

¹⁷⁸ Bruckert & Hannem, *supra* note 161 at 49.

¹⁷⁹ Bruckert & Hannem, *supra* note 161 at 49.

¹⁸⁰ Bruckert & Hannem, *supra* note 161 at 49.

¹⁸¹ Bruckert & Hannem, *supra* note 161 at 49.

¹⁸² Bruckert & Hannem, *supra* note 161 at 49.

¹⁸³ Campbell, *supra* note 1 at 28.

prostitution.¹⁸⁴ These laws further entrench ideas of sex work as unsafe, dirty and a threat to the community. The structural stigma stemming from these ideas further degrades sex workers in the community and threatens their safety. Framing legal intervention (ie. criminalizing sex work) around the idea of “helping” people as previously discussed has been used in Canada’s recent *Protections Act*. The Act legitimizes the stigmatization of “exploited” and “not-exploited” sex workers by referring to its purpose of “protecting” vulnerable populations.¹⁸⁵

It has been established that stigma in general negatively impacts sex workers. Koken conducted a study on independent women escorts advertising in a major metropolitan city in the United States. Koken’s study is useful in examining the effects of stigma on sex workers as the stigma associated with sex workers in the United States is found in a similar legal context (prostitution is illegal in most states) to that in Canada. The purpose of this study was to qualitatively analyze how independent female escorts advertising online experience and perceive stigma involved with their work, along with strategies used to manage the impact of work-related stigma on their individual lives.¹⁸⁶

Most of the women interviewed in this study told very few people about their work, with most confidants being fellow sex workers.¹⁸⁷ While some women in this study were open about their sex work with boyfriends, friends and family members, many women in this study chose to stay “closeted” about their work, not because of personal negative feelings associated with their work, but to avoid loss of status that “can accompany being identified as a member of a

¹⁸⁴ Campbell, *supra* note 1 at 28.

¹⁸⁵ Campbell, *supra* note 1 at 33.

¹⁸⁶ In Koken’s study, all participants were women whose ages ranged from 21 to 57. The study consisted of a 30 person sample. With regards to diversity, 70 % of participants were of white/European decent, 10 % were Asian/South Asian, 16.6 % were African American/Caribbean American, and 3.3 % were Multi-Racial. See Koken, *supra* note 166 at 213. See Koken, *supra* note 162 at 224.

¹⁸⁷ Koken, *supra* note 159 at 224.

stigmatized group.”¹⁸⁸ Some women may even “come out” as a sex worker, but may go back to a closeted lifestyle when their work endangers close relationships and future opportunities.¹⁸⁹ One participant shared about going “back into the closet”:

Um, who does know? Another girl that does this, um, my boyfriend knew, but now he thinks I’ve stopped. I met my boyfriend when I was, um, doing this. Which at first we weren’t dating seriously. He was okay with it because he uh, he had no feelings for me, so. So now I unfortunately lie about it.¹⁹⁰

This woman’s experience exemplifies the stereotypes she and other people hold about individuals who engage in sex work. This participant felt that when her relationship became significant, she needed to protect it by lying about her work.¹⁹¹ This woman’s experience highlights the limits stigma has on her sexual self-expression.¹⁹² Her experience is limited by the stigmatic lens through which she and society view sex work. Anderson’s construction of social norms as limiting expression can be seen here as relevant to the analysis of sex work. She is stigmatized due to her work; therefore, the stigma limits her to staying closeted about her sex work. This is an example of how the limits created by stigma effect sex workers choices and lives.

The narratives within Koken’s study were consistent. Many women were aware of the stigma associated with sex work and did not want to risk openly identifying as sex workers.¹⁹³ Sex workers who chose to not confide in anyone about their work to protect themselves from stigma reported feelings of isolation and loneliness, resulting in a loss of possible social support from family and friends.¹⁹⁴ Feelings of isolation and loneliness were also reported by sex

¹⁸⁸ Koken, *supra* note 159 at 225.

¹⁸⁹ Koken, *supra* note 159 at 221.

¹⁹⁰ Koken, *supra* note 159 at 221.

¹⁹¹ Koken, *supra* note 159 at 221.

¹⁹² Nelson, *supra* note 121 at 627.

¹⁹³ Koken, *supra* note 159 at 225.

¹⁹⁴ Koken, *supra* note 159 at 219.

workers wishing to leave the trade, mentioning exhaustion and stress as the result of leading a double life.¹⁹⁵ An indoor sex worker, quoted in O’Doherty, shared the psychological effects of belonging to a marginalized group:

I would like to be able to say, “I’m a professional, elite, independent escort” and not feel afraid I’m going to be arrested, ridiculed, or judged wrongly as “loose”, “slutty,” or “pathetic.” I feel proud of myself what I’ve achieved and angry that I have to keep it a secret and feel the shame of others. I’m not ashamed- it’s other people’s issues because of ignorance.¹⁹⁶

The stigma associated with sex work is clearly damaging, and can dissuade sex workers from accessing social support from governmental agencies and legal institutions out of fear they will be labeled through ongoing stigma associated with sex work. Not surprisingly, women with a highly positive orientation towards their work were reported to be more open with family and friends, resulting in greater access to social support.¹⁹⁷

The law engages with social norms in myriad ways. Laws can both shape social attitudes as well as respond to and entrench them. Thus, social norms can impact the stigma sex workers experience in various ways. Here, this paper will analyze the models of criminalization, legalization and partial criminalization found in multiple countries in order to uncover the impact each of these approaches have on the structural stigma surrounding sex work. The legalization model can be found in the Netherlands. In the Netherlands, prostitution is legal with the exception of trafficking, some street prostitution, and child prostitution.¹⁹⁸ Legalization removes adult prostitution from criminal laws and substitutes with regulation through licensing.¹⁹⁹ This allows sex workers access to criminal justice protection, along with a degree of legitimacy

¹⁹⁵ Koken, *supra* note 159 at 225.

¹⁹⁶ O’Doherty, *supra* note 61 at 231.

¹⁹⁷ Koken, *supra* note 159 at 225.

¹⁹⁸ Longworth, *supra* note 45 at 12.

¹⁹⁹ Longworth, *supra* note 45 at 12.

afforded through labor laws.²⁰⁰ Unfortunately, only four per cent of prostitutes have registered with Netherland authorities, resulting in the majority of prostitutes being unable to access health and safety regulations, employment rights, and pension benefits.²⁰¹ In Germany, prostitution is also legalized. Even though it is legalized, municipal “exclusion zones” are used and enforced through criminal sanction to restrict sex workers to certain areas, these areas being isolated and dark with inadequate sanitation and security.²⁰² In Munich, Germany, street-based sex work is prohibited.²⁰³

Even within legalized framework, sex work is still stigmatized. Within Amsterdam, known globally for its prostitution industry, business people (accountants, health insurance, and accountants) have reported wanting nothing to do with prostitution.²⁰⁴ The stigma attached to prostitution may be factor in why so little sex workers choose to self-register in countries like the Netherlands. In Nevada, the only American state where prostitution has been legalized, sex workers cannot work independently and must work with a license and within licensed brothels.²⁰⁵ Therefore, sex workers who do not fit within the legalized regime (i.e. irregular migrants, individuals with criminal backgrounds, individuals unable to meet criteria for licensing, individuals who do not want the stigma associated with registering as a sex worker) are subject to further exclusion and repression from the justice system.²⁰⁶ The lack of acceptance of sex workers within communities, exclusion zones in Germany that force sex workers to work in unsafe areas, and the difficulty many sex workers face in attempting to become licensed in

²⁰⁰ Bruckert & Hannem, *supra* note 161 at 55.

²⁰¹ Longworth, *supra* note 45 at 13.

²⁰² Bruckert & Hannem, *supra* note 161 at 55.

²⁰³ Bruckert & Hannem, *supra* note 161 at 55.

²⁰⁴ Longworth, *supra* note 45 at 13.

²⁰⁵ Bruckert & Hannem, *supra* note 161 at 56.

²⁰⁶ Bruckert & Hannem, *supra* note 161 at 57.

Nevada and the Netherlands continually perpetuate stigma. Legalization frameworks tend to criminalize sex workers who “cannot” be licensed, pushes sex work away from the public eye through zoning practices, and ultimately disallows many sex workers from civic inclusion.

New Zealand was the first country in the world to fully decriminalize prostitution with the *Prostitution Reform Act* in 2003.²⁰⁷ This Act permitted the commercial sale of sex by individuals over 18 years of age.²⁰⁸ The *Prostitution Reform Act* requires brothels with more than four workers to obtain an operator certificate, however, small operations of four or fewer workers are exempt from regulation.²⁰⁹ Health and safety requirements are set by the *Prostitution Reform Act* regarding sexual protection, and workers working within smaller establishments can negotiate working conditions using labor laws.²¹⁰ Many supporters of decriminalization believe it can lessen the stigma experienced by sex workers, but unfortunately, stigma still remains.²¹¹ New Zealand’s law allows local jurisdictions to again create exclusion zones for prostitution.²¹² These exclusion zones alone speak of the stigma accompanied by sex work, creating isolation and community rejection towards prostitution.²¹³

Stigma may always be present no matter the policy approach to prostitution. Although it may always be present, the removal of regulation cloaked in structural stigma may be a step towards reducing the stigma associated with sex work.²¹⁴ Therefore, the decriminalization model may currently be the best model to further this initiative. Research has suggested that in New

²⁰⁷ Bruckert & Hannem, *supra* note 161 at 59.

²⁰⁸ Bruckert & Hannem, *supra* note 161 at 59.

²⁰⁹ Bruckert & Hannem, *supra* note 161 at 59.

²¹⁰ Bruckert & Hannem, *supra* note 161 at 60.

²¹¹ Melissa Farley, “Bad for the Body, Bad for the Heart”: Prostitution Harms Women Even if Legalized or Decriminalized” (2004) 10 *Violence Against Women* 1087 at 1092.

²¹² *Ibid* at 1092.

²¹³ *Ibid* at 1093.

²¹⁴ Bruckert & Hannem, *supra* note 161 at 61.

Zealand, victimized sex workers were more likely to report incidents to the police and seek assistance after prostitution was decriminalized than beforehand.²¹⁵ Immordino and Russo studied opinions of prostitution collected as part of the World Value Survey of 2005 to 2008.²¹⁶ The question specifically related to prostitution on the survey read: “Do you consider prostitution justifiable?”²¹⁷ The respondents on the survey had to answer on a scale of 1 to 10, with 1 signifying “Never justifiable” and 10 signifying “Always justifiable”. The legal regimes around prostitution at the time of the survey were placed into three categories: illegal, legal and regulated.²¹⁸ The average scores of countries were as follows: 2.31 for illegal countries, 3.12 for legal countries, and 3.91 for regulated countries.²¹⁹

While these numbers do not show extensive differences between the opinions of prostitution within different legal frameworks, they do show that decriminalizing prostitution is a step toward decreasing structural stigma associated with sex work. Because the scores for legal and regulated countries were comparably low on the original scale, it is clear that more needs to be done than just erasing the legal framework surrounding prostitution. Not only must structural stigma be erased from legal framework, it must also be understood that stigma is embedded within society. Coming back to the idea of inadequate social norms surrounding prostitution, reinventing social norms may help erase stigma and allow sex workers to fully express themselves and become inclusive community members. A safety-based approach to prostitution

²¹⁵ Bruckert & Hannem, *supra* note 161 at 61.

²¹⁶ The World Value Survey is a global network of social scientists who study the changing social values and their impact on social and political life around the world. The surveys are nationally deployed in almost 100 countries, containing almost 90 % of the world’s population. See *What We Do*, online: WVS <<http://www.worldvaluessurvey.org/WVSContents.jsp>>.

²¹⁷ G. Immordino & F.F. Russo, “Laws and stigma: the case of prostitution” (2015) 40 *Eur J Law Econ* 209 at 211.

²¹⁸ *Ibid* at 211.

²¹⁹ *Ibid* at 213.

may be an adequate social norm for sex work. For now, it is understood that stigma creates inadequate social norms that can only be removed once stigma is erased.

The *Protection Act*: Stigma Continues

Partial criminalization is Canada's current prostitution model, and as previously mentioned was adapted from the Swedish *Sex Purchase Act* of 1999. While both legalized and criminalized models are based on managing the "risk" associated with prostitution, the partial criminalization model frames sex workers as "exploited" and in need of saving.²²⁰ Within this context, the buyers are considered to be male and the sellers are considered to be female victims of "male violence and patriarchal oppression."²²¹ This model denies sex workers' agency as it was created without the consultation of sex workers.²²² The partial criminalization model also dismisses the possibility that prostitution can be a "business transaction between two equal parties."²²³ Structural stigma is used in this model to validate the regulation of prostitution through stigmatic assumptions of victimhood, silencing sex workers' voices and positioning their choices as either good or bad.²²⁴

The *Prostitution Act* implemented a number of changes to the *Criminal Code* regarding prostitution. Some of these changes include new alterations to the advertising offense, the creation of a procuring offense, and an offense related to communicating for the purpose of prostitution near school grounds, playgrounds, and daycares.²²⁵ For the purpose of this paper, the focus will be on the largest and most important change the *Protection Act* has implemented. This

²²⁰ Bruckert & Hannem, *supra* note 161 at 58.

²²¹ Hon Chu & Glass, *supra* note 38 at 104.

²²² Hon Chu & Glass, *supra* note 38 at 104.

²²³ Bruckert & Hannem, *supra* note 161 at 58.

²²⁴ Bruckert & Hannem, *supra* note 161 at 59.

²²⁵ Department of Justice, *supra* note 36.

change includes criminalizing the buyers of sexual services and not the sellers.²²⁶ Unfortunately, criminalizing buyers only further perpetuates the stigma of risk and nuisance surrounding sex work. This section will analyze the *Prostitution Act* in order to understand why looking at sex work as a problem ultimately endangers, excludes, and further stigmatizes sex workers.

Risk

The risk of violence against sex workers still remains with the implementation of the *Protection Act*. As well, the stigma surrounding sex workers as either “at risk” or “risky” continues. The physical and sexual assault sex workers experience²²⁷ is perpetuated through the partial criminalization framework of the *Protection Act*. Before the *Protection Act* was implemented in Canada, the Vancouver (British Columbia) police force adopted partial criminalization framework that criminalized the buyers of sexual services and not the sellers in January 2013.²²⁸ By looking at the effects Vancouver’s prostitution policy has had on sex workers, understanding the negative impacts partial criminalization has on them can be accomplished.

Surveys were conducted to determine the pre and post policy violence rates of sex workers in Vancouver.²²⁹ In 2012, the pre-policy rate consisted of 23.7%.²³⁰ Eight months after the partial criminalization policy came into effect, the post-policy victimization rate consisted of 24.6%.²³¹ The results of the study show little variation in post and pre-policy rates. Therefore, even with partial criminalization, violence against sex workers still remains. It is in the best

²²⁶ Department of Justice, *supra* note 36.

²²⁷ See *supra* section ‘The Relationship Between Violence and Prostitution’.

²²⁸ A Krusi, K Pacey, L Bird, C Taylor, J Chettiar, S Allan, D Bennett, J S Montaner, T Kerr & K Shannon, “Criminalization of clients: reproducing vulnerabilities for violence and poor health among street-based sex workers in Canada- a qualitative study” (2014) 4:6 BMG Open 1 at 2 [Krusi].

²²⁹ *Ibid* at 5.

²³⁰ *Ibid* at 6.

²³¹ *Ibid* at 6.

interest of the sex worker and the client to not get caught.²³² Because of this, sex workers rush into client's cars before properly negotiating transactions, checking 'bad date' sheets, and checking for weapons.²³³ In Sweden, the risk of violence has also been reported since the implementation of their partial criminalization law. Regular clients have become fearful of police arrest and aggravation, resulting in the need for sex workers to find new and unknown clients.²³⁴ These unknown clients are more likely to be violent and request unprotected sex.²³⁵ It is clear that the new Act did not address the problem set out in Bedford that the inability to screen clients violated sex workers' s. 7 rights.

Criminalizing the buyers of sexual services pushes sex workers to work in dangerously isolated areas because of the risk of arrest posed on clients. This can be seen in both Vancouver and Sweden. Vancouver sex workers have reported being alone with clients often in "unknown, secluded, industrial areas where there is little chance for help."²³⁶ In Sweden, police surveillance has also driven sex workers to isolated zones where even informal support from other sex workers is weakened.²³⁷ As well, Swedish reports have indicated clients are less likely to report violence, abuse, and coercion against sex workers in fear of being arrested.²³⁸ Police and law enforcement are continually not trusted within both Vancouver and Sweden. Even within partial criminalization framework, street-based sex workers have displayed a distrust in police due to over policing and aggressive behavior towards clients.²³⁹ Indoor sex workers have also been

²³² *Ibid* at 6.

²³³ *Ibid* at 6.

²³⁴ Hon Chu & Glass, *supra* note 38 at para 7.

²³⁵ Hon Chu & Glass, *supra* note 38 at para 7.

²³⁶ Krusi, *supra* note 228 at 6.

²³⁷ Hon Chu & Glass, *supra* note 38 at para 8.

²³⁸ Hon Chu & Glass, *supra* note 38 at para 8.

²³⁹ Hon Chu & Glass, *supra* note 38 at para 9.

banned from indoor venues such as hotels due to police asking questions about transpiring sex work.²⁴⁰ This, in turn, pushes sex workers working indoors into dangerous street conditions.

In Vancouver, the main objective of the partial criminalization policy was to promote trusting relationships between police and sex workers in order to promote the safety of sex workers.²⁴¹ Unfortunately, this objective was not reached. Police involvement is understood commonly as harassment as their presence scares off sex workers' needed clientele.²⁴² Sex workers continue to also distrust Vancouver police due to past historic mistreatment and discrimination, resulting in their unwillingness to report violence.²⁴³ The stigma associated with sex work repeatedly stops sex workers from receiving help from law enforcement due to the worry they will not be taken seriously.²⁴⁴ Vancouver and Sweden's initiatives to end prostitution altogether due to its 'exploitative' nature continually places sex workers as 'at risk', a population that needs to be helped out of the trade.²⁴⁵ Accordingly, constant police harassment and arrest of clients promote the idea of sex work as a 'risky' endeavor. By criminalizing clients, sex work is continually stigmatized. As well, the violence associated with sex work is not lessened nor will it ever be reduced by partial criminalization framework. The risk of contracting HIV/AIDS is also heightened under the partial criminalization model. Sex workers in both Vancouver and Sweden have reported a higher risk of contracting HIV/AIDS and/or STIs because of their inability to properly screen clients.²⁴⁶ Selling sex in isolated areas with unwanted clientele decreases sex

²⁴⁰ Hon Chu & Glass, *supra* note 38 at para 9.

²⁴¹ Krusi, *supra* note 228 at 6.

²⁴² Krusi, *supra* note 228 at 6.

²⁴³ Krusi, *supra* note 228 at 7.

²⁴⁴ Krusi, *supra* note 228 at 7.

²⁴⁵ Bruckert & Hannem, *supra* note 161 at 48.

²⁴⁶ Hon Chu & Glass, *supra* note 38 at para 42.

workers ability to say no to unprotected sex.²⁴⁷ Undoubtedly, the *Protection Act* will not minimize the stigma of risk and the safety risk experienced by sex workers.

Nuisance

As stated previously, viewing sex work as a nuisance contributes greatly to the stigmatization of sex workers. The *Protection Act* continues to view sex work as a nuisance despite its intentions. Therefore, under this model, sex work is not destigmatized. Simply the act of criminalizing clients continues to position sex work as an unwanted activity by society. The *Protection Act* will continue to push sex workers from community inclusion and legislative reform as criminal laws against prostitution have always done.²⁴⁸ The psychological implications on sex workers who do not wish to disclose their work to family, friends, and social services are direct indications that viewing sex work as a nuisance is damaging.²⁴⁹ The *Protection Act* will not even protect exploited sex workers despite its intentions. It will further silence, exclude and endanger sex workers due to the stigma created by viewing sex work as a nuisance.

Due to the criminalization of their work, sex workers, in turn, do not wish to receive protection and/or help from law enforcement and public services. The long-standing stigma attached to sex work encourages sex workers to stay away from police involvement.²⁵⁰ This lasting stigma and continued view by law enforcement of prostitution as a community nuisance limits sex workers from accessing help in violent and dangerous situations out of fear they will not be understood and/or taken seriously.²⁵¹ A street-based sex worker commented on reporting violence to police:

²⁴⁷ Krusi, *supra* note 228 at 7.

²⁴⁸ Campbell, *supra* note 1 at 33.

²⁴⁹ O'Doherty, *supra* note 61 at 231.

²⁵⁰ Campbell, *supra* note 1 at 41.

²⁵¹ Campbell, *supra* note 1 at 41.

No I would never go to the cops [to report violence]. Because it makes it look like, we shouldn't be out there like we can't take care of ourselves. I feel like if I went and reported some of these things that it might do more harm to the working profession than do good. So I don't do that. Basically we have to fend for ourselves. They don't really like us to begin with.²⁵²

The distrust in police intervention is visible within the above comment. "They don't really like us" resonates with the idea of viewing sex work as an unwanted activity that is not desired by police and communities at large. Going to the police may also reinforce the idea that all sex workers are "risky,"²⁵³ an idea that may support the criminalization of sex work because sex workers "shouldn't be out there."²⁵⁴

The *Protection Act* is especially dangerous to Aboriginal, migrant, and trafficked sex workers.²⁵⁵ Historical abuse and racism against Aboriginals have led to unfortunate social and economic disparities among the Aboriginal population of Canada.²⁵⁶ This can be seen in the overrepresentation of Aboriginal street-based sex workers in Vancouver as previously discussed.²⁵⁷ Treating sex work as a nuisance will continually affect Aboriginal women disproportionately due to their overrepresentation in the sex industry. As well, Migrant and trafficked sex workers will likely not look to law enforcement for help under the *Protection Act* due to the criminalization of sex work. These workers fear contacting law enforcement will lead to deportation.²⁵⁸

Because the *Protection Act* focuses solely on exploited sex workers, sex workers who do not see themselves as exploited receive little protection and are again ostracized

²⁵² Krusi, *supra* note 228 at 7.

²⁵³ Bruckert & Hannem, *supra* note 161 at 48.

²⁵⁴ Krusi, *supra* note 228 at 7.

²⁵⁵ Campbell, *supra* note 1 at 42.

²⁵⁶ Campbell, *supra* note 1 at 42.

²⁵⁷ Bingham, *supra* note 75 at 441.

²⁵⁸ Campbell, *supra* note 1 at 42.

from community involvement. Viewing sex work as a nuisance encourages the abolishment of prostitution as the stigmatization surrounding its practice creates repugnant views of sex work.²⁵⁹ These views, in turn, inspire legislation that encourages sex workers to adopt a “respectable” and “recognized” lifestyle by leaving the sex industry.²⁶⁰ This objective is clearly seen within the *Protection Act*, which constructs sex work as an inherent exploitative practice. The only way to achieve community inclusion is for sex workers to adopt a “respectable” and “recognized” lifestyle that society as deemed fit.²⁶¹ Accordingly, sex workers who refuse to adopt this lifestyle because they have chosen sex work out of desire are left without community inclusion and protection. They are left being a nuisance to the community.²⁶² It is very important to protect and help truly exploited sex workers out of the sex trade, but that should not in danger and exclude the vast number of sex workers who do not see themselves as exploited. In the end, the structural stigma perpetuated through criminalization and the *Protection Act* continue to in danger not just willing sex workers, but exploited sex workers as well.

Conclusively, if Canada is to continue criminalizing sex work, whether it be full or partial criminalization, dangerous working conditions and negative relations between police and sex workers will continue. As long as sex work is criminalized, prostitution will be forever seen as a nuisance. As this paper has discussed, viewing sex work as a nuisance promotes unwanted stigma and safety concerns for sex workers. To protect sex workers’ safety, future legislation must not look at prostitution as a criminalized activity,

²⁵⁹ Campbell, *supra* note 1 at 39.

²⁶⁰ Campbell, *supra* note 1 at 39.

²⁶¹ Campbell, *supra* note 1 at 39.

²⁶² Campbell, *supra* note 1 at 39.

but as an industry full of varied experiences. Future legislation must understand some people enter into prostitution because they genuinely enjoy it, while others are participating in sex work for social and economic reasons that cannot be criminalized away. It's time Canadian legislation started looking at sex work as a safety concern, and not as a problematic nuisance that needs to be abolished through the criminalization of either client or sex worker.

Conclusion

Within a criminalized sphere, sex workers will never receive the protection and safety they urgently need. Criminalizing sex work has drastic implications on workers' safety and health. Such implications include psychological, physical and social consequences that render sex workers stigmatized and excluded from community involvement. Accordingly, Canada's new *Protection Act* perpetuates these dangers through criminalizing the buyers of sexual services. Decriminalizing prostitution in Canada may put legislation on the right track to improving the health and safety of sex workers. Once prostitution is decriminalized, it is important to remember there will still be exploited individuals within the sex industry who may wish to leave.

Decriminalization can protect individuals' choices to choose prostitution. It may also allow legislation to move towards a safety-based approach. Remembering the protection of sex workers' choices is important in preserving their decisional autonomy and credibility. A safety-based approach to prostitution understands that there is no "right choice" regarding prostitution. Accordingly, all sex workers deserve protection no matter the reason for entering into prostitution.

A safety-based approach to prostitution involves decriminalizing prostitution and implementing many more social programs and policies than the amount currently operating in Canada. It is clear sex workers who are exploited, trafficked and impoverished do exist. Therefore, the sex workers who need to be helped out of the sex trade must be helped without lessening the credibility of those sex workers who genuinely choose to enter into prostitution. Transitional housing programs can offer exit strategies to sex workers wishing to leave the industry. The Covenant House²⁶³ in Toronto has recently created a specific transitional program tailored to helping young women out of prostitution.²⁶⁴ This is the first long-term program in Toronto designated to helping sexually exploited sex workers rebuild their lives outside of the sex industry.²⁶⁵ Unfortunately, the program will only hold up to seven residents, ages 16 to 24, at a time.²⁶⁶ In Vancouver, transitional sex work programs are beginning to develop. In 2014, six community organizations with experience in working with a variety of sex workers created a report regarding the development of future transitional programs.²⁶⁷ Transitional programs are an important factor in a safety-based approach to prostitution. Thus, more programs like these need to be implemented throughout Canada. These programs target the economic and social reasons individuals enter into prostitution that criminalizing fails to take into consideration.²⁶⁸ They target housing issues, substance

²⁶³ The Covenant House is Canada's largest homeless youth agency. They advocate for public policies effecting homeless youth and deliver awareness and prevention programs. See *About Us*, online: <<http://www.covenanthousetoronto.ca/homeless-youth/About-Us>>.

²⁶⁴ *New Housing Program For Sex-Trafficked Victims First Step in Covenant House Combat Plan*, online: Covenant House Toronto <<http://www.covenanthousetoronto.ca/homeless-youth/New-Housing-Program-for-Sex-Trafficked-Victims>>.

²⁶⁵ *Ibid.*

²⁶⁶ *Ibid.*

²⁶⁷ Andrei Ouspenski, *Sex Work: Transitioning, Retiring and Exiting*, online: <http://wish-vancouver.net/wp-content/uploads/2012/03/SexWork-TRE-REPORT_MAY-6-2015.pdf>.

²⁶⁸ Krusi, *supra* note 228 at 5.

addiction, and living expense issues that are at the heart of why some individuals choose to enter into prostitution.

Because decriminalizing sex work cannot alone fully destigmatize the practice, focusing legal responses to prostitution as a safety concern and not as a nuisance may further destigmatize the practice. Structural stigma historically perpetuated through Canadian legal framework is addressed by the decriminalization of sex work. Protecting the safety of sex workers over viewing them as second class citizens further destigmatizes the practice. Once stigma has been lessened, moving towards a safety-based approach could provide a new expressive vehicle in which sex workers could use to fully express themselves. Safety as an expressive vehicle can ultimately be a new non-damaging social norm through which sex workers can express the plurality of reasons for why they engage in prostitution. Within this framework, sex workers will no longer be categorized as an “at risk” or “risky” population that needs to either be saved from exploitation or erased from communities. A safety-based approach to prostitution allows for a wide range of different experiences. Providing safety to all sex workers is the main goal of this approach.

When safety becomes a new social norm, it can be followed by a new vehicle of expression. This new expressive vehicle may encourage sex workers to report violence due to knowing their safety is the interest of law enforcement and the community. They will begin to enter back into the community as true members of society, and make use social services provided to them. In turn, the physical and psychological health of sex workers may drastically improve. Protecting the safety of all sex workers can only be done by understanding the widely different experiences within the sex industry. A safety-based approach to prostitution means

understanding these differences by working with sex workers to develop effective safety-based policies. Sex workers are the ones who truly understand their safety requirements and, therefore, should be involved in future legislation and policy creation. The destigmatization and acceptance of sex workers within communities can contribute greatly to their contributive ability in future policies and legislation. Thus, a safety-based approach to sex work will ultimately provide sex workers with the protection, inclusion, and credibility they have always needed.

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