

## OWNING RISK: SEX WORKER SUBJECTIVITIES AND THE REIMAGINING OF VULNERABILITY AND VICTIMHOOD

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*The 2013 Canada (Attorney General) v. Bedford decision saw a fundamental shift in the discursive constructions of sex worker identities. Moving away from sex work as a societal nuisance, the landmark case highlights the complexities of sex work regulation through a language of risk. Exploring the Supreme Court of Canada's decision and the testimony presented in the Bedford trials, I argue that sex workers articulate their legal position by downloading risk onto their own subjectivities, navigating the sex trade through technologies of risk management, simultaneously reproducing and challenging notions of ideal victimhood. This paper maps these attachments towards and away from vulnerability and victimhood and explores the ways sex workers subvert their at-risk identities for a subject position that is risk-aware.*

Key words: subjectivities, risk, vulnerability, sex work, critical victimology, affect

### *Introduction*

The language of risk and vulnerability are an integral part of criminal justice and legal reform discourses (see [Walklate and Mythen 2011](#)). Traditionally, risk and governmentality scholars ([Castel 1991](#); [Rose 2000](#); [Rose et al. 2006](#); [Garland 2012](#)) theorize risk at the level of the abstract, primarily constituted through modalities of aggregates and metrics of predictability ([Beck 1992](#); [Hacking 1999](#); [O'Malley 2004](#); [Dean 2010](#)). Though this approach is useful in understanding how aggregates govern at the level of the population, its theoretical applications are largely underdeveloped when exploring the ways risk is performed, negotiated, and managed by and through the subject. In other words, how can we conceptualize the everyday risks as processes towards a *making of the self*? How do everyday risks, including risks associated with criminalized activities, including sex work, constitute, and produce different kinds of subjectivities? How do sex workers take up risks as a constitutive part of their risk-aware identities?

The *Canada (Attorney General) v. Bedford* decision points to these questions of risk and vulnerability and their relationship to how sex worker subjectivities are forged through changing legal regulation, and how these sociolegal identities are negotiated by sex workers and their advocates. In 2013, the Supreme Court of Canada ruled that the *Criminal Code* provisions governing prostitution were unconstitutional. These impugned provisions effectively criminalized the ways in which sex workers could actively protect themselves from the associated risks of the sex trade. Although prostitution itself remained legal, these provisions targeted the public nuisances of the sex trade, attempting to limit the visibility of sex workers in public. Sex trade workers and

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advocates claim that these provisions do virtually nothing to stop prostitution (Benoit and Shaver 2006). Nuisance laws fuelled a regulatory regime that sought to prevent sex workers from soliciting clients in public, hiring third-party personnel (bodyguards, drivers, etc.), or operating a bawdy-house—provisions that ultimately prevent sex workers from working in safer indoor environments and restricting their ability to screen potential clients.

Contrary to this, sex trade prohibitionists and government officials under Conservative leadership claim that the risks associated with the sex trade are inextricably linked to the nature of the profession. The former Conservative government cited the sex trade itself as part of a system of exploitation that capitalizes on the vulnerable and profits from the sale of those who are unable to consent. This rhetoric defines two important strategies. First, it assumes that all sex workers experience violence in the same way, ignoring the fact that those with certain cultural, social, and economic capital may be able to maneuver the sex trade in more effective ways. Second, it positions sex workers beyond the reach of any meaningful harm reduction strategies. This characterization of the sex trade is grossly problematic in that it generalizes the experiences of those who have been trafficked and superimposes them onto all consenting adults capable of making cost-benefit decisions as to whether (or not) to sell sex. Occupational hazard-awareness is required for any form of employment, but because women occupy a central role in the sex work economy, the state asserts its patriarchal role in attempting to govern and control women's bodies.<sup>1</sup> Risk becomes something both inevitable and non-negotiable; risk of violence is inextricably bound to the sex trade as a permanent and universal feature of sex work.

Though the *Bedford* case is most notable for its decision in striking down the *Criminal Code* provisions governing sex work—a considerably important legal reformation project—it also reorients discussions related to the governance of the sex trade from questions of *nuisance management* to that of *risk management*. The question of which risks are worthy of state intervention and which risks are appropriately woven into individual (and collective) subjectivities become central to the ways in which the debates around sex work are framed. Thus, the discussion that follows surrounds the ways in which the ideas of the “at-risk” sex worker is taken up by key sociolegal actors (i.e. both prohibitionists and sex worker advocates) who actively shape the discourse around the sex trade. As Judith Butler (2009) contends, this project is taken up in ways that attach themselves to certain kinds of bodies—some more precariously situated and politically recognized than others.

Thinking about the ways sex workers (and sex worker advocates) embody and perform what Walklate and Mythen (2011) call neoliberal fantasies of risk, I explore the identity politics that emerge from the constitutional challenge of *Canada v. Bedford* and map how sex workers negotiate the juridical subjectivity of the “risky prostitute” in two fundamental ways. The first examines the ways sex work has traditionally been governed in the Canadian context and how these regulations have undergone a significant

<sup>1</sup>Though women represent the majority of those working in the sex trade, other gender identities also constitute an important part of the sex industry. Men and trans people, for example, also experience heightened forms of violence and lack of protections from legal and social institutions, though their experiences are largely ignored by official state discourse and prohibitionist narratives which tend to centre the experiences of the sex trade around cis-gendered women (see Fletcher 2013; Redwood 2013).

shift in framing prostitution debates. Within the last decade, there have been considerable global trends to shift the regulatory focus of the criminal justice system towards criminalizing those who purchase sexual services. This approach, known as the Nordic or Swedish model, was enacted in Sweden in the late 1990s, and adaptations of this regulatory framework have been implemented by many Western governments, most notably in the United Kingdom's *Policing and Crime Act (2009)* and Canada's *Protection of Communities and Exploited Persons Act (2014)*. Though these trends point to a renewed effort to adapt the ways of policing to changing perspectives on sex work, I focus specifically on the Canadian context to illustrate the ways in which sex workers and sex worker advocates negotiate these changing modalities of regulatory power in an effort to subvert the constructed identity of the "prostituted victim," while simultaneously offering an account of sex work that is entrepreneurial in both exploiting a particular economic demand while also offering an account that is largely focused on risk management.

The second rests on the ways sex workers embody risk and advocate for decriminalization in terms of self-responsibilization and risk management. I interrogate how sex work takes on different ontological categories based on how sex work is policed in various socio-political climates. In the case of *Bedford*, I argue that there is a markedly different approach in regulating the sex trade—one which initially sought to govern sex work through mechanisms of nuisance management to one that now focuses on risk management. The subject position of the sex worker is constantly reproduced and challenged in ways that actively make risk a proprietary feature of the sex trade, one where the kinds of risks sex workers take constitute their own presentation of self (see [Goffman 1974](#))—a self that is at times both recognizable and unrecognizable within the legal imaginary. Extending beyond an analysis of risk at the level of the abstract, I argue that sex workers and their allies actively play into a neoliberal politics of risk by challenging and replacing the subjectivity of the "passive victim" for a more entrepreneurial sex worker identity—one capable of assessing and willing to download risk onto their own subjectivities. I maintain that the sex worker subject position becomes a quintessential embodiment of this "at-risk" consciousness. They own their own risk, compartmentalize it in manageable ways, and actively weave it into their own subjectivities. What emerges is a more nuanced account of the ways in which sex workers negotiate their at-risk identities and how their performance as self-responsibilized subjects actively engage in a politics of risk-based identity politics.

*From regulating nuisance to saving sex workers: Canada v. Bedford and the shifting dynamics of risk*

With the continued expansion of the carceral state, the project of governing through mechanisms of risk and self-regulation seek to both produce and reify risk knowledges. These knowledges set the tone for a system that privileges and speaks in a language of actuarialism, risk, and prediction. As [Feeley and Simon \(1994\)](#) suggest, the techniques and practices of managing risk through the flows of aggregated data create a dynamic in which criminal justice discourses and knowledge create the conditions for a kind of "actuarial justice." Foucault's commentary on the prison's failure to adequately rehabilitate and transform the individual offender provides the underpinning to what has been called the "new penology" of state governance ([Feeley and Simon 1992](#)). Criminality

becomes normalized as an ordinary social fact and technologies of rehabilitation and transformation are replaced by risk management techniques (Ericson and Haggerty 1997). The subject is transformed into an object of knowledge, discursively situated as a metric through which the criminal justice system evaluates its disciplinary efficacies (Foucault 1977). Risk is externalized and compounded at the level of the population (Rabinow and Rose 2006), regulated through technologies aimed at efficiently governing and managing aggregated groups (e.g. criminals and/or victims).

Risk becomes merely an external quality of the subject. As Robert Castel (1991: 288) writes, “There is, in fact, no longer a relation of immediacy with the subject *because there is no longer a subject*” (emphasis in original). This is not to say that all risk scholars theorize risk in such an abstract way (Rose 2009; Hannah-Moffat 2013; Werth 2017), but it does point us to an understanding that risk—as an epistemological concept—is rooted in a certain skepticism related to individuality and often privileges its aggregated and abstracted form. Castel suggests that the concept or measurement of risk is based primarily on actuarial models of assessment born out of formulaic calculations. He writes, “risk does not arise from the presence of particular precise danger embodied in a concrete individual or group. It is the effect of a combination of abstract factors which render more or less probable the occurrence of undesirable modes of behaviour” (Castel 1991: 287).

Though these seemingly disparate risks coalesce to construct versions of “risky groups,” Brock (1998) argues that the ways the government chooses to regulate sex work—i.e. strategies that aim at managing sex workers as risky, harmful, nuisance, etc.—actually produce the kinds of sex worker subjects by and through legal regulation. In her analysis of sex work regulation in Canada, Brock maintains that the identity category of the “prostitute” is socio-historically contingent, constituted by and through law. Within competing discourses, the prostitute category has been organized through a variety of different categorizations, including the “fallen woman,” “sexual deviant,” urban “nuisance,” and legitimate “entrepreneur.” For example, the enforcement of prostitution took on different forms in different socio-economic periods. Canada, along with many other Western countries, has taken a largely risk-based approach to sex work regulation (Sanders 2004; Krüsi et al. 2012). Constance Backhouse (1991) and Mariana Valverde (2008) trace these biopolitical interventions to the 19th century where prostitution was not only policed along lines of puritanical rationality, but also through discourses of public health. Between 1865 and 1970, officials recognized the futility of criminalizing prostitution under a moral rubric and, instead, opted to regulate sex work through a public health approach. Police became enforcers of the *Contagious Disease Act* and “were authorized to detain women suspected of prostitution for medical examination” (Backhouse 1991: 235). Here, the merging of medical-criminal discourses that produce knowledge on prostitution constitute the sex worker as “contagion.” In other historical/political moments the sex trade was “regarded by judges and police as a convenient outlet for male sexual needs” (Brock 2000: 82). The shifting social and political landscapes create the conditions for various regulatory approaches to sex work, ultimately creating the kinds of sex worker identities that emerge from criminal justice and public health discourse.

Until the 2013 *Bedford* decision, prostitution was considered a *de facto* crime. Prostitution itself was never included as part of the *Criminal Code*; rather, the activities

related to prostitution (i.e. hiring bodyguards, working indoors, screening clients) were criminalized in ways that aimed at curtailing sex work as a societal nuisance:

It is not a crime in Canada to sell sex for money. However, it is a crime to keep a bawdy-house, to live on the avails of prostitution or to communicate in public with respect to a proposed act of prostitution. It is argued that these restrictions on prostitution put the safety and lives of prostitutes at risk, and are therefore unconstitutional.<sup>2</sup>

The Supreme Court decision held that the provisions governing sex work are grossly disproportionate to its official objective of managing nuisance. The Supreme Court writes, “The harms identified by the courts below are grossly disproportionate to the deterrence of community disruption that is the object of the law. Parliament has the power to regulate against nuisances, but not at the cost of the health, safety and lives of prostitutes.”<sup>3</sup> The decision also makes considerable efforts to distinguish those who are positioned to exploit sex workers, particularly those in more precarious socio-economic positions, against those who may in fact play a large role in effectively executing mechanisms of self-protection. The Court argues that “the law not only catches drivers and bodyguards, who may actually be pimps, but it also catches clearly non-exploitative relationships, such as receptionists or accountants who work with prostitutes.”<sup>4</sup> Finally, the Supreme Court accepted that the criminalization of communicating for the purposes of prostitution actively restricts sex workers “from screening clients and setting terms for the use of condoms or safe houses. In these ways, it significantly increases the risks they face.”<sup>5</sup>

The *Bedford* case allows for a critical unpacking of sex worker subjectivities and the processes and techniques that constitute juridical subjects like the entrepreneurial risk-taking sex worker or the “prostituted” victim. The *Bedford* constitutional challenge becomes more than just a legal battle over the right to security, life, or even the right to work; it inevitably becomes the space in which sex workers can reclaim their subjectivities from the juridical—a process through which the apparatus of law intersects with the power of identity-making (Bell 1992; Scouler 2004). Through this identity (re)making, risk becomes a point of maneuverability—a way to relate oneself towards or away from claims related to victimhood. Criminalized groups must package their legal claims in ways that arouse a reaction from both legal actors and the general public. These almost always present themselves in the language of risk. But, as I argue, one cannot speak to a particular behaviour or subject position as risky without employing strategic narratives, words, and descriptors that *affectively* negotiate perceptions of how certain subjects are constituted. In doing so, I challenge the notion that risk is a concept abstracted from the subject, restricted to descriptors of data aggregates. Instead, risk is mobilized in strategic ways that operate at the level of the subject, allowing for certain reorganizations and representations of risk.

Although the Supreme Court accepted that there are inherent risks associated with the sex trade, its decision held that the government could not regulate sex work as a public nuisance because it exacerbates and amplifies these risks. This hierarchizing

<sup>2</sup>*Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101 at para 1.

<sup>3</sup>Ibid at para 136.

<sup>4</sup>Ibid at para 162.

<sup>5</sup>Ibid at para 71.

of sex worker safety over the state's power to regulate sex worker as a nuisance is, as I argue, a strategic turn in the history of Canadian sex work regulation, signalling a new recognition of sex worker autonomy—as a rights-bearing (see [Scoular 2015](#)) and risk-bearing subject—providing a prerequisite for lawmakers to actively consider how sex work affects the lived reality of individuals. In this reimagining of the sex trade, the sex worker becomes reconstituted as a grievable subject (see [Butler 2009](#)) and as a life worth protecting. The “vulnerable” sex worker becomes the catalyst through which fantasies of risk create the conditions that make victimhood possible. The movement *away* from a nuisance-centred identity in favour of one that is always victimized actively distances the sex worker subjectivity from the one that is capable of choosing sex work in the first place.

### *Relocating risk through vulnerability*

The (re)constitution of sex worker subjectivity as victim plays heavily into the *Bedford* decision, where narratives of inherent violence and harm saturate the risk-logics curated by the state. Framing the sex trade as “inherently risky” is a strategic characterization that not only simplifies the underlying socio-economic and historical circumstances that may contribute to the choice to undertake sex work, it simultaneously absolves the state from providing any substantial safety provisions that allow sex workers to protect themselves from potentially violent encounters. In the 2003 *Malmo-Levine* decision,<sup>6,7</sup> the Supreme Court had rejected that illicit activities were considered “a ‘lifestyle choice’ and that lifestyle choices, especially risky ones, were not constitutionally protected.”<sup>8</sup> The state also reproduced this when the Canadian media reported that Federal Crown lawyer, Michael Morris, called prostitution a choice and that sex workers are fully aware of the risks involved in the sex trade ([Davidson 2012](#)). The sentiment here extends beyond the immediacy of sex work. State actors, including prosecutors and politicians, actively assert that those who contradict the heteronormative ideals of the neoconservative agenda are, by their very definition of legitimacy, not worthy of harm reduction strategies. Thus, the state has shifted the responsibility of (preventing) victimhood onto sex workers in an effort to legitimize a governing strategy that prioritizes criminalization rather than investment in social programs that may assist sex workers in transitioning out of the sex trade (if they so choose) and/or ensuring safety and protection in undertaking sex work.

Rejecting the “official” function of regulating nuisance opens tremendous space for a juridical and criminological reinterpretation and representation of the sex worker. The Supreme Court acknowledges agency within the sex trade, albeit to a limited degree, stating, “while some prostitutes may fit the description of persons who freely choose (or at one time chose) to engage in the risky economic activity of prostitution, many prostitutes have no meaningful choice but to do so.”<sup>9</sup> The Attorneys General of

<sup>6</sup>*R. v. Malmo-Levine; R. v. Caine*, [2003] 3 S.C.R. 571, 2003 SCC 74

<sup>7</sup>*Malmo-Levine* is a Canadian constitutional decision in which the appellant argued that the criminalization of marijuana is unconstitutional because the role of criminal regulation is to reduce or protect against harm and that marijuana use was not harmful. The Court clarified the constitutionality of this argument, claiming that the criminalization of marijuana was in fact valid because the government need not establish that harm exists, but merely a reasonable apprehension of harm.

<sup>8</sup>*Canada v. Bedford* (2013) at para 82.

<sup>9</sup>*Ibid.* at para 86.

both Ontario and Canada made their positions clear that the notion of “constrained choice” does not provide a realistic understanding of agency in that sex workers do not “freely choose” to put themselves at increased risk of violence.<sup>10</sup> The Supreme Court, however, was unwilling to accept the axiomatic claim that the sex trade is inherently and invariably violent, and instead, took the approach that sex workers often choose, among other employment options, to engage in sex work (even when choices are constrained). The state’s position that sex work is always exploitative invokes a traditional understanding of vulnerability and agency. For most prohibitionists, resiliency to these risks is virtually impossible. It is their position that sex workers—most often referred to as “prostituted” women—cannot overcome their victimization because abuse, exploitation, and harassment are intrinsically embedded within the sex trade and the institutions that regulate it. For sex worker advocates and harm reductionists, criminalizing the tools that ensure safety poses a threat to overcoming barriers that may harm the livelihood of sex workers. However, though vulnerability is supposed to be a metric of predicting the likelihood of victimization (Walklate 2011; Chakraborti and Garland 2012), prohibitionists have argued that sex workers—especially young women and children—lack the capacity to make a meaningful *choice* to engage in sex work.

Though official state discourses often represent the sex trade as inherently violent, the Supreme Court of Canada focused its attention on the ways in which criminal law actually expose sex workers to increased levels of violence. The language of risk becomes attached to the subject positions of sex workers as always “at-risk,” or at the very least, vulnerable to external harms such as traffickers, pimps, and johns. This precariousness, as Butler (2006) argues, is part of the processes that constitute subjectivities as always exposed to violence. The use of language, and specifically, the term “inherent violence,” serves as a strategic homogenization and over-simplification of the complex forms of subjugation that women can experience and the techniques they can use to mitigate these circumstances (Lowman 2000). It shows that resiliency is impossible, vulnerability and victimhood as absolute, and that the attention to individual vulnerability is a strategic shift from concentrating on the act of prostitution as a nuisance to an emphasis on prostitution as an oppression that affects the individual.

Unlike risk, where the targets of criminal justice intervention pose a particular threat to social safety, the concept of vulnerability is intended to mark one’s exposure to risk. Once constituted as risks to public health social order, sex workers are now constituted as a kind of vulnerable subject. Misztal’s (2011) work explores the theoretical possibilities for understanding how vulnerability offers an inverse to the kinds traditional musings on risk. Arguing that the conceptual uses of vulnerability allow for a reworking of the politics of fear in ways that simply pivot notions of risk, she writes, “We are becoming culturally disposed to express our vulnerabilities in the language of risk and fear, while at the same time the grammar of risk and fear constructs our lives as having acquired a new quality of insecurity” (Misztal 2011: 41). If everything is in need of a risk analysis, and vulnerability, as a conceptual tool, allows for the relocation of risk as something that is external to and acting upon the subject, then the proliferation of a language of vulnerability creates the conditions in which those who have traditionally been characterized as both “risky” and somehow “at-risk” are situated at the centre of criminal (and broader state) surveillance strategies.

<sup>10</sup>Ibid.

Since anti-prostitution policy initiatives are often tangled with anti-trafficking discourses, the hyper-securitization of sex work regulation offers a futile endeavour in actually locating the sources of harm (Doezema 2000; Carline 2012). If we are to consider, for a moment, the prohibitionist claim that risk is both intrinsic to sex work (e.g. as a degradation of the human condition) and externally located in the violent recruiting practices of pimps, johns, and traffickers (see Sanders and Campbell 2007; Weitzer 2007), then the distinction between consensual sex work and forced sexual labour/sexual violence collapses into one another. When the latter becomes indistinguishable from the former, harm becomes a floating signifier unable to attach itself to any material accounts of violence.

Using the lexicon of vulnerability in sex work discourse (van der Meulen and Durisin 2008) allows for both the externalization and internalization of risk in a unique way. It places risks as an external and imminent threat by broader social and economic forces that cannot be easily located while also reifying the seemingly intrinsic and inherent violence within the sex trade. Risk is found everywhere and nowhere at the same time. Brown and Sanders (2017: 431) argue that the proliferation of this language of vulnerability is deployed normatively to invoke a very strategic and often policy-oriented response. The corresponding policy initiatives that emerge from these shifting narratives on sex work serve to reconstitute the sex worker from risky nuisance to vulnerable victim. The regulatory practices, however, tell a much different story. In most countries that employ the Nordic model of criminalizing purchasers of sex, sex workers face heightened state surveillance practices (Munro and Scoular 2012) and often engage in evasive strategies to ensure their clients' anonymity and reduced police interaction.

This new *kind* of sex worker subject position, as Hacking (1999) would argue, becomes lodged between two poles of the same subject position—one where risks is attached to the sex trade and is distanced from individual choice. In an affective sense, the “prostituted victim” is maintained through a repositioning of sex worker subjectivities (see also Ahmed 2004). The victim position is actively challenged by sex workers and advocates who articulate the sex trade as something navigable. Unlike prohibitionists, sex work activists have taken a harm-reduction approach, arguing for the law's protection by merely allowing sex workers to navigate the sex trade in a way that does not criminalize or impede appropriate mechanisms of self-protection. In their efforts to end the subjugation of sex trade workers, advocates and their allies have formed a coalition aimed at taking a sensible approach to risk prevention, management, and self-responsibilization. The argument stands that while there are undeniable risks associated with prostitution, those risks can be mitigated through techniques of risk management.

#### *Challenging the politics of ideal victimhood through techniques of the self*

Discourses around self-responsibilization and risk management became a central focus of testimonies in the Bedford trials. Sex workers and their advocates never deny the existence of potential risks in the sex trade; rather, they argue that the decriminalization of sex work signals the legitimization of sex work as real work. As such, sex workers can take the necessary precautions to address workplace hazards, embodying discourses of self-responsibility and individual success that forms the cornerstone of a neoliberal free market. For critical victimologists, the potentiality of harm centres on an individual's possibility for resiliency. Their ability to not only recognize their



at-risk status but also employ measures of self-protection (Walklate 1997) is negotiated in different ways by those positioned differently within the sex trade. Resiliency, and the ability to negotiate risk, is always dependent on how one is situated within broader structures of power and domination, both within and external to the sex trade.

In the same ways critical victimologists (Spencer 2010; McGarry and Walklate 2015) force us to think about the ways victims experience and live through trauma in differing and unique kinds of ways, I too suggest that risk and vulnerability should be taken up in similar fashion. Vulnerability then is not just the accumulation of disparate aggregates hinged on making a prediction of victimhood, it is embodied through a phenomenology of risk (Robertson 2000: 230). The potential victim—one who is vulnerable to a specific set of risks (i.e. risk of harm)—represents the pivot point through which sex work advocates challenge tropes of passive victimhood. Instead of placating to archetypal tropes of victimhood in need of more robust legal protections, sex workers simply argue for the removal of criminal law, which impedes their own ability to protect themselves. In doing so, sex workers claim that the law itself creates and exacerbates the conditions that make sex workers vulnerable in the first place (Benoit and Millar 2001; O’Doherty 2011). As Carol Smart (1989) suggests, this exposure to criminal justice mechanisms aimed at “protection” actually serve to expose sex workers to the juridogenic nature of law. Though sex workers and their advocates tend to agree that certain and specific risks exist within the sex trade, these risks can often be managed through a variety of techniques of the self. Rather than take up an evaluation of these risks, I unpack how these risks are framed, packaged, and negotiated by what Nikolas Rose (1992) refers to as the “enterprising self.” Drawing on Foucault (1997), this enterprising and entrepreneurial self is actively part of the matrix of power relations that mediate how disciplinary and biopolitical power are interconnected to other relationalities of both state and non-state governance, including the production of a consumer/capitalist self that is affectively oriented towards self-empowerment and self-worth. For sex workers, technologies of the self include both the material practices of negotiating risk through harm reduction technique and the ideological construction of their own subjectivities, countering narratives that tend to affix the sex worker subject as an unchanging monolith (see Bell 1992; Brock 2000; Scoular 2004; Clipperton 2013; Raguparan 2017).

In her sworn affidavit<sup>11</sup>, sex worker and activist Kara Gillies gave her account of what it is like to conduct safe street-based work:

This struggle is the most stark at the street level. Throughout my sixteen years at Maggie’s<sup>12</sup>, I have heard women report that in order to avoid arrest under the communicating law, they are compelled to enter vehicles without proper negotiation with potential clients. Before the laws were introduced, they would take the time to assess potential customers, or jot down license plate numbers or other identifying information. Now they must make the decision to enter the vehicle in as little time as possible. By not being able to make a proper determination of a client’s suitability before entering their vehicle, the sex worker instantly becomes disempowered vis-à-vis the client and is rendered more vulnerable to violence.<sup>13</sup>

<sup>11</sup>The following references to affidavits submitted by from Kara Gillies, Amy Lebovitch, and Terri-Jean Bedford are part of the evidence submissions by Bedford et al. at the initial trial.

<sup>12</sup>Maggie’s refers to Maggie’s: The Sex Worker Action project. It is a Toronto-based community activist organization comprised of local sex workers who educate the public and advocate on behalf of and provide support to local sex workers.

<sup>13</sup>*Affidavit of Kara Gillies*, Joint Discovery of Evidence to the Ontario Superior Court of Justice, (28 Mar 2007), Vol. 6 at 1300, <https://bedfordsafehaveninitiative.files.wordpress.com/2014/01/volume-6.pdf>.

She goes on to tell the Court how the communication provision of the *Criminal Code* actually does more to harm sex workers:

With respect to the indoor worksites, even though they are illegal, they are by far the most economically viable and secure sites for women in the sex industry. I form this belief based on my conversations with hundreds of indoor sex workers, including those with former experience in street-based prostitution. In terms of safety, the set location provides the opportunity to work with colleagues and have someone else present on the premises if required. Further, other people know where the worker is located and will notice if they disappear unexpectedly. Also, women can control the number of people entering and occupying the space. Finally, women are aware of the location and accessibility of exits, telephones and other safety-promotion features. Due to the fact that they control the environment, workers can enhance safety protocols and security systems to a much more sophisticated level.

In fact, “Many described how the control afforded by an enhanced sense of safety allowed them to refuse unwanted risky services that they would have to perform in other environments where support from staff, other sex workers, or police was not readily available when clients used violence to force unwanted services such as unprotected sexual intercourse” (Krüsi et al. 2012: 1157). This view, however, also rests against the backdrop that, though some sex workers may experience less overt kinds of violence while working for both regulated and non-regulated third-parties, sex worker safety is privileged when individuals are empowered to make meaningful choices as to how they conduct sex work. This nuanced understanding of regulatory structures is highlighted by Emily van der Muelen and Elya Durisin (2008: 290) who argue, “how federal and municipal regulatory structures penalize and criminalize sex workers’ common job-related activities and create the conditions that expose workers to unnecessary risks.” Third-party management and licensing structures can sometimes pressure sex workers into performing certain sexual services or accommodating clients they normally would not had they had the power to choose their own work conditions. Van der Muelen and Durisin go on to critique these kinds of regulatory schemas, suggesting that they themselves may place sex workers in vulnerable positions. Instead, they argue for a privileging of sex workers’ experiential knowledge, and the individual capacity to choose to engage in sex work, as the foundation of a rights-based framework for empowering sex workers.

Sex workers compartmentalize and manage risks according to their perceived harms. Sanders (2004) argues that rather than homogenizing risks in the sex trade as a universal experience, we must conceptualize risk as existing on a continuum. This continuum is useful in understanding how sex workers manage these everyday risks and how they become routine parts of their risk management approaches to sex work. This self-governance is taken up by harm reductionists in a way that asserts that the ability to protect oneself from violence is in fact the primary legal argument made by the decriminalization movement—one which highlights the complex and nuanced characteristics of risk and galvanizes a “rights—not rescue”—approach. These risk-centred and individualized modalities echo what David Garland (1996: 451) suggests are “[t]he new programmes of action [that] are directed not towards individual offenders, but towards the conduct of potential victims, to vulnerable situations, and to those routines of everyday life which create criminal opportunities as an unintended byproduct.” The prevention of these

vulnerable situations is what is at stake when organizing around the right to self-determine how one's own sex work is conducted.

This continuum of various kinds of risks intersect with how sex workers embody, negotiate, and maneuver through the sex industry reverberates in Amy Lebovitch's testimony. When asked about the potential risks involved in conducting sex work, Lebovitch acknowledges the myriad of dangers that must be avoided, but argues that they cannot be understood outside a broader set of other life possibilities:

Yes, there's a potential risk of me getting hit by a car, right. There's a potential risk of me inviting a relationship date from a bar over to my house and being raped. That's probably bigger than sex work, I would imagine, from my eyes, from where I'm sitting and from what - the safety measures I take. [...] I also know my environment, if I need to get to something in the kitchen, you know, I know my environment. I know how to escape, you know, I know my place, I've lived there for a year and a bit, this particular place. So someone knows where I am with the person, as opposed to a date that I might pick up, I mean a date like a relationship, like outside of work where there's no safety measures taken. I don't, you know, go for dinner with someone and then call a friend and like "this is his name."<sup>14</sup>

Lebovitch points out how risk management within the sex trade mirrors logics used in other aspects of governing one's own sense of self. Risk becomes mundane, situated as a facet of everyday life so as to not fuel the ongoing moral panics that sex work is inherently dangerous. Sex work, like employment and other lifestyle risks, operates along a spectrum of risk. Like any risk calculation, the level of risk and potential harm is met with a calculated response to prevent or mitigate the possibility of harm.

### *Risk-taking and rights-bearing subjects*

From the perspective of critical victimology, the ideal victim must embody, or at least perform, certain characteristics that play on this notion of responsibility. In fact, some critical parallels can be made between sex work self-responsibilization and the narratives of rape victims. For rape victims, certain criteria tend to increase the likelihood of criminal sanction against assailants if the narratives of the sexual assault tend to "conform to prevailing societal expectations, as understood by the legal system" (Stevenson 2000: 347). These expectations are often structured in ways that scrutinizes the victim's relationship to the attacker, the victim's identity (including age, sexuality, race, etc.), and the measures put into place to prevent such an attack. Wendy Larcombe (2002) provides an analysis of cases in Australia in which the commentary of judges suggest that the ideal victim of sexual violence is one who is married, an upstanding housewife, and a woman that does not provoke any sexual advancement. She is not assaulted by her husband, but by a stranger who breaks into her dwelling and commits rape. Larcombe (2002: 133) writes, "Clearly, the construct of the rape victim valorised here invokes a particular ideal of woman: chaste, sensible, responsible, cautious, dependent." The literature surrounding ideal victimhood (Christie 1986; Randall 2004, 2010; Smolej 2010) emphasizes the ways the victim identity is constituted through a network of criminal justice processes. The ways in which victims are read, including their demeanor and comportment, are all factors that shape the ways in which their subjectivities are constituted within a criminal-judicial moment. Those who

<sup>14</sup>Affidavit of Amy Lebovitch, Joint Discovery of Evidence to the Ontario Superior Court of Justice, (28 Mar 2007), Vol. 2 at 202, <https://bedfordsafehaveninitiative.files.wordpress.com/2014/01/volume-2.pdf>.

can distance their own subjectivities away from culpability are less likely to be targets of victim-blaming. In order to satisfy this, they cannot provoke their assailant, nor can their victimization be constituted within a pattern of deviant and potentially “risky” behaviours.

Terri-Jean Bedford, one of the main applicants in this Supreme Court challenge, has made her public persona and story as a dominatrix running the “bondage bungalow” in Thornhill, Ontario, Canada quite the media spectacle since the 1990s. Her business as a dominatrix suffered a huge set back when it was raided in 1994 and she was charged with operating a common bawdy-house. The premise to her constitutional challenge was not necessarily to provide a substantial right-based framework for inclusivity and respect for sex workers, it was to convince the courts that sex work is a legitimate business.

In a sworn affidavit given to the Court by Terri-Jean Bedford in 2007, Crown attorney E. Gail Sinclair questioned the former dominatrix in a pre-trial deposition about her involvement in the sex trade and her arrest and conviction on prostitution related charges from the mid-1990s:

**Sinclair:** So you found yourself at a turning point once again.

**Bedford:** Yes, ma’ am.

**Sinclair:** And at that point, you wanted to challenge the constitutionality of the prohibition on running a common bawdy house.

**Bedford:** Yes, indeed. If you only went through what I went through.

**Sinclair:** If the law prohibiting communication for the purpose of prostitution was struck down, would you return to prostitution?

**Bedford:** No, I have no interest in prostitution what so - the dominatrix is not a prostitute; however, the York Regional Police<sup>15</sup> felt that they could charge me under the prostitution laws and the first judge agreed, there was no basis for the charges, and all my publicity will – I have clippings that say the cop says there was no sex for sale in this house. No, I wouldn’t, no, absolutely not.

**Sinclair:** You do not like prostitution?

**Bedford:** Well, let’s put it this way. I haven’t got a problem with people who do like it because, I’ll tell you, I’ve met some women that are super fine and very successful. The only problem is they’re not paying their taxes, you know. That’s a problem because they can drive these nice cars and get away with a lot but not pay their taxes, and they’re sharp, they’re financial wizards, okay, so there is no victims there (sic).<sup>16</sup>

This excerpt points us to what Brian Massumi (2015) would call the maneuverability of affective attachments. Massumi argues that affective attachments—the way we affect or become affected—sustain the possibility to reimagine and reconceptualize how subjectivities orient around discourses of criminal justice. Terri-Jean Bedford is strategically maneuvering towards constructing a different frame around sex work. She is distinguishing herself from prostitution, and more specifically, street-based prostitution, something she left because it was “repulsive and repugnant,”<sup>17</sup> and instead, positions her own subjectivity as part of a higher moral caste—one in which power and control become defining features of her entrepreneurial self. Her definition of

<sup>15</sup>York Regional Police are responsible for governing the regional jurisdiction located just north of Toronto, Ontario—Canada’s most densely populated city.

<sup>16</sup>*Affidavit of Terri-Jean Bedford*, Joint Discovery of Evidence to the Ontario Superior Court of Justice, (27 Mar 2008), Vol. 2 at 97–8, <https://bedfordsafehaveninitiative.files.wordpress.com/2014/01/volume-2.pdf>.

<sup>17</sup>*Ibid.* at 99–100.

sex work, however, comes into conflict with the ways in which she and her allies argue for the rights on behalf of *all* sex workers. It is clear from such a statement that she hierarchizes her sex work above other forms of sexual labour based on the fact that she pays taxes, ultimately allowing her to access some form of legitimacy. Despite her history as a street-based sex worker, Bedford clearly distances herself from her past, which includes a history of sexual abuse from her adopted brother, a drug addiction to methamphetamine, and a stint as a street-based worker where she was subjected to verbal and physical abuse.<sup>18</sup>

Bedford's outlook towards the sex trade often reflects a position that invokes the right to safety but is frequently supplanted by a right to work—a fundamental part of good neoliberal citizenship. This is best reflected in her sentiments towards those who cheat the tax system. She distances herself from these women, as they do not represent the interests of good, hard-working neoliberal subjects. The language of victimhood, as expressed above, seeks to delegitimize any commercial value sexuality may have, and instead, constitutes sex as something women ought to give freely to men (Bernstein 2001). Moving outside the public and political frame through which Bedford presents herself, we see that she is in fact asserting that “legitimate” sex work manifests in particular kinds of ways. She is advocating that sex workers be given the necessary tools to avoid criminalization because sex work is real work, and in doing so, privileges the ability to negotiate an economy of sex that can provide financial support while also empowering women to take control of their own sexual and entrepreneurial prowess.

This is reiterated in Amy Lebovitch's testimony, who states that her activist efforts to decriminalize sex work are intended to remove any laws that regulate sex work and privilege the involvement of sex workers in their own regulation:

As I said, I think it should be run by sex workers, it should be—that's why—how I see a distinction between legalization and decriminalization. Myself, personally, as a sex worker and not a lawyer who understands, you know, the law like you would, I'm someone who believes from what I've read from various areas that, you know, a collective of sex workers coming up with regulations that are based on safety and not based on morality, not centred around, you know, that it's a dirty job to be part of.<sup>19</sup>

The demarcation between risk management and morality becomes a pivotal part of the constitutional challenge. Though Lebovitch's statement clearly marks the divisions between risk management and moral paternalism (Bruckert and Hannem 2014), risk-based vernacular is not diametrically opposite to moral intervention. As discussed above, prohibitionist efforts to articulate and sketch an *always* risky and *always* harmful sex trade is in itself rooted in a risk-based language. At the same time, it also carries the remnants of a conservative regulatory framework that morally condemns the sale of consensual sexual services whilst speaking to the courts within a risk-based framework. This particularly complex legal articulation of sex work poses significant challenges for harm reduction movements, but as seen throughout the moves towards reorienting sex workers around risk logics, sex work advocates have taken it upon themselves to challenge the stereotypes linked to the sex trade and reformulate an identity of the sex worker that resembles a responsible neoliberal subject. This is of course to challenge

<sup>18</sup>Ibid. at 87–8.

<sup>19</sup>*Cross-examination of Amy Lebovitch*, Joint Discovery of Evidence to the Ontario Superior Court of Justice (27 Mar 2008), Vol.2 at 225, <https://bedfordsafehaveninitiative.files.wordpress.com/2014/01/volume-2.pdf>.

the stigmas surrounding the ways sex workers have traditionally been perceived as a societal nuisance and vectors of disease, while also invoking an idea of sex work as a legitimate entrepreneurial venture. This choice to actively self-responsibilize and ensure technologies of self-protection and risk management are part of an ongoing tactic by sex workers to challenge the passivity of victimization and reconstitute vulnerable subjects as active risk takers—one that is not in need of saving but in need of legal protection and recognition. Claiming that the government is taking actions to prevent sex workers from employing techniques of self-management is a strategy aimed at claiming that sex workers are self-responsibilized victims. Rather than relying on the state to enable a framework that *actively* protects sex workers, one that may take shape through legalizing and regulating the sex trade, advocates have merely been advocating for a system that allows them to effectively perform strategies of neoliberal governance.

By focusing on how the entrepreneurial sex worker subject is repositioned in terms of traditional discourses around sexual violence, victimhood, and vulnerability, the risk-aware sex worker now occupies a central position within the legal imaginary. This active engagement in risk-related legal and political discourse allows for sex worker subject positions that can fully reject exit-based interventions as anti-liberal and anti-choice which is fundamental to any rights-based legal challenge. This is particularly salient in Canada as the federal government announced over \$20 million in funding for sex workers who exit the sex trade (Grant 2016). Many sex workers would rather negotiate the stigmas of the sex trade than the stigmas attached to that of welfare recipients (Hallgrímsdóttir et al. 2006; Scouler and O'Neill 2007). Transitioning out of the sex trade would require a fundamental reliance on state sponsored service—a position Canadian sex workers have distanced themselves from during the *Bedford* trials. The effective state sponsored, victim-centric strategy to advocate for the removal of sex workers from the industry is often met with, or at very least presented as, the promise of creating job training programs, increased funding for psychological counselling through victim support groups, and other transitional programs. These programs not only serve to extend the regulatory reach of the state, they also blur the ways in which these seemingly softer approaches to criminal justice intervention reify a punitive system for those unwilling to exit. These exit-focused interventions mark the patriarchal and pastoral power of the state, which also characterize sex workers as reliant on the paternal governing logics of criminal justice interventions (Bruckert and Hannem 2013). This governing strategy becomes quite paradoxical to the ethos of both individualism and austerity that constitute neoliberalism's precariat. If sex workers are offered an exit strategy, largely characterized through mechanisms aimed at psychological, educational, and employment-based training, these techniques offer a governing tool that creates the need to rely upon the state.

To some degree, sex workers' successful articulation of the right to work materializes because of its ideological position that the state should have no, or very minimal, involvement in the regulation of sex workers. This may provide an explanatory framework as to why sex work advocates are adamant about positioning the sex worker subject as entrepreneurial in nature. The claimants in *Bedford* are not necessarily seeking state-sanctioned recognition or regulation but rather, they are actively articulating a laissez-faire sex trade—one in which sex workers are empowered through technologies of self-protection to mitigate their own risks. Many sex workers want to adopt their

own techniques of risk management, challenging tropes of passive victimhood and distancing their subjectivities from those that seemingly rely on the state/criminal justice intervention.<sup>20</sup>

### *Conclusion*

Theorizing risk at the level of the subject forces us to consider how sex worker subjectivities are forged through a language of risk (and vulnerability) and how this disrupts the logics of neoliberal citizenship vis-à-vis criminal justice regulation. The malleability of risk-based lexicons create the condition for new ways of understanding, conceptualizing, and potentially exploiting the moral underpinnings of risk (O'Malley 2004). Sex workers embody, perform, and reconfigure risk to align their own subject positions with that of self-responsibilized neoliberal subjects. The move towards self-responsibilizing narratives shifts our understandings of the ways risk is mapped onto the subject. Since the issue of prostitution is situated in a dialogue of harm reduction and risk management, the ability to embody risk, and in turn invoke a self-responsibilizing subject position, is crucial for the project of decriminalization.

Risk becomes the pivot point through which sex workers position their own subjectivities in relation to those constructed by criminal justice discourses. This paper expands upon how sex workers position their own identities in relation to those constituted by and through law. They download risk and shift the narratives of responsibility onto their own subject positions. Sex workers embody risk because they too see it as a fundamental part of negotiating the sex trade. As Scoular (2015) puts it, the discursive, symbolic, and material subject positions of sex workers is made and remade through various experiential knowledges that exist from both those who advocate for harm reduction and those who support ongoing efforts to criminalize prostitution. The adversarial nature of legal reformation allows for the critical unpacking of these changing subject positions and can be useful in highlighting how sex workers attempt to control the narratives surrounding their own identities.

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<sup>20</sup>Of course, this is taken up in different ways. Some have the capacity to responsabilize themselves in a way that refuses any involvement of the state, while others, who are perhaps subjugated through race, class and material dispossession may look to the state to provide some forms of socio-economic sustainability.

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