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Playing the victim: a critical analysis of Canada's Bill C-36 from an international human rights perspective

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This article analyses the recent legislative reforms regulating the Canadian sex industry, Bill C-36, the Protection of Communities and Exploited Persons Act. Bill C-36 has been described as an 'abolitionist' approach to sex work, drawing heavily from the 'Nordic model' which is increasingly being adopted across the globe. This 'abolitionist' approach rests on the radical feminist perspective of sex work as inherently exploitative, and accordingly, seeks to re-focus criminal measures solely on the demand-side of the transaction. This article examines the foreseeable impact of the abolitionist perspective enshrined in Bill C-36 on the lives of domestic Canadian sex workers, from an international human rights perspective, paying particular attention to the Convention on the Elimination of All Forms of Discrimination against Women. Both of you have talked a number of times about how this is making it more dangerous for prostitutes. Of course, we don't want to make life safe for prostitutes; we want to do away with prostitution. That's the intent of the bill. (1)

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I INTRODUCTION

On 4 November 2014, the Canadian Parliament passed Bill C-36, the Protection of Communities and Exploited Persons Act ('Bill C-36'). (2) The Act is a legislative response to the ruling of the Supreme Court of Canada in *Attorney-General (Canada) v Bedford* ('Bedford'), which unanimously declared various provisions of the Canadian Criminal Code relating to sex work unconstitutional. (3) Pivotal to the Supreme Court's reasoning in *Bedford* was that compliance with the Canadian Criminal Code directly infringed the individual's right to security of the person, preventing sex workers from utilising measures which would increase their safety and reduce their vulnerability to harm. (4) Against this background, Bill C-36 was promoted as a 'compassionate Canadian response' introduced in the 'collective desire for Canada to be a leader on human rights in the international community'. (5)

Characterised as an 'abolitionist' response to sex work, Bill C-36 criminalises the 'demand-side' of the transaction, with a view to abolishing the sex industry, drawing heavily from the 'Nordic model'. (6) In this regard, the pure 'abolitionist' or Nordic model is distinguished from alternative modes of sex work governance in one fundamental respect; by focusing criminal measures solely on clients of sex workers, rather than on sex workers themselves. (7) The specific criminalisation of the 'demand-side' of the transaction within this abolitionist framework rests on two distinct strands of reasoning--a market-based theory of consumer 'demand', and anti-sex work arguments most commonly associated with radical feminism. (8) As such, Bill C-36 is heavily premised on theories regarding the 'inherently exploitative' nature of sex work, which find their origins in radical feminism, and has been advanced as a legislative mechanism to enhance gender equality. (9)

This article seeks to assess the primary objectives of Bill C-36, in order to examine the ideological effect of radical feminism and abolitionism on the legislative regime, and Bill C-36's impact on the human rights of Canadian sex workers. In essence, it is argued that the structural or abstract arguments underlying the legislative framework, which promote a totalising conception of the harms associated with sex work, obstruct Bill C-36's ability to meaningfully address the human rights concerns facing Canadian sex workers. (10) While the radical feminist views underlying Bill C-36 are useful in illuminating the common features, trends and power

dynamics which subjugate women in society, (11) they promote a form of gender essentialism--a singular view of women (12)--which, when uncritically enshrined in law, limits and erodes the autonomy and decision-making capacity of women within sex work. (13) The radical feminist views on which Bill C-36 is based deny the very notion of consensual sex work, thereby erasing the concept of 'agency' as it applies to sex workers, and preventing an appreciation of the diverse experiences of women who choose to engage in sex work. (14) This sets a foundation where Bill C-36 constructs the sex worker as categorically and universally a 'victim' of exploitation, positioning their 'extraction' from sex work as the only possible remedy, and thus ignoring the potential to enhance sex workers' safety, and more generally improve the protection of human rights, from within the institution of sex work. (15)

Drawing on a gendered approach to sex work, which views the issue of sex work as distinctively 'female', Bill C-36 promotes harmful stereotypes regarding the roles of men and women in the sex industry (and society more broadly) and carries important exclusionary effects. (16) Whilst the inaccuracy of this gendered approach is acknowledged, the focus of this article is both to test the Canadian Parliament's claim that Bill C-36 will further (female) gender equality and to analyse the productive effects of Bill C-36's rhetorical construction of female sex workers as 'victims'. (17) Through confining the analysis to Bill C-36's impact on female sex workers specifically, this article draws attention to the disjuncture between the emancipation of women from socially constraining norms, as required under art 5 of the Convention on the Elimination of All Forms of Discrimination against Women ('CEDAW'),¹⁸ and the oppressive protectionist approach of Bill C-36, as a response to female sex workers' 'victimhood'. Accordingly, the scope of this analysis is largely confined by the female-centric framework set by Bill C-36.

This article is set out into two parts. Parts 11(a) and (b) briefly outline the political background to Bill C-36 and its primary influences--the abolitionist or Nordic approach to sex work governance, founded on radical feminist views concerning sex work. (19) The subsequent focus of Part 11(c) is to examine the Canadian Government's primary objectives in enacting Bill C-36, namely, to reduce demand for sexual services, curb global human trafficking and reduce violence in the sex industry. (20) Part 11(c) contrasts these objectives with the counterintuitive effects produced by the Bill C-36 framework, including its inability to appreciate the structural catalysts for women engaging in sex work, its rigid categorisation of sex workers as victims and consequential misconceptions concerning the nature of violence against sex workers. (21) Part III considers the impact of Bill C-36 from an international human rights lens, with a focus on CEDAW. Here it is argued that Bill C-36 is of concern to the human rights of sex workers in two distinct respects. First, the criminalisation of sex workers under Bill C-36 is likely to give rise to human rights violations in and of itself, drawing on research from Canada and Sweden. (22) Second, the reconstruction of patronising stereotypes surrounding sex workers, within the gender-focused Bill C-36 framework, raises significant human rights concerns related to the stigmatisation of an already socially marginalised group. (23) In accordance with the work of the CEDAW Committee, this social stigmatisation has the capacity to aggravate vulnerability to violence and other harms faced by sex workers, in the context of Bill C-36. (24)

II THE APPROACH TAKEN BY THE CANADIAN PARLIAMENT IN BILL C-36

A Background to Bill C-36

1 Bill C-36 and the Bedford Decision

The origins of Bill C-36 can be traced back to the decision of the Supreme Court in Bedford, which examined the longstanding, nuisance-based approach to regulating the Canadian sex industry. (25) This seminal case marked a considerable shift in the treatment of sex work in Canada, holding that the legislative regulation of public nuisances within the Criminal Code by way of measures, including those which prohibit public communication, must not jeopardise the 'health, safety and lives of prostitutes'. (26) Accordingly, for the first time in Canadian history, the preservation of sex workers' human rights, particularly their right to security of the person, (27) was afforded priority over competing community interests in curbing public nuisances. (28)

2 The Canadian Missing Women Commission of Inquiry

The decision in Bedford arose in the context of increasing political concern over the safety of Canadian sex workers, following intense public criticism of the Vancouver Police Department's ('VPD') handling of the Robert Pickton investigation. (29) Pickton, a wealthy farmer of British Columbia, was convicted in 2007 for the murder of six women and charged with the death of an additional 20 women, charges that were eventually stayed by the Crown in 2010. (30) The common traits of the victims in this harrowing case, who were predominantly female sex workers operating in the Downtown Eastside of Vancouver ('DTES'), many of whom were also facing extreme poverty and homelessness, (31) helped spur public and political momentum towards addressing the safety of sex workers. Outrage over the perceived mismanagement of the Pickton investigation by the VPD also drew public attention to the institutionalised neglect faced by sex workers when enforcing their legal rights and led to the VPD taking the unusual step of publicly apologising to the victims' families for its conduct. (32)

Given the significance of this case in exposing the harms faced by (particularly vulnerable) sex workers in Canada, combined with the inertia of law enforcement and judicial functions from the perspective of the victims' families, there was a compelling need to publicly re-examine the circumstances which produced the devastation caused by Pickton. (33) This led to the establishment of the Canadian Missing Women Commission of Inquiry ('CMWC'), (34) chaired by Wally Oppal QC, which was called to examine the role of the VPD and investigators in the disappearance of these women from the DTES, and the vulnerabilities and risks faced by sex workers working in the DTES. (35) To this end, the Commission called on a spectrum of experts, such as doctors, police and social workers operating in the DTES, familiar with the geographical area and the women who were the subject of the inquiry. (36) The resulting CMWC report, handed down in November 2012, provides a comprehensive analysis of the vulnerabilities faced by sex workers in the DTES, and paints a bleak picture of despair, desperation and institutional neglect. (37) The report was particularly critical of the legal regulation of sex workers and the enforcement of criminal laws against them, noting that it is characterised by a 'profound unevenness in the legal regime, which has become mostly about the control of public space'. (38) On this issue, the CMWC inquiry highlights how the traditional focus on public space, and enforcement measures directed at curbing the visibility of sex work in the

DTES, amplified the risks faced by the missing women. (39)

3 A Brief History of Sex Work Governance in Canada

In examining the history of Canadian sex work governance, a somewhat paradoxical narrative becomes apparent, whereby sex workers have been simultaneously treated as a scourge on social values and morality, and as helpless victims in need of state rehabilitation. (40) Early articulations of sex work governance that predate Canadian confederation perceived the issue as one of vagrancy, and criminalised the activities of sex workers, brothel owners and clients alike. (41) The first Canadian Criminal Code, dating back to 1892, confirmed this approach, explicitly drawing a connection between sex work and vagrancy and categorising sex work as an offence against 'Religion, Morals and Public Convenience'. (42) However in 1915, following amendments to the Criminal Code, which removed the connection between sex work and vagrancy, a slight shift emerged in the political narrative--legislators had come to view sex work as capable of social abolition through rehabilitation and social engineering. (43)

It should be noted that this political narrative is continued by Bill C-36, a key preambular objective of which is to curb the social commoditisation of sexual services, with a view to enabling individuals to 'leave' the industry. (44)

B Bill C-36's Primary Influences

1 Bill C-36 and the Nordic Model

The Swedish Act Prohibiting the Purchase of Sexual Services ('Swedish Act') (45) is often recognised as the archetypal abolitionist approach to sex work, criminalising the purchase of sexual services on the basis of radical feminist theory. (46) The 'Nordic' approach, which is also taken in Nepal, India, Korea, Finland and Israel (and is being considered for adoption in France and Argentina) (47) is said to be a 'unique measure; to only punish those who buy sexual services, not those who sell them'. (48) This 'abolitionist' perspective of sex work begins from the position that all prostitution is inherently degrading to women, drawing parallels between sex work and rape or sexual slavery. (49) Thus, in seeking to balance the need to protect the 'exploited' whilst eliminating the opportunity for further social commodification of 'sexual slavery', the abolitionist perspective finds its equilibrium by criminalising the 'demand-side' or 'procurers' of sexual services. (50) Accordingly, Bill C-36's key provisions prohibit the purchase of sexual services by anyone in any location (both indoor and outdoor), (51) as well as all communication 'for the purpose of obtaining for consideration, sexual services'. (52) The abolitionist perspective, as influenced by the Nordic model and radical feminist principles related to sex work, would demand that Bill C-36 limit its regulation of the sex industry to these provisions alone in order to focus punishment on the demand-side of the transaction. (53)

However, Bill C-36 goes much further and, in contrast to the 'Nordic model', (54) directly criminalises the activities of sex workers in two distinct respects. First, the 'communication' offence solely criminalises those who offer or provide sexual services (ie sex workers) 'in a public place, or in any place open to public view ... [including] next to a school ground, playground or daycare centre'. (55) Sex workers are also specifically targeted under the 'sweeping' advertising prohibition, (56) which criminalises those who 'knowingly advertis[e] an offer to provide sexual services for consideration' and carries a penalty of up to five years imprisonment. (57) Accordingly, Bill C-36 has been widely criticised, even by proponents of the abolitionist model, for criminalising the activities of those said to be 'exploited'. (58) Gunilla Ekberg, prominent Swedish anti-prostitution campaigner and co-director of the Coalition Against Trafficking in Women ('CATW'), described Bill C-36 as 'bad policy' and 'unconstitutional because it targets those who are victims of ... a human rights violation'. (59) In this sense, Angela Campbell has noted the way in which Bill C-36 is publicly promoted as a 'radical political undertaking' on the issue of sex work, whilst simultaneously drawing on an 'outdated approach to sex work governance, particularly insofar as its communication offences are concerned'. (60) The traditional 'nuisance/vagrancy' approach to sex work embodied in Bill C-36 is confirmed by its deviation from the pure abolitionist approach by criminalising the public activities of sex worker 'in a manner antithetical to [their] social, political and personal security interests'. (61) It is argued that the specific criminalisation of sex workers under Bill C-36, through the advertising and communication offences, erodes its rhetoric of 'compassion' and 'protection' and displaces its characterisation as a purely 'abolitionist' legal response to sex work. (62)

2 The Ideological Impact of Radical Feminism on Bill C-36

The abolitionist approach taken by the Canadian Government to Bill C-36 draws heavily from the radical feminist view of sex work, most commonly associated with the work of Catharine MacKinnon, Kathleen Barry and Andrea Dworkin. (63) Whilst this coupling of conservative politics and radical feminism may seem somewhat curious at first blush, it is anchored by a long history between radical feminist views and the 'abolitionist' approach to sex work expounded by Bill C-36. (64) 'Abolitionism' can be traced back to the late 1800s to a specific campaign, led by Josephine Butler, against the English Contagious Diseases Acts. (65) Butler famously employed feminist views to oppose the demonisation of sex workers as 'fallen women', seeing sex workers as 'victims' of male lust, capable of social rehabilitation. (66) Modern radical feminist theory elaborates on this approach, arguing that sex work is a violation of women's human rights per se, constituting 'a paradigm of sexual ... inequality'. (67) Within the radical feminist rubric, there can be no distinction between 'voluntary' and 'forced prostitution', as no person can consent to such a grave violation of themselves. (68) Accordingly, Barry has argued that 'it is impossible to distinguish between free and forced prostitution as the indiscriminate use by men of a woman's body for their sexual satisfaction leaves no room for female subjectivity, sexuality, or the possibility of consent'. (69) Based on the importance of (hetero)sexuality in the radical feminist view, as a 'linchpin' of male dominance, and the damage it inflicts on the female populace as a whole, the importance of the abolition of sex work in radical feminist discourse cannot be underestimated. (70)

Abolitionism (or neo-abolitionism), relying on radical feminist views of sex work, has, over the decade, undergone a significant resurgence as a consequence of the broader anti-trafficking and anti-sex slavery movement at an international level. (71) At the forefront of the global anti-trafficking offensive is what Elizabeth Bernstein aptly describes as a 'coalition of strange bedfellows'--predominantly neo-conservative and Christian right organisations, aligned with anti-trafficking groups such as CATW, who espouse

radical feminist views to combat the global sex trade. (72) Extensive academic literature exists on this relationship between radical feminism and the neo-conservative agenda in the fight against global trafficking, and while an analysis of this collaboration is beyond the scope of this article, what should be noted is that the anti-trafficking movement has utilised radical feminism to facilitate the treatment of global human trafficking and domestic sex work governance under the broad umbrella of 'sexual slavery', conflating any distinction between these issues. (73) The Canadian Parliament has similarly adopted these views as part of its anti-trafficking initiatives and, as early as 2007, indicated an intention to introduce an abolitionist approach to sex work based on radical feminist ideology. (74) It should therefore be understood that it is the theoretical foundations of 'abolitionism' as a regulatory response to sex work that facilitate Bill C-36's discursive reliance on radical feminist theory. (75)

C Key Objectives of Bill C-36 and Likely Effects on the Sex Worker Population

1 Objective One: Reducing the Demand for Sexual Services

A key objective of Bill C-36 is to 'end demand' for sexual services--a factor which was accepted as the primary cause of the existence of the sex industry. (76) As such, the Preamble to Bill C-36 recognises the importance of denouncing and prohibiting the 'purchase of sexual services because it creates a demand for prostitution'. (77) Justice Minister Peter MacKay expanded on this issue throughout the Bill C-36 debates, arguing that the legislation addresses the 'root causation' of sex work, by placing criminal liability on those 'who drive the demand for the purchasing and commoditization of sexual services'--'the johns [and] the pimps'. (78) This is a view that aligns closely with radical feminist commentary, which promotes an analysis of sex work focusing solely on (male) demand for such services, devoting little consideration to the reasons women may engage in such work. (79) In this sense, Barry argues that '[prostitution is a male consumer market.... What matters in terms of the prostitution market and male demand is that there are female bodies provided for sex exchange. How or why they get there is irrelevant to the market'. (80) In this way, sex work is considered part of the 'social construction' of women as existing for the service of men, elevating it to an institution affecting all women 'because of the fact that if one woman is a prostitute this means that all women can be (treated as) prostitutes'. (81) In order to reconceptualise sex work in this manner, radical feminism seeks to distance itself from the notion of sex work as it occurs on an individual level. (82) Dorchen Leidholdt identifies this as the 'first myth [about] prostitution', that 'it is something one individual does with another, each acting on the same level in complementary ways'. (83) By dislocating the institution of sex work from the realm of individual experience, the arguments underlying Bill C-36 inhibit an understanding of the various catalysts for women actively participating in sex work.

(a) Effect 1: Disregarding the Experience of Sex Workers

The singular focus on sex work as a product of (male) demand paints an incomplete picture by excluding the lived realities of sex workers, which are relevant to the existence of the sex industry and to any legal regime purporting to regulate it. An unfortunate impact of radical feminist rhetoric as used within the Bill C-36 debate is that it silences the varied experiences of sex work, and denies an understanding of the structural conditions within which women may enter into sex work. (84) In this sense, to argue that 'gender is fully constituted through and by sexuality is to ignore the ways that race, class [and economic disempowerment] ... bring different meanings to sexuality', and the conditions in which sexual interactions take place. (85) It further ignores the mediating effect of personal agency as a site of resistance against gender/sex norms and social circumstances, where individuals utilise their autonomous capacity to forge a meaningful life. (86) The discussion which follows is therefore intended to shed some light on the broader socio-political context in which female sex workers operate to draw attention to the causal factors which are silenced by Bill C-36's narrow demand focus. (87)

At an international level, it has been noted that sex work often arises in situations of poverty and economic disadvantage, particularly in the realm of human trafficking. (88) Thus, CEDAW recognises that individual human beings have vastly different possibilities in life, with women holding a position of special inequality 'because of persistent political, social, economic and cultural discrimination against them'. (89) As such, the CEDAW Committee has described global trafficking as 'a phenomenon inexorably linked to the socio-economic impact of globalisation' and 'often attributed to the "feminization of poverty" arising from the failure of social structures in the provision of equal and just educational and employment opportunities for women'. (90) Similarly, in Canada, a central finding of the CMWC was the impact of poverty on the exploitation of sex workers. (91) Crucially, most, if not all, of the missing and murdered women who were the subject of the inquiry were found to be in the 'survival sex trade'--engaging in sex work in exchange for necessities for survival, including basic needs and wants such as food, shelter, clothing, money and drugs. (92) As described by John Lowman, 'survival sex is driven by poverty and addiction ... in a legal sense survival sex workers do "choose" to prostitute, but they make that choice in a set of social conditions they did not choose'. (93) This 'complex matrix' of choice and coercion in the face of rising global economic inequality (94) makes it inevitable that 'individuals [will] make transactional arrangements with regard to sexual relationships that are not always a matter of direct coercion but rather, a reflection of limited options'. (95) In the Canadian context, these issues were found to be a direct product of the 'need to compensate for inadequate social assistance', thereby increasing structural barriers preventing access to employment. (96) In this regard, Pivot Legal has shown through their research on the Canadian sex trade that 'the possibility of finding licit work is severely hampered because of fundamental structural barriers such as lack of access to childcare, work clothes, money for public transport, and a phone'. (97) The CMWC found that it is this combination of social marginalisation and economic desperation that drives the more vulnerable sectors of the sex industry and heightens the susceptibility of sex workers to violence, not the 'demand' for sexual services. (98)

In spite of these crucial findings underscoring the impact of economic and social disadvantage to the lives of particularly marginalised sex workers Justice Minister Peter MacKay mentioned these issues only in passing during Bill C-36's second reading speech. (99) Indeed, a startling omission in the enactment of Bill C-36 was the absence of discussion regarding the findings of the CMWC, which appeared to warrant no mention despite its comprehensive analysis of vulnerability in the Canadian sex industry. (100) Thus, while \$20 million in funding accompanied Bill C-36, dedicated to institutions that would 'help individuals exit prostitution', the conditions of poverty and 'inadequate social assistance' found by the CMWC will continue to prevail, unaddressed by the legislation. (101) In this

sense, the rigid market-style analysis of the sex industry under Bill C-36, with its singular focus on (male) demand, is effectively blinded to the conditions faced by sex workers (102) in spite of its legislative objective to 'protect [the] human dignity' of women. (103)

(b) Effect 2: Empirical Research on Client Criminalisation

Moreover, Bill C-36's claim that criminalising demand will 'end' prostitution is one that does not stand up to empirical scrutiny. (104) Indeed there is 'little evidence from Canada or any other country to support the claim that prohibiting the purchase of sex halts demand for sex work or reduces the number of people engaged in sex work'. (105) In the Canadian context, an abolitionist enforcement procedure was trialled in Vancouver in 2013 (the 'VPD Guidelines'), (106) re-directing law enforcement efforts to clients of sex workers, in order to address negative public perception regarding the relationship between police and sex workers, particularly in the DTES. (107) Subsequent research undertaken on the effects of the VPD Guidelines found it to have had 'limited to no effect' in preventing street-based sex work and violence against sex workers. (108) In fact, since the enforcement regime has been adopted in Vancouver, statistics have revealed that sex work-related criminal offences rose from an all-time low of 47 offences in 2012, to 71 in 2013. (109)

These trends must be understood in light of the fact that 'punishing conduct as a crime does not "stop" or "end" it' but merely empowers a 'range of specific institutional actors [such as police, courts and prosecutors] to do a wide range of things'. (110) The ineffectiveness of such criminal measures is illustrated by the experiences of (predominantly street-based) sex workers under the VPD Guidelines, who invariably found their most significant adjustment to be the longer working hours required to earn an adequate income. (111) According to one sex worker surveyed in Vancouver, '[w]hile they're going around chasing johns away ... I have to stay out for longer ... if we weren't harassed we would be able to be more choosy as to where we get in, who we get in with'. (112) These comments allude to the powerlessness of sex workers under a Bill C-36 abolitionist-style framework--a system which, for those whose survival depends on the income derived through sex work, has been recognised as directly contributing to the conditions of vulnerability they face. (113)

It has been noted that under the Swedish Act the reduction in the number of clients has had a correlative effect on the client's negotiating power while the overwhelming need to generate an income greatly reduced the sex worker's bargaining ability within the transaction. (114) In accordance with the findings in Sweden and Vancouver, it is not difficult to conceive of situations under Bill C-36 whereby a sex worker who has been able to attract far fewer clients than before and thus is unable to financially support themselves, may be coerced--by the overwhelming pressure to sustain themselves and provide for their basic needs--into accepting an unsafe transaction (for example, with a client who may be violent or unwilling to practice safe sex). Here, Bill C-36 operates to reinforce conditions of exploitation by eliminating the means of survival for sex workers, whilst providing no other alternative for subsistence. (115)

2 Objective Two: Reducing Global Human Trafficking

As a product of effacing any distinction between 'forced' and 'consensual' sex work, radical feminism sees such an 'inexorable link between [human] trafficking and prostitution' that they 'have come to use the terms "prostitution" and "trafficking" interchangeably'. (116) This conflation of human trafficking with domestic sex work arose in the Bill C-36 debate, reinforcing the victim status of the sex worker through the notion that sex workers are passively 'brought into a life of prostitution ... most often through no fault of their own'. (117) To position the sex worker as a quiescent actor, the Bill C-36 debates deployed stereotypical constructions of the sex worker as 'commodit[ies] to be bought and sold', and victims of 'human trafficking', 'violence, addiction' and 'childhood abuse', as well as the persistent conflation of women and children. (118) In emphasising the nexus between sex work and human trafficking, the Bill C-36 debates featured testimony from a vast number of human trafficking organisations, including Hope for the Sold, REED and CATW, seeming to dwarf the presence of sex worker advocates in attendance. (119) The rationale for this deviation from the issue of domestic sex work was helpfully summarised by Minister Galipeau, who argued that:

Prostitution and human trafficking exist along a continuum. For example, a person may decide to sell their own sexual services to pay rent, feed their children or just survive. That person may be recruited or forced to work for those who would exploit her, or she may seek out the protective services of those same people, thinking that they will protect her when engaged in an inherently dangerous activity. (120)

However, this was not the first opportunity the Canadian Parliament took to express its concerns about the interconnected nature of sex work and human trafficking. (121) In 2006, the Canadian Parliament's Standing Committee on the Status of Women conducted an inquiry into human trafficking, concluding 'that prostitution is closely linked to trafficking in persons', before proceeding to recommend an abolitionist model of domestic regulation of sex work, in the nature of Bill C-36. (122) This digression to the issue of sex work was facilitated by the Committee's contention that 'to stop trafficking in human beings and to protect trafficking victims, it seems urgent that we examine those who motivate it: Canadian prostituting clients'. (123) Although the association between global human trafficking and Canadian clients of sex workers seems somewhat tenuous, the Committee's agenda becomes apparent in their concluding remarks--the 'message needs to be clear: prostitution is not a "culturally acceptable" activity'. (124)

Such an approach is not unique to Canada. Numerous commentators have noted the tendency of state governments to utilise the conflation of sex work with human trafficking as a guise to institute stricter regulations on the sex industry. (125) This led the former UN Special Rapporteur on Violence against Women to caution against the propensity of states to assume that sex workers have necessarily been trafficked, exploited or taken from their country against their will, rather than considering the extent to which they may be voluntary participants. (126) A necessary consequence of this reduction of all sex work to human trafficking, as exemplified in Bill C-36, is that it establishes criminal law as the only permissible legal solution, and rescue as the only possible response to dealing with the victims' exploitation. (127) As Carole Vance has noted, '[i]f all women in prostitution are sex-trafficked, and if rescue is the only remedy, then what need is there for ongoing health services and education to meet the needs of women in sex work?' (128) As an inevitable consequence of the exclusive focus on criminal law, the utility of the modern human rights framework in expanding the

legal rights of sex workers, rather than merely 'protecting an individual from abuse', can be overlooked. (129)

(a) Effect 1: The Construction of Sex Workers as 'Victims'

This effect is particularly profound in the manner in which Bill C-36 constructs the sex worker as a 'victim subject', (130) inviting remedies and responses which 'reinforce [their] lack of agency rather than treating them as bearers of human rights'. (131) In the context of Bill C-36's preambular objective of 'encouraging' sex workers to 'leave prostitution', the construction of the sex workers' victim status generated paternalistic legal solutions, including that laws criminalising sex work provide 'an opportunity to extract ... those who are the victims of prostitution'. (132) Yet such 'rescue' responses on behalf of states, under the facade of 'protecting the victim', are patronising and ineffective at affording meaningful human rights protection to those they seek to protect. (133) The temporal point of 'rescue' within the Bill C-36 framework is merely the beginning of the story--a meaningful human rights response must be tailored to the needs of each individual, requiring their input and consultation to adequately reflect their personal circumstances. (134) This view is confirmed in ethnographic and journalistic research which suggests that after 'having entered prostitution for a myriad of reasons, many rescued women return to prostitution'. (135)

However, for those women who believe they choose sex work, and engage in it voluntarily and actively, the radical feminist response is that they suffer from a 'false consciousness'--an inability to identify their own oppression as a result of a complex continuum of 'disassociation of their own selves'. (136) Kathleen Barry argues that this process begins with 'distancing strategies' which lead to 'disengagement [through] establishing emotional distance by disassociating themselves' before the final stage of 'disembodiment and disassembling' where 'women become interchangeable with life-size plastic dolls'. (137) In this manner, radical feminism seeks to underscore the permanency of the 'mark' of sex work on women, that in 'prostitution, no woman stays whole'--she is selling 'herself in a very real sense'; (138) views which were discursively employed in the Bill C36 references to the 'buying' and 'selling' of 'women and girls'. (139) These constructions of sex workers as passive victims of 'prostitution' have a distinctly dehumanising effect by uncritically accepting the 'oppression of the individual by the institution as inevitable', rather than something that is capable of being resisted, or experienced in another way. (140) In contrast to Kathleen Barry's perception of sex work as necessitating the suppression of human emotion, Wendy Chapkis' extensive research on sex work in the United States and Netherlands suggests that the sex worker is able to 'summon and contain emotion within the commercial transaction', to 'erect and maintain boundaries that protect the sex worker from abuse, and to develop a professionalism toward the job'. (141) Moreover, United Nations research on the occurrence of 'weekend prostitution' suggests that the fixed rhetorical construction of 'the prostitute' within Bill C-36, as a state of permanency, fails to reflect the more nuanced perceptions of sex workers' identities. (142)

The inability to recognise the diverse experiences of sex workers can be readily criticised by post-modern feminist theory which 'emphasise[s] the need to accord due recognition to the subjectivity of sex workers'. (143) In this sense, post-modern feminism 'argue[s] against the imposition of external moral strictures and in favour of attention to sex workers' own views'. (144) However, within the abolitionist driven ideology, exemplified in Bill C-36, it has been noted that 'the choice or decision to enter into and/or remain in sex work remains the paradigmatic expression of agency'. (145) Accordingly, the radical feminist theory of sex work 'relies on a circular logic whereby women's involvement in sex work constitutes proof of their victimization and lack of agency', creating the context in which the experiences of sex workers can be ignored. (146) This denial of agency manifested itself throughout the debates on Bill C-36, with the testimony of sex workers and advocates being largely disregarded and ignored. (147) The evidence of Natasha Potvin, a former sex worker and volunteer at Prostitutes Empowerment Education and Recourse Society, which described how she 'proud[ly]' engaged in voluntary sex work for 15 years to support her children, challenged this victim paradigm, provoking hostility and patronising scepticism from government members: 'you mentioned ... you're proud of your choice and that it's worked for you in your life. The way you tell it, frankly, it sounds like a TV sitcom about happy hookers'. (148)

While Bill C-36's totalising conceptualisation of agency suggests that it is a characteristic which does not inhere in sex workers, it is argued that this construction fails to address the innately personal nature of 'agency' and 'consent'. (149) The problem arises through the conflation of subjective (identity) and social position (gender) within radical feminism, which ignores the mediating effect of agency in the tension between one's subjectivity and the denial of its full political and social expression. (150) As such, it is argued that 'agency, as the ability to act in a given context, is intrinsic to what it means to be human'. (151) This understanding of agency characterises it as 'an inherent human capacity (rather than a quality that only some people have)'. (152) Accordingly, it is argued that agency is deeply connected with the personal decision-making capacity of an individual, regardless of their social, economic or employment status, and the manner in which this capacity is used to shape and resist individual expressions of gender and social identity. (153) In contradistinction, the abolitionist discourse within Bill C-36 dislocates the concept of agency from the individual and focuses on ' [t]he site at which agency is exercised (sex work), rather than the action itself to determine whether agency is recognised or not. (154) The focus on sex work as being the point at which women no longer have the capacity to make active decisions about their lives carries moralistic undertones and ignores the complex dilemmas of survival and gender inequality that compel such decisions. (155) As Chuang has aptly remarked, the focus on the normative question

of whether a woman should be able to consent to ... prostitution overlooks the empirical fact that women actually do consent to these practices, and, moreover, risks neglecting important descriptive facts regarding the quality of a woman's consent to these practices. (156)

This perspective is reflected by research undertaken by Joanna Busza on Vietnamese sex workers in Cambodia, which indicates that the reality of what brings women into sex work and why they may choose to remain there is far more complicated than simply always being a consequence of 'coercion'--an emphasis that has the effect of 'oversimplifying women's realities and choices'. (157) Rather, studies from a range of countries including Russia, Nepal and China suggest that 'sex workers' experiences fall along a continuum, with women who have undergone widely varying degrees of choice or coercion working alongside each other in the same sites'. (158) Moreover, individual sex workers can encounter different stages of the choice/coercion continuum at different temporal points; for example, a woman who was initially 'tricked' into selling sex may then independently opt to continue working in the industry. (159) Anand Grover has noted that although some 'sex workers may have experienced forms of coercion or compulsion initially ... by the

time they are apprehended, [they] may have decided to continue sex work'. (160) This indicates that initial pathways into sex work do not, therefore, necessarily define sex workers' 'current perceptions, motivations and priorities' and that a more fluid, human-centred understanding of 'consent' and 'choice' would more adequately reflect the reality of female agency in sex work. (161) In contrast to the nullification of sex workers' capacity to consent under Bill C-36, it is argued that a genuine human rights approach to sex work would accord due respect and autonomy to the personal decisions of women with respect to private, consensual sexual activities. (162)

3 Objective Three: Reducing Violence within Sex Work

The Bill C-36 framework rests on the radical feminist view that 'prostitution itself' is 'not just violent', it is a form of violence. (163) This thinking equates the very act of sex work with 'violence'; 'violence is omnipresent in prostitution ... [i]t is not simply that violent incidents occur; instead, prostitution is a form of violence categorically and universally'. (164) Thus, a key component of the preamble to Bill C-36 describes the Canadian Parliament's 'grave concerns about the exploitation that is inherent in prostitution and the risks of violence posed to those who engage in it'. (165) In introducing Bill C-36, Justice Minister Peter MacKay emphasised the universality of violence in sex work, alleging that '[t]he evidence, including the evidence submitted to the courts in the Bedford case, shows that prostitution is extremely dangerous no matter where it takes place'. (166)

Yet this statement directly contradicts the evidence and findings of the Canadian Supreme Court in Bedford, who agreed with the trial judge that 'the safest form of prostitution is working independently from a fixed location'. (167) In this regard the Court stated that the trial judge 'concluded that indoor work is far less dangerous than street prostitution--a finding that the evidence amply supports'. (168) The Court rather placed responsibility in part on the law itself: '[sex workers] are faced with deciding between their liberty and their security of the person ... in my view the law plays a sufficient contributory role in preventing a prostitute from taking steps that could reduce the risk of such violence'. (169) As is apparent, the ideological perspective of sex work as violence obscured the ability for Bill C-36 to meaningfully analyse the nature and occurrence of violence within sex work.

(a) Effect 1: Sex Work as Inherently Violent and the Failure to Define the Sex Industry

It is argued that the absence of this analysis is partly attributable to the fact that the notion of 'sexual services' in Bill C-36 was never subjected to a definition, either within the legislation or in the debates leading up to its enactment. In this regard, Francoise Boivin expressed concerns during the debates on Bill C-36 that she was 'still trying to find out what "sexual services" means in this Bill. Nobody is really defining it for me ... Minister [MacKay] couldn't'. (170) This failure to define and differentiate between different forms of sex work represents a fundamental flaw in the Bill C-36 debate, primarily because it has been recognised that '[t]he sex worker population is not homogenous and there are issues that are more pertinent to [some] sectors than others', particularly with respect to the issue of violence. (171) Despite the noted variations in the nature of sex work, the focus of Bill C-36 was confirmed from the outset, with Minister MacKay describing 'prostitution' as something which occurs 'most often on the street' during his second reading speech. (172) This construction of sex work as 'street-based' carried through the debates with references to sex work occurring 'most often on the street' and the absence of any recognition of other forms of sex work. (173)

In contrast to the stereotypical view of sex work as uniformly street-based, research suggests there are various modes and sub-modes operating under the broad banner of 'sex work', where individuals exert varying levels of control over their conditions, in varied institutional settings, 'within sex businesses of different scales and where they engage with different sets of stakeholders'. (174) As Ann Lucas has remarked, '[t]he stereotypical image of the streetwalker does not adequately represent the business of prostitution or its practitioners'. (175) Rather, research indicates that 5-20 per cent of prostitutes solicit on the streets, while the majority (80-95 per cent) work off the streets in brothels, massage parlours, escort services and similar establishments, or as independent 'call girls'. (176)

In Canada, as in the United Kingdom and Australia, recent studies indicate that the majority of sex work takes place in private venues. (177) For this reason, Vanwesenbeeck is highly critical of the widespread 'failure to adequately differentiate between sex workers', arguing that they are not the homogenous category that they are taken to be. (178) Likewise, Lynn Chancer notes that sex workers' 'experiences, situations and circumstances differ greatly over the gamut of this highly class-stratified occupation', which is distinctly hierarchical in and of itself. (179) Comparatively, empirical research has found a remarkable diversity of experience among street-based workers, call girls, brothel workers and providers of escort services with respect to job satisfaction, self-esteem, physical and psychological health and occupational practices. (180) Factually, it is asserted that these variations in the forms and nature of sex work have an important role to play in the exacerbation of vulnerability, as well as the production of violence and exploitative conditions faced by sex workers. (181) As stated by Chris Atchison during the Bill C-36 debates, 'findings around violence reveal that the actual occurrences of violence and victimization in the sex trade vary significantly across different contexts, specifically different venues where commercial sexual transactions take place'. (182) By preoccupying itself with the violence faced by street-based sex workers through the invocation of a stereotypical streetwalker, (183) the Canadian Parliament premised its Bill C-36 deliberations on a small minority, those who will be most affected by the new regime. (184) This is likely to enhance the perception that sex work is inherently violent, by focusing on a narrow class of the industry who are particularly vulnerable to victimisation and violence, based on their public exposure and criminal status. (185) In this regard, research has shown that street-based sex workers, who are likely to be more economically disadvantaged than their indoor counterparts, disproportionately bear the weight of criminalisation and police enforcement as a consequence of their public visibility. (186) In Canada, criminal enforcement has been found to focus 'almost exclusively' on the street-level sex trade, largely ignoring the much more significant indoor sex trade. (187) Accordingly, whilst only 5-20 per cent of sex work occurs on the street, 93-95 per cent of arrests are for this type of sex work. (188)

In contrast to Bill C-36's singular conceptualisation of sex work, an approach that would address the needs of the most vulnerable street-based workers, as well as catering to the situations of exploitation that can arise in the various segments of the sex industry, must necessarily be attuned to its multi-dimensional nature, how it functions in practice, and the impact of the 'varying bargaining

powers of [its] stakeholders'. (189) At the very least, this would necessitate an appreciation of 'sexual services' within Bill C-36 through a definition that addresses the nature of 'sex industries as highly fragmented and differentiated', and an understanding of the various forms of violence and over-enforcement which can arise in different contexts. (190)

(b) Effect Two: Misconstruing the Sources of Violence under Bill C-36

The conceptualisation of violence as inherent to sex work, as a component of the radical feminist perspective, rests on the notion that procurers and third parties involved in the transaction are invariably the perpetrators of violence and harm towards sex workers. (191) Because 'prostitution [is] in and of itself an abuse of a woman's body', (male) clients of sex workers and third parties involved in the transaction are necessarily denounced as the perpetrators of such abuse. (192) In this sense, a key premise underlying Bill C-36 is that violence is habitually committed against sex workers by 'the pimps, and those who drive the demand for the purchasing and the commoditization of sexual services'. (193) As such, 'third parties' are criminalised under extensive prohibitions within Bill C-36, effectively capturing all third parties including managers, receptionists, security, drivers and web-designers. (194)

Canadian research, on the other hand, indicates that a more comprehensive understanding of the role of third parties in sex work is needed. (195) As Christine Bruckert of the University of Ottawa testified during the Bill C-36 debates, while 'third parties are cavalierly denounced as pimps, exploiters and profiteers', the evidence suggests the role of third parties is 'much more complicated'. (196) Third parties can provide sex workers with the 'skills, assets' and 'knowledge' required to 'improve their safety and security' contributing important services, such as 'screening', in the business of sex work. (197) This is not to suggest that third parties are not exploitative and violent towards sex workers in some instances, however research has shown that they can also provide services which protect sex workers from the higher rates of violence faced by independent workers, and act as a guardian for street-based workers. (198) As was noted in Bedford and the Bill C-36 debates, third parties 'could increase prostitutes' safety'. (199) Moreover, the positioning of third parties as invariably the perpetrators of violence directly conflicts with studies undertaken in Canada, which indicate that violence against sex workers is perpetrated by a 'wide variety of actors'. (200) According to the CMWC findings '66 per cent of females [sex workers] ... had experienced violence ... from a variety of sources with approximately 32 per cent reporting that violence came at the hands of a stranger, 43 at the hands of an acquaintance, 5 per cent partners, 4 per cent friends, about 4 per cent drug dealers, 4 per cent police, about 5 per cent a sex trade client or worker, and 3 per cent made up the other category'. (201) Notably, strangers and acquaintances were found to make up the majority of perpetrators of violence, illustrating the harmful and routinely ignored impact of social victimisation on sex workers. (202)

The productive effect of the radical feminist view that it is sex work itself which constitutes an abuse of sex workers is that Bill C-36 fails to address the instances of violence against sex workers which arise outside the context of the 'sexual transaction' and are committed by persons aside from a client or third party to the transaction. This is a critical oversight, particularly given the vulnerability of street-based sex workers to violence and victimisation by strangers, as well as to predatory violence. (203) Furthermore, the positioning of sex work as 'inherently violent' sends a problematic message to sex workers by creating a framework whereby the sex worker 'victim' is, in effect, made to shoulder the responsibility for any violence they may encounter. (204) As a consequence, it is argued that sex workers may be less inclined to report violent incidents against them, in the belief that nothing can be done to resolve the issue. (205) Such reforms fail to alleviate the obstacles to achieving safe working conditions for sex workers, preferring to reject the very notion that such work could ever be organised in a manner which preserves the security of the person. (206)

III The Effect of Bill C-36 on the Human Rights of Sex Workers

A Bill C-36 and International Human Rights Law

While the phrase 'gender equality' is littered throughout the Bill C-36 debates, and referred to in the legislative preamble, it is pertinent to note that the Canadian Government opted not to include any references to CEDAW in the legislative framework and made no mention of CEDAW during the parliamentary debates. (207) This is so despite Gunilla Ekberg, of CATW, testifying that specific connections to CEDAW would benefit the legislation, citing the Swedish Act as an example. (208) The discussion which follows therefore examines Bill C-36's contribution to the specific obligations set forth by CEDAW, focussing particularly on arts 5 and 6.

1 CEDAW Article 6

Bill C-36 may be contrasted with art 6 of CEDAW, which requires states to protect women and girls against the 'exploitation of prostitution', through third parties such as pimps. (209) Whilst the terms 'exploitation' and 'prostitution' remain undefined under CEDAW, the language used in art 6 indicates that, within the CEDAW framework, not all instances of sex work are considered inherently exploitative. (210) Moreover, as its travaux préparatoires clarify, art 6 of CEDAW was not intended to suppress prostitution per se, but rather its 'exploitation'. (211) This is so despite Norway and Morocco's proposals during the drafting process that the article should 'combat [all forms of] prostitution', consistent with the Mexico City World Plan of Action--proposals which were ultimately rejected. (212) It should be mentioned that the international instruments adopted following CEDAW have similarly referred to the suppression of the 'exploitation of prostitution', rather than 'prostitution' more generally. (213)

Article 6 has generated somewhat inconsistent CEDAW Committee reviews of state party reports with respect to sex work, perhaps as a consequence of the personal views held by committee members themselves, and it has been suggested that the article's interpretation would 'benefit from a specific elaboration in the form of a general recommendation' pertaining to voluntary sex work. (214) On the one hand, the CEDAW Committee itself has called upon state parties to discourage 'demand for prostitution', (215) and to 'develop programs to prevent women from entering prostitution'. (216) Yet unlike the nature of Bill C-36, which prioritises a criminal response to 'end demand', the CEDAW Committee's recommendations go deeper by 'targeting the root causes of prostitution' with a focus on the need to change the social objectification of women, particularly in the media. (217) Recent concluding observations of

the Committee also illustrate the need to address the causal factors generating the need to engage in sex work, calling on Finland, for example, to provide 'alternative income-generating opportunities' to women in sex work. (218) Similarly, recent concluding observations on Portugal reinforce the need to address poverty and the 'social exclusion of women', particularly migrants and asylum seekers engaging in sex work. (219) These comments of the CEDAW Committee suggest a more holistic approach to understanding the causal factors which create the need to engage in sex work. (220)

2 The CEDAW Committee and the Criminalisation of Sex Work

With respect to criminal law frameworks, the CEDAW Committee has expressed concerns that they could further add to sex work's clandestine nature and increase the potential for trafficking in women and girls, yet it also recognises that systems of decriminalisation, as in the Netherlands, can have negative impacts on migrant sex workers. (221) By calling for the protection of human rights regardless of the legal regime adopted, through the requirement for states to assess the impact of their regulatory frameworks on sex workers, the CEDAW Committee's approach is arguably pragmatic. (222) Nevertheless, it has recommended some important, yet broad, programmatic measures, such as those aimed at alleviating poverty and women's economic empowerment, as well as the provision of information 'regarding the causes and extent of prostitution', (223) the collection of data on the impact of anti-trafficking interventions, and the avoidance of measures which discriminate against sex workers. (224) More specifically, General Recommendation 19 of the CEDAW Committee identifies that sex workers, due to their marginalised (and often unlawful) status, may be 'especially vulnerable to violence' and thus need the equal protection of laws against rape and other forms of violence. (225) It must therefore be recognised that, in contrast to the position adopted in Bill C-36, the CEDAW Committee clearly perceives violence as an external vulnerability faced by sex workers, as opposed to an inherent feature of the sex industry. (226)

One issue upon which the CEDAW Committee has expressed a clear position is with respect to ensuring that legal regulations do not disproportionately penalise sex workers relative to clients and third parties. (227) Recent concluding observations by the CEDAW Committee on the administrative punishment of sex workers, by way of pecuniary penalties, in Bosnia and Herzegovina indicate that even non-criminal punishment of sex workers can infringe the protections guaranteed by CEDAW. (228) This is highly relevant to the 'communication' and 'advertising' prohibitions in Bill C-36, and the noted tendency for police enforcement to be skewed towards the (female) sex worker. (229) In this regard, the CEDAW Committee has stated that laws criminalising prostitution have, in practice, penalised the prostitute, rather than the exploiters of prostitution such as pimps and johns', affirming that the actions of women involved in sex work should not be punished. (230)

(a) Criminalisation of Sex Workers: Recognised Human Rights Implications

Although the CEDAW Committee has not expressed a definitive opinion on the effects of sex work regulation, the World Health Organization, UNAIDS, (231) the United Nations Development Programme, the United Nations Population Fund and Amnesty International have found that the criminalisation of sex work in and of itself contributes to the exploitative conditions in which such work can occur. (232) In the same sense, while the CMWC's mandate precluded consideration of Canadian regulation of sex work, it found it 'cannot ignore the reality that this legal regime played an important role in shaping the relationship between the police and women ... potentially affecting the police investigations into the women's disappearances'. (233) Crucially, the report noted three 'overarching social and economic trends [which] contribute to the women's marginalization' and cause their vulnerability to violence: 'retrenchment of social assistance programs, the ongoing effects of colonialism, and the criminal regulation of prostitution and related law enforcement strategies' (234) Similarly, Amnesty International has stated that, 'while sex work carries certain risk factors, these are exacerbated by the threat of criminal sanctions and the stigma attached to sex work'. (235) A key example cited by Amnesty International is the risk of police abuse and extortion, which is given more room to occur in a system of criminalisation, particularly one which imposes criminal measures in a discriminatory manner, as in the case of Bill C-36's communication and advertising offences. (236)

This concern was raised during the Bill C-36 debates, particularly with respect to the contradictory nature of the rhetoric of 'protection' and the fact that Bill C-36 imposes a 'summary conviction offence' against sex workers communicating for the purpose of selling sexual services in public, which carries a \$5000 fine and maximum jail term of six months. (237) Detective Thai Truong, of the Drugs and Vice Unit of York Regional Police testified that he preferred the legislation to specifically criminalise sex workers, because, 'from the operational perspective ... [w]hen [the sex workers] chose to walk away, they couldn't because they had to listen to us'. (238) While these statements were made in the context of 'extracting' victims of human trafficking, they overlook the often harmful effects of police enforcement of sex work regulations, in addition to the limitations imposed on individual sex workers through a criminal record. (239)

The impact of police enforcement on the human rights violations suffered by sex workers as a population has been widely documented. (240) In Canada, the VPD's failure to address the murdered and missing women of the CMWC inquiry has been described as 'one of the most well-known examples of police negligence'. (241) In Vancouver in particular, law enforcement strategies were found to be characterised by 'stroll evictions, displacement and containment', 'developed by police in response to community pressures'. (242) As a consequence of these strategies, sex workers have reported both direct and indirect harm at the hands of police, through detention without arrest, violence and assault, as well as confiscation of clean syringes and condoms. (243) Thus, the CMWC found a 'clear correlation between law enforcement strategies of displacement and containment in the period leading up to and during [the] terms of reference and increased violence against prostitutes'. (244)

Moreover, it has been noted that the criminalisation of sex work often means that sex workers feel unable to enforce their basic human rights, as their status and work are illegal. (245) As recognised by the former UN Special Rapporteur on Violence against Women, although sex workers face constant rights violations as a consequence of violence within the community and from law enforcement, these problems are compounded by the absence of redress and access to justice for violations, as well as the forced detention and rehabilitation of sex workers. (246) Sex workers have reported that they are frequently vulnerable to police harassment,

(247) and yet feel unable to report crimes against them due to stigmatisation, an unwillingness to investigate such crimes, and the potential for extortion and misconduct. (248) Accordingly, Catharine Mackinnon has argued that to 'be a prostitute is to be a legal nonperson in the ways that matter', illustrating the inherent circularity of abolitionist arguments which operate to further isolate sex workers from the protection of the law and diminish their legal status. (249)

3 Bill C-36 and CEDAW Article 5

Fundamentally, it is argued that the social stigmatisation and marginalisation of sex workers, through Bill C-36's gender-based stereotypes and ideologically charged sexual hierarchies, create conditions of vulnerability to violence and human rights violations. (250) This view is confirmed by the CMWC which found the exposure to violence of sex workers was 'abetted by [their] relentless stigmatization and demonization', with sex workers being 'treated as morally and socially distinct from other women'--'as "non-ideal victims" who are less deserving of respect and protection'. (251) In Norway, the 2012 City of Oslo report highlighted how demand-side criminalisation 'greatly influenced how the average person viewed women selling sex, meaning more women have experienced an increase in harassment from strangers in public spaces', noting 'a greater proportion of the population perceiving sex workers as criminals, even though they have not been criminalized'. (252) The relentless stigmatisation of sex workers in Norway has therefore been described as the 'most common and perhaps most serious complaint' of the abolitionist approach. (253) The CEDAW Committee's concluding observations reflect this concern, calling on Norway to study the effects of its legal regime, particularly with respect to 'social perceptions on prostitution' and 'women who engage in prostitution'. (254) Likewise in India, where an abolitionist model also operates, the Committee's recent concluding observations express 'concern' at the persecution of women in prostitution as a consequence of anti-trafficking initiatives, including raid and rescue operations. (255)

With respect to the stigmatisation of sex workers, the CEDAW Committee has taken a relatively strong position, urging states parties to 'take action aimed at changing men's and society's perception of women' and has recommended the use of 'regular mass media programmes, conferences and seminars on prostitution' addressing the elimination of gender stereotypes. (256) Such initiatives take on a culturally transformative quality whilst addressing the issue of sexual commodification in a manner which deals with its root causes, in addition to respecting the personal autonomy of the sex worker. Thus, art 5 of CEDAW is also relevant to the Bill C-36 framework, in that it requires states to work towards the elimination of stereotypes or prejudices based on sex. (257) As Rikki Holtmaat has argued, CEDAW 'requires fundamental changes in society in order to create more room for diversity and freedom for women ... to decide for themselves what it means to be a woman'. (258) CEDAW therefore demands, through art 5 and its Preamble, that states parties eliminate gender stereotypes (including those enshrined in law), which are seen as the root cause of discrimination against women, and, on some readings of CEDAW, are discriminatory per se. (259) Thus, rigid stereotypes regarding women in sex work, including that they are categorically 'victims of exploitation', 'drug addicted, mentally ill and poor', and more generally, that their activities are inconsistent with social expectations of women, can feed the causes and exacerbate the consequences of gender inequality. (260) Moreover, such prejudices can justify gender-based violence 'as a form of protection or control of women', particularly sex workers. (261) Former UN Special Rapporteur on Violence against Women, Radhika Coomaraswamy, has studied this effect, concluding that the stereotypical male view of female sexuality, characterised by dependency, powerlessness, and the need for protection, makes women more susceptible to sex-related crimes. (262) This closed, static construction of the female sex worker results in a deprivation of individuals' right to control their own destiny and utilise their human capabilities to lead a meaningful life in accordance with their personal values and perspectives. (263) The concepts of individual autonomy, freedom and diversity are therefore integral to the application of CEDAW, and particularly, art 5. (264)

In contrast to requirements of art 5 of CEDAW, Bill C-36's gendered approach to sex work, facilitated by radical feminist theories, only serves to perpetuate stereotypes relating to women who engage in sex work. (265) By drawing on essentialist conceptions of female sexuality, and women within sex work, Bill C-36 justifies and reinforces the prevailing sexual norms that constrain the 'socially acceptable' choices women may make about their bodies and sexual expression. (266) This effect is particularly profound throughout the debates on Bill C-36, which deconstructed the nature and existence of the (female) sex worker, based on stereotypes regarding her childhood and upbringing ('abuse and neglect'), and identity ('victims of exploitation'), while the (hypothetical male) client avoided this depth of scrutiny, obscured by abstract references to 'sexual demand'. (267) In this way, the economic analysis of sex work on which abolitionism is based, has been described as 'insufficient' as it 'leaves unaddressed the tolerated and/or accepted "natural law" of male sexuality'. (268) This tendency of radical feminism to focus solely on the stereotyped effects of the (female) sex worker is criticised by Carisa Showden, based on its implication that 'men can separate self from sex without being deficient in some way'. (269) But within the radical feminist perspective of Bill C-36 '[i]t is the cultural code of what a woman is ... that makes women seem so pathological when they "sell themselves"'. (270) This is not to suggest that (male) clients of sex workers entirely escaped damaging generalisations throughout Bill C-36's enactment. Indeed, a necessary corollary of the gendered stereotypes pertaining to female sex workers as 'victims' is the construction of harmful stereotypes regarding male clients. Within the Bill C-36 dichotomy, the vulnerability and weakness of female sex workers demands a concomitant perpetrator, the male client. (271) Janet Halley has referred to this as the 'm>f dimension of feminist analysis which depicts women as 'perpetually victimized and subordinated, while men are constructed as the inevitable oppressors'. (272) Thus, Bill C-36 characterises clients of sex workers as men who had 'been taught that it is acceptable to buy people to be used at his disposal' and engage in the 'unwelcome solicitation of children', in addition to being (alongside third party 'pimps') the perpetrator of all violence against sex workers. (273) In this way, the notion of gender in Bill C-36 reinforces the 'ascribed, social nature of distinctions between women and men--the excess cultural baggage associated with biological sex'. (274)

It is therefore apparent that the rigid gender paradigm, on which Bill C-36 is based, reconstructs a form of gender asymmetry within the Canadian sex industry, reinforcing outdated stereotypes of both women and men, and entirely erasing the experiences of those who do not fit this rigid gender binary, including male, intersex and transgender sex workers. (275) Thus, while an analysis of all the exclusionary effects of this rigid gender framework is beyond the scope of this article (warranting significant attention in its own right), it must be recognised that, from a human rights perspective, the intentional exclusion of an entire class of persons working in the sex industry paints an incomplete picture, and offers little by way of addressing the distinct vulnerabilities and risks they may face. (276)

For example, it has been noted that in Montreal, transgender sex workers were far more likely to experience violence when being detained in prison cells with men, a common tool used by law enforcement. (277) This, in their view, was a more pressing concern than street-based violence, in conjunction with the dehumanising and discriminatory nature of their treatment by the police, both within and outside of custody. (278) An unfortunate consequence of locating sex work along gendered lines is that the Canadian Parliament was unable to attend to these urgent human rights concerns. (279)

Yet even within the female/male dichotomy constructed by Bill C-36, the focus on 'gender equality' produces counterproductive effects, as it reinforces a 'naturalized moorings of sex/gender' and 'supports concomitant conceptions of women (and men) that justify protective ... rather than rights-based, responses to women's human rights violations'. (280) The gender paradigm on which Bill C-36 is based assumes that gender is a 'fixed, immutable characteristic', and clearly delineates a social construction of biological difference between men and women by reference to power. (281) Underlying Bill C-36 is a form of biological essentiality which equates the 'feminine' with notions of powerlessness, helplessness, and victimhood, whereas the 'masculine' delineates 'demand for sex', 'sexual commodification' and 'violence'. (282) The problem with this approach is that it limits the possibility for restructuring the social conceptualisation of female sexuality and male dominance, as required under art 5 of CEDAW, and restricts the possibility for a new, human rights approach to sex work regulation. (283) Thus, the gender essentialism underlying Bill C-36 obstructs the social change mandated by art 5 of CEDAW and 'slides uncomfortably and exceedingly quickly into socio-biologism which merely puts women back in their place'. (284)

Bill C-36 therefore carries substantial symbolic weight, given the importance of law as a mechanism for institutionalising norms and expressing social values. (285) As Michel Foucault argued, 'discourses produce knowledge that ascribes identities, and disseminate it as authoritative'. (286) Here, 'discourse' refers to the way in which ideologically charged social constructions shape how 'we see and understand ourselves, our desires, and our freedom'. (287) Nancy Hirschmann's analysis of social construction suggests three components which readily translate to the context of Bill C-36; the process begins with the ideological claim (sex work is inherently harmful to women), creating the material conditions within Bill C-36 (sex workers are positioned as helpless victims, and physically excluded from the public sphere by the communication and advertising offences) that then reinforce a discursive notion of gender (it is immoral for women to engage in sex work, and those that do choose to, are damaged or suffer a 'false consciousness'). This in turn 'legitimizes and reinforces' the foundational ideology (that sex work is inherently harmful to women and permanently damages them). (288) The promotion of femininity in Bill C-36 as giving way to a fixed and immutable vulnerability to exploitation for the purpose of sex follows a circularity which establishes female sex workers as just that: vulnerable persons available for male exploitation. It is argued that, consistent with Hirschmann's theory, promoting autonomy and freedom from a feminist perspective requires 'cutting through' these layers of ideology and social constraint to open the possibility for appreciating the ways in which women (and men) 'are simultaneously restricted from and compelled towards particular expressions of will and desire'. (289) In the context of Bill C-36, it is in fact the sex worker who challenges these layers of ideology and social limitations by 'choosing to adopt stigmatised roles' and defying the victim paradigm through 'demonstrating exceptional normative competence and normative resistance [by] insisting that stigma and poverty are the problem', not sexual activity outside state-sanctioned circumstances. (290) This is the active agency of the sex worker that emerges even within the constraining gender norms and social, legal and economic conditions that limit their personal autonomy and freedom of choice. (291)

IV Conclusion

The effect of the abolitionist rhetoric underlying Bill C-36 has significant ramifications for the human rights of sex workers in Canada. As has been shown, the radical feminist perspective of sex work, as deployed throughout the enactment of Bill C-36, has the effect of undermining the capacity for women to consensually engage in sex work, directly criminalises their status, and provides no alternate means for their subsistence--a factor that is particularly problematic in light of the noted effects of poverty and social disadvantage in generating the need to engage in sex work. (292)

The paradox of radical feminism's approach to the human rights of sex workers is amplified under Bill C-36--a framework that directly acknowledges the coercive effects of gender inequality and the limitations it places on free choice, whilst simultaneously constraining female sex workers' autonomy and capacity for survival. (293) In this sense, it seems appropriate that any system purporting to advance the interests of women should necessarily focus on expanding their opportunities for survival, for personal autonomy, and for choice. Accordingly, by separating Bill C-36's rhetorical claims from its actual effects, the reality of the legislative framework is exposed as little more than a moralising condemnation of female sex workers, designed to limit their freedoms and capacity for self-determination, in order to induce their exit from sex work, in a manner which is wholly irreconcilable with the pursuit of 'gender equality'. (294)

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(1) Canada, Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs, 15 (9 September 2014) 84 (Donald Plett).

(2) Protection of Communities and Exploited Persons Act, SC 2014, c 25 ('Bill C-36'), amending Criminal Code, RSC 1985, c C-46 ('Criminal Code').

(3) A-G (Canada) v Bedford [2013] 3 SCR 1101 ('Bedford'), Parliamentary Information and Research Service, 'Legislative Summary--Bill C-36: An Act to Amend the Criminal Code in Response to the Supreme Court of Canada Decision in Attorney General of Canada v Bedford and to Make Consequential Amendments to Other Acts' (Legislative Summary No 41-2-C36-E, Library of Parliament, Canada, 18 July 2014) 2. See also Sandra Ka Hon Chu and Rebecca Glass, 'Sex Work Law Reform in Canada: Considering Problems with the Nordic Model' (2013) 51 Alberta Law Review 101; Kamala Kempadoo and Jo Doezema (eds), Global Sex

Workers: Rights, Resistance and Redefinition (Routledge, 1998) 9. I will use the phrase 'sex work' and 'sex worker' as far as possible throughout this paper because of the stigmatising effects of the word 'prostitute', and as a means to emphasise the importance of respecting sex workers' agency.

(4) Bedford [2013] 3 SCR 1101, 1156 [136].

(5) Canada, Parliamentary Debates, House of Commons, 11 June 2014, vol 147, no 101, 6652 (Peter MacKay); Canada, Parliamentary Debates, House of Commons, 12 June 2014, vol 147, no 102, 6732 (Joy Smith).

(6) Criminal Code s 286.3, as inserted by Bill C-36 s 20. See generally Don Kulick, 'Sex in the New Europe: The Criminalisation of Clients and Swedish Fear of Penetration' (2003) 3 Anthropological Theory 199; Department of Justice, Canada, 'Bill C-36, Protection of Communities and Exploited Persons Act' (Technical Paper, 1 December 2014) <<https://perma.cc/QX5A-Z8GY>>; Canada, Parliamentary Debates, House of Commons, 11 June 2014, vol 147, no 101, 6652-5 (Peter MacKay); Yugank Goyal and Padmanabha Ramanujam, 'Ill-Conceived Laws and Exploitative State: Toward Decriminalizing Prostitution in India' (2015) 47 Akron Law Review 1071, 1091; Ka Hon Chu and Glass, above n 3, 102; Act on Prohibiting the Purchase of Sexual Services 1998 (Sweden); Gunilla Ekberg, 'The Swedish Law that Prohibits the Purchase of Sexual Services: Best Practices for Prevention of Prostitution and Trafficking in Human Beings' (2004) 10 Violence against Women 1187.

(7) See Criminal Code s 286.4, as inserted by Bill C-36 s 20; Criminal Code s 213(1.1), as inserted by Bill C-36 s 15(1.1); Canada, Parliamentary Debates, House of Commons, 11 June 2014, vol 147, no 101, 6652-5 (Peter MacKay); Parliamentary Information and Research Service, above n 3, 5.

(8) See Jacqueline Berman, 'The Left, the Right and the Prostitute: The Making of US Antitrafficking in Persons Policy' (2006) 14 Tulane Journal of International and Comparative Law 269, 273; Elizabeth Bernstein, 'The Sexual Politics of the "New Abolitionism"' (2007) 18(5) Differences 128, 129.

(9) See Andrea Dworkin, 'Prostitution and Male Supremacy' (1993) 1 Michigan Journal of Gender & Law 1, 3; Catharine A MacKinnon, 'Prostitution and Civil Rights' (1993) 1 Michigan Journal of Gender & Law 13; Kathleen Barry, *The Prostitution of Sexuality* (New York University Press, 1996) 121. Cf Bill C-36 Preamble: 'the Parliament of Canada has grave concerns about the exploitation that is inherent in prostitution ... which has a disproportionate impact on women and children' (emphasis added). See also Canada, Parliamentary Debates, House of Commons, 12 June 2014, vol 147, no 102, 6730 (Joy Smith): 'Prostitution exploits women [and] escalates gender inequalities by turning women's bodies into a commodity to be bought, sold, rented, and exploited by men' (emphasis added).

(10) See Vanessa E Munro, 'Violence against Women, "Victimhood" and the (Neo) Liberal State' in Margaret Davies and Vanessa E Munro (eds), *The Ashgate Research Companion to Feminist Legal Theory* (Ashgate, 2013) 233, 237.

(11) *Ibid.*

(12) Ratna Kapur, 'The Tragedy of Victimization Rhetoric: Resurrecting the "Native" Subject in International/Post-Colonial Feminist Legal Politics' (2002) 15 Harvard Human Rights Journal 1, 6; Ratna Kapur, 'Post-Colonial Economies of Desire: Legal Representations of the Sexual Subaltern' (2001) 78 Denver University Law Review 855.

(13) Munro, above n 10, 237.

(14) See generally Canada, Parliamentary Debates, House of Commons, 11 June 2014, vol 147, no 101, 6652-5 (Peter MacKay); Bernstein, 'New Abolitionism', above n 8, 129; Carisa R Showden, *Choices Women Make: Agency in Domestic Violence, Assisted Reproduction and Sex Work* (University of Minnesota Press, 2011) 141.

(15) Dianne Otto, 'Making Sense of Zero Tolerance Policies in Peacekeeping Sexual Economies' in Vanessa E Munro and Carl F Stychin (eds), *Sexuality and The Law: Feminist Engagements* (Routledge-Cavendish, 2007) 261; Belinda Cooper, 'Prostitution: A Feminist Analysis' (1989) 11 Women's Rights Law Reporter 99, 105; Carole S Vance, 'Innocence and Experience: Melodramatic Narratives of Sex Trafficking and Their Consequences for Law and Policy' (2012) 2 History of the Present 200, 201; Tripti Tandon, Gabriel Armas-Cardona and Anand Grover, 'Sex Work and Trafficking: Can Human Rights Lead Us Out of the Impasse?' on Perspectives (21 October 2014) <<https://perma.cc/EW2UP5FS>>.

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(20) See Pivot Legal Society, 'My Work Should Not Cost Me My Life: The Case against Criminalizing the Purchase of Sex in Canada' (Discussion Paper, 2014) 5; Goyal and Ramanujam, above n 6, 1110; Janice G Raymond, 'Prostitution on Demand: Legalizing the Buyers as Sexual Consumers' (2004) 10 *Violence against Women* 1156; Ronald Weitzer, 'The Social Construction of Sex Trafficking: Ideology and Institutionalization of a Moral Crusade' (2007) 35 *Politics & Society* 447, 452; Janet Halley et al, 'From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism' (2006) 29 *Harvard Journal of Law and Gender* 336.

(21) See A Kriisi et al, 'Criminalisation of Clients: Reproducing Vulnerabilities for Violence and Poor Health among Street-Based Sex Workers in Canada--A Qualitative Study' (2014) *BMJ Open* 1, 7-9; Act on Prohibiting the Purchase of Sexual Services 1998 (Sweden); Parliamentary Information and Research Service, above n 3, 2; Ka Hon Chu and Glass, above n 3, 102; Kulick, above n 6, 199; British Columbia, Missing Women Commission of Inquiry, *Forsaken: The Report of the Missing Women Commission of Inquiry* (2012) vol 1 ('Missing Women Commission of Inquiry Report'), Julie Kaye, 'Canada's Flawed Sex Trade', *The New York Times* (New York), 20 January 2015, 1.

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(23) See generally Pivot Legal Society, above n 20, 5; Goyal and Ramanujam, above n 6, 1110; Otto, 'Rethinking Sex/Gender Dualism', above n 16, 198.

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(26) Bedford [2013] 3 SCR 1101, 1133 [58], 1156 [136],

(27) Canada Act 1982 (UK) c 11, s 7 ('Canadian Charter of Rights and Freedoms').

(28) Bedford [2013] 3 SCR 1101, 1133 [58], 1156 [136].

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(43) See *ibid* 157.

- (44) Bill C-36 Preamble.
- (45) Act on Prohibiting the Purchase of Sexual Services 1998 (Sweden).
- (46) Ka Hon Chu and Glass, above n 3, 103-4; Ekberg, above n 6, 1188; Dodillet and Ostergren, above n 19, 3.
- (47) Amnesty International, 'Decriminalization of Sex Work' (Policy Background Document) 6 <<https://perma.cc/RYE8-7PVM>>.
- (48) Dodillet and Ostergren, above n 19, 1. See also Ka Hon Chu and Glass, above n 3, 102.
- (49) MacKinnon, above n 9, 28; Barry, above n 9,49.
- (50) Dodillet and Ostergren, above n 19.
- (51) Criminal Code s 286.1, as inserted by Bill C-36 s 20.
- (52) Ibid.
- (53) Ekberg, above n 6, 1188; Dodillet and Ostergren, above n 19, 1. See Ka Hon Chu and Glass, above n 3,103.
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- (65) Doezema, above n 64, 27.
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(74) Standing Committee on the Status of Women, Turning Outrage into Action to Address Trafficking for the Purpose of Sexual Exploitation in Canada (Parliament of Canada, 2007).

(75) See, eg, Bill C-36 Preamble: 'the Parliament of Canada has grave concerns about the exploitation that is inherent in prostitution ... which has a disproportionate impact on women and children' (emphasis added); Canada, Parliamentary Debates, House of Commons, 12 June 2014, vol 147, no 102, 6730 (Joy Smith): 'Prostitution exploits women [and] escalates gender inequalities by turning women's bodies into a commodity to be bought, sold, rented, and exploited by men'.

(76) Department of Justice, Canada, 'Bill C-36, An Act to Amend the Criminal Code in Response to the Supreme Court of Canada Decision in Attorney General of Canada v Bedford and to Make Consequential Amendments to Other Acts' (Technical Paper, 1 December 2014) 3.

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(83) Ibid.

(84) See Showden, above n 14, 141.

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(90) Freeman, Chinkin and Rudolf, above n 88, 172-5.

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- (133) Vance, above n 15, 211; Kapur, 'Victimization Rhetoric', above n 12, 32.
- (134) Vance, above n 15, 211.
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