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RE(DE)FINING PROSTITUTION AND SEX WORK: CONCEPTUAL CLARITY FOR LEGAL THINKING

Debra Haak*

I. INTRODUCTION

Recent developments in the legal framework applicable to the exchange of sexual services for consideration in Canada have exposed and mobilized debate over the problems associated with prostitution and sex work and how to respond to them. Before 2013, it was not illegal to buy or sell sexual acts in Canada, but criminal laws curtailed how prostitution could be conducted. In December of 2013, the Supreme Court of Canada ("SCC") declared three *Criminal Code*[1] offences applicable to adult prostitution unconstitutional on the basis that they violated the applicants' right to security of the person by making a lawful activity more dangerous in ways that did not accord with the principles of fundamental justice.[2] In 2014, the Canadian Parliament enacted the *Protection of Communities and Exploited Persons Act* ("*PCEPA*"),[3] which seeks to abolish prostitution by ending demand through criminalizing obtaining sexual services for consideration as well as other activities that establish and promote a market for sexual services.[4] Prostitution is now illegal in Canada; it is a criminal offence

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[1] *Criminal Code*, RSC 1985, c C-46 [*Criminal Code*].

[2] *Canada (AG) v Bedford*, 2013 SCC 72, [2013] 3 SCR 1101 [*Bedford* SCC].

[3] *Protection of Communities and Exploited Persons Act*, SC 2014, c 25 [*PCEPA*].

[4] For a discussion of the objectives of the *PCEPA* see Debra M Haak, "The Initial Test of Constitutional Validity: Identifying the Legislative Objectives of Canada's New Prostitution Laws" (2017) 50:3 UBC L Rev 657 at 660 [Haak].

every time sexual services are exchanged for consideration.[5] The constitutionality of the new criminal laws has been questioned,[6] and at least two constitutional challenges to new criminal offences have been commenced.[7] A review of the provisions and operation of the *PCEPA* is mandated by 2020.[8]

Contemporary debate over the appropriate role of the state and of criminal law in the commercial exchange of sex largely centres on a dichotomy that posits the exchange as either sexual exploitation or legitimate work.[9] One side in the debate understands prostitution as exploitation of women and women's bodies on a structural basis, focusing on the equality and human rights interests of women as a class. From this perspective, harm is inherent in prostitution itself, and choice cannot overcome the inherent harm of sexual exploitation and the objectification that results from the exchange of sexual acts for payment. Those who understand prostitution as inherently exploitive generally support Canada's current criminal legislative regime that targets buyers and those who facilitate the exchange of sexual services for consideration

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[5] *Criminal Code*, *supra* note 1, s 286.1 (Section 286.1 makes it an offence to obtain sexual services for consideration). See also *R v Alexander et al*, 2016 ONCJ 452 at para 14, 2016 CarswellOnt 12535 ("prostitution itself is now illegal" where the Court considered whether there was sufficient evidence to commit the defendants to stand trial for charges under sections 286.1–286.5 of the *Criminal Code*); Sonia Lawrence, "Expert-Tease: Advocacy, Ideology and Experience in *Bedford* and Bill C-36" (2015) 30:1 CJLS 5 at 7 (where the author identifies that selling sex is no longer legal) [Lawrence]; Hamish Stewart, "The Constitutionality of the New Sex Work Law" (2016) 54:1 Alta L Rev 69 at 79 (where the author describes it as unlawful).

[6] See Sandra Ka Hon Chu & Rebecca Glass, "Sex Work Law Reform in Canada: Considering Problems with the Nordic Model" (2013) 51:1 Alta L Rev 101 [Chu & Glass] (where the authors argue that a model premised on ending demand would not survive constitutional scrutiny). But see Lisa Dufraimont, "*Canada (AG) v Bedford* and the Limits on Substantive Criminal Law under Section 7" (2014) 67:1 SCLR (2d) 483 at 485 (where the author concludes that it may be constitutionally permissible for Parliament to criminalize prostitution itself).

[7] Both challenges arise in the context of criminal proceedings; See *R v Anwar & Harvey* Court File No 16-7780 (OCJ West Region) [*Anwar*]; *R v Chisholm* Court File No 14315/16 (SCJ Central East Region) [*Chisholm*].

[8] *PCEPA*, *supra* note 3, s 45.1.

[9] Christine Overall, "What's Wrong with Prostitution? Evaluating Sex Work" (1992) 17:4 Signs: J Women in Culture and Society 705 at 707.

but immunizes sellers from criminal prosecution.[10] Conversely, those who understand sex work as a legitimate form of service work reflective of the exercise of individual agency or choice, or treat it as a site to expand the boundaries of sexuality and gender usually argue that commercial sex between adults must be decriminalized and destigmatized.[11] The sex workers' rights movement focusses on the human and labour rights of sex workers. Those who advocate for the rights of sex workers situate the problems they experience in the criminal law, its enforcement, and the stigma associated with sex work. They seek to reduce the harms experienced by sex workers and optimize their employment opportunities.[12] Critics on both sides of this policy debate identify that it is based on ideology incorporating theoretical and normative claims about the nature of the underlying act, such that developing policies and enacting laws from within one ideological[13] frame invariably leads to choices that result in

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[10] Sandra-Lynn Coulter & Megan Walker, *Choosing the Nordic Model: Championing Women's Equality and Human Rights* (London, Ont: London Abused Women's Centre, 2017) at 23 (Section 286.5 immunizes sellers from prosecution for most offences).

[11] Brenda Belak & Darcie Bennet, *Evaluating Canada's Sex Work Laws: The Case for Repeal* (Vancouver: Pivot Legal Society, 2016) [Pivot Report]; See also Amnesty International, "Explanatory Note on Amnesty International's Policy on State Obligations to Respect, Protect and Fulfil the Human Rights of Sex Workers, POL 30/4062/2016" (26 May 2016), online (pdf): *Amnesty International* <www.amnesty.org/download/Documents/POL3040632016 ENGLISH.PDF> [Amnesty International].

[12] *R v Anwar & Harvey, supra* note 7 at 62 (Transcript of Chris Atchison).

[13] I use the term ideological to mean containing subjective beliefs and being associated with the pursuit of political aims. An ideology is therefore not based entirely on factual statements but reflects a "fusion of, on the one hand, a set of (more or less) biased values, beliefs and morals and, on the other hand, a set of (more or less) established facts." See Andreas Fagerhom, "Ideology: A Proposal for a Conceptual Typology" (2016) 55:2 Social Science Information 137 at 142. Scholarly work has identified claims about prostitution and sex trafficking as ideological. See e.g. Ronald Weitzer, "The Social Construction of Sex Trafficking: Ideology and Institutionalization of a Moral Crusade" (2007) 35:3 Politics & Society 447 at 450 (where the author argues they are based on an ideology that "simply decrees that prostitution is immoral, a threat to marriage and the family, or oppressive to women"). See also 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) 29:2 Harv J L & Gender 335 at 406 (where the authors note: "[t]he contradictory descriptions of the realities of sex work and trafficking-as inherently harmful and victimizing or as possibly empowering and liberating-are evidently not purely information driven; rather they are influenced by ideology and morality").

winners and losers.[14] This ideology frames how empirical research is conducted, what is identified as problematic, and how it suggests law and policy should respond to articulated problems.

This article seeks to bring conceptual clarity to legal discourse in Canada by stepping outside of the existing ideological framework to focus on the descriptive features of the word "prostitution" and the term "sex work" as they are defined and employed in works and contexts relevant to legal decision makers in Canada.[15] I contend that the word "prostitution" and the term "sex work" are not synonymous. Understanding the differences in how these terms are defined and used in scholarly literature or legal argument is critical for decision makers tasked with evaluating empirical research and the constitutionality of Canada's new criminal laws applicable to prostitution. In particular, a nuanced understanding of how these words are defined and used allows legal decision makers to consider whose interests and experiences are addressed in theoretical and empirical works, in addition to the factual basis provided in these works, and legislative responses to them.[16] Clearer definitions also expose differently situated rights holders who might, by making competing

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[14] See e.g. Lisa Kerr, Book Review of *Sister Wives, Surrogates and Sex Workers: Outlaws by Choice?* by Angela Campbell (2016) 28:3 Can J Women & L 676 at 679 (with specific reference to Angela Campbell's agent-victim binary).

[15] In a recent article about human trafficking, Dempsey identified the importance of attending to legal definitions in generating reliable empirical research for use by legal decision-makers. See Michelle Madden Dempsey, "What Counts as Trafficking for Sexual Exploitation? How Legal Methods Can Improve Empirical Research" (2017) 3:1 J Human Trafficking 61 [Dempsey]. See also Michael Pendleton, "Non-Empirical Discovery in Legal Scholarship – Choosing, Researching and Writing a Traditional Scholarly Article" in Mike McConville, ed, *Research Methods for Law* (Edinburgh: Edinburgh University Press, 2017) 159 at 172 (where the author identifies that interpreting words is the essence of law).

[16] It has been suggested that the experiences of sex workers are ignored and misrepresented in research promoting anti-trafficking efforts and that the experiences of sex trade survivors are excluded from research about sex work. See e.g. Emily van der Meulen & Elya M Durisin, "Introduction" in Emily van der Meulen & Elya M. Durisin, eds, *Selling Sex* (Vancouver: UBC Press, 2013); See also Meagan Tyler, "Where do Survivors Fit in Australian Sex Industry Research" (1 November 2016) *Tasmanian Times*, online: <tasmaniantimes.com/index.php?/weblog/ article/where-do-survivors-fit-in-australian-sex-industry-research/&utm_content=buffer6e406&utm_medium=social&utm_source=twitter.com&utm_campaign=buffer>.

claims on the state, illuminate the increasing difficulty in striking an appropriate balance in the contemporary Canadian constitutional context.[17]

This paper is divided into four parts. The first part discusses the contemporary debate over prostitution and sex work, identifying its normative and ideological features and laying the foundation for descriptive analysis as a fruitful means of understanding the interests of differently situated stakeholders. The second part examines how the terms "prostitution" and "sex work" have been defined and are used in Canadian law and jurisprudence, raising specific concerns over a lack of conceptual clarity in legal texts and analysis. The third part examines the term "sex work" in greater detail, highlighting its use as largely political and arguing that while it lacks a clear and consistent definition, it may be distinguished from "prostitution" because it includes only one subset of prostitution participants. "Sex work" often includes acts falling outside of the legal definition of prostitution. The final part explains how and why determining the distinctions between "prostitution" and "sex work" is relevant in generating a more nuanced understanding of the social phenomenon of prostitution, the limits of empirical research, evaluation of the constitutionality of Canada's current applicable criminal laws, and the rights claims of the sex workers grounding them.

Words are the subject matter of this article. Consistent with the legal definition discussed below, the word "prostitution" is used here to describe the activity of exchanging sexual services or acts for payment or consideration. The term "sex work" is used when referring to works and contexts in which the term is used. As will be discussed below, it is my contention that sex work is primarily a political term that does not bear one concise and consistent descriptive meaning. It is consistently used in a manner that demonstrates it to be conceptually distinct from prostitution. The intention of this article is, in part, to begin the conversation of how "sex work" might be legally defined in a way that meaningfully recognizes its unique contours, how it differs from prostitution as

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[17] For a discussion of how Parliament tried to balance the concerns identified by the SCC in *Bedford* with the overall objective of the PCEPA see Haak, *supra* note 4.

legally defined, and whose interests are included in theoretical arguments or empirical work about sex work.

II. THE CONTESTED DEBATE OVER MEANING

Divergent normative claims about what it means to exchange sexual acts for payment ground the debate over what is problematic and how criminal law is implicated in responding to identified problems.[18] Janine Benedet has described these normative claims as the "paradigms of prostitution" that reflect how prostitution is understood in its social context and that provide the lens through which law reform and judicial review currently take place.[19]

There are two dominant ideological approaches grounding contemporary policy debates in Canada.[20] Both rest on these contested and divergent normative claims about what it means to exchange sexual acts for consideration.[21] The first

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[18] See e.g. Jane Scoular, "The 'Subject' of Prostitution: Interpreting the Discursive, Symbolic and Material Position of Sex/Work in Feminist Theory" (2004) 5:3 Feminist Theory 343 (for a discussion of the theoretical lenses through which prostitution and the problems associated with it are seen and understood); Lara Gerassi, "A Heated Debate: Theoretical Perspectives of Sexual Exploitation and Sex Work" (2015) 42:4 J Soc & Soc Welf 79 at 94 (where the author concludes that the "heated debates of various feminist perspectives have greatly influenced the divisions within the legal frameworks with which countries of the world are governed") [Gerassi]; Janine Benedet, "Paradigms of Prostitution: Revisiting the Prostitution Reference" in Kim Brooks, ed, *Justice Bertha Wilson: One Woman's Difference* (Vancouver: UBC Press, 2009) 131 (where the author identifies the paradigms of prostitution in the following ways: prostitution as immorality (for women); prostitution as sexual freedom (for men); prostitution as public nuisance; prostitution as sex inequality; prostitution as work; and prostitution as inevitable (harm reduction for men)) [Benedet].

[19] Benedet, *supra* note 18 at 133–41.

[20] These ideological approaches largely mirror dominant feminist positions on this topic. See generally Kate Sutherland, "Work, Sex, and Sex-Work: Competing Feminist Discourses on the International Sex Trade" (2004) 42:1 Osgoode Hall LJ 1 139. See also Gerassi, *supra* note 18; Stacey Hannem & Chris Bruckert, "Legal Moralism, Feminist Rhetoric, and the Criminalization of Consensual Sex in Canada" in Jennifer M Kilty, ed, *Within the Confines: Women and the Law in Canada* (Toronto: Women's Press, 2014) 318 (where the authors identify the competing discourses in the *Bedford* decision).

[21] What Elizabeth Bernstein has called "normative visions of sexuality" and "political and ethical disputes over what sexuality should *mean*," see Elizabeth Bernstein, *Temporarily Yours: Intimacy, Authenticity, and the Commerce of Sex* (Chicago: University of Chicago Press, 2007) 167–68. O'Connell Davidson refers to these as assumptions about the essential

posits the activity of prostitution as a structural example of sexual exploitation and violence against women. The second posits sex work as a legitimate form of labour reflecting the individual exercise of choice and agency and a site to expand the boundaries of sexuality and gender.[22] The choice of the word "prostitution" or the term "sex work" often signposts alignment with one or the other side of this debate.

Divergent understandings about the nature of prostitution, its harms, and what to do about them is a longstanding issue for Canadian policy makers. In 2004, for example, a Parliamentary Subcommittee on Solicitation Laws was struck to study the laws related to prostitution in Canada.[23] This represented the fourth study into prostitution law since the 1980s.[24] The purpose of the committee was to "improve the safety of sex-trade workers and communities overall, and to recommend the changes necessary to reduce the exploitation of and violence against sex-trade workers."[25] The committee delivered its report in 2006. The report identified and reflected differing views on prostitution, its causes, effects, and the measures that should be taken to address them. The committee members agreed that the status quo was not acceptable but were

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properties of prostitution, see generally Julia O'Connell Davidson, *Prostitution, Power and Freedom* (Cambridge: University of Michigan Press, 1998) (where the author aims to show that the power relations in prostitution are more complicated than either position suggests).

[22] See generally Rebecca Beegan & Joe Moran, "Prostitution and Sex Work: Situating Ireland's New Law on Prostitution in the Radical and Liberal Feminist Paradigms" (2017) 17:1 Irish J of Applied Soc Stud 59
(for a more detailed discussion of the ideologies emerging from feminist theory about prostitution and sex work). See also Carisa R Showden, *Choices Women Make: Agency in Domestic Violence, Assisted Reproduction, and Sex Work* (Minneapolis: University of Minnesota Press, 2011) at 137–66 [Showden] (for a discussion of what the author identifies as three models of prostitution: sex as violence, sex radicalism, and sex as work).

[23] Glenn Betteridge, "Standing Committee on Justice Re-Establishes Subcommittee on Solicitation Laws" (2005) 10:1 HIV/Aids Policy & L Rev 39.

[24] Leslie Ann Jeffrey & Barbara Sullivan, "Canadian Sex Work Policy for the 21st Century: Enhancing Rights and Safety, Lessons from Australia" (2009) 3:1 Can Pol Sci Rev 57 at 57.

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

unable to agree on how to change the laws.[26] Members of the Liberal, NDP, and Parti Quebecois parties "took the position that prostitution is a public health and human rights issue; that an adult has the right to sell sexual services and to do so in a safe environment."[27] By contrast, the Conservative committee members saw prostitution as a dehumanizing and degrading act, and did not believe it possible for the state "to create isolated conditions in which the consensual provision of sex in exchange for money does not harm others" noting that all prostitution has a social cost.[28] Furthermore, the committee found that decriminalization of prostitution would signal that commodification or exploitation of women and women's bodies was acceptable. They also suggested this would violate the dignity of women and their equality rights.

The divergent approaches to understanding the commercial exchange of sex have become entrenched.[29] The debate has been captured in a variety of ways:

> It is a split between an emphasis on sexual freedom and pleasure that views women exclusively as agents, on the one hand, and an emphasis on sexual danger and degradation that sees women exclusively as victims on the other.[30]
>
> Compounding the controversy in these international debates are ideological disagreements over whether to respond to the individual experience of involvement in prostitution or the structural significance of men's commodification and consumption of female sexuality.[31]

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[26] Sarah Beer, *The Sex Worker Rights Movement in Canada: Challenging the 'Prostitution Laws'* (PhD Thesis, University of Windsor, Department of Sociology, 2010) [unpublished] at 100–01 [Beer].
[27] *Ibid* at 101.
[28] Report of Standing Committee, *supra* note 25 at 90.
[29] Kate Grantham, "Criminals or Victims? An Analysis of the Harper Conservatives' Efforts on the Sex Trade and Human Trafficking" in Rebecca Tiessen & Stephen Baranyi, eds, *Obligations and Omissions: Canada's Ambiguous Actions on Gender Equality* (Montreal: McGill-Queen's University Press, 2017) 91 at 96–97 [Grantham] (for a discussion of how this fixed ideological binary is the framework within which sex trade work is considered)
[30] Overall, *supra* note 9 at 707.
[31] Vanessa E Munro & Marina Della Giusta, "The Regulation of Prostitution: Contemporary Contexts and Comparative Perspectives" in Vanessa E Munro & Marina Della Giusta, eds, *Demanding Sex: Critical Reflections on the Regulation of Prostitution* (Burlington: Ashgate Publishing, 2008) 1 at 4 [Munro & Della Giusta].

> The two diametrically opposed understandings of commercial sex are that it is either a negative social phenomenon in itself that should therefore be eliminated or restricted, or that it is a multifaceted phenomenon *containing* negative elements, which are best dealt with by integrating the sex work sector into the societal framework.[32]

Scholars increasingly acknowledge that the debate as currently framed inadequately accounts for the complexity of the topic. Teela Sanders, Maggie O'Neill, and Jane Pitcher recently called the two now dominant approaches "overly simplistic". A review of the literature indicated that the two polarized feminist perspectives are represented in public discourses and tend to reduce arguments to a small number of basic assertions that avoid the complexities of prostitution.[33]

Marlene Spanger and Maru-Len Skilbrei express concern over how researchers manage the relationship between "what sex for sale *is* (ontology), how sex for sale can be known and represented (epistemology), and how research-based knowledge interacts with ideas about what should be done about sex for sale (politics)."[34] Gert Vermeulen and Nina Persak note that "[a]cademic research on prostitution is mostly written through the perspective of a single research discipline, a single normative framework, or a particular stakeholder. Only to a minor extent, prostitution research relies on facts and fully unbiased empirical evidence."[35] John Lowman, who gave evidence for the applicants in

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[32] Petra Östergren, "From Zero-Tolerance to Full Integration: Rethinking Prostitution Policies," (2017) DemandAT Working Paper No 10 at 9, online: <www.demandat.eu/sites/default/files/DemandAT_WP10_Prostitution PoliciesTypology_June2017_0.pdf>.
[33] Teela Sanders, Maggie O'Neill & Jane Pitcher, *Prostitution: Sex Work, Policy and Politics*, 2nd ed (London, UK: Sage Publications Ltd, 2018) at 5.
[34] Marlene Spanger & May-Len Skilbrei, "Exploring Sex for Sale: Methodological Concerns" in Marlene Spanger & May-Len Skilbrei, eds, *Prostitution Research in Context: Methodology, Representation and Power* (New York: Routledge, 2017) 1 at 2.
[35] Gert Vermeulen & Nina Peršak, "Prostitution Undressed: From Discourse to Description, from Moralisation to Normalisation?" in Nina Peršak & Gert Vermeulen, eds, *Reframing Prostitution: From Discourse to Description, from Moralisation to Normalisation?* (Antwerp: Maklu, 2014) 315 at 315 [Vermeulen & Peršak]. Note that it is of growing concern whether empirical evidence can ever truly be unbiased. Statements of positionality are increasingly common in empirical work.

Bedford, observed that most of the experts who gave evidence in that case researched from within one or the other of the ideological frames described.[36]

Scholars also point to the fact that empirical evidence about prostitution and sex work is wanting or lacking and difficult to gather.[37] Feminist theory highlights the importance of listening to the voices of women who have experienced the phenomena being studied.[38] While literature increasingly seeks to represent the experiences of those who engage in prostitution and sex work (including through first person testimonies,[39] interviews,[40] and empirical research studies[41]), most of this work remains focused on achieving particular

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[36] John Lowman, "The Role of Expert Testimony in *Bedford v. Canada* and *R. v. McPherson*" (Paper delivered at Durham Law School, Durham University, 18–19 September 2014) at 2 [unpublished] (the author identifies that while none of the parties objected to any of the expert witnesses called to give evidence in *Bedford*, each sought to discount the adversary's evidence on the basis of methodological concerns or bias. All of the evidence was admitted, with the application judge evaluating how much weight it should be given).

[37] Isabel Crowhurst, "Troubling Unknowns and Certainties in Prostitution Policy Claims-Making" in Marlene Spanger & May-Len Skilbrei, eds, *Prostitution Research in Context: Methodology, Representation and Power* (New York: Routledge, 2017) 47. See also Hayli Millar, Tamara O'Doherty & Katrin Roots, "A Formidable Task: Reflections on Obtaining Legal Empirical Evidence on Human Trafficking in Canada" (2017) 8 Anti-Trafficking Rev 34 (where the authors discuss the difficulty in obtaining reliable research about human trafficking).

[38] This has been called "one of the central contributions of feminism to academic research": Lawrence, *supra* note 5 at 5–6.

[39] See generally Caroline Norma & Melinda Tankard Reist, eds, *Prostitution Narratives: Stories of Survival in the Sex Trade* (Victoria, Australia: Spinifex Press, 2016). See also Rachel Moran, *My Journey Through Prostitution* (New York: WW Norton & Company, 2013); See also River Redwood, "Myths and Realities of Male Sex Work: A Personal Perspective" in Emily van der Meulen, Elya M Durisin & Victoria Love, eds, *Selling Sex: Experience, Advocacy, and Research on Sex Work in Canada* (Vancouver: UBC Press, 2013).

[40] See e.g. Julie Bindel, *The Pimping of Prostitution: Abolishing the Sex Work Myth* (London, UK: Palgrave Macmillan, 2017) (where the author conducted around 250 interviews in 40 different locations).

[41] See e.g. Canadian Institute of Health Research, "(Understanding) Sex Work: A Health Research & Community Partnership" (2016) online: <www.understandingsexwork.ca> [Canadian Institute of Health Research] (a study of 218 sex workers 19 years of age or older, legally able to work in Canada and having received money in exchange for sexual services on at least 15 different occasions in the preceding 12 months which describes itself as "[t]he largest research project in Canada examining sex work and prostitution law"). Some of the articles utilizing the data collected in this study include: Cecilia Benoit et al, "Sex Work and

political aims, including promoting a particular approach to criminal legal intervention.[42] Scholars in Canada increasingly call for "evidence-based research on the actual lived experiences of sex workers, and how various criminal law and regulatory approaches impact their human rights and dignity."[43] However, as Janice Raymond has identified with specific reference to prostitution, empirical data does not directly produce evidence based conclusions but, rather, is mediated by interpretation of the evidence.[44]

The ideological arguments employed to justify and contest Canada's current legislative approach to prostitution have both normative and descriptive dimensions.[45] The normative claims that prostitution should be understood as inherently exploitive or sex work as a form of labour, create a dichotomy that may, in fact, proves false. For example, recognizing the complexity of the topic and the range of individual experiences suggests that exchanging sexual services for consideration is not always or invariably experienced as one or the other. Recognizing that prostitution may have structural effects for women and girls

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Three Dimensions of Self-Esteem: Self-Worth, Authenticity and Self-Efficacy" (2018) 20:1 Culture, Health & Sexuality 69 [Benoit, "Sex Work and Three Dimensions"]; Cecilia Benoit et al, "Prostitution Stigma and Its Effect on the Working Conditions, Personal Lives, and Health of Sex Workers" (2018) 55:4 J Sex Research 457 [Benoit, "Prostitution Stigma"]; Cecilia Benoit et al, "Would you Think about Doing Sex for Money? Structure and Agency in Deciding to Sell Sex in Canada" (2017) 31:5 Work, Employment & Society 1 [Benoit, "Would you Think"]; Cecilia Benoit, Nadia Ouellet & Mikael Jansson, "Unmet Health Care Needs Among Sex Workers in Five Census Metropolitan Areas of Canada" (2016) 107:3 Can J Public Health 266; Bill McCarthy, Cecilia Benoit & Mikael Jansson, "Sex Work: A Comparative Study" (2014) 43:7 Arch Sex Behav 1379.

[42] Michelle Madden Dempsey, "How to Argue About Prostitution" (2012) 6:1 Crim L & Philosophy 65 at 76 ("[b]y constructing their research projects with an eye primarily on the task of making a difference in the real world and influencing their audience to adopt particular policies, they leave behind the paradigmatic task of the empirical researcher—that is, adding to our body of empirical knowledge").

[43] Cecelia Benoit et al, "'Well, It Should be Changed for One, Because It's Our Bodies': Sex Workers' Views on Canada's Punitive Approach towards Sex Work" (2017) 6:1 Soc Sci 52 [Benoit, "Sex Workers' Views"].

[44] Janice G Raymond, *Not a Choice, Not a Job: Exposing the Myths About Prostitution and the Global Sex Trade* (Virginia: Potomac Books, 2013) at xii [Raymond].

[45] See Vermeulen & Peršak, *supra* note 35 (where the authors aim to include both dimensions in their examination of empirical and policy work about prostitution and the social reaction to it).

does not preclude also recognizing that individual women and girls may not subjectively experience those effects. Another potential means of making sense of this apparent dichotomy lies in a more nuanced appreciation for the descriptive aspect of the word prostitution and the term sex work. The remainder of this article focuses on the definitional distinctions between prostitution and sex work relevant in legal contexts.

III. THE USE OF "PROSTITUTION" AND "SEX WORK" IN CANADIAN JURISPRUDENCE

The word "prostitution" has been defined by Canadian courts to refer to the activity of exchanging sexual services for payment or consideration. The activity legally defined as "prostitution" is now illegal in Canada. Despite increasing reference to the term "sex work" in contemporary jurisprudence, no Canadian court has to date defined it, even though it is increasingly used as if it were interchangeable with the word "prostitution". This section examines the use of the word "prostitution" and the term "sex work"[46] in the context of Canadian jurisprudence[47] and new criminal laws applicable to prostitution, raising concerns over the lack of conceptual clarity.

a. Legal Definition of Prostitution

The word "prostitution" was defined by the Supreme Court of Canada in the *Prostitution Reference* case as follows: "[i]t seems to me that there is little

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[46] The term sex trade is also used regularly used in legal texts. It has been defined as "an umbrella term that encompasses both legal and illegal transactions through which sexual acts are exchanged for money or other goods" and is likely a more apt synonym for prostitution than sex work. See Grantham, *supra* note 29 at 93.

[47] Jurisdiction matters in identifying how words are used and what meaning is ascribed to them. See Dempsey, *supra* note 15 at 68. See also Stuart P Green, "What Counts as Prostitution?" (2016) 4:1 Bergen J of Crim L & Crim J 184 at 185: "[t]he key is to recognize that how we choose to define prostitution will inevitably depend on why we believe one or more aspects of prostitution are wrong or harmful, or should be criminalized or otherwise deterred, in the first place".

dispute as to the basic definition of prostitution, that being the exchange of sexual services of one person in return for payment by another."[48] At that time, the word "prostitution" was used in the definition of "common bawdy-house" included in then section 193 (later section 197) of the *Criminal Code* and was included in the wording of the offence in section 195.1(1)(c). "Prostitution" was not defined in the *Criminal Code*.[49]

The definition of "prostitution" set out by the SCC in the *Prostitution Reference* decision is consistent with definitions used in subsequent cases. In *R v Mara*, the Ontario Court of Appeal provided this well recognized definition: "[t]he basic definition of prostitution is the exchange of sexual services in return for payment."[50] "Prostitution" has been identified by the Quebec Court of Appeal as a term of common usage and an objective concept.[51] The Alberta Court of Queen's Bench defined "prostitution" to mean: "sexual acts performed for money."[52] The Ontario Superior Court of Justice recently reasoned as follows: "[a] prostitute is, for all intents and purposes, a person who offers or provides sexual services for consideration."[53]

b. Canada's Legislative Response to Prostitution

The objectives and provisions of contemporary criminal laws related to prostitution in Canada focus on the activity of exchanging sexual services for

[48] *Reference re ss 193 and 195.1(1) of the Criminal Code*, [1990] 1 SCR 1123 at 1159, [1990] 4 WWR 481 [*Prostitution Reference*] (where the SCC identified the word "prostitution" as a term of common usage).
[49] Section 197 of the *Criminal Code* defined "prostitute" to mean "a person of either sex who engages in prostitution", however, the definition was repealed in 2014.
[50] (1996) 27 OR (3d) 643 at 14, 133 DLR (4th) 201 (On CA).
[51] *R v Tremblay*, [1991] RJQ 2766 at 453–54, 41 QAC 241.
[52] *R v Juneja*, 2009 ABQB 243 at para 27, [2009] AWLD 3120.
[53] *R v Evans*, 2017 ONSC 4028 at para 136, 140 WCB (2d) 373.

consideration.[54] Where previous criminal laws targeted the suggested adverse effects of this activity,[55] current legislative provisions target the activity directly.

Canada's earliest criminal laws related to prostitution were codified in Canada's first *Criminal Code* in 1892.[56] Early *Criminal Code* offences targeted both vagrancy and nuisance (bawdy-house, living on the avails, and street walking), as well as coercion.[57] Scholars identify that the streetwalking provision effectively made the status of being a prostitute against the law.[58] They also identify that early prohibitions on prostitution were gender specific.[59] Buyers were not in violation of criminal laws unless found in a bawdy-house. Canada's vagrancy laws were removed from the *Criminal* Code in 1972. The provisions aimed at street prostitution were replaced by a prohibition on solicitation for the purpose of prostitution. In November of 1985, Parliament introduced Bill C-49 which included a communicating provision.[60] In 1990, the

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[54] *Criminal Code*, *supra* note 1, s 286.1. Section 286.1 makes it an offence to obtain sexual services for consideration. The phrase "sexual services for consideration" has been in the *Criminal Code* since 1997 when the previous section 212(4) was enacted, and there is a developed body of case law interpreting the phrase.

[55] See Lauren Jones, "Canadian Prostitution Law: History and Market Impacts" in Scott Cunningham & Manisha Shah, eds, *The Oxford Handbook of the Economics of Prostitution* (New York: Oxford University Press, 2016) 391 [Jones] (for a discussion of the history of Canada's prostitution laws); Along with the common laws it inherited from Britain, the *Contageous Diseases Act* allowed for the detention of diseased prostitutes for up to three months at a certified hospital — to protect military men from venereal disease, see Constance Backhouse, "Nineteenth-Century Canadian Prostitution Law Reflection of a Discriminatory Society" (1985) 18:36 Soc Hist 387 at 390. The *Indian Act 1880* prohibited Indigenous women from "keeping, frequenting, or being found in disorderly houses"— a mechanism to uphold racial segregation between Indigenous peoples and the white settler population. See Constance Backhouse, "Canadian Prostitution Law 1829-1972" in *Prostitution in Canada* (Ottawa: Canadian Advisory Council on the Status of Women, 1984) 7 at 16–17.

[56] *Ibid*.

[57] *Ibid*. In 1892, procuring offences were enacted to address exploitation and what was referred to as the white slave trade: Frances M Shaver, "The Regulation of Prostitution: Avoiding the Morality Traps" (1994) 9 Can JL & Soc 123 at 128–29 [Shaver] (while targeting coercive conduct, the word coercion was not used).

[58] *Supra* note 55.

[59] Shaver, *supra* note 57 at 127 (where the author identifies earliest laws targeted women and later laws, in place until 1972, targeted male exploiters).

[60] Bill C-49 became law in December of 1985.

SCC dismissed *Charter* challenges to the bawdy-house and solicitation offences, in the case in which the above definition of prostitution was set out.[61]

Until 2014, while prostitution itself was not directly criminally sanctioned, criminal laws continued to target the public nuisance associated with prostitution and the exploitation of those engaged in it.[62] In 2007, two legal proceedings were commenced to challenge the constitutionality of criminal laws then applicable to adult prostitution.[63] The *Bedford* case reached the highest court first. In *Bedford*, three individuals who identified as then current or former sex workers,[64] commenced an application in the Ontario Superior Court of Justice seeking a declaration that section 210 (the "Bawdy-House Offence"), section 212(1)(j) (the "Living on the Avails Offence"), and section 213(1)(c) (the "Communicating Offence") of the *Criminal Code* were unconstitutional and of no force and effect.[65] They founded this claim on the contention that the impugned criminal provisions violated section 7 of the *Charter*, that the deprivation did not accord with the principles of fundamental justice. Furthermore, they held that the provisions could not be justified under section 1 of the *Charter* as a reasonable limit demonstrably justified in a free and democratic society.[66]

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[61] Section 193 created offences related to common bawdy-houses and section 195.1(1)(c) precluded solicitation for the purpose of prostitution, see *Prostitution Reference*, *supra* note 48.
[62] While many authors suggest that Canada's prostitution laws to this point were grounded solely in nuisance, the SCC's decision in *Bedford* specifically identified exploitation as an objective of one of the impugned offences, see Angela Campbell, "Sex Work's Governance: Stuff and Nuisance" (2015) 23:1 Fem Leg Stud 27 (discussion of the nuisance objective).
[63] See *Bedford* SCC, supra note 2. See also *Canada (AG) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, [2012] 2 SCR 524 [*SWUAV*]; In addition to the legal grounds relied on in *Bedford*, in *SWUAV* it was argued that the then existing prostitution laws violated sections 2(d) and 15 of the *Canadian Charter of Rights and Freedoms*, ss 2(d), 15, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 [*Charter*].
[64] The courts used the term prostitutes. This point will be further discussed below.
[65] *Bedford v Canada*, 2010 ONSC 4264 at para 4, 102 OR (3d) 321 [*Bedford* Application].
[66] *Ibid*. It was also argued that the Communicating Offence violated section 2(b) of the *Charter* in a way that could not be justified under section 1.

In 2013, the SCC declared the Bawdy-House Offence (as it related to prostitution), the Living on the Avails Offence, and the Communicating Offence inconsistent with the *Charter* and therefore void. The SCC struck the word "prostitution" from the definition of "common bawdy-house" in section 197(1) of the *Criminal Code* as it applied to the Bawdy-House Offence only. Following a finding that the three impugned criminal provisions failed to accord with the principles of fundamental justice, the SCC suspended the declaration of invalidity for a period of one year, "returning the question of how to deal with prostitution to Parliament."[67] The SCC provided Parliament with 12 months in which to respond before adult prostitution would have been effectively decriminalized in Canada.[68] The SCC acknowledged that dealing with prostitution is complex and sensitive. The court held that how prostitution is regulated is a matter of great public importance which few countries leave unregulated. The SCC stated that Parliament was not precluded by the decision from imposing limits on where and how prostitution might be conducted in Canada. In suspending the declaration of invalidity, the SCC reasoned that "moving abruptly from a situation where prostitution is regulated to a situation where it is entirely unregulated would be a matter of great concern to many Canadians."[69]

The Canadian government introduced Bill C-36 on June 4, 2014, and it received Royal Assent on November 6, 2014. The PCEPA came into force on December 6, 2014. Parliament responded to the decision of the SCC in *Bedford* by amending the Bawdy-House Offence to remove reference to prostitution, repealing the Living on the Avails Offence,[70] and repealing and replacing the Communicating Offence to align with a new legislative objective. Parliament

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[67] *Bedford* SCC, *supra* note 2 at para 2.
[68] See generally Peter M Hogg, Allison A Bushell Thornton & Wade K Wright, "Charter Dialogue Revisited—or 'Much Ado About Metaphors'" (2007) 45:1 Osgoode Hall LJ 1 (discussion of *Charter* dialogue).
[69] *Bedford* SCC, *supra* note 2 at para 167. Provinces and territories would likely have some role in regulating a legal sex industry, including in relation to safety in commercial establishments. Provincial and municipal laws that adversely impacted sex workers could also give rise to constitutional challenges.
[70] As well as the other offences included in section 212. See *Criminal Code, supra* note 1.

also enacted four new offences and immunized those who exchange their own sexual services for consideration from prosecution.

Canada's current prostitution laws criminalize the activity of prostitution itself, such that obtaining sexual services for consideration is a criminal offence. The legislative scheme aims to denounce and deter both exchanging sexual services for consideration and activities that support a market for sexual services. It does so on the basis that prostitution as an activity is understood to be a gendered practice—a form of sexual exploitation that disproportionately and negatively impacts women and girls—and that it is harmful to those who engage in it and to society at large.[71] Parliament expressed "grave concerns about the exploitation that is inherent in prostitution and the risks of violence posed to those who engage in it."[72] The preamble to the *PCEPA* identified that social harm results from "the objectification of the human body and the commodification of sexual activity" and that, to protect human dignity and equality, prostitution must be discouraged.[73]

The centrepiece of the new legislative scheme is the criminalization of obtaining sexual services for consideration,[74] a provision intended to make prostitution itself illegal in Canada.[75] Section 286.1 makes it an offence to obtain the sexual services of another person for consideration, or to communicate for that purpose. The new legislative scheme also criminalizes activities that create a market for sexual services. Section 286.2 makes it an offence to receive a financial or other material benefit knowing it to be derived from the commission

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[71] See *PCEPA*, *supra* note 3 at Preamble. See also Canada, Department of Justice, *Technical Paper: Bill C-36, Protection of Communities and Exploited Persons Act* (Ottawa: Department of Justice, 1 December 2014) at 3 [*Technical Paper*] (describing how Canada's new legislative approach to prostitution was informed by the evidence and decision in *Bedford*, public consultations held in February and March of 2014, jurisprudence, and domestic and international research and government reports). For an analysis of the Parliamentary Committee hearings, see Genevieve Fuji Johnson, Mary Burns & Kerry Porth, "A Question of Respect: A Qualitative Text Analysis of the Canadian Parliamentary Hearings on *The Protection of Communities and Exploited Persons Act*" (2017) 50:4 Can J of Pol Sci 921.
[72] *PCEPA*, *supra* note 3 at Preamble.
[73] *Ibid.*
[74] *Criminal Code, supra* note 1, s 286.1.
[75] *Technical Paper*, *supra* note 71 at 5–6. See also *House of Commons Debates*, 41st Parl, 2nd Sess, Vol 147, No 101 (11 June 2014) at 6653 (Hon Peter MacKay).

of an offence under section 286.1. Section 286.3 makes it an offence to procure another person to offer or provide sexual services for consideration. Section 286.4 prohibits advertising an offer to provide sexual services. Those who exchange their own sexual services for consideration are immunized from prosecution under most of the new offences.[76]

In a technical paper intended to provide an overview of the decision of the Supreme Court in *Bedford* and to explain the basis for Parliament's legislative response, the Department of Justice confirmed that the *PCEPA* targeted the activity of prostitution and discussed what was meant by the term "sexual services for consideration."[77] They noted that whether a particular act constituted a "sexual service for consideration" was a question of fact to be determined by a court. The test to be applied considers whether the service is "sexual in nature" and whether the purpose of providing the service is "to sexually gratify the person who receives it."[78] A contract or agreement for a specific sexual service in return for some form of consideration is required; consideration must be contingent on provision of a particular service; and the

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[76] *Criminal Code*, *supra* note 1, ss 286.4, 286.5(1)(d).

[77] This term has been described as vague and unclear, however courts have long interpreted this term and the SCC has found this definition of prostitution not to be impermissibly vague. See Andrea Sterling & Emily Van der Meulen, "We are Not Criminals: Sex Work Clients in Canada and the Constitution of Risk Knowledge" (2018) 33:3 CJLS 291. But see *Prostitution Reference*, *supra* note 48, at 1159–60 (where the SCC considered then section 193 of the *Criminal Code* and reasoned: "[i]n terms of words and phrases like 'prostitution' and 'acts of indecency', I note that they have been given meaning by courts on many occasions, and I re-iterate that these are largely terms of common usage … It seems to me that there is little dispute as to the basic definition of prostitution, that being the exchange of sexual services of one person in return for payment by another … I wish to make reference to a pre-*Charter* case dealing with s. 193 of the *Code*, *R. v. Hislop*, Ont. C.A., September 22, 1980, unreported (summarized 5 W.C.B. 124). In dismissing the challenge to the offence of keeping a common bawdy-house, MacKinnon A.C.J.O. stated the following at page 4 of the court's reasons: The words attacked have been in the *Criminal Code* since 1917 and have been interpreted and applied by our courts without difficulty for years. We do not think the words are vague, uncertain or arbitrary … Of course, the very nature of language will always mean that there will be a certain area of flexibility open to interpretation and judicial appreciation. This does not equate with impermissible vagueness. I conclude that s. 193 of the *Criminal Code* is not impermissibly vague as courts have and continue to give the words and phrases found therein sensible meaning").

[78] *Technical Paper*, *supra* note 71 at 5.

contract or agreement must be entered into before the sexual service is provided.[79] In the technical paper, the Department of Justice identified that: "[i]n most cases, physical contact, or sexual interaction, between the person providing the service and the person receiving it is required."[80] Courts in Canada have held that pornography[81] and stripping[82] do not constitute prostitution or "sexual services for consideration."[83]

The constitutionality of the *PCEPA* has been questioned.[84] It has been suggested that the criminal provisions enacted by the *PCEPA* may violate sections 2(b), 2(d), 7, 11, and 15 of the *Charter*.[85] At least two constitutional challenges to some of these provisions have been commenced in the context of criminal proceedings.[86] In a recent decision, the Ontario Superior Court of

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[79] See *ibid*: "[s]exual activity involving no expectation of getting paid for the services provided does not meet the test. Sexual activity in the context of ongoing relationships also fails to meet the test, unless the evidence shows that the alleged consideration was contingent on the provision of a particular sexual service. Another case held that the phrase "sexual services for consideration" is not intended to apply to consensual actions between those having an affinity towards one another".

[80] *Ibid*. See also *R v Bauer* (1999), OJ No 5294 (Ct J), 45 WCB (2d) 280 [*Bauer*].

[81] See e.g. *Bauer*, *supra* note 80 at para 47.

[82] See e.g. *R v Saftu*, [2001] OJ No 3046 at para 12–13, 50 WCB (2d) 514 (Ontario Court of Justice noted that "private dancing" or "lap dancing" might cross the line separating "mere erotic entertainment from acts of prostitution").

[83] *Ibid* (the Department of Justice identified that the following activities have been "found to constitute a sexual service or an act of prostitution, if provided in return for some form of consideration: lap-dancing … ; masturbation of a client in the context of a massage parlour … ; and, sado-masochistic activities, provided that the acts can be considered to be sexually stimulating/gratifying").

[84] See e.g. Chu & Glass, *supra* note 6. See also Letter from Adam J Norget et al, Concerned Citizens and Members of the Legal Profession (7 July 2014) "Re: Canada's response to the decision in *Canada (Attorney General) v. Bedford*", online: <d3n8a8pro7vhmx.cloudfront.net/pivotlegal/pages/666/attachments/original/1404836275/Harper_07_07_2014.pdf?1404836275> (where the signatories suggest Canada's new criminal regime is likely to offend the *Charter*). But see Allison Jones, "Ontario Review Finds Ottawa's Sex-Work Law Constitutional, Wynne Says", *The Globe and Mail* (1 April 2015), online: <beta.theglobeandmail.com/news/politics/ontario-review-finds-ottawas-sex-work-law-constitutional-wynne-says/article23734478/?ref=http://www.theglobeandmail.com&>.

[85] "[B]y "infring[ing] sex workers' rights to freedom of expression, freedom of association, security, liberty, autonomy, and equality," Pivot Report, *supra* note 11 at 11–12, 39–63.

[86] See *Anwar*, *supra* note 6. See also *R v Boodhoo and Others*, 2018 ONSC 7205 [*Boodhoo*].

Justice upheld the constitutionality of three of Canada's new criminal prostitution laws.[87]

Arguments that the new criminal laws applicable to adult prostitution are unconstitutional are principally founded on a contention that the *PCEPA* violates the *Charter* rights of sex workers. Pivot Legal Society ("Pivot"), a Canadian organization committed to decriminalization of adult sex work, released a report in 2017 calling for repeal of the *PCEPA*.[88] Pivot argues that the ban on purchasing impacts sex workers' safety by putting them in increased risk of danger and creates a distinction that sets sex workers apart and perpetuates dehumanizing stereotypes about them.[89] Pivot argues that the communicating offence inhibits free speech and places sex workers at greater risk by impeding their ability to negotiate consent and make intimate decisions about their bodies,[90] and that the material benefit offences "strip … sex workers of the opportunity to create and maintain supportive work environments where they can expect fair labour practices" while mitigating their workplace risks.[91] They argue that the advertising offence makes it "more difficult for sex workers to enjoy the safer conditions of indoor work and to set boundaries with clients about the conditions they work under and the services they offer."[92]

c. *References to Sex Work in Jurisprudence*

The term "sex work" is increasingly used by Canadian courts either interchangeably with the word "prostitution", or on its own.[93] Since 2010, the

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[87] *Boodhoo*, *supra* note 86 at para 12 (where the the applicants applied for an order declaring sections 286.2(2), 286.3(2) and 286.4 of the *Criminal Code* to be unconstitutional on the basis that sections 286.2(2), 286.3(2) and 286.4 were overbroad and grossly disproportionate, offending section 7 of the *Charter,* and that section 286.4 was arbitrary and offended section 7 and section 2(b) of the *Charter*.)

[88] Pivot Report, *supra* note 11.

[89] *Ibid* at 45–46.

[90] *Ibid* at 47–52.

[91] *Ibid* at 59.

[92] *Ibid* at 63.

[93] Prostitution and sex work have also been used interchangeably by representatives of the Canadian government. See e.g. House of Commons, Report of Standing Committee on Justice

term "sex work" has been used in at least 39 decisions in Canadian courts and tribunals.[94] In no case has a Canadian court provided a definition for this term. In those decisions that courts and tribunals have used both "prostitution" and "sex work", they have used them interchangeably as if they bore the same meaning.[95]

The decisions of the courts in *Bedford* and in *SWUAV*, the concurrent constitutional challenges to then existing criminal provisions applicable to adult

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and Human Rights, *The Challenge of Change: A Study of Canada's Criminal Prostitution Laws* (December 2006) at n 2 (Chair: Art Hanger) [*Challenge of Change*]. The word and term are also used by scholars without definition in theoretical work. The potential adverse implications of this on our understanding and our thinking cannot be understated.

[94] *Boodhoo*, *supra* note 86; R *v Esho and Jajou*, 2017 ONSC 6152, [2017] OJ No 5418 [*Esho*]; *R v Ackman*, 2017 MBCA 78, 354 CCC (3d) 172; *R v McDonald*, 2017 ONCA 568, 351 CCC (3d) 486; *R v Evans*, 2017 ONSC 4028, 140 WCB (2d) 373 [*Evans*]; *R v Ellis*, 2017 ONSC 3812, [2017] OJ No 3196; *R v Deiaco*, 2017 ONSC 3174, [2017] OJ No 3081; *R v Wruck*, 2017 ABQB 32; *R v Akumu*, 2016 BCSC 2500, [2017] BCWLD 5739; *Re 1512-11494*, 2016 ONSBT 4926; *Araya v Nevsun Resources Ltd*, 2016 BCSC 1856, [2016] BCWLD 7429 ; *R v McCart*, 2016 ONCJ 512, [2016] OJ No 4488; *R v Stubbs*, 2016 ONSC 3756, [2016] OJ No 3115; *R v Denny*, 2016 NSPC 83, 139 WCB (2d) 74; *Re TSL-73260-16*, 2016 CanLII 38751 (ON LTB); *Lin v Canada*, 2016 CanLII 96719 (CA IRB); *R v H(H)*, 2015 ONCJ 392, [2015] OJ No 3881; *Atira Property Management v Richardson*, 2015 BCSC 751, [2015] BCWLD 4586; *N(P) v R(F) and another (No 2)*, 2015 BCHRT 60, [2015] BCWLD 3412; *Re KM*, 2014 CanLII 78987 (ON CCB); *BC/Yukon Association of Drug War Survivors v Abbotsford*, 2014 BCSC 1817, [2014] BCWLD 7379; *Kazi v Canada*, 2014 CanLII 83460 (CA IRB); *Providence Health Care Society v Canada (AG)*, 2014 BCSC 936, [2014] BCWLD 6062; *R v Calnen*, 2014 NSPC 17, [2014] NSJ No 735; *Aderinboye v Picard*, 2014 ONSC 2279, [2014] WDFL 2219; *R v Parent*, 2014 QCCS 132, 111 WCB (2d) 717; *R v Beszedes*, 2013 BCSC 2500, [2013] BCJ No 2965; *R v Cardinal*, 2013 YKTC 30, [2013] YJ No 27; *Padilla v Canada (Minister of Citizenship and Immigration)*, 2013 FC 247, 223 ACWS (3d) 1005; *SWUAV*, *supra* note 63; *R v McPherson*, 2011 ONSC 7717, [2011] OJ No 6548; *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44, [2011] 3 SCR 134; *Ogden v British Columbia (Registrar of Companies)*, 2011 BCSC 1151, [2011] BCJ No 1615; *Imafidon v Canada (Citizenship and Immigration)*, 2011 FC 970, [2011] FCJ No 1192; *R v Mernagh*, 2011 ONSC 2121, [2011] OJ No 1669; *R v Bedford*, 2010 ONCA 814, [2010] OJ No 5155; *Downtown Eastside Sex Workers United Against Violence Society v Canada*, 2010 BCCA 439, [2010] BCWLD 8413; *Bedford v Canada*, 2010 ONSC 4264, [2010] OJ No 4057; *R v Samuels*, 2013 ONCA 551, [2013] OJ No 4200.

[95] See e.g. *Esho*, *supra* note 94 (where both prostitution and sex work are used interchangeably and without definition). See also *Evans*, *supra* note 94 (where both prostitution and sex work are used interchangeably, and prostitution is defined while sex work is not).

prostitution,[96] provide some insight into how "prostitution" and "sex work" may coalesce in a way that fails to address any potential distinction between them.

The claim in the *Bedford* case was framed as a deprivation of sex workers' rights. Counsel for the applicants in *Bedford* identified that the challenge to three of the then existing criminal laws applicable to adult prostitution was specifically designed to attack the contribution of those laws to the daily risks faced by sex workers.[97] The applicants' claim, as set out in the Notice of Application, was founded on the contention that the impugned provisions deprived sex workers of their right to liberty and their right to security of the person.[98]

In their decisions in the *Bedford* case, however, the courts at all three levels used the word "prostitution" and not the term "sex work" in the body of their decisions. The application judge provided a definition of prostitution, relying on an earlier decision of the Ontario Court of Appeal: "'Prostitution' has been defined as 'lewd acts for payment for the sexual gratification of the purchaser.'"[99] She defined a "prostitute" as "a person of either sex who engages in prostitution."[100] The application judge characterized the applicants' claim as follows: "[t]he applicants' case is based on the proposition that the impugned provisions prevent prostitutes from conducting their lawful business in a safe environment."[101] She further described their section 7 claim as alleging that "the operation and intersection of the impugned provisions materially contribute to the violence faced by prostitutes."[102]

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[96] For a discussion of the social and legal story of the *SWUAV* litigation, see Lisa Kerr & Elin Sigurdson, "'They Want In': Sex Workers and Legitimacy Debates in the Law of Public Interest Standing" (2017) 80 SCLR (2d) 145 at 154–71 [Kerr & Sigurdson].

[97] Alan Young, "Afterword" in Emily van der Meulen, Elya M Durisin & Victoria Love, eds, *Selling Sex: Experience, Advocacy, and Research on Sex Work in Canada* (Vancouver: UBC Press, 2013) 123 at 124.

[98] *Bedford v R* (20 March 2007), Toronto, On CJ 07-CV-329807PD1 at para 2(f) (Notice of Application)

[99] *Bedford* Application, *supra* note 65 at para 248.

[100] *Ibid* at para 276.

[101] *Ibid* at para 8.

[102] *Ibid* at para 10.

No definition of "sex work" or "sex worker" was provided in any of the decisions in the *Bedford* case and the application judge suggested the decision about which term to use was political, rather than legal, reflecting at least in part a personal preference:

> It has been brought to my attention that some people prefer the term sex worker to prostitute, which they consider to be pejorative. Others decry the use of sex worker as they claim it ignores the plight of victimized women forced into prostitution. This judgment uses the term prostitute as a legal term in accordance with the Criminal Code and should not be understood to enter the debate over the proper political term to be used.[103]

At each level however, the courts merged the identifying features of the applicants with those of the group described throughout the decisions as prostitutes. As a result, they used the word "prostitution" to refer to adults[104] engaged in a legal activity,[105] and evidence about the effect of prostitution or the laws applicable to it on victims of trafficking was excluded.[106] Despite acknowledging that there is no one experience of prostitution that is representative of the experience of all prostitutes,[107] the courts made findings addressing the group, which they referred to throughout their decisions as prostitutes.[108]

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[103] *Ibid*, n 4.
[104] *Ibid* at para 6 (the laws related to persons under the age of 18 were not challenged).
[105] *Ibid* at para 55; *Bedford* SCC, *supra* note 2 at paras 98–99 (the narrow question before the courts was whether the impugned criminal provisions violated the rights of the applicants to engage in what the application judge referred to as their "livelihood" and the Court of Appeal described as a "lawful commercial activity").
[106] *Bedford* Application, *supra* note 65 at para 357 (in criticizing the evidence given by one of the respondent's expert witnesses, the application judge noted that some of her "statements on prostitutes were based on her research on trafficked women"). However, the word prostitution as it has been legally defined does not exclude exchanges of sexual acts for compensation where that exchange takes place in the context of human trafficking or third-party coercion. This point will be further discussed.
[107] *Ibid* at para 88 (the application judge reasoned: "it is clear that there is no one person who can be said to be representative of prostitutes in Canada").
[108] *Ibid* at para 8 (the application judge stated that the applicants' case was "based on the proposition that the impugned provisions prevent prostitutes from conducting their lawful

Their understanding of prostitution directly affected the courts' analysis of harm and harm avoidance. While the application judge recognized that harm could be understood in different ways,[109] she focused on physical violence, and the way in which the impugned criminal provisions inhibited the applicants' ability to take steps to reduce their risk of experiencing physical violence. She made no reference to the gendered and racialized nature of prostitution cited in intervenor submissions.[110] She expressly rejected evidence of the harm experienced by those who engaged in prostitution in the context of human trafficking.[111] The application judge did acknowledge that the risk of experiencing harm is not equally distributed across all seller constituencies. There was, however, no concurrent discussion of whether and how the ability to take basic precautions to avoid experiencing harm might also be unequally distributed. At no point did the courts in *Bedford* consider whether the steps identified as having the potential to reduce prostitutes' risk of experiencing violence were equally available to and likely to be availed of by all prostitution participants.[112]

A distinction between the words "prostitution" and "prostitute", and the terms "sex work" and "sex worker", was expressly acknowledged by the

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business in a safe environment"); *Bedford* SCC, *supra* note 2 at para 73 (throughout its decision, the SCC likewise found: "the impugned laws negatively impact and thus engage security of the person rights of prostitutes"); *Bedford* SCC, *supra* note 2 at para 18 (in summarizing the decision of the application judge, the SCC also noted that the application judge found that the impugned laws deprived "the applicants and others like them" of their liberty and security of the person).

[109] *Bedford* Application, *supra* note 65, n 9, at para 344.

[110] Jennifer Koshan, "Teaching Bedford: Reflections on the Supreme Court's Most Recent Charter Decision" (24 December 2013), *ABLawg* (blog), online: <ablawg.ca/2013/12/24/teaching-bedford-reflections-on-the-supreme-courts-most-recent-charter-decision/>.

[111] *Bedford* Application, *supra* note 65 at para 134 (while all experts appear to have conducted studies including street prostitutes, only the respondent's experts appeared to have included victims of trafficking in their studies).

[112] See e.g. Marcus Sibley, "Owning Risk: Sex Worker Subjectivities and the Reimagining of Vulnerability and Victimhood" (2018) 58:6 Brit J Criminol 1462 at 1476 (where the author identifies that sex workers advocate for decriminalization in terms of self-responsibilization and risk management: "[s]ince 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").

plaintiffs in *SWUAV*; however the SCC in that case also used the words "prostitution" and "prostitutes" as interchangeable with "sex work" and "sex workers". In that case, the plaintiffs commenced an action challenging most of the criminal offences then applicable to adult prostitution in Canada on the basis that the impugned provisions violated the rights of sex workers.[113] The appellants identified in their factum on appeal to the SCC as follows:

> "Prostitute" is defined in s. 197(1) of the *Criminal Code*. However, the respondents used the term "sex worker" in their Statement of Claim and the subsequent amendments to it. The meaning of the term as the respondents use it has evolved through several versions in the course of these proceedings, and it is not co-extensive with the meaning of the term "prostitute" defined in the *Criminal Code*.[114]

While the individual plaintiff was referred to by the SCC as a sex worker, in setting out the basis of the plaintiffs' claims, the SCC set out the claims with reference to the impact of the impugned provisions on the rights of prostitutes (rather than sex workers).[115]

In the first two challenges commenced to Canada's new criminal prostitution laws, the constitutional rights of sex workers are again directly at issue. In the first constitutional challenge to three of the new offences targeting adult prostitution, the applicants are two individuals charged under three of the new criminal offences in relation to their ownership and operation of an escort agency. The applicants contend that the provisions violate the rights of "escorts and other sex workers."[116] The terms "escort", "sex work", and "sex worker" are

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[113] *Downtown Eastside Sex Workers United Against Violence Society and Sheryl Kiselbach v Canada (AG)* (15 December 2008), Vancouver, BC SC, S075285 at paras 20–45 (Amended Statement of Claim). See also Kerr & Sigurdson, *supra* note 96 at 157.

[114] *SWUAV*, *supra* note 63 (Factum of the Appellants at para 9).

[115] *SWUAV*, *supra* note 63 at para 8.

[116] *Anwar*, *supra* note 7 (Notice of Application Re: Constitutionality of ss.286.2, 286.3 and 286.4 of the *Criminal Code*). The applicants were charged with three of the new criminal offences applicable to adult prostitution: section 286.2 (the "Procuring Offence"); section 286.3 (the "Material Benefit Offence"); and section 286.4 (the "Advertising Offence"). They had been co-owners of a commercial business offering sexual acts by female employees in exchange for payment, including through online advertising. No "escort or other sex worker"

not defined in the pleadings. In *Boodhoo*, the applicants challenged the constitutionality of three of the new criminal provisions relating to sexual services provided by a person under the age of 18 years.[117] In their factum, the applicants claimed that the impugned provisions criminalized various activities related to sex work[118] and specifically characterized the objectives of the new legislative provisions as: to enhance the safety, security and dignity of people involved in sex work.[119] The terms "sex work" and "prostitution" appear to be used interchangeably and neither is defined. Both are used in the decision upholding the constitutionality of the impugned provisions.[120]

IV. DISTINGUISHING SEX WORK FROM PROSTITUTION

While the word "prostitution" has been legally defined in Canada to mean the activity of exchanging sexual services for consideration, the term "sex work" is usually used to refer to that activity and others when engaged in by seller participants bearing certain characteristics, most notably that they are adults, who engage as a matter of consent and in the absence of third party coercion. This section examines how the term "sex work" has evolved and is now defined

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was a party to or has to date given evidence in the case. The applicants rely on the use of reasonable hypotheticals—a device that allows judges to evaluate whether a law has an adverse impact on third parties other than the accused. The applicants will bear the onus of establishing reasonable hypothetical circumstances in which enforcing the impugned provisions would violate the section 7 rights of a third party to the proceeding. This means the adverse impact must apply to situations that commonly arise. Witten argues that the reasonable hypothetical is a poor tool for assessing proportionality. See also Lauren Witten, "Proportionality as a Moral Process: Reconceiving Judicial Discretion and Mandatory Minimum Penalties" (2017) 48:1 Ottawa L Rev 81 at 100.

[117] Sections 286.3(1) and (2), 286.2 and 286.4 (pursuant to which they were convicted but have not yet been sentenced). See *Boodhoo*, *supra* note 86 (Factum of the Applicant).

[118] *Boodhoo*, *supra* note 86 (Factum of the Applicant at para 1).

[119] *Ibid* at para 21. In a recent article examining what counts as human trafficking in empirical research studies, Dempsey identified the importance of legal definitions in promoting rights claims and influencing legal decision makers and policy makers. For a discussion of the objective of Canada's new prostitution laws, see generally Haak, *supra* note 4 at 694 (where the author argues that it is not an objective of the new legislative provisions to improve the safety of those who continue to engage in prostitution).

[120] *Boodhoo*, *supra* note 86.

and used in scholarly and non-scholarly work, demonstrating that it is not synonymous with the word "prostitution" as it has been legally used in Canada.

a. Prostitutes' Rights Movement

In the 1970s, the prostitutes' rights movement began to reconstruct the social problems associated with prostitution and shift the focus from the activity of exchanging sex for money to the rights of women who engaged in that activity. The term "sex work" was first used in the late 1970s as a conceptual tool to promote the political aims of the pragmatic movement to invigorate prostitution with new meaning.[121]

Three central claims underlie the prostitutes' rights movement: not all prostitution is forced prostitution; prostitution is work and should be respected and treated like other service work; and to deny the right to work as a prostitute under conditions of one's own choosing is a human rights violation.[122] Valerie Jenness notes that to challenge historically developed images of prostitution, the movement relied on "two accessible and powerful linguistic devices to present an alternative image of prostitutes. One of these is the focus on the "work of prostitution," while the other is the focus on the "civil rights" of prostitutes as

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[121] The official launch of the prostitutes' rights movement has been attributed to an event that took place in Lyons, France, in 1975. Local prostitutes took over a church and publicized a list of grievances at the core of which was a plea for protection from police harassment arising from the enforcement of French prostitution laws. Around the same time, the prostitutes' rights group COYOTE emerged in San Francisco and quickly developed branches in cities throughout the United States. See Valerie Jenness, *Making it Work: Prostitutes' Rights Movement in Perspective* (Piscataway: Aldine Transaction, 1993) at 2–3, 114 [Jenness, *Making it Work*]. COYOTE was founded by Margo St James, an ex-prostitute, to instigate and sponsor protests to bring attention to the abuse of local prostitutes and provide community services to women and prostitutes. It has been acknowledged that only a small percentage of COYOTE's members at that time actually worked as prostitutes. See also Raymond, *supra* note 44 at 10.

[122] Valerie Jenness, "From Sex as Sin to Sex as Work: COYOTE and the Reorganization of Prostitution as a Social Problem" (1990) 37:3 Soc Problems 403 at 404, 416 [Jenness, "From Sex as Sin"] (Jenness described COYOTE as "an organization vying for control of the definition of a social problem… COYOTE has attempted to change the discourse surrounding prostitution by severing prostitution from its historical roots with sin, crime, and illicit sex. COYOTE locates the social problem of prostitution firmly in the discourse of work, choice, and civil rights" at 404). See also Jenness, *Making it Work*, *supra* note 121 at 5.

service workers.[123] In the early stages of the movement, those advocating for the rights of prostitutes worked to reframe prostitutes as service workers,[124] "invoking and institutionalizing a vocabulary of sex as work, prostitutes as sex workers, and prostitutes' civil rights as workers."[125]

Two main theoretical arguments emerged in scholarly work to animate the human rights claims of sex workers. The first, grounded in liberal feminism, constructs "sex work" as a choice often made in constrained circumstances, arguing that the activity could be made safer by the removal of criminal laws and the stigma surrounding it. This argument emphasizes "rights, the legitimacy of consent and a conception of equality based on gender neutrality."[126] The second theoretical argument draws on postmodern feminism and queer theory, emphasizing "the radical potential of sex work in exploding and expanding the boundaries of sexuality and gender."[127] Sex work represents economic empowerment and expressive freedom.[128] Sex work is considered liberating and

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[123] Jenness, "From Sex as Sin", *supra* note 122 at 405.
[124] *Ibid.*
[125] *Ibid* at 417. See also Jenness, *Making it Work*, *supra* note 121 at 120–21 (where the author also identifies how the crusade and its claims are not located in and do not reflect discussions about sex itself). Jenness identified that this had the effect of severing "the social problem of prostitution from its historical association with crime, illicit sex, and disease".
[126] Lisa Carson & Kathy Edwards, "Prostitution and Sex Trafficking: What are the Problems Represented to Be? A Discursive Analysis of Law and Policy in Sweden and Victoria, Australia" (2011) 34:1 Austl Feminist LJ 63 at 65 [Carson & Edwards]. See Martha C Nussbaum, "Whether from Reason or Prejudice: Taking Money for Bodily Services" (1998) 27:2 J of Legal Studies 693 at 696 (in a formative article, Nussbaum argued that we all take money for the use of our bodies, and that feminist theory is insufficiently grounded in working class lives and too focused on sexuality. Nussbaum suggested that lack of employment opportunities was the most urgent issue raised by prostitution, and that legalizing prostitution would likely make things better for women).
[127] Leslie Ann Jeffrey & Gayle Macdonald, *Sex Workers in the Maritimes Talk Back* (Canada: UBC Press, 2006) at 10.
[128] See Elizabeth Bernstein, "What's Wrong with Prostitution? What's Right with Sex Work? Comparing Markets in Female Sexual Labour" (1999) 10:1 Hastings Women's L Rev 91 at 95–101 (for an overview of feminist theories of prostitution). See also Noah D Zatz, "Sex Work/Sex Act: Law, Labor, and Desire in Constructions of Prostitution" (1997) 22:2 Signs: J Women in Culture and Soc 277 (who argues the act is a site of powerful sexual pluralism).

an opportunity for self fulfillment.[129] The idea of prostitution as transgressive is founded on the idea of bodily need and pursuit of sexual pleasure on the buyer's part, and the idea that the seller sells a service but not his or her self.[130]

From its inception, the term "sex work" has been used in a way that has drawn a distinction between so called forced and free prostitution. From the early days of the prostitutes' rights movement, advocates were concerned with "dispelling the myth that prostitution is forced sexual slavery and that all prostitutes are necessarily victimized."[131] Early activists articulated prostitution as a mutually consensual relationship and suggested that any exploitation was at the hands of law authorities.[132] With the growing public awareness of human trafficking, the sex workers' rights movement consistently distinguished sex work from human trafficking,[133] arguing that they not be conflated to "ensure equal protection for the rights of sex trade workers and women who are trafficked."[134] However, scholars question whether it is possible to distinguish forced prostitution from free prostitution, highlighting for example the need to

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[129] "The complex, multiple prostitution exchange is a site of powerful sexual pluralism, capable of contesting hegemonic constructions of sexuality." See also Carol Leigh, "Inventing Sex Work" in Jill Nagle, ed, *Whores and Other Feminists* (New York: Routledge, 1997) 223 [Leigh].

[130] Sherene Razack, "Race, Space, and Prostitution: The Making of the Bourgeois Subject" (1998) 10:2 Can J Women & L 338 at 347.

[131] Jenness, *Making it Work*, *supra* note 121 at 5.

[132] Efforts focused on stopping harassment by police, and having police treat offences as victimless therefore issuing citations but not arresting. COYOTE instigated at least 26 lawsuits with the support of ACLU and others. COYOTE argued that people had a right to choose prostitution as an occupation, and that if they chose that occupation, they had the right to engage in it without violations of their civil rights. Jenness, "From Sex as Sin", *supra* note 122 at 406–07.

[133] This distinction is not universally drawn by sex workers or their advocates, see e.g. Juno Mac & Molly Smith, *Revolting Prostitutes: The Fight for Sex Workers' Rights* (London: Verso, 2018) at 56–86 (for a discussion of the need for sex workers to talk also about trafficking).

[134] Grantham, supra note 29 at 108. See also Kamala Kempadoo et al, eds, *Challenging Trafficking in Canada: Policy Brief* (Toronto: Centre for Feminist Research York University, 2017) at 108.

recognize women's experiences as existing on a continuum where a range of "constraining contexts" may be taken into account.[135]

However, the central claims and theoretical arguments made by sex workers' rights advocates about the nature of sex work are contested. Some scholars argue they focus only on individual interests and insufficiently account for the structural contexts in which individual decisions are made, including the gendered, racial, and socioeconomic inequalities that underlie the prostitution exchange. Maddy Coy and Benedet identify the shortcomings of focusing solely on an individual account of choice or consent:

> What matters is the power relationship and the coercive circumstances it produces. It is precisely this unequal power relationship…that links prostitution to a continuum of violence against women. Women's voluntary engagement in prostitution cannot be extracted from the social conditions in which such decisions are made. Notions of women's bodies as commodities, of men's need and entitlement to sexual release in and through women's bodies, and that some form of gain (not limited to the financial) cancels out harm, exploitation or inequalities, are dominant socio-cultural norms.[136]

Focusing only on the individual also has the effect of making the individual responsible for their own avoidance of harm.[137]

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[135] Monica O'Connor, "Choice, Agency, Consent and Coercion: Complex Issues in the Lives of Prostituted and Trafficked Women" (2017) 62 Women's Stud Intl Forum 8 at 9 [O'Connor]. See also Maddy Coy, "This Body Which is Not Mine: The Notion of the Habit Body, Prostitution and (Dis)embodiment" (2009) 10:1 Feminist Theory 61. Coy further develops the continuum of sexual violence as a framework for exploring women's experience of sexual violation in prostitution. Her research reveals how women express the same feelings of "shame, guilt, hating the body and alienation" when discussing their experience of rape and sexual assault as they do when discussing commercial sexual acts, even where there was no violence or coercion".

[136] Maddy Coy & Janine Benedet, "Prostitution on a Continuum of Violence Against Women" (Paper delivered at National Research Day, Simon Fraser University, 9 November 2012) [unpublished].

[137] See O'Connor, *supra* note 135 at 14–15. See also Rachel Chagon & Francois Gauthier, "From Implicitly Christian to Neoliberal: The Moral Foundations of Canadian Law Exposed by the Case of Prostitution" in Tuomas Martikainen & Francois Gauthier, eds, *Religion in the Neoliberal Age: Political Economy and Modes of Governance* (Fanham, UK: Ashgate

Catherine MacKinnon identifies that the debate over how to respond to prostitution is characterized by five moral distinctions that are used to make some examples of prostitution less problematic than others:

> Adult is distinguished from child prostitution, indoor from outdoor, legal from illegal, voluntary from forced, and prostitution from trafficking. Child prostitution is always bad for children; adult prostitution is not always bad for adults. Outdoor prostitution can be rough; indoor prostitution is less so. Illegal prostitution has problems that legal prostitution solves. Forced prostitution is bad; voluntary prostitution can be not-so-bad. Trafficking is really, really bad. Prostitution—if, say, voluntary, indoor, legal, adult—can be a tolerable life for some people.[138]

She argues that these purported distinctions are illusory and ideological, functioning to make an activity that structurally subordinates women more socially tolerable.[139] Other scholars specifically question the effectiveness of policies that treat adult prostitution differently from child prostitution. Coy argues that: "[p]olicy approaches that presume a distinct market for the purchase of girls' bodies for sex from that of adult women's are blinkered to the myriad of connections that span the age of majority."[140] O'Hara adds that the commercial sexual exploitation of children is an integral part of the wider sex trade and when the exchange of sexual services for compensation by adults is understood as socially acceptable or inevitable, children will be recruited.[141]

Publishing, 2013) 177 at 190 (where the authors describe this as the privatization of risk, consistent with neoliberal principles); Raymond, *supra* note 44 at 15.

[138] Catherine A MacKinnon, "Trafficking, Prostitution and Inequality" (2011) 46:2 Harv CR-CLL Rev 271 at 272 [MacKinnon].

[139] *Ibid* at 306–07.

[140] Maddy Coy, "Joining the Dots on Sexual Exploitation of Children and Women: A Way Forward for UK Policy Responses" (2016) 36:4 Critical Soc Policy 572 at 587 (where the author argues that we must see prostitution as a social institution that reflects and reproduces inequality between the sexes).

[141] Maureen O'Hara, "Making Pimps and Sex Buyers Visible: Recognising the Commercial Nexus in 'Child Sexual Exploitation'" (2019) 39:1 Critical Soc Policy 108 at 121.

In the late 1970s, sex workers' rights organizations began to actively advocate for the decriminalization of prostitution.[142] The removal of criminal offences specifically targeting prostitution became integral to the sex workers' rights movement in Canada as well.[143] Sex worker run advocacy organizations emerged in Canadian cities in the 1970s and 1980s denouncing criminalization, stigmatization, harassment, and violence.[144] In 1983, the Government of Canada established a Special Committee on Pornography and Prostitution to study the problems associated with pornography and prostitution and to conduct related

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[142] Jenness, "From Sex as Sin", *supra* note 122 at 409–10. See also Gail Pheterson, *A Vindication of the Rights of Whores* (Seattle: Seal Press, 1989) at xix (where the author identifies that Jennifer James, a professor of anthropology in Seattle, coined the word "decriminalization").

[143] Emily van der Meulen, "When Sex is Work: Organizing for Labour Rights and Protections" (2012) 69 Labour 147 at 154.

[144] Sarah Beer & Francine Tremblay, "Sex Workers' Rights Organizations and Government Funding in Canada" in Carisa R Showden & Samantha Majic, eds, *Negotiating Sex Work: Unintended Consequences of Policy and Activism* (Minneapolis: University of Minnesota Press, 2014) 287 at 287. Sex workers' rights activists began to organize community-based initiatives in Vancouver in the 1980s and since that time more than twenty-six sex workers rights groups have formed, see Joyce Arthur, Susan Davis & Esther Shannon, "Overcoming Challenges: Vancouver's Sex Worker Movement" in Emily van der Meulen & Elya M Durisin, eds, *Selling Sex: Experience, Advocacy, and Research on Sex Work in Canada* (Vancouver: UBC Press, 2013) 130 at 144 (for a discussion of the sex worker movement in Vancouver). Similar organizations have also formed in other Canadian cities, and in 2012 the Canadian Alliance for Sex Work Law Reform was formed. The Canadian Alliance for Sex Work Law Reform is made of "sex worker led and allied organizations" across Canada (28 at the time of writing this article), see Canadian Alliance for Sex Work Law Reform, "Member Groups," online: *Sex Work Law Reform* <sexworklaw reform.com/about us/member-groups/>; Global Alliance Against Traffic in Women, *Sex Workers Organising for Change: Self-Representation, Community Mobilisation and Working Conditions* (Bangkok: GAATW, 2018) at 189–90 ("[t]he Alliance started as a small group of sex worker activists who came together to organise around the *Bedford* case as it was going through the courts between 2009 and 2012."); Anna-Louise Crago & Jenn Clamen, "Né dans le Redlight: The Sex Workers' Movement in Montreal" in Emily van der Meulen & Elya M Durisin, eds, *Selling Sex: Experience, Advocacy, and Research on Sex Work in Canada* (Vancouver: UBC Press, 2013) 147 at 151 (where the authors identify that leadership and focus on street issues remains entrenched in Montreal through the organization Stella). See also Gayle MacDonald et al, "Stepping All Over the Stones: Negotiating Feminism and Harm Reduction in Halifax" in Emily van der Meulen & Elya M Durisin, eds, *Selling Sex: Experience, Advocacy, and Research on Sex Work in Canada* (Vancouver: UBC Press, 2013) 165.

socio-legal research.[145] In its report, the committee identified a divide in Canada between a desire to curtail street prostitution and a push towards decriminalization to decrease the negative effects of existing laws on prostitutes. Ultimately, the committee recommended removing specific prostitution related activities from the *Criminal Code*.[146] While this recommendation was not implemented, the report became a blueprint used by sex workers in Canada in formulating legal strategies.[147] Subsequent Parliamentary reports highlight how this proposal about the appropriate role of criminal law in prostitution has been contested.[148]

As with most aspects of this debate, claims about the appropriateness and effectiveness of decriminalization are contested.[149] Decriminalization efforts focus on the removal of all criminal sanctions directly targeting the activity of prostitution, in part on the basis that existing criminal and private laws already respond to what MacKinnon refers to as "the more problematic examples of prostitution".[150] This raises a number of potential concerns. First, it relies on accepting the normative claim that such examples represent the only problematic ways in which prostitution occurs to which criminal law ought to respond.[151]

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[145] Canada, Department of Justice, *Pornography and Prostitution in Canada: Report of the Special Committee on Pornography and Prostitution*, vol 2 (Ottawa: Department of Justice, 1985).

[146] *Ibid* at 534.

[147] Beer, *supra* note 26 at 24.

[148] *Challenge of Change, supra* note 93 (where the committee members of a Parliamentary Subcommittee on Solicitation Laws were unable to agree on the appropriate legislative approach). See also House of Commons, Standing Committee on the Status of Women, *Turning Outrage into Action to Address Trafficking for the Purpose of Sexual Exploitation in Canada* (February 2007) (Chair: Yasmin Ratansi) [*Turning Outrage into Action*] (where the Standing Committee on the Status of Women recommended adopting an abolitionist approach to prostitution).

[149] Evaluating the appropriateness or effectiveness of legislative approaches to prostitution and sex work rests largely on what is understood as problematic or harmful to begin with. Recently, economists have begun to develop economic models to examine the effects of prostitution policies, see e.g. Giovanni Immordino & F F Russo, "Prostitution Policy" in Scott Cunningham & Manisha Shah, *The Oxford Handbook of the Economics of Prostitution* (New York: Oxford University Press, 2016) 332 at 332–33.

[150] See e.g. Amnesty International, *supra* note 11 at 21.

[151] This discounts any arguments about the harms of prostitution on a structural basis.

Second, it has the effect of placing primary or sole responsibility for harm avoidance on the individuals who engage in prostitution.[152] Third, it presumes that existing public and private laws would adequately respond to any other harms (including those associated with non-consensual or coerced participation in prostitution).[153] Finally, whether or not decriminalization makes sex work safer, and for whom it makes prostitution safer, is also contested.[154]

The problems associated with the exchange of sexual acts for compensation, and the effectiveness of laws in responding to or exacerbating those problems,[155] are researched largely from within one or the other ideological framing. The assessment of whether a law is responsive or effective in reducing harm depends largely on what counts as harm and whose harm is counted.[156] Better attending to how the term "sex work" is used and defined has the potential to allow policy makers and legal decision makers evaluating legal interventions to meaningfully contend with this concern.

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[152] O'Connor, *supra* note 135 at 14–15. In part due to the lack of conceptual clarity around the word prostitution and the term sex work, there is to date a lack of empirical evidence about how and whether all prostitution participants are equally able to employ measures to reduce their risks of experiencing harm.

[153] To date, there is no scholarly work in Canada that focuses directly on the question of how substantive and procedural criminal and contract laws applicable to the commercial exchange of sexual acts for compensation, for example, would function following removal of prostitution-specific criminal sanctions.

[154] See e.g. Scott Cunningham & Manisha Shah, "Decriminalizing Indoor Prostitution: Implications for Sexual Violence and Public Health" (2018) 85:3 Rev Economic Studies 1683 at 1684 (where the authors suggest that decriminalization increases the indoor market but decreases prices, and reduces sexual violence and improves public health outcomes). See also Seo-Young Cho, Axel Dreher & Eric Neumayer, "Does Legalized Prostitution Increase Human Trafficking?" (2012) 41 World Development 67 at 68 (where the authors conclude that where prostitution is legal, there are larger human trafficking inflows).

[155] The effectiveness of the abolitionist approaches to prostitution is also contested. For a critical discussion of the impact of criminalizing the purchase of sex see e.g. Amnesty International, *supra* note 11 at 16–19.

[156] Mariana Valverde, "The Harms of Sex and the Risks of Breasts: Obscenity and Indecency in Canadian Law" (1999) 8:2 Soc & Leg Studies 181 at 187 (where the author identifies that harm can mean many things and that harm-based approaches can have different rationales and produce different effects).

b. Defining "Sex Work"

The term "sex work" was incepted as a political term: "[t]he use of the term 'sex work' signifies a self-conscious effort by advocates and self-identified sex workers to recast people selling sexual services as workers organising for the rights and protections afforded workers in any other context, including the right to be free from violence and bodily harm in the workplace."[157]

The Global Network of Sex Work Projects, an international membership organization advocating for the rights of sex workers, identifies: "Our use of the term sex work … is purposeful and political and speaks to our solidarity across working contexts."[158] The terms "sex work" and "sex worker" were coined by sex workers themselves,[159] and the political movement is focused on the identity of sex worker.[160]

The term "sex work" is not consistently defined or used in scholarly or non-scholarly literature. However, three seller characteristics increasingly qualify the term "sex work" as used in scholarly and non-scholarly works and begin to flesh out its descriptive character. First, "sex work" is usually used to refer only to sexual acts undertaken by adults. Second, the term "sex work" is almost always distinguished from human trafficking or circumstances in which participation in prostitution is coerced. Finally, consent is increasingly used in definitions of "sex work". Each of these defining characteristics is discussed

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[157] Svati P Shah, "Prostitution, Sex Work and Violence: Discursive and Political Contexts on Paid Sex, 1987–2001" (2004) 16:3 Gender & Hist 794 at 795.

[158] NSWP, "Consensus Statement on Sex Work, Human Rights, and the Law" (2013), n 1, online (pdf): *NSWP* < www.nswp.org/resource/nswp- consensus-statement- sex-work-human-rig hts-and-the-law>.

[159] The term sex work is attributed to Carol Leigh (Scarlot Harlot) in 1978. See Emily van der Meulen, Elya M Durisin & Victoria Love, "Introduction" in Emily van der Muelen & Elya M Durisin, eds, *Selling Sex: Experience, Advocacy, and Research on Sex Work in Canada* (Vancouver: UBC Press, 2013) 1 at 17 [Van der Meulen, Durisin & Love]. See also Leigh *supra*, note 129 at 225 (where the author asserts "I invented sex work. Not the activity, of course. The term" at 225. See also the author's engagement with the sex workers' rights movement).

[160] Van der Meulen, Durisin & Love, *supra* note 159 at 2 (where the authors note that the language of sex work and sex workers is "a critical framework through which sex workers articulate their realities").

below, revealing "sex work" as distinct from "prostitution" and establishing "sex workers" as a subset of those who engage in the activity legally defined as prostitution.

The term "sex work" has been defined and used in two recent texts promoting decriminalization using the qualifying characteristics of adults, who consent, and who have not been forced or coerced by a third party. In 2016, Amnesty International ("Amnesty") adopted a policy calling for "the decriminalization of all aspects of adult consensual sex work." [161] Around the same time, in Canada, Pivot recommended repealing "all criminal laws that prohibit the purchase or sale of sexual services by adults and that limit adults selling sex from working with others in non-coercive situations."[162]

Both Amnesty and Pivot describe "sex work" as an activity engaged in by adults who consent. They define "sex work" as "the exchange of sexual services (involving sexual acts) between consenting adults for some form of remuneration, with the terms agreed between the seller and the buyer."[163] Amnesty defines "consent" as "the voluntary and ongoing agreement to engage in a particular activity" and uses "consent" as a factor to distinguish "sex work" from "human trafficking", "sexual exploitation", "sexual violence", and "gender-based violence".[164] Pivot identifies "consent" as a principal tenet of

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[161] Amnesty International, *supra* note 11 at 2; Amnesty set out states' obligations to "respect, protect, and fulfil the human rights of sex workers" and detailed state actions that Amnesty believed would "best address the barriers that sex workers routinely face in realizing their rights." Amnesty further noted: "This policy is grounded in the principles of harm reduction, gender equality, recognition of the personal agency of sex workers, and general international human rights principles." To protect the human rights of sex workers, Amnesty considered it necessary to: (a) repeal laws criminalizing the sale of sex; (b) repeal laws criminalizing the buying of sex from consenting adults; and (c) repeal laws criminalizing the organization of sex work. Amnesty took no position on whether and how sex work should potentially be regulated.

[162] Pivot Report, *supra* note 11 at 4, 6, 75 (Pivot argued that the *PCEPA* is unconstitutional and made recommendations aimed at "creating laws that respect and promote the human rights of sex workers" and "creat[ing] a safer sex industry").

[163] Amnesty International, *supra* note 11 at 3; Pivot Report, *supra* note 11 at 9. Sex workers are defined by Amnesty as adults aged 18 and older who "receive money or goods for the consensual provision of sexual services, either regularly or occasionally." Pivot refers to sex workers as "people who earn income through exchanging sex".

[164] Amnesty International, *supra* note 11 at 15, 28.

Canadian sexual assault law, noting that "consent" must be voluntary and affirmative, can never be assumed or given on behalf of another person, and may be withdrawn at any time.[165] Amnesty identifies that if consent is not voluntary and ongoing, the sexual activity constitutes rape and is a human rights abuse that must be treated as a criminal offence.[166] Amnesty identifies that consent analysis needs to be situated in the broader understanding of individual autonomy.[167]

Both Amnesty and Pivot also distinguish "sex work" from "human trafficking".[168] Pivot states plainly that "[s]ex work (the consensual exchange of sexual services for money) is not trafficking."[169] Amnesty's position, however, is somewhat less concise. Amnesty uses "consent" to distinguish "sex work" from "human trafficking", "sexual exploitation", "sexual violence", and "gender-based violence".[170] Amnesty states that "where consent is absent for reasons including threat or use of force, deception, fraud, and abuse of power or involvement of a child, such activity would constitute a human rights abuse which must be treated as a criminal offence."[171]

Some scholars disagree with the proposition that trafficking would necessarily negate consent, specifying that victims of trafficking who have been forced or coerced can nonetheless consent.[172] Concerns over the utility of criminal sanctions targeting only the absence of consent is heightened in circumstances where a purchaser has no knowledge of the trafficking or coercion: "[t]he single biggest moral obstacle to prosecution lies in the objection that the users of trafficked prostitutes should not be prosecuted for unwittingly

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[165] Pivot Report, *supra* note 11 at 50.
[166] See Amnesty International, *supra* note 11 at 26–28 (for Amnesty's position on consent, coercion and autonomy).
[167] *Ibid* at 26.
[168] The terms human trafficking is also used in a variety of ways that do not always align with legal definitions, see generally Dempsey, *supra* note 15.
[169] Pivot Report, *supra* note 11 at 75.
[170] Amnesty International, *supra* note 11 at 15, 26–28.
[171] *Ibid* at 4, 26.
[172] See e.g. Dempsey, *supra* note 15 at 66.

using women they do not know to be coerced into prostitution."[173] In Canada, it is possible that those who purchase sex from someone who has been trafficked could avail themselves of the defence of honest but mistaken belief.

The term "sex work" is also sometimes used to refer to activities that fall outside of the legal definition of "prostitution" in Canada. For example, courts have held that pornography and stripping do not constitute "sexual services for consideration." [174] Ronald Weitzer notes that while "sex work" does involve the exchange of sexual services for material compensation, it also includes selling erotic performances or products. He suggests that "sex work" includes both acts of direct physical contact and "indirect stimulation" including pornography, stripping, telephone sex, live sex shows, and erotic webcam performances.[175] Showden suggests that there are many forms of "sex work" and that "prostitution" is the form of "sex work" that is illegal and the most stigmatized.[176] Lowman uses the words "prostitution" and "prostitute" to distinguish the "exchange of physical sexual services for reward" from other kinds of "sex work" and "sex worker".[177]

c. *Empirical Research about Sex Work in Canada*

Scholars and activists increasingly accept the privileging of sex workers and sex worker organizations in generating knowledge about sex work.[178] In Canada,

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[173] David Archard, "Criminalizing the Use of Trafficked Prostitutes: Some Philosophical Issues" in Vanessa E Munro & Marina Della Giusta, eds, *Demanding Sex: Critical Reflections on the Regulation of Prostitution* (Abingdon: Ashgate, 2008) 149 at 151.

[174] See e.g. *Technical Paper*, *supra* note 71 at 5 (for a discussion of how courts have interpreted "sexual services for consideration").

[175] Ronald Weitzer, *Legalizing Prostitution: From Illicit Vice to Lawful Business* (New York: New York University Press, 2012) at 3.

[176] Showden, *supra* note 22 at 135–37.

[177] John Lowman, "Crown Expert-Witness Testimony in *Bedford v Canada*: Evidence-Based Arguments or Victim-Paradigm Hyperbole?" in Emily van der Muelen & Elya M Durisin, eds, *Selling Sex* (Vancouver: UBC Press, 2013) 230 at 246, n 1.

[178] See e.g. Lorraine Nencel, "Epistemologically Privileging the Sex Worker" in Marlene Spanger & May-Len Skilbrei, eds, *Prostitution Research in Context: Methodology, Representation and Power* (New York: Routledge, 2017) 67. See also Marlene Spanger & May-Len Skilbrei, "Exploring Sex for Sale: Methodological Concerns" in Marlene Spanger &

there has been a growing movement to ensure sex workers play a role in law, policy, and social reform around sex work because of their unique insight and experience.[179] As a result, there is a growing body of scholarly and community based empirical research about sex work in Canada, focused on "what adult sex workers themselves say about their lives."[180]

Almost all the empirical work about prostitution in Canada now uses the term "sex worker", usually without defining either "sex work" or "sex workers". "Sex work" is used but not defined in some studies.[181] In other studies, it is defined simply as the exchange of sex for money,[182] or used interchangeably with "prostitution".[183]

Where the term "sex work" is used in studies but not defined, or used interchangeably with the word "prostitution", attending to subject characteristics helps identify whose subject positions are and are not accounted for. Most recent studies conducted about sex work in Canada consider only adults.[184] Most

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May-Len Skilbrei, eds, *Prostitution Research in Context: Methodology, Representation and Power* (New York: Routledge, 2017) 1; Carol Harrington, "Collaborative Research with Sex Workers" in Marlene Spanger & May-Len Skilbrei, in Marlene Spanger & May-Len Skilbrei, eds, *Prostitution Research in Context: Methodology, Representation and Power* (New York: Routledge, 2017) 85.

[179] See e.g. Shari Allinott et al, *Voices for Dignity: A Call to End the Harms Caused by Canada's Sex Trade Laws* (Vancouver: Pivot Legal Society, 2004); Mary Childs et al, *Beyond Decriminalization: Sex Work, Human Rights and a New Framework for Law Reform* (Vancouver: Pivot Legal Society, 2006); Pivot Report, *supra* note 11.

[180] Chris Bruckert & Frédérique Chabot, "Challenges: Ottawa Area Sex Workers Speak Out" (December 2010) at 7, online (pdf): *Rainbow Health Ontario* <www.rainbowhealthontario.ca/wp-content/uploads /woocommerce _uploads/2014/ 08/POWER_Report_Challenges.Pdf> [Bruckert & Chabot].

[181] See e.g. Putu Duff et al, "Pregnancy Intentions Among Female Sex Workers: Recognising their Rights and Wants as Mothers" (2015) 41 J Family Planning & Reproductive Health Care 102 at 103 (where the study considered females who had exchanged sex for money within the preceding month).

[182] See e.g. A Krüsi et al, "Criminalization of Clients: Reproducing Vulnerabilities for Violence and Poor Health Among Street-Based Sex Workers in Canada — A Qualitative Study" (2014) 4:6 BMJ Open 1 at 4 (in a study where the participants were adults ranging in age from 24–53).

[183] See e.g. Benoit, "Prostitution Stigma", *supra* note 41 at 457 (where the authors refer to both prostitution and sex work as "payment for the exchange of sexual services").

[184] See e.g. Vicky Bungay, John Oliffe & Chris Atchison, "Addressing Underrepresentation in Sex Work Research: Reflections on Designing a Purposeful Sampling Strategy" (2016) 26:7

scholarly empirical work is also limited to subjects who are legally able to work in Canada.[185] In a study described as the "largest research project in Canada examining sex work and prostitution law,"[186] the sample of 218 participants included the following characteristics:

> Recruitment criteria for participating in the sex worker study included being 19 years of age or older,[187] being legally able to work in Canada and having received money in exchange for sexual services on at least 15 different occasions in the last 12 months. Sexual services were defined as including, necessarily but not exclusively, direct physical contact between the worker and a client.[188]

Qualitative Health Research 966 at 967; Benoit, "Sex Workers' Views", *supra* note 43; Benoit, "Would you Think", *supra* note 41.

[185] Although at least one community-based study focuses on issues faced by migrant sex workers, see e.g. Migrant Sex Workers Project, online: *Migrant Sex Workers* <www.migrantsexworkers.com>. See also Elene Lam, *Behind the Rescue: How Anti-Trafficking Investigations and Policies Harm Migrant Sex Workers* (Toronto: Butterfly Print, 2018) (for the stories of 18 migrant sex workers).

[186] Canadian Institute of Health Research, *supra* note 41. Cecilia Benoit, the lead researcher on this project, has been awarded a $225,000 fellowship by the Pierre Elliott Trudeau Foundation for her project, "Beyond the 'Missing Women Inquiry': Empowering Sex Workers as Social Justice Advocates," see University of Victoria, "Trudeau Fellow to Help Sex Workers Become Social Justice Advocates" (26 June 2018), online: *University of Victoria* <www.uvic.ca/news/topics/2018+trudeau-fellow-cecelia-benoit+media-release>.

[187] Empirical work about experiences of adult sex workers in Canada often includes subjects who are 19 or older, while the existing criminal offences in Canada distinguish adult from child prostitution where the adult offence applies to purchases from a seller who is 18 or older. This means that evidence is lacking about an important adult age demographic when considering removal of the existing adult sanctions. For the reasons discussed above, it is also important to recognize characteristics of study participants that tend toward evidence only about the examples of prostitution MacKinnon suggests are characterized as less problematic, see MacKinnon, *supra* note 140.

[188] Benoit, "Sex Work and Three Dimensions", *supra* note 41 at 71; See also Benoit, "Would you Think" *supra* note 41 at 5 (where the authors suggest that the "age threshold was chosen out of interest in recruiting participants who would be subject to potential conviction as adults under the criminal code. The work frequency threshold was determined to only include those who engaged in sex work on at least a part-time regular basis"). See also Benoit, "Sex Workers' Views", *supra* note 43 at 6.

Attending to the activities included as "sex work" is also important in evaluating whether that activity is likely to fall within the legal definition of "prostitution" or "sexual services for consideration" in Canada.[189]

V. RE(DE)FINING PROSTITUTION AND SEX WORK

Conceptual clarity around the word "prostitution" and the term "sex work" is essential in evaluating the constitutionality and effectiveness of Canada's existing prostitution laws and considering potential policy alternatives. It also more clearly identifies differently situated stakeholders and the problems to which they suggest law and policy ought to respond.

The activity of exchanging sexual services for consideration has been legally defined in Canada as "prostitution", and prostitution is now illegal in Canada. Canada's current criminal laws applicable to prostitution govern the activity of prostitution whenever and however it occurs. The new legislative regime would apply to include every circumstance in which sexual services are exchanged for consideration. This would include situations in which sexual services are exchanged for consideration in the absence of consent or in circumstances that would also qualify as human trafficking.[190] Indeed, an intention to directly address human trafficking informed the new legislative scheme.[191] In a 2007 Report, the House of Commons Standing Committee on the Status of Women recommended that Canada implement legislation targeting

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[189] See e.g. Bruckert & Chabot, *supra* note 180 at 9 (where the subject sex workers included exotic dancers, who likely do not fit within the definition of prostitution of sexual services for consideration).

[190] *Criminal Code*, *supra* note 1, s 286.1 (this applies to the obtaining of sexual services for compensation).

[191] See e.g. *Technical Paper*, *supra* note 71 at 4 ("[c]ommercial enterprises in which prostitution takes place … create opportunities for human trafficking for sexual exploitation to flourish"). See also *Technical Paper*, *supra* note 71 at 12 ("in April 2014, the Council of Europe recommended that member and observer states, which includes Canada, consider criminalizing the purchase of sexual services, as the most effective tool for preventing and combating human trafficking").

the demand for prostitution in an effort to combat trafficking in human beings,[192] which has been described as a supply system for prostitution.[193]

The term "sex work" is used to refer to the activity of prostitution when undertaken by a subset of prostitution participants, and often to activities falling outside of the legal definition of prostitution. From its inception, the term "sex work" has sought to exclude anyone who has been forced to exchange sexual services for compensation. One of the political aims of the sex workers' rights movement is to distinguish "sex work" from "human trafficking". Recent definitions in community based and scholarly work further circumscribe which prostitution participants are included in rights' claims and in empirical work.[194] Empirical work about sex work sometimes includes evidence about examples of sex work that would fall outside of the legal definition of "prostitution", including for example exotic dancing or webcam performances.

Calls for the removal of all criminal sanctions directly aimed at adult prostitution and challenges to the constitutionality of Canada's existing criminal prostitution laws are grounded in claims about the effects of those laws on sex

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[192] *Turning Outrage into Action, supra* note 148 at 12–16.

[193] Sheila Jeffreys, *The Industrial Vagina: The Political Economy of the Global Sex Trade* (Abingdon: Routledge, 2009) at 153–55.

[194] Not all prostitution participants who might it a descriptive definition of sex work bearing these characteristics agree with the normative claim that the activity be understood or treated as work, or with the political goal of decriminalization. Some adults, for example, identify as survivors. While having engaged in the activity Amnesty defines as sex work, those who identify as survivors rather than sex workers tend to promote abolition of prostitution rather than decriminalization. Both Amnesty and Pivot acknowledge that "not everyone who sells or trades sex identifies as a sex worker": Amnesty International, *supra* note 11 at 3–4; Pivot Report, *supra* note 11 at 9. For perspectives of those who instead identify as prostituted women and survivors of exploitation, see e.g. Rachel Moran, *Paid For: My Journey Through Prostitution* (New York: WW Norton, 2015); Caroline Norma & Melinda Tankard Reist, eds, *Prostitution Narratives: Stories of Survival in the Sex Trade* (Victoria: Spinifex Press, 2016); Julie Bindel, *The Pimping of Prostitution: Abolishing the Sex Work Myth* (London, UK: Palgrave MacMillan, 2017). See also Raymond, *supra* note 44 at xliii (where the author argues that sex workers be distinguished from survivors on the basis that the former advocate for the sex industry while the latter struggle against it); SPACE International "Home Page", online: *SPACE International* <www.spaceintl.org> (SPACE International is an international organization formed to "give voice to women who have survived the abusive reality of prostitution").

workers. The current challenge to three of the new criminal laws applicable to adult prostitution is founded on the contention that the impugned provisions violate the rights of "escorts and other sex workers."[195] While no escort or other sex worker is a party to the proceeding,[196] and the pleadings disclose no definition of "escorts and other sex workers," counsel for the accused has suggested that evidence about exploitation is not relevant,[197] thereby seeking to exclude evidence about the experiences of some prostitution participants. However, in light of the legislative objectives of the new legislative provisions, the interests of everyone who exchanges sexual services for consideration as well as Canadian society at large (and women and girls in Canada in particular) should inform any eventual decision about constitutionality.[198] Understanding how the word "prostitution" and term "sex work" are defined and used has significant implications for assessing whose experiences are and are not reflected in argument and in evidence, and for evaluating what is known or not known about those experiences.[199] Where a court is asked to review existing laws applicable to the activity of prostitution on the basis that they violate the rights of a subset of prostitution participants, a clear appreciation of whose interests are implicated in the new legislative regime and how those interests intersect and conflict with the interests of the (potentially hypothetical) sex workers in the case should underpin any eventual decision. A clear and nuanced

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[195] *Anwar*, *supra* note 7 (Notice of Application Re: Constitutionality of SS.286.2, 286.3 and 286.4 of the *Criminal Code* at p 2).

[196] The applicants, owners of an escort agency, adduced legislative fact evidence from two expert witnesses about the effect or potential effect of the new criminal provisions on adults 19 years of age or older; legally able to work in Canada; and who had not been trafficked or coerced by a third party into exchanging sexual services for payment. See *Anwar*, *supra* note 7 (Transcript of Chris Atchison and Andrea Sterling). The applicants had originally been charged under trafficking offences but those charges were dropped concurrent with the agreement to proceed with a pretrial application to determine constitutionality.

[197] See *Anwar*, *supra* note 7 (Transcript of Maddy Coy).

[198] The courts in Bedford did not consider the question of how a court should respond to a challenge of impugned laws that in some respects operate in a constitutionally proper manner and in other respects violate the rights of some who are affected by the legislation, see Alan N Young, "Proving a Violation: Rhetoric, Research and Remedy" (2014) 67 SCLR (2d) 617 at 618.

[199] Dempsey, *supra* note 15 at 63.

understanding of whose interests and rights are and are not reflected in empirical research and evidence about sex workers and in arguments about sex workers' rights will be required.

Beyond the implications for existing or future constitutional challenges, conceptual clarity around the word "prostitution" and the term "sex work" has the potential to move discourse away from the master narratives currently employed in existing debates about the commercial exchange of sexual acts[200] to permit a more nuanced evaluation of the problems associated with both prostitution and sex work,[201] and bring to question how the law should, could, or may respond to them.[202] For example, understanding "prostitution" as an activity and "sex work" as that activity (and others) when engaged in under certain conditions would help to alleviate claims that "sex work" is conflated or equated with "human trafficking".[203] It would permit legal decision makers to

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[200] See Vanessa Munro, *Law and Politics at the Perimeter Re-evaluating Key Debates in Feminist Theory* (Portland, Oregon: Hart Publishing, 2007) at 35–39 (where the author argues that postmodern approaches to feminism recognize that no one narrative fits the experience of every woman and, as such, master narratives are not sufficient or relevant). See also Munro & Della Giusta, *supra* note 31 at 6 (where the authors identify the need to move beyond polarized perspectives about the commercial exchange of sex, especially "when presented as an abstract position that claims universal applicability to all women and all commercial sex").

[201] Lise Gotell, "Litigating Feminist 'Truth': An Antifoundational Critique" (1995) 4:1 Soc & Leg Stud 99 at 123. See also Carson & Edwards, *supra* note 126 at 76. Recent work in feminist discourse theory identifies that "as researchers we have work to do in ensuring that we do not simply buy into certain problem representations without reflecting on their origins, purposes and effects." See also Josefina Erikson, "The Various Problems of Prostitution — A Dynamic Frame Analysis of Swedish Prostitution Policy" in Maddy Coy, ed, *Prostitution, Harm and Gender Inequality: Theory, Research and Policy* (Abingdon: Ashgate Publishing, 2012) 159 at 160 (where the author uses the example of the Swedish prostitution policy to show how disagreements over the problem of prostitution make some solutions desirable and others unlikely).

[202] See Munro & Giusta, *supra* note 31 at 4 (where the authors characterize the policy challenges as "ideological disagreements over whether to respond to the individual experience of involvement in prostitution or the structural significance of men's commodification and consumption of female sexuality"); Vermeulen & Peršak, *supra* note 35 at 315 (where the authors identify the "paralysing dichotomy between interpretations of the prostitution phenomenon through opposed normative or moral values and opinions" and challenge this "flawed research tradition").

[203] See Pivot Report, *supra* note 11 at 65–74 (where the authors discuss distinctions between sex work and trafficking, including policy).

more directly contend with questions about whether or how the law might or ought to respond differently to different instantiations of prostitution.[204] It also has the potential to ground more nuanced theoretical and empirical research that might better account for the experiences of all prostitution participants and the effect of prostitution and prostitution policies on them, as well as on the communities in which they live, and society at large.

VI. CONCLUSION

Constructing a legislative model at the intersection of choice and inequality may be one of the great challenges now facing those tasked with legal responses to the problems associated with the commercial exchange of sex. Constitutional challenges to Canada's current legislative approach to prostitution will need to contend with the competing subject positions of differently situated vulnerable and marginalized individuals and groups, and differing conceptions of equality, security of the person, and dignity.[205] Removing all criminal sanctions directly applicable to adult prostitution and placing responsibility for the consequences of participation in prostitution on each individual seller may not reduce the harm or potential for harm for all who sell or are sold, or increase the wellbeing of all women and girls.[206] Legal decision makers should pay close attention to whose interests and experiences are and are not reflected in empirical research and in legal arguments incorporating rights claims.[207] As Raymond notes: "[t]he legal

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[204] This is perhaps the most important question, and one that certainly bears further consideration. Is it possible to respond to both the problems of prostitution and the problems of sex work without choosing as between them and the policy interventions now proposed?

[205] Indeed, a *Charter* challenge may not be the best place to meaningfully contend with complex issues involving multiple stakeholders with potentially competing interests and rights claims.

[206] In this article, I have focussed on the equality concerns of women and girls. These are the equality concerns that undergird Canada's new prostitution laws. Men, boys, and transgender individuals also exchange sexual services for consideration in Canada. While I have not addressed concerns specific to them here, the conceptual clarity I recommend could better contend with their individual and structural concerns about prostitution and sex work and reflect their unique experiences.

[207] Empirical investigation into the impact of the PCEPA will be relevant to Parliament's eventual review of Canada's prostitution policy and to future Constitutional challenges. There

status of prostitution is essentially an ethical and political inquiry and cannot be solved by reducing it to a pragmatic and economic calculus that is value-neutral."[208] Brison adds: "… we need to consider whether one woman's liberating (and lucrative) insurrectionary act may contribute to another's victimization and, if so, how such conflicts ought to be addressed."[209] Attending to how the word "prostitution" and the term "sex work" are used and defined is an essential first step on the path towards resolving such conflicts.

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are significant limitations on evidence about the effectiveness of policy addressing the commercial exchange of sex. A Scottish Government report recently suggested that "evidence on interventions in this area does not, on its own, provide an independent source for the determination of policy and/or legislation". See Margaret Malloch, Laura Robertson & Emma Forbes, *Evidence Assessment of the Impacts of the Criminalisation of the Purchase of Sex: A Review* (Edinburgh: The Scottish Government, 2017) at 2. See generally Eileen Munro, "Evidence-Based Policy" in Nancy Cartwright and Eleonora Montuschi, eds, *Philosophy of Social Science: A New Introduction* (Oxford: Oxford University Press, 2015) 48 (where the author discusses the limits of empirical research on policy making).

[208] Raymond, *supra* note 44 at 18.

[209] Susan J Brison, "Contentious Freedom: Sex Work and Social Construction" (2006) 21:4 Hypatia 192 at 199. See also Margaret Jane Radin, *Contested Commodities* (Cambridge: Harvard University Press, 1996) at 123–30 (for a discussion of what the author calls the double bind where both commodification and noncommodification may be harmful).