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The criminalization of sexual commerce in Canada: Context and concepts for critical analysis

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Discussions of the rights and wrongs of sex for pay often occur in abstraction from the contexts in which they occur. Given the federal government's emphasis that its new legislation, *The Protection of Communities and Exploitation of Persons Act*, is a "made-in-Canada" solution to the problem of prostitution, the author examines Canadian legal, academic, activist, and mass media documents to explore made-in-Canada dimensions of the issues. A notable feature of the Canadian context is the long and ongoing history of policing of those perceived as prostitutes and their associates, as guilty of status offences. Social profiling and vulnerability to violence and exploitation in Canada also reflect the particular intersections of race, gender, class and nation in producing Canadian forms of sexual and other exploitations. Consideration of the implications for agency and passive subjugation in the terminology used to name *the problem* reveals ambiguities in the meaning of exploitation that reproduce a version of the status offence as well as environmental, waged labour and settler colonial forms of exploitation and injustice. Reference to indigenous, feminist, Kantian, and Marxist analyses of objectification and exploitation helps to reveal how this is occurs.

KEY WORDS: prostitution, sex work, law, intersectionality, exploitation, settler colonialism

INTRODUCTION

In December 2013 the Supreme Court of Canada struck down laws regulating various activities related to prostitution. The court ruled unanimously that:

Section 210, as it relates to prostitution, and ss. 212(1)(j) and 213(1)(c) of the *Criminal Code* are declared to be inconsistent with the *Charter*. The word "prostitution" is struck from the definition of "common bawdyhouse" in s. 197(1) of the *Criminal Code* as it applies to s. 210 only. The declaration of invalidity should be suspended for one year. (Canada [Attorney General] v. Bedford, 2013, p. 1104)

The court gave the government one year to modify the unconstitutional sections of the law, or produce entirely new law relating to the purchase and sale of sex, or simply to leave it unregulated by criminal law. In June 2014, the federal government introduced Bill C-36, *The Protection of Communities and Exploited Persons Act*. The law is supposed to replace unfair blaming of those who are paid for their sexual services with a new focus on the criminal exploitation they suffer. The legislation constructs the payment itself as an instance

of criminally culpable exploitation. Under this law, to be paid for sex is to be *prostituted*, which is to be sexually exploited. Often described in the media as a version of the *Nordic model*, the government insists it is a "made in Canada" response to threats posed by the sex trade especially to the women and girls *prostituted* in it (MacKay, 2014). It is more accurate to say that Bill C-36, which came into effect as criminal law on December 6th, 2014, is the government's response to a threat posed by the Supreme Court ruling, namely a potential legal vacuum in the regulation of sexual commerce in Canada. However, the new law itself created a barely noticed but potentially dangerous discursive hole. While the term, *prostitution* is deleted from the Canadian Criminal Code, those people previously labelled prostitutes remain liable to policing of what is now unnamable, as well as to state intervention in their lives. The deletion of the term *prostitution* from the law coincides with the replacement in public debates of the term *prostitute* with the polarized terms of *sex worker* or *victim*. Removing a term associated with stigma does not necessarily change the social relations out of which the stigma arises; it may make them harder to recognize, critically discuss and appropriately respond to.

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Discussions leading up to and following the implementation of Bill C-36 have been heated. Not for the first time in Canadian history, social activists expressing concern for the well-being and liberty of women disagreed profoundly about the implications of legal permissiveness with respect to sexual commerce (Bittle, 2002; Erickson, 2012; Valverde, 2008). What generated such polarized differences this time? In search of an answer, this article examines the discursive and historical contexts from which they have emerged.

The dominant discursive framework in Canada is shaped by an adversarial parliamentary and legal system and a debate approach to moral and political issues, as well as sensationalist and conflict driven mass media. These approaches encourage the belief that there are always two and *only* two sides to every issue. We are encouraged to vilify villains and rescue victims. Complex issues are oversimplified and forced into a pro and con structure framed by familiar and equally oversimplified moral and political questions. Should the right to sell one's labour include a right to sell sexual services? Is sexuality a kind of natural resource or does it have a special moral dimension that is corrupted by commerce? Is corrupt sexuality a threat to the well-being of communities, especially to women and children? Is prostitution on a continuum with sexual harassment, assault, objectification and even slavery? These are some of moral and political questions in terms of which the rights and wrongs of sexual commerce and prostitution are discussed in Canada, and in certain other parts of the world (Overall, 1992; Zatz, 1997).

It is extraordinarily difficult to express an unfamiliar way of framing an issue. This is true even in a culture that values free speech and with mass media outlets that invite all comers. If all perspectives are given equal time, those that are more familiar will need less time to express and will seem intuitively more plausible (Chomsky, 1989). Efforts to reframe the meaning of experiences, observations, practices, and policies are also hindered by individual and group interests in preserving frames that obscure their own possible moral failures, shame, complicity, or complacency (Butler, 2004, 2009). Identifying such phenomena may explain obstacles to the uptake of marginalized perspectives in Canada, except insofar as they fit dominant narratives (Janzen, Strega, Brown, Morgan, & Carrière, 2013; Sayers 2013b, 2013c; Smith 2003).

The question that has dominated recent judicial and media discussions about the criminal regulation of sexual commerce is what is best for those who get hurt by it. Even a brief review of recent answers to this question reveals differences in key terminology as well as conceptual ambiguities and discursive distortions in the face of widespread agreement that sexual commerce is associated with serious harms. This article surveys these terminological differences and conceptual ambiguities and asks what difference they may make in legitimating policy decisions and obscuring policy failures.

This analysis is based on a review of recent relevant Canadian legal cases, policy background papers, public statements by government officials and non-governmental organizations, articles in cross-disciplinary academic literature, internet blogs

and mass media discussions of sex work, prostitution and human trafficking. Particular attention is paid to statements made by people identifying themselves as current or former sex workers, or prostituted persons (Bell, 1987; Blair, 1919; Bruckert and Chabot, 2010; Indigenous Sex Sovereignty Collective, 2015; Janzen et al., 2013; Leigh, 2003; Migrant Sex Workers, n.d.; Mooney, 2012; Native Youth Sexual Health Network, 2010, 2011; Quan, 2006; Siouxsie Q, n.d.; Sex Workers United Against Violence et al., 2014; van der Meulen, Durisin, & Love, 2013). Statements made by indigenous organizations or individuals were also particularly sought (Aboriginal Women's Action Network, 2009; Indigenous Sex Sovereignty Collective, 2015; Mooney, 2012; Native Youth Sexual Health Network, 2010, 2011; Native Women's Association of Canada, 2012; Sayers 2013b, 2013b; Yee, 2009). So too were those of advocates for migrant workers (Barrero, 2005, Maynard, 2010, Migrant Sex Workers, n.d.). After identifying key areas of terminological dispute and conceptual ambiguity an effort is made to reconsider them in light of philosophically distinct considerations from Kantian, Marxist, radical feminist, and resurgent indigenous perspectives. Canadian legal history and political economy provides the context within which to understand the specifically made in Canada meanings and material experiences of sexual commerce and its regulation.

CONTESTED TERMINOLOGY, CONCEPTUAL CONFUSIONS AND AMBIGUITIES

In attempting to make sense of terminological disputes, ambiguities and confusions in discussions of paid sex, it is unhelpful to point to speakers' biases. There is no value-free terminology to be had here. Attention to terminological differences reveals deeper differences in analytical frameworks that are not easily resolved. The most obvious area of terminological dispute lies between the language of work and commerce on the one hand and the language of exploitation and victimization on the other. While some speak of sex work, sex workers, the sex industry, the sex trade, commercial sex and so on, others speak of prostituted persons and victims of prostitution, though they refrain from applying the label *prostitute*. Those who prefer to use this passive construction – of *being prostituted* or *victimized* – tend also to speak of victims of trafficking and sexual exploitation.

The main point of difference between these two sets of terms has to do with agency. A worker is an agent. Workers may be treated well or badly, but as workers they are engaged in action. To the extent that workers have rights and are granted respect for their productivity, this language has positive connotations. In contrast to the agency of workers, prostituted persons, and victims of exploitation are acted upon. Of conceptual necessity, the ways that they are acted on are bad; victims, by definition, are harmed. The expression *prostituting persons* represents a sort of compromise position to refer to people who are not to be blamed but who in effect engage

in self-harming actions (Farley et al., 2005). However, the self-defeating quality of the attribution of self-harm undermines possible claims to agency.

A third category of terms includes colloquial and slang words such as prostitute, whore, slut, hooker, streetwalker, nightwalker, and so on. This language emphasizes moral marginality particularly that associated with public or shameless female sexual agency. These terms are often used to insult, oppress or condemn. On the other hand, some use these terms affirmatively, to resist moral marginalization or social and political oppression. Examples of proud public self-identification with this language include the title of two meetings of the *World Whores Congress*, and cultural productions such as a podcast called *The whorecast with Siouxsie Q* (Siouxsie Q, n.d.). Supportive allies also use this language, for example in the title of the anthology, *A Vindication of the Rights of Whores* (Pheterson, 1989). While many such activists and their allies prefer the language of work, some have made concerted efforts to reoccupy the moral ground at the stigmatized intersection of commerce and sexuality. Carol Leigh is credited with coining the term *sex work* at a feminist conference in the late 1970s. Decades later she published a book under the title, *Unrepentant Whore: The Collected Works of the Scarlet Harlot* (Leigh, 2003). Originally intended as a claim for respect, some believe the term sex worker has become a euphemism so tinged by political correctness as to imply that there really is something morally wrong with being a prostitute. The term *commercial sex worker* is credited to non-sex worker led NGOs and has been resisted as reflecting an outsider agenda (Quan, 2006, p. 342).

Controversies about language also emerge in discussions of SlutWalks – a made in Canada phenomenon that went global. It began as a protest against victim-blaming language when a Toronto police constable spoke to a York University safety forum at Osgoode Hall Law School on January 4, 2011. He is reported to have said that women should avoid dressing like sluts in order not to be victimized. The first protesters marched on Toronto Police Headquarters to demand accountability. Organizers of that event were quoted as saying that the group “...also wants to reclaim the definition of ‘slut’ as someone who is in control of their own sexuality,” and to “...push the idea that nobody is worthy of any kind of violence, whether you enjoy sex or not” (Randall, 2011). Similar events soon occurred in other Canadian cities and before long sprang up all over the world, including in North, Central and South America, Europe, Asia, and Africa. One participant explained her involvement as “...protest against sexual violence; in favour of sex positivity and sexual empowerment” (Leach, 2013, p.11). Whether this is an achievable project is questionable, given the difficulties of *reclaiming* language structured by the virgin/whore binary. That binary is also superimposed on racial and class divisions, and used to discipline those who are privileged and disadvantaged along gender identity, class, or racialized lines (Cooper, 2011; Leach 2013). In these protest marches, people wore all sorts of clothes, but those who

chose fishnet stocking and bustiers or other so-called deliberately *slutty* clothing, and even full or partial nudity, got disproportionate media coverage. Nonetheless, the strategic diversity, complexity and impurity of this transnational protest perhaps suggestively parallels resistance to the demand for purity, which has long served as an alibi for sexual violence. Whether this can coherently translate into action on behalf of those most harmed is another question.

In addition to the moral loading of language associated with prostitution and sex work, the label sex worker is potentially overbroad. For some the use of language with such a broad reference is purposeful. It can express an intention to cast a wide net, seeking solidarity across diverse segments of the sex industry. It might refer to those who work in phone-sex, strippers, prostitutes who work in brothels or other regular locations, regularly or only occasionally, for high pay as an escort or for bare sustenance on the street. It could include porn actors, and producers, writers of erotica, rent boys and chat girls. The term sex worker also makes no gender distinction and thus makes it easier to express the sexual and gender diversity of the people who are paid for sexual services. At the same time it obscures distinctions between those who make money in this field, for example as managers or owners of brothels, and those who are employed by them. In jurisdictions with a flourishing legal sex industry, many people who are employed in this economic sector do not easily fit the categories of prostitutes or pimps. In the documentary *Like a Pascha*, we see cafeteria workers, janitors, receptionists, and managers among others (Gandini and Åberg, 2010). This documentary was filmed in Cologne’s 12 story *Pascha Club*. It has about 80 employees. People paid directly for sex are not counted in that number. They are a subset of freelance workers who rent rooms from the Club and charge clients for services, after those clients have paid the club’s entry fee. While the other employees of the *Pascha Club*, in one sense, all work in the sex industry it is not clear that they are what is usually meant by *sex workers*.

Another family of terms deserve particular note: *survival sex*, or *survival sex work*. This language is defined in *Forsaken: The Report of the Missing Women Commission of Inquiry* (Oppal, 2012). The commission’s definition links the survival sex trade to the risk of lethal violence faced by socially marginalized women, including those murdered by Robert Pickton. Some, like Oppal (2012), use this expression to emphasize vulnerability and victimhood. Others draw a more nuanced distinction between *survival sex* and *sex work* to emphasize the agency of both while noting differences in the conditions under which it is exercised:

Sex work is real work – let’s be clear on that. That is not to say that it is by any means glamorous, advisable, or the first choice of work for many people. The issue of engagement in sex work has a lot to do with making informed choices, and there is a marked difference between sex work and survival sex (Yee, 2009, p. 45).

Ferris (2008) turns to Maria Campbell's 1973 autobiographical novel *Halfbreed* in an effort to understand the possibility and meanings of agency even in the context of survival sex. She takes pains that this recognition of agency not function as an alibi for the forces that create the conditions in which sex becomes a tool or even weapon for survival:

In Campbell's narrative, an Aboriginal survival sex worker and regularly sexually exploited woman becomes not a pivotal signifier of the degradation that is prostitution but, rather, a street fighter whose daily struggles to survive illustrate the pervasive effects of colonial racism and cultural misogyny (Ferris, 2008, p. 141).

PHILOSOPHICAL DIFFERENCES AND POLITICAL ECONOMICS

Lowman (2011) observes that certain philosophical differences keep re-emerging in official Canadian discussions of sex for pay. He contrasts a conservative view focused on violence and victimization with a liberal conception of the issue defined in terms of human rights, specifically, "... the right of an adult to use his or her body to provide sexual services in exchange for money and to operate in a safe environment" (p. 44). But the conservative versus liberal contrast oversimplifies differences among those "...having some claim to be feminist, progressive, or otherwise liberatory" (Zatz, 1997, p. 282). Zatz (1997) divides the latter according to their concern for "free contract/autonomous action, subordinated labour, subordinated sex, and sexual pluralism, which roughly correspond to the commonly distinguished approaches of liberal feminism, Marxist feminism, radical feminism, and sex radicalism" (p. 282).

Conservatives, liberals and other progressives are not as neatly distinguishable as Zatz (1997) implies, however. Contemporary socially conservative politicians concerned with sexual exploitation are usually also economic liberals committed to the free market and individual responsibility for financing personal and family well-being. Social conservatives condemn the objectification of women and commodification of sexuality, though like liberals they generally support a globalized free market in which every self is an enterprise (McNay, 2009). Radical feminists resist the objectification of women and sexual commodification, but critique it in within patriarchal family relations as well as in the market (Pateman, 1988). Radical feminists share sex radicals' resistance to patriarchal constructions of sex and gender. Yet sex radicals seek liberation through consensual relations (Rubin, 1984). Radical feminists are skeptical about the meaningfulness of consent within social frameworks defined by their roots in patriarchal property relations (MacKinnon, 1983; Pateman 2002).

None of these philosophical frames does justice to Indigenous accounts of the historical and contemporary role of sexual commerce and violence in settler colonialism. Nor do

they have room for indigenous women, two-spirited, and youth's resistance to sexual shaming. (Hunt, 2014; Sayers 2013b, 2013c; Yee, 2009). Hunt (2014) points out the double bind involved in resistance to degrading stereotypes. She asks, "has Indigenous women's refusal of these sexual stereotypes resulted in simultaneously distancing ourselves from women who are working in the sex trade?" (Hunt, 2014, p. 87). The task of claiming or reclaiming sexual agency in Canada is complicated by the history of its degradation (Henderson and Wakeham, 2009, p. 4). Yet this is part of the work of decolonization (Yee, 2009).

There are reasons to think that what distinguishes the Canadian project from the Nordic Model after which it was patterned are the values and practices of specifically Canadian political economics. The approach to the *problem* of prostitution taken in Sweden and Norway, is to criminalize buyers and third party beneficiaries, but not those it regards as prostituted. It offers prostituted women programs to encourage their exit from the sex trade. The Nordic rationale is explicitly feminist, arguing that prostitution objectifies and commodifies women and upholds a broader patriarchal system that is at odds with their national commitments to gender equality (Ekberg, 2004). This argument is relatively plausible in Sweden and Norway in light of their material achievements in gender equity. By contrast Canada is a land of vast inequalities between diverse communities as well as the site of declines in several measures of gender equity. During a period of rapidly globalizing neoliberal market economics, women's situation has materially worsened in Canada:

The percentage of women living in poverty has actually increased over the past twenty years to over 13 percent today and has remained consistently higher than men's levels of poverty – with Aboriginal and racialized women and women with disabilities further over-represented. (Canadian Centre for Policy Alternatives, CCPA, 2014, p.6)

Centuries of economic disruption, the Indian Act and the reservation system, environmental racism, the horrors of the residential school system and other attacks on Indigenous children and their families, make Indigenous communities and individuals especially vulnerable to all sorts of exploitation. For indigenous people in Canada, state sponsored rescue and exit programs resonate with assimilationist politics. Their experience with Canada demands that closer attention be paid to the role of diverse kinds of exploitation in the formation of the nation and its contemporary projects. Programs to support exit from criminalized relations of sexual exploitation are ultimately not helpful if the alternatives offered are state legitimated yet socially, environmentally and personally destructive relations of exploitation.

Support for rescue and exit programs is mobilized by distressing representations of suffering. The prostituted woman as exploited victim, as the very figure of abjection, is a powerful trope in public policy debates. This figure is rhetorically exploited in these debates, sometimes relatively cheaply. That

could be said of the price that the conservative government put on rescue when publicizing their approach to protecting communities and exploited persons. Justice Minister Peter MacKay promised funding in recognition of the non-culpability of victims of prostitution, whom,

[r]esearch shows . . . are often in vulnerable situations, and in many cases . . . the victims of violence and manipulation at the hands of those who exploit them. This is why we do not seek to criminalize them. Instead we are investing \$20-million into federal and provincial programs as well as grass roots organizations that assist prostitutes in exiting the sex-trade. This funding will also support work that's being done to address the dangers associated with prostitution and the underlying causes, including addiction, poverty, violence and organized crime (MacKay, 2014).

The list of underlying causes of abjection in Canada should be longer, but MacKay is arguably already expecting too much from the government's modest new investment in social programs. Another notable perspective is offered by those who see the sex trade in Canada, and violence against indigenous women, including high rates of unsolved missing persons and murder cases, as of a piece with the social and environmental degradation wrought by a natural resource extraction based settler colonial economy and widespread willful blindness to the damage this causes (Sayers, 2013a). Sexual commerce is directly associated with resource extraction and development projects. The trade in sex is not simply created by deviant individuals but also by larger economic forces that are central to the national economy. Laite (2009) explores the complex and enduring relation between sex work and the mining industry in Canada and elsewhere. Reporters describe a boom in sex work in the tar sands of Alberta (CBC News Calgary, 2007).

The damage caused is not limited to victims of prostitution. Community displacement to facilitate large natural resource extraction projects have socially catastrophic and long lasting effects. Their impacts are particularly devastating for indigenous women and their communities (Campbell, 2007). Kuokkanen's (2011) discussion of indigenous economics explains how this happens through an analysis that notes women's critical roles in subsistence, mixed, and social economies, as well as their roles in waged labour. She notes, as have others, that waged labour capitalist economies make unwaged work invisible as activity that is essential. It is essential to the survival and flourishing of humans who exist within extensive systems of interrelationships in their social and natural environments. Natural resource extraction projects and other profit driven enterprises undermine these systems, assaulting the well-being of women in the process and thereby assaulting the families, communities and environments in which women played such a key role. The over exploitation of natural resources and super exploitation of waged labour not only alienates workers from their labour it also alienates them from the systems of natural and social relations in

which, according to indigenous knowledge traditions, they are embedded. Entry to the waged labour market becomes a necessity (one to which indigenous women have had access at higher rates than indigenous men). This is only one step in a longer journey, or forced march, towards survival under capitalism. Exclusive focus on exploitation at that step obscures its economic rationality when monetized systems have largely displaced subsistence and social economies.

Attention to the similarities between the paid sex work and other waged work with respect to both exploitation and economic rationality helps explain contemporary criticisms of anti-trafficking discourse. These criticisms are leveled at a nation that represses the memory of its colonial history and record of human rights abuses. Canada positions itself among the growing number of western nations who oppose cross border trafficking on human rights grounds. Critiques from migrant labour advocates in Canada, and internationally, call for an analysis of the conditions that motivate international economic migration as well as attention to the conditions faced by those who engage in it (Carline, 2011, 2012; Maynard, 2010; Sharma, 2005). They argue that criminalizing migrants, and those who assist their migration, with or without pay, obscures the roles played by legal neoliberal forces of exploitation at global and local levels. Furthermore, in Canada the discourse of domestic trafficking for purposes of sexual exploitation obscures the continuing dispossession of Indigenous people. It also reduces systemic relations of gendered inequalities and sexualized degradation to individual instances of criminal action. There is additional irony in the Canadian discourse of *exit for the exploited* when their vulnerability to exploitation is caused by the characteristically Canadian forms of local and global resource extraction that displace indigenous communities and individuals within Canada and add to the pressures that create international labour migrations and precarity.

PERPETRATORS, PERVERTS, AND PIMPS

In the official unveiling of the *The Protection of Communities and Exploited Persons Act*, the threats from which protection is needed were named by the Justice Minister: perpetrators, pervers and *pimps*. Purchasers also got a mention at that press conference, though *prostitutes* were not referred to by name. Closer examination of the Act reveals that it deletes prostitution from the criminal code. The rationale of the Nordic model implies that this is because those formerly stigmatized as *prostitutes* are not only to be rescued with social programs but also conceptually rehabilitated as *victims*. Just as there are reasons to wonder about the efficacy of the government's \$20 million rescue program, so too are there reasons to wonder about the impact of discursively displacing the stigmatized identity of the *prostitute* with that of the victim of pervers and pimps given that under the new law most of the things that used to get suspected prostitutes in

trouble with the law will still get those in prostitution in trouble with the law.

Purchasers and pimps are not the only ones whose activities are criminal under the new law. Section 213 of the criminal code not only criminalizes those who want to buy sexual services but also anyone offering to sell sexual services, if this interferes with vehicular or pedestrian traffic, or occurs next to a school ground, playground, or daycare centre (*Criminal Code*, 1985, s 213). The latter restriction applies even if the communication takes place in a car. Also if they associate with others who get paid for sex, they might be in trouble. Knowingly benefitting from their association, as might be the case even in non-exploitive relations of mutual support, would be legally risky. Freedom of association is the specific right that sex workers have been deprived of according to the case brought before the Supreme Court by the Downtown Eastside Sex Workers United Against Violence. In this case, decided in 2012, they further argued that this is a violation of the Charter guarantees of equality insofar as

...sex workers as a group are dis-advantaged and stigmatized. Women, transgendered persons and gay men are over-represented among sex workers, as are aboriginals, people living in poverty, and people with substance addictions. The laws and their enforcement discriminate against street-level sex workers in a variety of ways... They discriminate against all sex workers by treating them differently from people who have consensual sex without exchange of money, and by treating sex workers differently from other persons who perform other personal services for pay (Lowman, 2011, p. 47).

A little more than two years later, although it is still not a crime in Canada to receive money for sexual services, it is now illegal for someone to pay you for sex (*Criminal Code*, 1985, s 286). Therefore, getting paid for sex now automatically means associating with a criminal, i.e., the purchaser. If that association occurs in the wrong place, i.e., a *common bawdy house*, then the person who is, according to the law, victimized by that purchase might also be guilty of an offence: being an inmate of a bawdy house. The definition of bawdy house appears in section 197 of the criminal code. Formerly the criminal code stated that, *common bawdy house* “means a place that is (a) kept or occupied (b) resorted to by one or more persons for the purpose of prostitution or the practice of acts of indecency” (*Criminal Code*, 1985, s 197). Since December 6, 2014, it is no longer defined in terms of prostitution, but is still defined in terms of acts of indecency. Section 210 catalogues the offences of being in control of, being an inmate of, or being found in a common bawdy house without lawful excuse (*Criminal Code*, 1985, s 210). It might seem to be a perverse application of the law to charge persons under section 210 if they are selling their own sexual services, since such persons according to section 286.5 have immunity from being charged with the offence of benefitting from the sale of or advertising the sale of their own sexual services (*Criminal Code*, 1985, s 286). However, the immunity

from prosecution spelled out in section 286.5 only explicitly applies to the offences outlined in sections 286.2 and 286.4 (*Criminal Code*, 1985, s 286). Immunity from prosecution under section 210 is not mentioned. Perhaps if police raid a *bawdy house* they could arrest everyone found there, not just *pimps* and *purchasers*. It is not clear how effectively the concept of being a victim of *purchasers* or *pimps* would function as protection against such policing. Could failure to co-operate with police in pursuing *pimps* and purchasers put someone in conflict with the law? That remains to be seen. At any rate it is possible that refusing to be rescued might be regarded as deviant: either a sign of Stockholm-syndrome-like false consciousness, which could justify intervention, or it might instead be interpreted as evidence of willful perversity. Could that make the person who is paid for sex a pervert along with the purchaser of sex? Possibly. In public discussions about the law, sex worker rights advocates *have* been identified with the perversity of the *pimp*. They are rhetorically dismissed as members of the “pimp lobby” (Zerbesias, 2015).

The term *pimp* is question begging. It assumes uncontroversial answers to the question of whether selling sexual services is categorically different from other forms of waged labour. Pimps not only make money off of the labour of others. Plenty of business owners do that. *Pimps* make money out of the desires of *perverts*. *Pimps* are only one type of perpetrator targeted by the new Canadian law. The other category is purchasers. In a free market society where the customer is king, demonizing consumer activity is a little odd. Understanding the purchaser as perpetrator makes better sense when his consumer desires are categorized as perverted. The alliterative identification of purchasers with perverts and perpetrators, however, is as question begging as that of *pimps* and perverts. Perhaps the question begging rhetorical identification of *pimps* with perversity and criminality is less surprising given the term’s connotative loading with anti-black racism. This is a connotation that the term purchaser and even the slightly more disparaging term *John* does not carry. At the same time the legal reconstruction of prostitutes as victims may force some to accept forms of help they do not want from people or institutions they do not trust. The alternative may be to be forced into the same category as the purchasers, *pimps*, and perverts – all of whom are constructed in Canadian law as threats to children and the order of decent communities.

There is a powerful strain of moral and political thought that understands sexual commerce as generating precisely that dilemma. The dilemma is characterized by a choice between passivity or resistance to sexual overtures on the one hand and immoral agency on the other. The early modern philosophical roots of this dilemma may lie in a Kantian conception of morality and sexual desire. According to 18th century German philosopher, Immanuel Kant, the ultimate moral rule, the categorical imperative, is to “Act in such a way that you treat humanity, whether in your own person

or in the person of another, never merely as a means to an end, but always at the same time as an end” (Kant, 1993, p. 30). Another way of putting this is that we should not treat people as objects. Regarding someone as an object of sexual desire, and using them for one’s own gratification is, for, Kant the paradigm of immoral behaviour. That holds even if the person consents, since according to Kant, moral beings may not consent to lose their status as agents by permitting themselves to be reduced to an object. The same rule also holds, according to Kant, even if the person used is oneself. For Kant, suicide is immoral, so is selling oneself into slavery, as is masturbation (Kant, 1963).

Kant’s views on morality in general continue to be highly respected in Western liberal democracies even if his views on sexuality are regarded as an eccentricity that can be overlooked. Eccentric or not, some aspects of his concerns about sex are worth taking seriously in the context the Canadian law that criminalizes “obtaining for consideration the sexual services of a person.” If we consider obtaining sexual services as a form of commodity acquisition that means that sexuality is the property of a person to which another person gains access and uses. If sexuality is the kind of property that is somehow intrinsic to what it means to be a person then it is inalienable, or at least it could not be taken or bought without violating personhood. This seems to be a Kantian assumption about sexuality and personhood in general. It is also a radical feminist assumption about the construction of womanhood under patriarchy (MacKinnon, 1983; Papadaki, 2007, 2010; Pateman, 2002, 2006).

The conceptual alternative to commodity acquisition as the model for sex work might be to understand “obtaining for consideration the sexual services of a person” as a contractually limited sexual interaction. On this view the interaction involves the sexual actions of two (or more) agents on terms that are agreed by them. Those terms might include exchanging something that is of some value to the agents additional to the value of the sexual interaction itself. Whether it is possible to imagine sexual interactions in this way depends probably on our capacity to imagine sexuality in non-exploitive ways. A major barrier to that is the extent to which our moral imaginations have become colonized by commodity exchange as the dominant mode of human interaction. It is worth pointing out that inequalities in domestic and global markets are in no small part due to the legacy of European industrialization and capitalization financed by *new world* colonization and slave economics (Mills, 1997). These inequalities are rooted in the literal dispossession, and commodification, and violation of people. The racist sexualization of that violence has ramifications to the present day (Amoah, 1997; Hooks, 2004).

Whether sexual interaction is ever not sexual commerce in the sense to which Kant objects and whether sexual commerce is ever not exploitive in the sense identified by Marx and Engels, it has so often been both, that the term prostitution functions as a metaphor for exploitation in general. But if

that is the nature of the problem, opponents of prostitution should resist more than sex work.

Prostitution is only a specific expression of the general prostitution of the labourer, and since it is a relationship in which falls not the prostitute alone, but also the one who prostitutes – and the latter’s abomination is still greater – the capitalist, etc., also comes under this head (Marx, 1959, p. 42).

As defined in Canada since 2005, by section 279 of the Criminal Code, exploitation involves “forcing performance of a service...through threats made to the safety of the exploited person or to the safety of another.” This is clearly not compatible with consent. But that is not the sort of exploitation involved in obtaining sexual services *for consideration*. A consideration, i.e., some kind of payment is not a threat; it is an inducement. If all inducements generate exploitation, not just inadequate inducements, then all commerce is necessarily exploitive.

The history of Canadian settlement and displacements of indigenous peoples is marked by coercion and violence and inducements and exclusions. This history includes forced labour, as records of chattel and indentured slavery and residential schools attest (Cooper, 2006; Milloy, 1999). Immigration policies are characterized by inducements and exclusions often targeted at the national economy’s specific productive and socially reproductive needs. Imagined in gendered and racialized terms these needs have included workers for railroad and canal building, agriculture and mining, for domestic workers and caregivers, homemaking and entertainment. Workers in Canada’s legal sex industry have also been recruited through targeted immigration and temporary work programs for exotic dancers. These waves of migration reflected Canadian desires for constructions of identity that are gendered and racialized – preferring, for example, dancers who are both exotically foreign and *white* (Barrero, 2005; Law 2012).

While some forms of difference are constructed as desirable others are regarded as contemptible. Canada has a long history of classifying people into racialized types and viewing them with suspicion, as nuisances or threats to innocence, enjoyment of property or more generally to the civilized order of things. Rhetorically, animality and dirt is contrasted with whiteness and sexual purity (Smith, 2003, 2005; Valverde, 2008). The *impure* are anxiously imagined as a constant threat to the *pure*. This is expressed in Canada’s history of moral panic about *white slavery* – the imagined risk of young white women being lured or forced into sexual servitude, especially for use by racialized men (Valverde, 2008). Far from being merely historical fantasy, Ross and Gómez-Ramírez (2014) find evidence of such moral panic in official condemnations of adult entertainment recruiters on contemporary university campuses. They argue, further, that this serves as a distraction from the economic burden generated by the high cost of education and the poor economic prospects of many graduates.

Internationally and in Canada the discourse of cross-border human trafficking draws attention away from the global inequalities in economic burdens and life chances that motivate migration. While some migrants are welcomed others are shut out or sent back. Sharma (2005) argues that anti-trafficking campaigns "...constitute the moral reform arm of contemporary anti-immigrant policies that targets negatively racialized migrants" (p. 88). Moreover, contemporary campaigns equating the extreme vulnerability of illegal migrants with the experience of victims of the trans-Atlantic slave trade distort and obscure the experiences of both. The nature of the economic and interpersonal exploitation of those with few choices is distinctly different from that of people who are legally counted as nothing but property (O'Connell Davidson, 2012).

REGULATING SEXUAL COMMERCE AND EXPLOITATION IN CANADA – CONTROL AND FACILITATION

The meanings of sexual commerce in Canada are not naturally given facts. They are effects of the interplay between historically situated material relations, and regulative discourses and practices. While the purchase of sex was not illegal in Canada before December 2014, it has been constrained and regulated in various, not always consistent, ways. Prostitution was tolerated in some towns and cities during the early days of colonial resource extraction, settlement and international trade, to "...service the large surplus male population," for example, in the mid nineteenth century port city of Halifax (McLaren, 1986, p. 127). Elsewhere women suspected of prostitution were subject to intense scrutiny and policing. In 1839, the first colonial ordinance to specifically mention prostitutes, permitted police in Montreal and Quebec to "...apprehend all common prostitutes or nightwalkers wandering in the fields, public streets or highways" (Poutanen, 2002, p. 55). This historical example of social profiling criminalized not what persons did, but their status, or the *type* of person they were taken to be. The problem with prostitution on this view is prostitutes. Being a prostitute was a status offence (van der Meulen et al., 2013, p.5). Vagrancy laws notoriously depend on social profiling marked by particular intersections of gender, racialization and socioeconomic class. Women were charged with vagrancy in Montreal in 1839 at a rate almost double that of men. Most were Irish, which at that time and place was a racialized identification (Poutanen, 2002). A prostitute was the wrong sort of woman; women who for any reason were regarded as the wrong sort were in turn regarded as prostitutes.

In some parts of Canada *whiteness* located female sex workers somewhere outside of the more heavily stigmatized meaning of prostitution. Madeleine Blair (1919) made enough money selling sex in the North American West from the mid-1880s onwards that a decade later she bought her own brothel

outside Edmonton. Her business was welcomed by police officials who believed that it provided the disproportionately male population with opportunities for safer sex than with indigenous women.

The police condoned prostitution by settler women, Madeleine believed, because it protected single, unmarried men from Aboriginal women. As long as Madeleine's girls subjected themselves to regular medical examinations by a physician and paid regular fines, the police turned a blind eye to their business (Erickson, 2012, p.81).

In settler colonial societies indigenous women, men and children are also targeted according to the status constructed for them by the state. They have been policed, dispossessed, displaced and incarcerated – in prisons, in residential schools and within the reserves and band identities created by Canada's Indian Act. Significant numbers of First Nations women in Canada were systematically stripped of even that status and subjected to further social and economic precarity. The Indian Act stipulated a woman's loss of band membership or even Indian status if she married outside of her band (Amnesty International, 2004; Sterritt, 2007). A woman with Indian status could also lose it involuntarily if her husband became *enfranchised*, that is, if he took one of the paths to assimilation laid out by Canada. In addition to indigenous women's history of unequal access to the rights allotted to status Indians, the effects of the Indian Act undermined women's political participation within their communities, many of which historically identified community membership and inheritance through bilateral or matrilineal descent. It replaced traditional forms of governance with elected band councils and until 1951 denied female band members the right to stand or vote in those elections. Though, in 1985, Bill C-31 reformed certain gender discriminatory aspects of the Indian Act, it continues to have damaging and discriminatory effect on Indigenous communities and descendants of previously excluded First Nations women (Lawrence, 2004).

Indigenous scholars argue that the high number of indigenous women, youth and two-spirited people identified in studies of prostitution reflects the effects of colonization and runs counter to Indigenous traditions of respect for women and children and two-spirited people (Smith 2003, 2005). These traditions were systematically repressed while settler colonial law and literature disseminated their degradation. Stoler (1989), and Strange and Loo (1997) trace the forces that produce what Boyer calls the Aboriginal woman "legislated as prostitute" (Boyer, 2006, p. 16). Other scholars trace the systematic degradation of indigenous women in colonial discourses and legal practices that situate both prostitutes and native women as sites of danger and as natural victims of violence (Carter, 1997; Mawani, 2002; Razack, 1998, 2000). Acoose (1995) finds a similar dichotomy in the stereotypes of Indigenous women drawn in Euro-Canadian literature: *Indian princesses* welcoming white men to their land, and *easy squaws* fit for the worst kinds of use and abuse. Both

of these stereotypes prescribe access to indigenous women and land while making the exploitive and violent nature of that access invisible

The history of regulating racialized and other *types* of women through the policing of prostitution in Canada is notable by contrast to the approach taken in England. While Canada's Vagrancy Act of 1869 made the mere attributed status of being a prostitute in a public place illegal, in England, *street prostitutes* were only to be arrested if they were a nuisance, "behaving in a riotous or indecent manner" (McLaren, 1986, p. 127). Furthermore, according to the Canadian *Vagrancy Act*, the corrupt status of the prostitute infected certain men in their lives, not those buying sexual services but "...those found to be living on the avails of prostitution" (McLaren, 1986, p. 131). Exactly how little it took to acquire this secondary status was specified in a 1913 amendment to the Criminal Code. An accused person was presumed guilty if he "...lived with or was habitually in the company of prostitutes with no visible means of support" (McLaren, 1986, p. 149). Boyer (2006) also notes the racism in how such law was enforced. "The Indian Act criminalized Native women for practicing prostitution and punished Aboriginal men for 'pimping' and 'purchasing' the services of prostitutes; however, few attempts were made to punish non-Aboriginal men" (Boyer, 2006, p. 17). As Little (1998) documents, policing the relations between economically marginalized women – especially single mothers – and the men with whom they associate continued well beyond the 19th century. More recently, Bruckert and Chabot (2010) demonstrate how *courtesy stigma* applied to friends, family, neighbours, and other associates, serves to discipline the lives of those publicly harassed by police as sex workers even when they are going about the ordinary activities of life and not engaging in selling sex.

The criminal status offence relating to prostitution remained in effect in Canada until a successful 1972 court challenge. Applying only to women, it was found to be in violation of the 1960 Canadian Bill of Rights (Robertson, 2003). Bawdy houses, however, remained illegal. New legislation was developed that echoed the older English approach to prostitution, namely policing it as a nuisance. The law regulating the nuisance of solicitation was officially gender neutral and formally applied equally to persons seeking to buy sex and those trying to sell it. Yet, studies of judicial decision making and policing practices revealed a sustained focus on controlling prostitutes or those girls and women perceived as prostitutes (Boyle and Noonan, 1986; Bruckert and Hannem, 2013; Lowman, 2000).

The regulation of nuisance faced further legal challenges. It was perceived both as a threat to gender equality and not up to the task of protecting children and communities. Prostitution and crime were linked in the media and by popular politics and policing strategies. The theme of criminal and sexual deviance as a threat to the most vulnerable, namely children, was galvanized in public response to the 1977 sexual assault and murder of a 12 year old boy in the sex trade area of Toronto's Yonge Street. "An estimated twelve thousand participants marched on Nathan Phillips' square and Toronto's City Hall, demanding that the city clean its 'devious' neigh-

bourhood" (Shoeshine boy, n.d.). Such outcries were followed by more police raids on Toronto massage parlours and bath-houses and the sex trade moved from clubs and other indoor establishments back onto the streets (Bittle, 2002; Brock, 1998).

Around the same time feminist resistance to violence against women focused on normalized inequality within domestic and workplace experiences of heterosexual desire. It critiqued popular representations of *normal* heterosexuality. They argued that liberal appeals to free speech provided cover for misogyny and that the movement for sexual liberation had been appropriated by men's sense of sexual entitlement. Nonetheless, they emphatically insisted on the difference between feminist analyses of sexual objectification and conservative moralism about sex (Davies, 1988). Such feminist analyses later informed Swedish policy. Other feminists allied themselves with self-identified sex workers, queer activists and sex radicals during what was also a time of widespread discrimination against people with HIV/AIDS and an upsurge of homophobia (Kinsman, 2006; Rubin, 1984; Valverde, 1985). On the subject of pornography and prostitution, feminists were divided into two camps dubbed *anti-porn* versus *pro-sex* (Bell, 1987; Overall, 1992).

It is noteworthy that the concept of nuisance has been downplayed in recent discussions of prostitution although reports of policing practices still tell a different story, with court ordered or police imposed red zones, or boundary restrictions, still functioning to *clean up* the streets, eradicating public disorder by regulating those who are socially profiled as disordered people (Bruckert & Chabot, 2010, p. 73). By contrast the government's resistance to decriminalizing prostitution-related offences rested on arguments emphasizing concern for the health and safety of *prostituted persons* as well as threats to the safety of communities and children. This theme continued in public relations work undertaken to explain Bill-36 when it was proposed and enacted in 2014. Concern for the vulnerable was represented as a characteristically made in Canada aspect of the conservative solution. The government's opponents in the Bedford case, sex worker rights advocates, also framed their arguments in terms of fundamental Canadian rights including the Charter right to life, liberty and the security of the person. They argued that decriminalization is required by Canadian values as a solution to the problems created by the policing of prostitution. The court agreed that the enforcement of sections 210, 212, and 213 of the Canadian Criminal Code made it considerably more difficult to safely engage in otherwise legal commercial relations and sexual activities (Canada [Attorney General] v. Bedford).

CONCLUSIONS AND CONSIDERATIONS FOR FUTURE THOUGHT ABOUT SEXUAL COMMERCE IN CANADA

In Canada, sexual commerce is an interpersonal issue and it is an economic issue. The kind of interpersonal issue it is depends on the types of personhood that are possible in

Canada along with our capacities for imagining what sexual interaction can be. The kind of economic issue it is depends on the specific characteristics of political economies in Canada. Further while sexual commerce has been treated as a matter of immorality or criminality, it may be more productive to identify the regulation of sexual commerce as the issue requiring most attention and to attend to it as a justice issue. In Canada the focus has been on the regulation of sexual commerce as a criminal justice or even human rights issue. It is also a social justice issue and as such it has yet to be adequately addressed. Moreover, there is a significant tension between the social justice and the criminal justice approaches that depend on and reproduce epistemic injustices.

Sexual commerce is an expression used throughout this article without explanation. It is not intended as a synonym for prostitution or sex work, though it might overlap with both. It is meant to refer to all sexual interactions insofar as these are imagined as exchanges. Intercourse is a word that used to simply mean interaction, but which has come to be understood as sexual intercourse. Similarly, commercial relations involve exchanges. We tend to think of these exchanges as market exchanges – money for goods and services. But exchanges in markets can include all sorts of things. Think of the free market of ideas, for example. Are all conversations exchanges? Perhaps not. There are other ways of imagining what might be happening in such interactions.

The same might be true of sexual interactions. Nonetheless, people engage in sexual exchanges for all sorts of reasons: to get or to give pleasure; to give or receive comfort; in exchange for the security or other benefits of a relationship; for fun; for profit; and even for the sake of our health. Regardless of what exactly we might get or enable someone else to get out of sex, it is not unreasonable to suppose that getting something out of sex in exchange for giving something sexual is a way that many of us imagine sexual interactions generally to occur. An alternative to this is that being sexual is something that people can simply do together with no expectations of getting something else out of it. No doubt there are many other ways of imagining what it means to engage in sexual activity. There is no obvious reason, however, to privilege these over sexual commerce within a society that is structured around the commercial exchange of goods and services including ideas and other intangibles. The idea of sex as commerce is so fundamental that commerce used to be a euphemism for sex. This does not mean that commerce should not be challenged, just that it is problematic to exclusively focus that challenge on commerce that is sexual.

Sexual commerce is an economic issue in the sense that it is motivated by economic reasons. Within a wage labour economy, exchanges are motivated by inducements rather than coercion, in contrast to a slave economy, which is premised on coerced labour. Some relations based on inducements are exploitive and take advantage of structural inequalities between people. This is the core of Marxist critiques of capitalism. The problem is not that people should not be

motivated by inducements, but rather, inequalities in the conditions under which they make their choices about how to respond to inducements. Nonetheless, Marx and Engels recognized the agency of the wage labourer as a step forward from the condition of the serf, not to mention the slave. Whether economic exploitation needs to be overcome depends on what we imagine can replace this currently dominant form of interaction. Can we imagine economics differently? Marx imagined alternatives and so have such feminist, post-colonial and indigenous intellectuals as Marilyn Waring, Vandana Shiva, Andrea Smith, and Rauna Kuokkanen to name just a few.

In considering the regulation of sexual commerce as a justice issue we can see that several kinds of justice issues need to be addressed. These issues turn on various conceptions of and instances of exploitation. Sexual violence has played a significant role in creating and sustaining social injustice in Canada. However, the criminalizing of sexual purchases and thereby the disqualification of vendors of sexual services from the legal marketplace creates further injustices. It disadvantages those whose non-sexual capacities are not valued in existing markets. In a market-dominated society, denial of access to the market threatens survival. Such threats are consistent with the Canadian history of categorizing people into those whose lives matter and those whose disappearance is encouraged. Attending to this order of injustice requires analysis of the historical and political processes that produced and sustain them.

Narrow and exclusive focus on regulating sexual commerce through criminal law is mistaken in ways that go beyond the question of whether there is anything inherently wrong with sexual commerce or whether we can imagine better ways of being sexual. Exclusive focus on criminal law fosters the belief that justice, safety and well-being are ensured if only individual deviants are apprehended and punished. Indigenous experiences with the justice system in Canada – as well as that of people marginalized by systemic racism, nationalism, heterosexism and cisgender privilege – warrants skepticism about who will be targeted as deviant.

The focus on apprehending individual perpetrators of violence and exploitation also leads to an overly narrow misapprehension of the scope and meaning of violence and exploitation experienced by those who are subjected to it. Their testimony is too often only valued insofar as it counts as evidence against perpetrators the state is interested in pursuing. Silent witnessing in the form of mutilated corpses is too often preferred (Janzen et al., 2013; Sayers, 2015).

The Conservative government and anti-prostitution activists as well as sex worker rights advocates all cite extreme and pervasive violence against Indigenous women in their arguments and draw conflicting conclusions from them. Their use of the figure of the abject Aboriginal prostitute is striking and disturbing; it is also exploitive (Farley, Lynne, & Cotton, 2005; Janzen et al., 2013). Yee (2009) quotes Maurganne Mooney on some of the uses this to which this is

put, “A lot of our sorrows of our Aboriginal Women are being co-opted by feminist abolitionists [who] are exploiting our shame of working and or having relatives that have worked and died...” (p. 46) The Native Women’s Association of Canada and other indigenous activists also object to the same kind of exploitation of suffering used by sex worker rights advocates. (Aboriginal Women’s Action Network, 2009; Murphy, 2014; Native Women’s Association of Canada, 2012). While indigenous women are over-represented in statistics on violence and in degrading representations of sex work, the nuance and complexity of individual indigenous voices and indigenous women’s, youth and community opinions on justice issues are underrepresented in the mainstream media (Hunt, 2014; Mooney, 2012; Sayers, 2013a, 2013b, 2013c; Yee, 2009).

The construction of the victims of violence simply as victims of individual perpetrators devalues their knowledge of the systems that feed on their violation and exploitation. Too often that obstructs opportunities to share this knowledge. If we are encouraged to think that only individuals are to blame for social evils and if we are discouraged from systematic inquiry and analysis, we may have more difficulty understanding the world in the way that such analyses can reveal. This is an epistemic injustice that may well enable the continued reproduction of destructive and violent forces of exploitation.

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