

PLAYING THE VICTIM: A CRITICAL ANALYSIS OF CANADA'S BILL C-36 FROM AN INTERNATIONAL HUMAN RIGHTS PERSPECTIVE

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This article analyses the recent legislative reforms regulating the Canadian sex industry, Bill C-36, the Protection of Communities and Exploited Persons Act. Bill C-36 has been described as an 'abolitionist' approach to sex work, drawing heavily from the 'Nordic model' which is increasingly being adopted across the globe. This 'abolitionist' approach rests on the radical feminist perspective of sex work as inherently exploitative, and accordingly, seeks to re-focus criminal measures solely on the demand-side of the transaction. This article examines the foreseeable impact of the abolitionist perspective enshrined in Bill C-36 on the lives of domestic Canadian sex workers, from an international human rights perspective, paying particular attention to the Convention on the Elimination of All Forms of Discrimination against Women.

CONTENTS

| | | |
|-----|---|----|
| I | Introduction..... | 2 |
| II | The Approach Taken by the Canadian Parliament in Bill C-36 | 6 |
| | A Background to Bill C-36..... | 6 |
| | 1 Bill C-36 and the <i>Bedford</i> Decision | 6 |
| | 2 The Canadian Missing Women Commission of Inquiry | 6 |
| | 3 A Brief History of Sex Work Governance in Canada | 7 |
| | B Bill C-36's Primary Influences..... | 8 |
| | 1 Bill C-36 and the Nordic Model..... | 8 |
| | 2 The Ideological Impact of Radical Feminism on Bill C-36 | 9 |
| | C Key Objectives of Bill C-36 and Likely Effects on the Sex Worker Population..... | 11 |
| | 1 Objective One: Reducing the Demand for Sexual Services..... | 11 |
| | (a) Effect 1: Disregarding the Experience of Sex Workers | 12 |
| | (b) Effect 2: Empirical Research on Client Criminalisation.... | 14 |
| | 2 Objective Two: Reducing Global Human Trafficking | 15 |
| | (a) Effect 1: The Construction of Sex Workers as 'Victims' .. | 17 |
| | 3 Objective Three: Reducing Violence within Sex Work..... | 20 |
| III | The Effect of Bill C-36 on the Human Rights of Sex Workers | 25 |
| | A Bill C-36 and International Human Rights Law..... | 25 |
| | 1 CEDAW Article 6..... | 25 |
| | 2 The CEDAW Committee and the Criminalisation of Sex Work ... | 27 |
| | (a) Criminalisation of Sex Workers: Recognised Human Rights Implications | 28 |
| | 3 Bill C-36 and CEDAW Article 5 | 30 |
| IV | Conclusion | 35 |

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Both of you have talked a number of times about how this is making it more dangerous for prostitutes. Of course, we don't want to make life safe for prostitutes; we want to do away with prostitution. That's the intent of the bill.¹

I INTRODUCTION

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

Characterised as an 'abolitionist' response to sex work, Bill C-36 criminalises the 'demand-side' of the transaction, with a view to abolishing the sex industry, drawing heavily from the 'Nordic model'.⁶ In this regard, the pure 'abolitionist' or Nordic model is distinguished from alternative modes of sex work governance in one fundamental respect; by focusing criminal measures solely on clients of

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

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

³ *A-G (Canada) v Bedford* [2013] 3 SCR 1101 ('*Bedford*'); Parliamentary Information and Research Service, 'Legislative Summary — Bill C-36: An Act to Amend the Criminal Code in Response to the Supreme Court of Canada Decision in *Attorney General of Canada v Bedford* and to Make Consequential Amendments to Other Acts' (Legislative Summary No 41-2-C36-E, Library of Parliament, Canada, 18 July 2014) 2. See also Sandra Ka Hon Chu and Rebecca Glass, 'Sex Work Law Reform in Canada: Considering Problems with the Nordic Model' (2013) 51 *Alberta Law Review* 101; Kamala Kempadoo and Jo Doezema (eds), *Global Sex Workers: Rights, Resistance and Redefinition* (Routledge, 1998) 9. I will use the phrase 'sex work' and 'sex worker' as far as possible throughout this paper because of the stigmatising effects of the word 'prostitute', and as a means to emphasise the importance of respecting sex workers' agency.

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

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

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

sex workers, rather than on sex workers themselves.⁷ The specific criminalisation of the ‘demand-side’ of the transaction within this abolitionist framework rests on two distinct strands of reasoning — a market-based theory of consumer ‘demand’, and anti-sex work arguments most commonly associated with radical feminism.⁸ As such, Bill C-36 is heavily premised on theories regarding the ‘inherently exploitative’ nature of sex work, which find their origins in radical feminism, and has been advanced as a legislative mechanism to enhance gender equality.⁹

This article seeks to assess the primary objectives of Bill C-36, in order to examine the ideological effect of radical feminism and abolitionism on the legislative regime, and Bill C-36’s impact on the human rights of Canadian sex workers. In essence, it is argued that the structural or abstract arguments underlying the legislative framework, which promote a totalising conception of the harms associated with sex work, obstruct Bill C-36’s ability to meaningfully address the human rights concerns facing Canadian sex workers.¹⁰ While the radical feminist views underlying Bill C-36 are useful in illuminating the common features, trends and power dynamics which subjugate women in society,¹¹ they promote a form of gender essentialism — a singular view of women¹² — which, when uncritically enshrined in law, limits and erodes the autonomy and decision-making capacity of women within sex work.¹³ The radical feminist views on which Bill C-36 is based deny the very notion of consensual sex work, thereby erasing the concept of ‘agency’ as it applies to sex workers, and preventing an appreciation of the diverse experiences of women

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

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

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

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

¹¹ *Ibid.*

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

¹³ Munro, above n 10, 237.

who choose to engage in sex work.¹⁴ This sets a foundation where Bill C-36 constructs the sex worker as categorically and universally a ‘victim’ of exploitation, positioning their ‘extraction’ from sex work as the only possible remedy, and thus ignoring the potential to enhance sex workers’ safety, and more generally improve the protection of human rights, from *within* the institution of sex work.¹⁵

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

This article is set out into two parts. Parts II(a) and (b) briefly outline the political background to Bill C-36 and its primary influences — the abolitionist or Nordic approach to sex work governance, founded on radical feminist views

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

¹⁵ Dianne Otto, ‘Making Sense of Zero Tolerance Policies in Peacekeeping Sexual Economies’ in Vanessa E Munro and Carl F Stychin (eds), *Sexuality and The Law: Feminist Engagements* (Routledge-Cavendish, 2007) 261; Belinda Cooper, ‘Prostitution: A Feminist Analysis’ (1989) 11 *Women’s Rights Law Reporter* 99, 105; Carole S Vance, ‘Innocence and Experience: Melodramatic Narratives of Sex Trafficking and Their Consequences for Law and Policy’ (2012) 2 *History of the Present* 200, 201; Tripti Tandon, Gabriel Armas-Cardona and Anand Grover, ‘Sex Work and Trafficking: Can Human Rights Lead Us Out of the Impasse?’ on *Perspectives* (21 October 2014) <<https://perma.cc/EW2U-P5FS>>.

¹⁶ See generally Dianne Otto, ‘International Human Rights Law: Towards Rethinking Sex/Gender Dualism and Asymmetry’ (Melbourne Legal Studies Research Paper No 620) <<https://perma.cc/M2Z4-B2SJ>>.

¹⁷ *Ibid*; Kapur, ‘Victimization Rhetoric’, above n 12, 5; Steffanie A Strathdee and Jennifer Butler, ‘Dispelling Myths About Sex Workers and HIV’ (2014) 385(9962) *Lancet* 4, 4–5.

¹⁸ *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981) (‘CEDAW’); Rikki Holtmaat, ‘The CEDAW: A Holistic Approach to Women’s Equality and Freedom’ in Anne Hellum and Henriette Sinding Aesen (eds), *Women’s Human Rights: CEDAW in International, Regional and National Law* (Cambridge, 2013) 95, 97.

concerning sex work.¹⁹ The subsequent focus of Part II(c) is to examine the Canadian Government's primary objectives in enacting Bill C-36, namely, to reduce demand for sexual services, curb global human trafficking and reduce violence in the sex industry.²⁰ Part II(c) contrasts these objectives with the counterintuitive effects produced by the Bill C-36 framework, including its inability to appreciate the structural catalysts for women engaging in sex work, its rigid categorisation of sex workers as victims and consequential misconceptions concerning the nature of violence against sex workers.²¹ Part III considers the impact of Bill C-36 from an international human rights lens, with a focus on *CEDAW*. Here it is argued that Bill C-36 is of concern to the human rights of sex workers in two distinct respects. First, the criminalisation of sex workers under Bill C-36 is likely to give rise to human rights violations in and of itself, drawing on research from Canada and Sweden.²² Second, the reconstruction of patronising stereotypes surrounding sex workers, within the gender-focused Bill C-36 framework, raises significant human rights concerns related to the stigmatisation of an already socially marginalised group.²³ In accordance with the work of the CEDAW Committee, this social stigmatisation has the capacity to aggravate vulnerability to violence and other harms faced by sex workers, in the context of Bill C-36.²⁴

¹⁹ Chris Bruckert, 'Protection of Communities and Exploited Persons Act: Misogynistic Law Making in Action' (2015) 30 *Canadian Journal of Law & Society* 1; Susanne Dodillet and Petra Östergren, 'The Swedish Sex Purchase Act: Claimed Success and Documented Effects' (Paper presented at Decriminalizing Prostitution and Beyond: Practical Experiences and Challenges, The Hague, 3–4 March 2011) 1; Jay Levy and Pye Jakobsson, 'Sweden's Abolitionist Discourse and Law: Effects on the Dynamics of Swedish Sex Work and on the Lives of Sweden's Sex Workers' (2014) 14 *Criminology & Criminal Justice* 593, 598.

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

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

²² See generally Bruckert, above n 19, 1; Dodillet and Östergren, above n 19, 1; Levy and Jakobsson, above n 19, 598.

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

²⁴ *General Recommendation No 19: Violence against Women*, contained in Committee on the Elimination of All Forms of Discrimination against Women, *Report of the Eleventh Session*, UN GAOR, 47th sess, Supp No 38, UN Doc A/47/38 (1993) 3 ('*General Recommendation 19*'); Amnesty International, 'Draft Policy on Sex Work' (ICM Circular, No 18, Amnesty International, 7 July 2015) 4.

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

A Background to Bill C-36

1 *Bill C-36 and the Bedford Decision*

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

2 *The Canadian Missing Women Commission of Inquiry*

The decision in *Bedford* arose in the context of increasing political concern over the safety of Canadian sex workers, following intense public criticism of the Vancouver Police Department’s (‘VPD’) handling of the Robert Pickton investigation.²⁹ Pickton, a wealthy farmer of British Columbia, was convicted in 2007 for the murder of six women and charged with the death of an additional 20 women, charges that were eventually stayed by the Crown in 2010.³⁰ The common traits of the victims in this harrowing case, who were predominantly female sex workers operating in the Downtown Eastside of Vancouver (‘DTES’), many of whom were also facing extreme poverty and homelessness,³¹ helped spur public and political momentum towards addressing the safety of sex workers. Outrage over the perceived mismanagement of the Pickton investigation by the VPD also drew public attention to the institutionalised neglect faced by sex workers when enforcing their legal rights and led to the VPD taking the unusual step of publicly apologising to the victims’ families for its conduct.³²

Given the significance of this case in exposing the harms faced by (particularly vulnerable) sex workers in Canada, combined with the inertia of law enforcement and judicial functions from the perspective of the victims’ families, there was a compelling need to publicly re-examine the circumstances which

²⁵ *Bedford* [2013] 3 SCR 1101; Parliamentary Information and Research Service, above n 3, 2; Ka Hon Chu and Glass, above n 3, 101; Kempadoo and Doezema, above n 3, 9; Angela Campbell, ‘Sex Work’s Governance: Stuff and Nuisance’ (2015) 23 *Feminist Legal Studies* 27; Angela Campbell, *Sister Wives, Surrogates and Sex Workers: Outlaws by Choice?* (Ashgate, 2013) 156.

²⁶ *Bedford* [2013] 3 SCR 1101, 1133 [58], 1156 [136].

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

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

²⁹ *Missing Women Commission of Inquiry Report*, above n 21, vols IIA, IIB; Kaye, above n 21.

³⁰ *Missing Women Commission of Inquiry Report*, above n 21, vol I, 183.

³¹ *Ibid* vol I, 81–100.

³² *Ibid* vol III, 48–9.

produced the devastation caused by Pickton.³³ This led to the establishment of the Canadian Missing Women Commission of Inquiry ('CMWC'),³⁴ chaired by Wally Oppal QC, which was called to examine the role of the VPD and investigators in the disappearance of these women from the DTES, and the vulnerabilities and risks faced by sex workers working in the DTES.³⁵ To this end, the Commission called on a spectrum of experts, such as doctors, police and social workers operating in the DTES, familiar with the geographical area and the women who were the subject of the inquiry.³⁶ The resulting CMWC report, handed down in November 2012, provides a comprehensive analysis of the vulnerabilities faced by sex workers in the DTES, and paints a bleak picture of despair, desperation and institutional neglect.³⁷ The report was particularly critical of the legal regulation of sex workers and the enforcement of criminal laws against them, noting that it is characterised by a 'profound unevenness in the legal regime, which has become mostly about the control of public space'.³⁸ On this issue, the CMWC inquiry highlights how the traditional focus on public space, and enforcement measures directed at curbing the visibility of sex work in the DTES, amplified the risks faced by the missing women.³⁹

3 A Brief History of Sex Work Governance in Canada

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

It should be noted that this political narrative is continued by Bill C-36, a key

³³ Brian Hutchinson, 'Deadly Dysfunction: Scathing Undisclosed Details from Inside the Pickton Investigation', *National Post* (online), 25 May 2012 <<https://perma.cc/FC5K-XYFF>>.

³⁴ *Missing Women Commission of Inquiry Report*, above n 21, vol I, 4–8. See also Kaye, above n 21.

³⁵ *Missing Women Commission of Inquiry Report*, above n 21, vol I, 6–7.

³⁶ *Ibid* vol I, 81–100.

³⁷ *Ibid*.

³⁸ *Ibid* vol I, 100.

³⁹ *Ibid* vol I, 100, 105–10.

⁴⁰ Campbell, *Sister Wives*, above n 25, 156–7.

⁴¹ See *ibid* 157.

⁴² *Ibid*, citing *Criminal Code*, SC 1892, c C-29.

⁴³ See *ibid* 157.

preambular objective of which is to curb the social commoditisation of sexual services, with a view to enabling individuals to ‘leave’ the industry.⁴⁴

B *Bill C-36’s Primary Influences*

1 *Bill C-36 and the Nordic Model*

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

However, Bill C-36 goes much further and, in contrast to the ‘Nordic model’,⁵⁴ *directly* criminalises the activities of sex workers in two distinct respects. First, the ‘communication’ offence solely criminalises those who offer or provide sexual services (ie sex workers) ‘in a public place, or in any place open to public view ... [including] next to a school ground, playground or daycare centre’.⁵⁵ Sex workers are also specifically targeted under the

⁴⁴ Bill C-36 Preamble.

⁴⁵ *Act on Prohibiting the Purchase of Sexual Services 1998* (Sweden).

⁴⁶ Ka Hon Chu and Glass, above n 3, 103–4; Ekberg, above n 6, 1188; Dodillet and Östergren, above n 19, 3.

⁴⁷ Amnesty International, ‘Decriminalization of Sex Work’ (Policy Background Document) 6 <<https://perma.cc/RYE8-7PVM>>.

⁴⁸ Dodillet and Östergren, above n 19, 1. See also Ka Hon Chu and Glass, above n 3, 102.

⁴⁹ MacKinnon, above n 9, 28; Barry, above n 9, 49.

⁵⁰ Dodillet and Östergren, above n 19.

⁵¹ *Criminal Code* s 286.1, as inserted by Bill C-36 s 20.

⁵² *Ibid.*

⁵³ Ekberg, above n 6, 1188; Dodillet and Östergren, above n 19, 1. See Ka Hon Chu and Glass, above n 3, 103.

⁵⁴ Ekberg, above n 6, 1188; Dodillet and Östergren, above n 19, 1; Ka Hon Chu and Glass, above n 3, 103.

⁵⁵ *Criminal Code* s 213, as inserted by Bill C-36 s 15(1.1).

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

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

The abolitionist approach taken by the Canadian Government to Bill C-36 draws heavily from the radical feminist view of sex work, most commonly associated with the work of Catharine MacKinnon, Kathleen Barry and Andrea Dworkin.⁶³ Whilst this coupling of conservative politics and radical feminism may seem somewhat curious at first blush, it is anchored by a long history between radical feminist views and the 'abolitionist' approach to sex work expounded by Bill C-36.⁶⁴ 'Abolitionism' can be traced back to the late 1800s to a specific campaign, led by Josephine Butler, against the English Contagious Diseases Acts.⁶⁵ Butler famously employed feminist views to oppose the demonisation of sex workers as 'fallen women', seeing sex workers as 'victims'

⁵⁶ See Canadian HIV/AIDS Legal Network, Pivot Legal Society and Stella, l'amie de Maimie, 'Reckless Endangerment: Q&A on Bill C-36 — *Protection of Communities and Exploited Persons Act*' (Info Sheet, June 2014) 2.

⁵⁷ *Criminal Code* s 286.4, as inserted by Bill C-36 s 20.

⁵⁸ Evidence to the Standing Committee on Justice and Human Rights, House of Commons, Parliament of Canada, Ottawa, 41st Parl, 2nd sess, 38th mtg, 9 July 2014, 13 (Gunilla Ekberg).

⁵⁹ *Ibid.*

⁶⁰ Campbell, 'Sex Work's Governance', above n 25, 29.

⁶¹ *Ibid.*

⁶² *Ibid.*; Canada, *Parliamentary Debates*, House of Commons, 11 June 2014, vol 147, no 101, 6652 (Peter MacKay).

⁶³ See, eg, Dworkin, above n 9; MacKinnon, above n 9; Barry, above n 9.

⁶⁴ Elizabeth Bernstein, 'Militarized Humanitarianism Meets Carceral Feminism: The Politics of Sex, Rights, and Freedoms in Contemporary Antitrafficking Campaigns' (2010) 36 *Signs* 45, 49; Jo Doezema, 'Loose Women or Lost Women? The Re-Emergence of the Myth of White Slavery in Contemporary Discourses of Trafficking in Women' (2000) 18 *Gender Issues* 23, 33.

⁶⁵ Doezema, above n 64, 27.

of male lust, capable of social rehabilitation.⁶⁶ Modern radical feminist theory elaborates on this approach, arguing that sex work is a violation of women's human rights per se, constituting 'a paradigm of sexual ... inequality'.⁶⁷ Within the radical feminist rubric, there can be no distinction between 'voluntary' and 'forced prostitution', as no person can consent to such a grave violation of themselves.⁶⁸ Accordingly, Barry has argued that 'it is impossible to distinguish between free and forced prostitution as the indiscriminate use by men of a woman's body for their sexual satisfaction leaves no room for female subjectivity, sexuality, or the possibility of consent'.⁶⁹ Based on the importance of (hetero)sexuality in the radical feminist view, as a 'linchpin' of male dominance, and the damage it inflicts on the female populace as a whole, the importance of the abolition of sex work in radical feminist discourse cannot be underestimated.⁷⁰

Abolitionism (or neo-abolitionism), relying on radical feminist views of sex work, has, over the decade, undergone a significant resurgence as a consequence of the broader anti-trafficking and anti-sex slavery movement at an international level.⁷¹ At the forefront of the global anti-trafficking offensive is what Elizabeth Bernstein aptly describes as a 'coalition of strange bedfellows' — predominantly neo-conservative and Christian right organisations, aligned with anti-trafficking groups such as CATW, who espouse radical feminist views to combat the global sex trade.⁷² Extensive academic literature exists on this relationship between radical feminism and the neo-conservative agenda in the fight against global trafficking, and while an analysis of this collaboration is beyond the scope of this article, what should be noted is that the anti-trafficking movement has utilised radical feminism to facilitate the treatment of global human trafficking and domestic sex work governance under the broad umbrella of 'sexual slavery',

⁶⁶ Ibid.

⁶⁷ Dorchen Leidholdt, 'Prostitution: A Violation of Women's Human Rights' (1993) 1 *Cardozo Women's Law Journal* 133, 135. See also MacKinnon, above n 9, 14; Beverly Balos and Mary Louise Fellows, 'A Matter of Prostitution: Becoming Respectable' (1999) 74 *New York University Law Review* 1220, 1231, 1273–87; Doezema, above n 64.

⁶⁸ Barry, above n 9, 22–3.

⁶⁹ Kathleen Barry, *The Prostitution of Sexuality* (New York University Press, 1995), cited in Gabrielle Simm, 'Negotiating the United Nations Trafficking Protocol: Feminist Debates' (2004) 23 *Australian Year Book of International Law* 135; Barry, above n 9, 24.

⁷⁰ Munro, above n 10, 237. See Catharine MacKinnon, *Toward a Feminist Theory of State* (Harvard University Press, 1989) 3.

⁷¹ See Halley et al, above n 20, 355–60.

⁷² See Bernstein, 'Militarized Humanitarianism', above n 64, 47, 65.

conflating any distinction between these issues.⁷³ The Canadian Parliament has similarly adopted these views as part of its anti-trafficking initiatives and, as early as 2007, indicated an intention to introduce an abolitionist approach to sex work based on radical feminist ideology.⁷⁴ It should therefore be understood that it is the theoretical foundations of ‘abolitionism’ as a regulatory response to sex work that facilitate Bill C-36’s discursive reliance on radical feminist theory.⁷⁵

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

1 Objective One: Reducing the Demand for Sexual Services

A key objective of Bill C-36 is to ‘end demand’ for sexual services — a factor which was accepted as the primary cause of the existence of the sex industry.⁷⁶ As such, the Preamble to Bill C-36 recognises the importance of denouncing and prohibiting the ‘purchase of sexual services because it creates a demand for prostitution’.⁷⁷ Justice Minister Peter MacKay expanded on this issue throughout the Bill C-36 debates, arguing that the legislation addresses the ‘root causation’ of sex work, by placing criminal liability on those ‘who drive the demand for the purchasing and commoditization of sexual services’ — ‘the johns [and] the pimps’.⁷⁸ This is a view that aligns closely with radical feminist commentary, which promotes an analysis of sex work focusing solely on (male) demand for such services, devoting little consideration to the reasons women may engage in

⁷³ For a more comprehensive discussion on the conflation of trafficking with sex work, see Doezema, above n 64, 23; Bernstein, ‘Militarized Humanitarianism’, above n 64; Vance, above n 15, 201–2; Erin O’Brien, ‘Prostitution Ideology and Trafficking Policy: The Impact of Political Approaches to Domestic Sex Work on Human Trafficking Policy in Australia and the United States’ (2015) 36 *Journal of Women, Politics and Policy* 191; Anne Gallagher, ‘Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis’ (2001) 23 *Human Rights Quarterly* 975; Halley et al, above n 20; Janie A Chuang, ‘Exploitation Creep and the Unmaking of Human Trafficking Law’ (2014) 108 *American Journal of International Law* 609; Berman, above n 8, 269; Simm, above n 69, 135; Anne T Gallagher, ‘Human Rights and Human Trafficking: Quagmire or Firm Ground? A Response to James Hathaway’ (2009) 49 *Virginia Journal of International Law* 789; Sealing Cheng, ‘Interrogating the Absence of HIV/AIDS Interventions for Migrant Sex Workers in South Korea’ (2004) 7(2) *Health and Human Rights* 193; Joanna Busza, ‘Sex Work and Migration: The Danger of Oversimplification — A Case Study of Vietnamese Women in Cambodia’ (2004) 2(2) *Health and Human Rights* 231; Bernstein, ‘New Abolitionism’, above n 8, 129.

⁷⁴ Standing Committee on the Status of Women, *Turning Outrage into Action to Address Trafficking for the Purpose of Sexual Exploitation in Canada* (Parliament of Canada, 2007).

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

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

⁷⁷ Bill C-36 Preamble.

⁷⁸ Canada, *Parliamentary Debates*, House of Commons, 12 June 2014, vol 147, no 102, 6723 (Peter MacKay).

such work.⁷⁹ In this sense, Barry argues that '[p]rostitution is a male consumer market. ... What matters in terms of the prostitution market and male demand is that there are female bodies provided for sex exchange. How or why they get there is *irrelevant* to the market'.⁸⁰ In this way, sex work is considered part of the 'social construction' of women as existing for the service of men, elevating it to an institution affecting all women 'because of the fact that if one woman is a prostitute this means that all women can be (treated as) prostitutes'.⁸¹ In order to reconceptualise sex work in this manner, radical feminism seeks to distance itself from the notion of sex work as it occurs on an individual level.⁸² Dorchen Leidholdt identifies this as the 'first myth [about] prostitution', that 'it is something one individual does with another, each acting on the same level in complementary ways'.⁸³ By dislocating the institution of sex work from the realm of individual experience, the arguments underlying Bill C-36 inhibit an understanding of the various catalysts for women actively participating in sex work.

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

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

At an international level, it has been noted that sex work often arises in situations of poverty and economic disadvantage, particularly in the realm of

⁷⁹ Barry, above n 9, 22–4.

⁸⁰ *Ibid.* 39.

⁸¹ Simm, above n 69, 138, citing Sheila Jeffreys, *The Idea of Prostitution* (Spinifex Press, 1997).

⁸² Leidholdt, above n 67, 134.

⁸³ *Ibid.*

⁸⁴ See Showden, above n 14, 141.

⁸⁵ *Ibid.*

⁸⁶ Sari Kuovo and Zoe Pearson (eds), *Feminist Perspectives on Contemporary International Law: Between Resistance and Compliance?* (Hart, 2011).

⁸⁷ *Ibid.*

human trafficking.⁸⁸ Thus, *CEDAW* recognises that individual human beings have vastly different possibilities in life, with women holding a position of special inequality ‘because of persistent political, social, economic and cultural discrimination against them’.⁸⁹ As such, the CEDAW Committee has described global trafficking as ‘a phenomenon inexorably linked to the socio-economic impact of globalisation’ and ‘often attributed to the “feminization of poverty” arising from the failure of social structures in the provision of equal and just educational and employment opportunities for women’.⁹⁰ Similarly, in Canada, a central finding of the CMWC was the impact of poverty on the exploitation of sex workers.⁹¹ Crucially, most, if not all, of the missing and murdered women who were the subject of the inquiry were found to be in the ‘survival sex trade’ — engaging in sex work in exchange for necessities for survival, including basic needs and wants such as food, shelter, clothing, money and drugs.⁹² As described by John Lowman, ‘survival sex is driven by poverty and addiction ... in a legal sense survival sex workers *do* “choose” to prostitute, but they make that choice in a set of social conditions they did not choose’.⁹³ This ‘complex matrix’ of choice and coercion in the face of rising global economic inequality⁹⁴ makes it inevitable that ‘individuals [will] make transactional arrangements with regard to sexual relationships that are not always a matter of direct coercion but rather, a reflection of limited options’.⁹⁵ In the Canadian context, these issues were found to be a direct product of the ‘need to compensate for inadequate social assistance’, thereby increasing structural barriers preventing access to employment.⁹⁶ In this regard, Pivot Legal has shown through their research on the Canadian sex trade that ‘the possibility of finding licit work is severely hampered because of fundamental structural barriers such as lack of access to childcare, work clothes, money for public transport, and a phone’.⁹⁷ The CMWC found that it is this combination of social marginalisation and economic desperation that drives the more vulnerable

⁸⁸ Holtmaat, above n 18, 106; Marsha A Freeman, Christine Chinkin and Beate Rudolf, *The UN Convention on the Elimination of All Forms of Discrimination against Women* (Oxford University Press, 2012) 173; *Concluding Comments of the Committee on the Elimination of Discrimination against Women: Belarus*, 30th sess, Supp No 38, UN Doc A/59/38 (23 January 2004) [350]–[354]; *Concluding Observations of the Committee on the Elimination of Discrimination against Women: Portugal*, 42nd sess, UN Doc CEDAW/C/PRT/CO7 (1 April 2009) [44]–[45].

⁸⁹ Holtmaat, above n 18, 106.

⁹⁰ Freeman, Chinkin and Rudolf, above n 88, 172–5.

⁹¹ *Missing Women Commission of Inquiry Report*, above n 21, vol I, 86.

⁹² Neena Tiwana, *Violence by Clients against Street-Level Sex Workers: Applying Situational Crime Prevention Strategies* (Masters of Arts Thesis, Simon Fraser University, 2014) 3; *Missing Women Commission of Inquiry Report*, above n 21, vol I, 100.

⁹³ *Missing Women Commission of Inquiry Report*, above n 21, vol I, 100, citing Professor Lowman (emphasis added). See also Tiwana, above n 92, 3.

⁹⁴ Otto, ‘Making Sense of Zero Tolerance’, above n 15, 261, citing A M Miller, ‘Sexuality, Violence against Women, and Human Rights’ (2004) 7 *Health and Human Rights* 39; Tiwana, above n 93, 4.

⁹⁵ Amnesty International, ‘Draft Policy on Sex Work’, above n 24, 15; Amnesty International, ‘Decriminalization of Sex Work’, above n 47, 4.

⁹⁶ *Missing Women Commission of Inquiry Report*, above n 21, vol I, 86.

⁹⁷ *Ibid* 86–7.

sectors of the sex industry and heightens the susceptibility of sex workers to violence, not the ‘demand’ for sexual services.⁹⁸

In spite of these crucial findings underscoring the impact of economic and social disadvantage to the lives of particularly marginalised sex workers Justice Minister Peter MacKay mentioned these issues only in passing during Bill C-36’s second reading speech.⁹⁹ Indeed, a startling omission in the enactment of Bill C-36 was the absence of discussion regarding the findings of the CMWC, which appeared to warrant no mention despite its comprehensive analysis of vulnerability in the Canadian sex industry.¹⁰⁰ Thus, while \$20 million in funding accompanied Bill C-36, dedicated to institutions that would ‘help individuals exit prostitution’, the conditions of poverty and ‘inadequate social assistance’ found by the CMWC will continue to prevail, unaddressed by the legislation.¹⁰¹ In this sense, the rigid market-style analysis of the sex industry under Bill C-36, with its singular focus on (male) demand, is effectively blinded to the conditions faced by sex workers¹⁰² in spite of its legislative objective to ‘protect [the] human dignity’ of women.¹⁰³

(b) *Effect 2: Empirical Research on Client Criminalisation*

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

⁹⁸ Ibid 78–9, 86–7, 111–12.

⁹⁹ Canada, *Parliamentary Debates*, House of Commons, 11 June 2014, vol 147, no 101, 6653 (Peter MacKay).

¹⁰⁰ *Missing Women Commission of Inquiry Report*, above n 21, vol I, 86–110.

¹⁰¹ See Canadian HIV/AIDS Legal Network, Pivot Legal Society and Stella, l’amie de Maimie, above n 56, 3; *Missing Women Commission of Inquiry Report*, above n 21, vol I, 86.

¹⁰² See generally Showden, above n 14, 141.

¹⁰³ Bill C-36 Preamble.

¹⁰⁴ Halley et al, above n 20, 337–8; Department of Justice, Canada, ‘Bill C-36, An Act to Amend the *Criminal Code* in Response to the Supreme Court of Canada Decision in Attorney General of Canada v Bedford and to Make Consequential Amendments to Other Acts’ (Technical Paper, 1 December 2014) 4.

¹⁰⁵ Pivot Legal Society, above n 20, 6, citing Dodillet and Östergren, above n 19 and Kulick, above n 6; Halley et al, above n 20, 349.

¹⁰⁶ Kristie McCann, Richard Akin and Cita Airth, ‘Sex Work Enforcement Guidelines’ (Vancouver Police Department, January 2013).

¹⁰⁷ Krüsi et al, above n 21, 2–3.

¹⁰⁸ Ibid 7.

revealed that sex work-related criminal offences rose from an all-time low of 47 offences in 2012, to 71 in 2013.¹⁰⁹

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

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

2 Objective Two: Reducing Global Human Trafficking

As a product of effacing any distinction between ‘forced’ and ‘consensual’ sex work, radical feminism sees such an ‘inexorable link between [human] trafficking and prostitution’ that they ‘have come to use the terms “prostitution” and “trafficking” interchangeably’.¹¹⁶ This conflation of human trafficking with domestic sex work arose in the Bill C-36 debate, reinforcing the victim status of the sex worker through the notion that sex workers are passively ‘brought into a

¹⁰⁹ Pivot Legal Society, above n 20, 2.

¹¹⁰ Halley et al, above n 20, 337.

¹¹¹ Pivot Legal Society, above n 20, 17.

¹¹² Ibid 5.

¹¹³ Goyal and Ramanujam, above n 6, 1109.

¹¹⁴ Dodillet and Östergren, above n 19, 21; Anand Grover, *Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health*, UN GAOR, 14th sess, Agenda Item 3, UN Doc A/HRC/14/20 (27 April 2010) 12–13. See also *ibid*.

¹¹⁵ Goyal and Ramanujam, above n 6, 1109.

¹¹⁶ Berman, above n 9, 279.

life of prostitution ... most often through no fault of their own'.¹¹⁷ To position the sex worker as a quiescent actor, the Bill C-36 debates deployed stereotypical constructions of the sex worker as 'commodit[ies] to be bought and sold', and victims of 'human trafficking', 'violence, addiction' and 'childhood abuse', as well as the persistent conflation of women and children.¹¹⁸ In emphasising the nexus between sex work and human trafficking, the Bill C-36 debates featured testimony from a vast number of human trafficking organisations, including Hope for the Sold, REED and CATW, seeming to dwarf the presence of sex worker advocates in attendance.¹¹⁹ The rationale for this deviation from the issue of domestic sex work was helpfully summarised by Minister Galipeau, who argued that:

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

However, this was not the first opportunity the Canadian Parliament took to express its concerns about the interconnected nature of sex work and human trafficking.¹²¹ In 2006, the Canadian Parliament's Standing Committee on the Status of Women conducted an inquiry into human trafficking, concluding 'that prostitution is closely linked to trafficking in persons', before proceeding to recommend an abolitionist model of domestic regulation of sex work, in the nature of Bill C-36.¹²² This digression to the issue of sex work was facilitated by the Committee's contention that 'to stop trafficking in human beings and to protect trafficking victims, it seems urgent that we examine those who motivate it: Canadian prostituting clients'.¹²³ Although the association between global human trafficking and Canadian clients of sex workers seems somewhat tenuous, the Committee's agenda becomes apparent in their concluding remarks — the 'message needs to be clear: prostitution is not a "culturally acceptable" activity'.¹²⁴

Such an approach is not unique to Canada. Numerous commentators have noted the tendency of state governments to utilise the conflation of sex work with human trafficking as a guise to institute stricter regulations on the sex

¹¹⁷ Canada, *Parliamentary Debates*, House of Commons, 11 June 2014, vol 147, no 101, 6653 (Peter MacKay). See also Kapur, 'Post-Colonial Economies of Desire', above n 12; Kapur, 'Victimization Rhetoric' above n 12, 2.

¹¹⁸ Canada, *Parliamentary Debates*, House of Commons, 11 June 2014, vol 147, no 101, 6653 (Peter MacKay).

¹¹⁹ See CBC News, 'Bill C-36 Hearings Told Not to Conflate Prostitution with Human Trafficking', *Power and Politics*, 10 July 2014 (Christa Big Canoe).

¹²⁰ Canada, *Parliamentary Debates*, House of Commons, 26 September 2014, vol 147, no 117, 7885 (Royal Galipeau).

¹²¹ Standing Committee on the Status of Women, Parliament of Canada, *Turning Outrage into Action to Address Trafficking for the Purpose of Sexual Exploitation in Canada* (2007).

¹²² *Ibid* 5.

¹²³ *Ibid* 14.

¹²⁴ *Ibid* 16.

industry.¹²⁵ This led the former UN Special Rapporteur on Violence against Women to caution against the propensity of states to assume that sex workers have necessarily been trafficked, exploited or taken from their country against their will, rather than considering the extent to which they may be voluntary participants.¹²⁶ A necessary consequence of this reduction of all sex work to human trafficking, as exemplified in Bill C-36, is that it establishes criminal law as the only permissible legal solution, and rescue as the only possible response to dealing with the victims' exploitation.¹²⁷ As Carole Vance has noted, '[i]f all women in prostitution are sex-trafficked, and if rescue is the only remedy, then what need is there for ongoing health services and education to meet the needs of women in sex work?'¹²⁸ As an inevitable consequence of the exclusive focus on criminal law, the utility of the modern human rights framework in expanding the legal rights of sex workers, rather than merely 'protecting an individual from abuse', can be overlooked.¹²⁹

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

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

¹²⁵ See Doezema, above n 64, 23. See generally Bernstein, 'Militarized Humanitarianism', above n 64; Vance, above n 15, 201; Bernstein, 'New Abolitionism', above n 8, 129.

¹²⁶ Busza, above n 73, 232. See also Radhika Coomaraswamy, *Report of the Special Rapporteur on Violence against Women, Its Causes and Consequences on Trafficking in Women, Women's Migration and Violence against Women*, UN ESCOR, 56th sess, Agenda Item 12(a), UN Doc E/CN.4/2000/68 (29 February 2000) 3.

¹²⁷ See Vance, above n 15, 211.

¹²⁸ Ibid. See also Cheng, above n 73, 193.

¹²⁹ Vance, above n 15, 211.

¹³⁰ See Kapur, 'Victimization Rhetoric', above n 12, 3; Kapur, 'Post-Colonial Economies of Desire', above n 12.

¹³¹ Otto, 'Making Sense of Zero Tolerance', above n 15, 271. See also Kapur, 'Victimization Rhetoric', above n 12, 3.

¹³² Evidence to the Standing Committee on Justice and Human Rights, House of Commons, Parliament of Canada, Ottawa, 41st Parl, 2nd sess, 35th mtg, 8 July 2014, 6 (Rick Hanson, Calgary Police Chief); Kapur, 'Victimization Rhetoric' above n 12, 32; Goyal and Ramanujam, above n 6, 1110; Kapur, 'Post-Colonial Economies of Desire', above n 12.

¹³³ Vance, above n 15, 211; Kapur, 'Victimization Rhetoric', above n 12, 32.

¹³⁴ Vance, above n 15, 211.

and journalistic research which suggests that after ‘having entered prostitution for a myriad of reasons, many rescued women return to prostitution’.¹³⁵

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

The inability to recognise the diverse experiences of sex workers can be readily criticised by post-modern feminist theory which ‘emphasise[s] the need to accord due recognition to the subjectivity of sex workers’.¹⁴³ In this sense, post-modern feminism ‘argue[s] against the imposition of external moral strictures and in favour of attention to sex workers’ own views’.¹⁴⁴ However, within the abolitionist driven ideology, exemplified in Bill C-36, it has been noted that ‘the choice or decision to enter into and/or remain in sex work remains the paradigmatic expression of agency’.¹⁴⁵ Accordingly, the radical feminist

¹³⁵ Berman, above n 8, 293.

¹³⁶ Barry, above n 9, 28–9.

¹³⁷ *Ibid.*

¹³⁸ Dworkin, above n 9, 3; Carole Pateman, *The Sexual Contract* (Stanford University Press, 1988) 207.

¹³⁹ Canada, *Parliamentary Debates*, House of Commons, 15 July 2014, vol 147, no 117, 7885 (Royal Galipeau).

¹⁴⁰ Kuovo and Pearson, above n 86, 121; Kempadoo and Doezema, above n 3, 11–12.

¹⁴¹ Kempadoo and Doezema, above n 3, 5, citing Wendy Chapkis, *Live Sex Acts: Women Performing Erotic Labor* (Routledge, 1997); Kuovo and Pearson, above n 86, 121.

¹⁴² Berman, above n 8, 280; Busza, above n 73, 232.

¹⁴³ Simm, above n 69, 141.

¹⁴⁴ *Ibid.*

¹⁴⁵ Julie Ham and Alison Gerard, ‘Strategic In/Visibility: Does Agency Make Sex Workers Invisible?’ (2014) 14 *Criminology and Criminal Justice* 298, 300.

theory of sex work ‘relies on a circular logic whereby women’s involvement in sex work constitutes proof of their victimization and lack of agency’, creating the context in which the experiences of sex workers can be ignored.¹⁴⁶ This denial of agency manifested itself throughout the debates on Bill C-36, with the testimony of sex workers and advocates being largely disregarded and ignored.¹⁴⁷ The evidence of Natasha Potvin, a former sex worker and volunteer at Prostitutes Empowerment Education and Recourse Society, which described how she ‘proud[ly]’ engaged in *voluntary* sex work for 15 years to support her children, challenged this victim paradigm, provoking hostility and patronising scepticism from government members: ‘you mentioned ... you’re proud of your choice and that it’s worked for you in your life. The way you tell it, frankly, it sounds like a TV sitcom about happy hookers’.¹⁴⁸

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

¹⁴⁶ Ibid.

¹⁴⁷ See Kady O’Malley, ‘Prostitution Bill Critics Treated as Hostile Witnesses at Committee’ *CBC News* (online), 16 July 2014 <<https://perma.cc/8TZX-UD6Y>>.

¹⁴⁸ Evidence to the Standing Committee on Justice and Human Rights, House of Commons, Parliament of Canada, Ottawa, 41st Parl, 2nd sess, 42nd mtg, 10 July 2014, 15 (Stella Ambler).

¹⁴⁹ See Ham and Gerard, above n 145, 300.

¹⁵⁰ Showden, above n 14, 141.

¹⁵¹ Ham and Gerard, above n 145, 300.

¹⁵² Ibid.

¹⁵³ See Showden, above n 14, 141.

¹⁵⁴ Ham and Gerard, above n 145, 300.

and ignores the complex dilemmas of survival and gender inequality that compel such decisions.¹⁵⁵ As Chuang has aptly remarked, the focus on the normative question

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

This perspective is reflected by research undertaken by Joanna Busza on Vietnamese sex workers in Cambodia, which indicates that the reality of what brings women into sex work and why they may choose to remain there is far more complicated than simply always being a consequence of 'coercion' — an emphasis that has the effect of 'oversimplifying women's realities and choices'.¹⁵⁷ Rather, studies from a range of countries including Russia, Nepal and China suggest that 'sex workers' experiences fall along a continuum, with women who have undergone widely varying degrees of choice or coercion working alongside each other in the same sites'.¹⁵⁸ Moreover, individual sex workers can encounter different stages of the choice/coercion continuum at different temporal points; for example, a woman who was initially 'tricked' into selling sex may then independently opt to continue working in the industry.¹⁵⁹ Anand Grover has noted that although some 'sex workers may have experienced forms of coercion or compulsion initially ... by the time they are apprehended, [they] may have decided to continue sex work'.¹⁶⁰ This indicates that initial pathways into sex work do not, therefore, necessarily define sex workers' 'current perceptions, motivations and priorities' and that a more fluid, human-centred understanding of 'consent' and 'choice' would more adequately reflect the reality of female agency in sex work.¹⁶¹ In contrast to the nullification of sex workers' capacity to consent under Bill C-36, it is argued that a genuine human rights approach to sex work would accord due respect and autonomy to the personal decisions of women with respect to private, consensual sexual activities.¹⁶²

3 *Objective Three: Reducing Violence within Sex Work*

The Bill C-36 framework rests on the radical feminist view that 'prostitution itself' is 'not just violent', it is a *form* of violence.¹⁶³ This thinking equates the very act of sex work with 'violence'; 'violence is omnipresent in prostitution ... [i]t is not simply that violent incidents occur; instead, prostitution

¹⁵⁵ See *ibid*; Otto, 'Making Sense of Zero Tolerance', above n 15, 271.

¹⁵⁶ Janie Chuang, 'Redirecting the Debate over Trafficking in Women: Definitions, Paradigms, and Contexts' (1998) 11 *Harvard Human Rights Journal* 65, 84 (emphasis altered).

¹⁵⁷ Busza, above n 73, 232. See also Cheng, above n 73, 193.

¹⁵⁸ Busza, above n 73, 232.

¹⁵⁹ *Ibid*.

¹⁶⁰ Tandon, Armas-Cardona and Grover, above n 15.

¹⁶¹ Busza, above n 73, 231–2.

¹⁶² See, eg, Human Rights Committee, *Communication No 488/1992*, 50th sess, UN Doc CCPR/C/50/D/488/1992 (31 March 1994) ('*Toonen v Australia*').

¹⁶³ Canada, *Parliamentary Debates*, House of Commons, 12 June 2014, vol 147, no 102, 6730 (Joy Smith).

is a form of violence *categorically and universally*'.¹⁶⁴ Thus, a key component of the preamble to Bill C-36 describes the Canadian Parliament's 'grave concerns about the exploitation that is *inherent* in prostitution and the risks of violence posed to those who engage in it'.¹⁶⁵ In introducing Bill C-36, Justice Minister Peter MacKay emphasised the universality of violence in sex work, alleging that '[t]he evidence, including the evidence submitted to the courts in the *Bedford* case, shows that prostitution is extremely dangerous no matter where it takes place'.¹⁶⁶

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

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

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

¹⁶⁴ Weitzer, 'Social Construction of Sex Trafficking', above n 20, 451–2 (emphasis altered).

¹⁶⁵ Bill C-36 Preamble (emphasis added).

¹⁶⁶ Canada, *Parliamentary Debates*, House of Commons, 11 June 2014, vol 147, no 101, 6653 (Peter MacKay).

¹⁶⁷ *Bedford* [2013] 3 SCR 1101, 1134 [63].

¹⁶⁸ *Ibid.*

¹⁶⁹ *Ibid* 1121 [18], quoting *Bedford v Canada (Attorney-General)* (2010) 102 OR (3d) 321 [361]–[362] (Himel J) (emphasis added) (Ontario Superior Court of Justice).

¹⁷⁰ Evidence to the Standing Committee on Justice and Human Rights, House of Commons, Parliament of Canada, Ottawa, 41st Parl, 2nd sess, 38th mtg, 9 July 2014, 11 (Francoise Boivin).

¹⁷¹ Halley et al, above n 20, 418; Gillian M Abel, Lisa J Fitzgerald and Cheryl Brunton, 'The Impact of Decriminalisation on the Number of Sex Workers in New Zealand' (2009) 38 *Journal of Social Policy* 516, 518.

occurs ‘most often on the street’ during his second reading speech.¹⁷² This construction of sex work as ‘street-based’ carried through the debates with references to sex work occurring ‘most often on the street’ and the absence of any recognition of other forms of sex work.¹⁷³

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

In Canada, as in the United Kingdom and Australia, recent studies indicate that the majority of sex work takes place in private venues.¹⁷⁷ For this reason, Vanwesenbeeck is highly critical of the widespread ‘failure to adequately differentiate between sex workers’, arguing that they are not the homogenous category that they are taken to be.¹⁷⁸ Likewise, Lynn Chancer notes that sex workers’ ‘experiences, situations and circumstances differ greatly over the gamut of this highly class-stratified occupation’, which is distinctly hierarchical in and of itself.¹⁷⁹ Comparatively, empirical research has found a remarkable diversity of experience among street-based workers, call girls, brothel workers and providers of escort services with respect to job satisfaction, self-esteem, physical and psychological health and occupational practices.¹⁸⁰ Factually, it is asserted that these variations in the forms and nature of sex work have an important role to play in the exacerbation of vulnerability, as well as the production of violence and exploitative conditions faced by sex workers.¹⁸¹ As stated by Chris Atchison during the Bill C-36 debates, ‘findings around violence reveal that the actual occurrences of violence and victimization in the sex trade vary significantly across different contexts, specifically different venues where commercial sexual transactions take place’.¹⁸² By preoccupying itself with the violence faced by

¹⁷² Canada, *Parliamentary Debates*, House of Commons, 11 June 2014, vol 147, no 101, 6654 (Peter MacKay).

¹⁷³ *Ibid* 1710.

¹⁷⁴ Halley et al, above n 20, 418 (emphasis added).

¹⁷⁵ Ann M Lucas, ‘Race, Class, Gender and Deviancy: The Criminalization of Prostitution’ (1995) 10 *Berkeley Women’s Law Journal* 47, 48.

¹⁷⁶ *Missing Women Commission of Inquiry Report*, above n 21, vol I, 100; Abel, Fitzgerald and Brunton, above n 171, 518.

¹⁷⁷ See Pivot Legal Society, above n 20, 6.

¹⁷⁸ Ine Vanwesenbeeck, ‘Another Decade of Social Scientific Work on Prostitution’ (2001) 12 *Annual Review of Sex Research* 242, 279, cited in Ronald Weitzer, ‘Flawed Theory and Method in Studies of Prostitution’ (2005) 11 *Violence against Women* 934, 944.

¹⁷⁹ Lynn Sharon Chancer, ‘Prostitution, Feminist Theory, and Ambivalence’ (1993) 37 *Social Text* 143, 163, cited in Weitzer, ‘Flawed Theory’, above n 178, 944. See also Showden, above n 14, 136.

¹⁸⁰ Weitzer, ‘Flawed Theory’, above n 178, 944. See also Cheng, above n 73, 195.

¹⁸¹ Weitzer, ‘Flawed Theory’, above n 178, 944.

¹⁸² Evidence to the Standing Committee on Justice and Human Rights, House of Commons, Parliament of Canada, Ottawa, 41st Parl, 39th mtg, 2nd sess, 9 July 2014, 3 (Chris Atchison).

street-based sex workers through the invocation of a stereotypical streetwalker,¹⁸³ the Canadian Parliament premised its Bill C-36 deliberations on a small minority, those who will be most affected by the new regime.¹⁸⁴ This is likely to enhance the perception that sex work is inherently violent, by focusing on a narrow class of the industry who are particularly vulnerable to victimisation and violence, based on their public exposure and criminal status.¹⁸⁵ In this regard, research has shown that street-based sex workers, who are likely to be more economically disadvantaged than their indoor counterparts, disproportionately bear the weight of criminalisation and police enforcement as a consequence of their public visibility.¹⁸⁶ In Canada, criminal enforcement has been found to focus ‘almost exclusively’ on the street-level sex trade, largely ignoring the much more significant indoor sex trade.¹⁸⁷ Accordingly, whilst only 5–20 per cent of sex work occurs on the street, 93–95 per cent of arrests are for this type of sex work.¹⁸⁸

In contrast to Bill C-36’s singular conceptualisation of sex work, an approach that would address the needs of the most vulnerable street-based workers, as well as catering to the situations of exploitation that can arise in the various segments of the sex industry, must necessarily be attuned to its multi-dimensional nature, how it functions in practice, and the impact of the ‘varying bargaining powers of [its] stakeholders’.¹⁸⁹ At the very least, this would necessitate an appreciation of ‘sexual services’ within Bill C-36 through a definition that addresses the nature of ‘sex industries as highly fragmented and differentiated’, and an understanding of the various forms of violence and over-enforcement which can arise in different contexts.¹⁹⁰

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

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

¹⁸³ Lucas, above n 175, 48.

¹⁸⁴ Ibid. See also Alexandra Natapoff, ‘Underenforcement’ (2006) 75 *Fordham Law Review* 1715.

¹⁸⁵ See Kempadoo and Doezema, above n 3, 5; Natapoff, above n 184, 1718.

¹⁸⁶ Lucas, above n 175, 48–9; Natapoff, above n 184, 1718.

¹⁸⁷ *Missing Women Commission of Inquiry Report*, above n 21, vol I, 100.

¹⁸⁸ Ibid.

¹⁸⁹ Halley et al, above n 20, 418.

¹⁹⁰ Ibid.

¹⁹¹ Barry, above n 9, 121.

¹⁹² Dworkin, above n 9, 3.

¹⁹³ Canada, *Parliamentary Debates*, House of Commons, 11 June 2014, vol 147, no 102, 6723 (Peter MacKay).

effectively capturing all third parties including managers, receptionists, security, drivers and web-designers.¹⁹⁴

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

The productive effect of the radical feminist view that it is sex work itself which constitutes an abuse of sex workers is that Bill C-36 fails to address the instances of violence against sex workers which arise outside the context of the ‘sexual transaction’ and are committed by persons aside from a client or third party to the transaction. This is a critical oversight, particularly given the vulnerability of street-based sex workers to violence and victimisation by strangers, as well as to predatory violence.²⁰³ Furthermore, the positioning of sex work as ‘inherently violent’ sends a problematic message to sex workers by creating a framework whereby the sex worker ‘victim’ is, in effect, made to

¹⁹⁴ *Criminal Code* ss 286.2, 286.3, as inserted by Bill C-36 s 20.

¹⁹⁵ See, eg, Tiwana, above n 92, 4.

¹⁹⁶ Evidence to the Standing Committee on Justice and Human Rights, House of Commons, Parliament of Canada, Ottawa, 41st Parl, 2nd sess, 37th mtg, 8 July 2014, 1 (Christine Bruckert).

¹⁹⁷ *Ibid.*

¹⁹⁸ Tiwana, above n 92, 22–4.

¹⁹⁹ *Bedford* [2013] 3 SCR 1101, 1136 [67].

²⁰⁰ *Missing Women Commission of Inquiry Report*, above n 21, vol I, 105, quoting Dr Kerr.

²⁰¹ *Ibid.* 104–5 (emphasis added).

²⁰² *Ibid.*

²⁰³ *Ibid.*

shoulder the responsibility for any violence they may encounter.²⁰⁴ As a consequence, it is argued that sex workers may be less inclined to report violent incidents against them, in the belief that nothing can be done to resolve the issue.²⁰⁵ Such reforms fail to alleviate the obstacles to achieving safe working conditions for sex workers, preferring to reject the very notion that such work could ever be organised in a manner which preserves the security of the person.²⁰⁶

III THE EFFECT OF BILL C-36 ON THE HUMAN RIGHTS OF SEX WORKERS

A *Bill C-36 and International Human Rights Law*

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

1 *CEDAW Article 6*

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

²⁰⁴ Campbell, ‘Sex Work’s Governance’, above n 25, 41.

²⁰⁵ Mathew Greenall, ‘Sex Work, Violence and HIV’ (Programme Guide No 1, International HIV Alliance, May 2008) 8.

²⁰⁶ Weitzer, ‘Flawed Theory’, above n 178, 937.

²⁰⁷ See Canada, *Parliamentary Debates*, House of Commons, 11 June 2014, vol 147, no 101 (Peter MacKay).

²⁰⁸ Evidence to the Standing Committee on Justice and Human Rights, House of Commons, Parliament of Canada, Ottawa, 41st Parl, 2nd sess, 38th mtg, 9 July 2014, 13 (Gunilla Ekberg).

²⁰⁹ Otto, ‘Making Sense of Zero Tolerance’, above n 15, 269; Amnesty International, ‘Draft Policy on Sex Work’, above n 24, 11; Freeman, Chinkin and Rudolf, above n 88, 183.

²¹⁰ Otto, ‘Making Sense of Zero Tolerance’, above n 15, 269; Amnesty International, ‘Draft Policy on Sex Work’ above n 24, 7.

²¹¹ Otto, ‘Making Sense of Zero Tolerance’, above n 15, 269. See generally Amnesty International, ‘Draft Policy on Sex Work’, above n 24, 13; Canadian HIV/AIDS Legal Network, Pivot Legal Society and Stella, l’amie de Maimie, above n 56, 3; Freeman, Chinkin and Rudolf, above n 88, 183.

²¹² Freeman, Chinkin and Rudolf, above n 88, 176.

following CEDAW have similarly referred to the suppression of the ‘exploitation of prostitution’, rather than ‘prostitution’ more generally.²¹³

Article 6 has generated somewhat inconsistent CEDAW Committee reviews of state party reports with respect to sex work, perhaps as a consequence of the personal views held by committee members themselves, and it has been suggested that the article’s interpretation would ‘benefit from a specific elaboration in the form of a general recommendation’ pertaining to voluntary sex work.²¹⁴ On the one hand, the CEDAW Committee itself has called upon state parties to discourage ‘demand for prostitution’,²¹⁵ and to ‘develop programs to prevent women from entering prostitution’.²¹⁶ Yet unlike the nature of Bill C-36, which prioritises a criminal response to ‘end demand’, the CEDAW Committee’s recommendations go deeper by ‘targeting the root causes of prostitution’ with a focus on the need to change the social objectification of women, particularly in the media.²¹⁷ Recent concluding observations of the Committee also illustrate the need to address the causal factors generating the need to engage in sex work, calling on Finland, for example, to provide ‘alternative income-generating opportunities’ to women in sex work.²¹⁸ Similarly, recent concluding observations on Portugal reinforce the need to address poverty and the ‘social exclusion of women’, particularly migrants and asylum seekers engaging in sex work.²¹⁹ These comments of the CEDAW Committee suggest a more holistic

²¹³ Otto, ‘Making Sense of Zero Tolerance’, above n 15, 268. See, eg. *United Nations Declaration on the Elimination of Violence Against Women* GA Res 48/104, UN GAOR, 61st sess, 85th plen mtg, Supp No 29, UN Doc A/RES/48/104 (20 September 1993); Canadian HIV/AIDS Legal Network, Pivot Legal Society and Stella, l’amie de Maimie, above n 56, 3; Freeman, Chinkin and Rudolf, above n 88, 183.

²¹⁴ Freeman, Chinkin and Rudolf, above n 88, 173; Canadian HIV/AIDS Legal Network, Pivot Legal Society and Stella, l’amie de Maimie, above n 56, 3; CEDAW art 6.

²¹⁵ CEDAW Committee, *Report of the Committee on the Elimination of Discrimination against Women*, UN GAOR, 59th sess, Supp No 38, UN Doc A/59/38 (18 March 2004) [60]; CEDAW Committee, *Concluding Comments of the Committee on the Elimination of Discrimination against Women: Syrian Arab Republic*, 38th sess, UN Doc CEDAW/C/SYR/CO/1 (11 June 2007) [24]; CEDAW Committee, *Concluding Comments of the Committee on the Elimination of Discrimination against Women: Cook Islands*, 39th sess, UN Doc CEDAW/C/COK/CO/1 (10 August 2007) [27]; CEDAW Committee, *Concluding Comments of the Committee on the Elimination of Discrimination against Women: Honduras*, 39th sess, UN Doc CEDAW/C/HON/CO/6 (10 August 2007) [21]; Freeman, Chinkin and Rudolf, above n 88, 179.

²¹⁶ Freeman, Chinkin and Rudolf, above n 88, 179. See, eg. CEDAW Committee, *Concluding Comments of the Committee on the Elimination of Discrimination against Women: Australia*, 34th sess, CEDAW/C/AUL/CO/5 (3 February 2006) [21]; CEDAW Committee, *Concluding Comments of the Committee on the Elimination of Discrimination against Women: Denmark*, 36th sess, CEDAW/C/DEN/CO/6 (25 August 2006) [25]; CEDAW Committee, *Concluding Comments of the Committee on the Elimination of Discrimination against Women: Luxembourg*, CEDAW/C/LUX/CO/5 (8 April 2008) [30].

²¹⁷ Freeman, Chinkin and Rudolf, above n 88, 180. See CEDAW Committee, *Report of the Committee on the Elimination of Discrimination against Women*, UN GAOR, 59th sess, Supp No 38, UN Doc A/57/38 (2 May 2002) [308]. See further CEDAW Committee, *Report of the Committee on the Elimination of Discrimination against Women*, UN GAOR, 56th sess, Supp No 38, UN Doc A/56/38, 56th sess (19 April 2001) [304]; Holtmaat, above n 18, 97.

²¹⁸ CEDAW Committee, *Concluding Observations on the Seventh Periodic Report of Finland*, UN Doc CEDAW/C/FIN/CO/7 (10 March 2014) [20].

²¹⁹ CEDAW Committee, *Concluding Observations on the Combined Eighth and Ninth Periodic Reports of Portugal*, UN Doc CEDAW/C/PRT/CO/8-9 (24 November 2015) [28].

approach to understanding the causal factors which create the need to engage in sex work.²²⁰

2 *The CEDAW Committee and the Criminalisation of Sex Work*

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

One issue upon which the CEDAW Committee has expressed a clear position is with respect to ensuring that legal regulations do not disproportionately

²²⁰ Holtmaat, above n 18, 99.

²²¹ CEDAW Committee, *Report of the Committee on the Elimination of Discrimination against Women*, UN GAOR, 56th sess, Supp No 38, UN Doc A/56/38 (19 April 2001) [210]; CEDAW Committee, *Report of the Committee on the Elimination of Discrimination against Women*, UN GAOR, 58th sess, Supp No 38, UN Doc A/58/38 (14 March 2003) [414]; CEDAW Committee, *Concluding Comments of the Committee on the Elimination of Discrimination against Women: New Zealand*, 39th sess, UN Doc CEDAW/C/NZL/CO/6 (10 August 2007) [28]–[29]; CEDAW Committee, *Concluding Comments of the Committee on the Elimination of Discrimination against Women: Netherlands*, 37th sess, UN Doc CEDAW/C/NLD/CO/4 (2 February 2007) [21]–[22]; Freeman, Chinkin and Rudolf, above n 88, 179.

²²² Freeman, Chinkin and Rudolf, above n 88, 179.

²²³ Ibid. See CEDAW Committee, *Concluding Comments of the Committee on the Elimination of Discrimination against Women: China*, 36th sess, UN Doc CEDAW/C/CHN/CO/6 (25 August 2006) [19]; CEDAW Committee, *Concluding Comments of the Committee on the Elimination of Discrimination against Women: Vietnam*, 37th sess, UN Doc CEDAW/C/VNM/CO/6 (2 February 2007) [18].

²²⁴ CEDAW Committee, *Concluding Comments of the Committee on the Elimination of Discrimination against Women: Colombia*, 37th sess, UN Doc CEDAW/C/COL/CO/6 (2 February 2007) [21]; Economic and Social Commission for Asia and the Pacific, 'Violence against and Trafficking in Women as Symptoms of Discrimination: The Potential of CEDAW as an Antidote' (Gender and Development Discussion Paper Series No 17, Economic and Social Commission for Asia and the Pacific, 2005); Freeman, Chinkin and Rudolf, above n 88, 178.

²²⁵ *General Recommendation 19*, UN Doc A/47/38, [15] (emphasis added).

²²⁶ Otto, 'Making Sense of Zero Tolerance', above n 15, 269. See also *General Recommendation 19*, UN Doc A/47/38.

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

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

Although the CEDAW Committee has not expressed a definitive opinion on the effects of sex work regulation, the World Health Organization, UNAIDS,²³¹ the United Nations Development Programme, the United Nations Population Fund and Amnesty International have found that the criminalisation of sex work in and of itself contributes to the exploitative conditions in which such work can occur.²³² In the same sense, while the CMWC’s mandate precluded consideration of Canadian regulation of sex work, it found it ‘cannot ignore the reality that this legal regime played an important role in shaping the relationship between the police and women ... potentially affecting the police investigations into the women’s disappearances’.²³³ Crucially, the report noted three ‘overarching social and economic trends [which] contribute to the women’s marginalization’ and cause their vulnerability to violence: ‘retrenchment of social assistance programs, the ongoing effects of colonialism, and *the criminal regulation of prostitution and related law enforcement strategies*’.²³⁴ Similarly,

²²⁷ CEDAW Committee, *Report of the Committee on the Elimination of Discrimination against Women*, UN GAOR, 56th sess, Supp No 38, UN Doc A/56/38 (19 April 2001) [180]. See also CEDAW Committee, *Concluding Comments of the Committee on the Elimination of Discrimination against Women: Mauritius*, 36th sess, UN Doc CEDAW/C/MAR/CO/5 (25 August 2006) [20]–[21]; CEDAW Committee, *Concluding Comments of the Committee on the Elimination of Discrimination against Women: China*, 36th sess, UN Doc CEDAW/C/CHN/CO/6 (25 August 2006) [19].

²²⁸ CEDAW Committee, *Concluding Observations on the Combined Fourth and Fifth Periodic Reports of Bosnia and Herzegovina*, UN Doc CEDAW/C/BIH/CO/4-5 (30 July 2013) [25]; Krüsi et al, above n 21.

²²⁹ *Criminal Code* s 213(1.1), as inserted by Bill C-36 s 15(3); *Criminal Code* s 286.4, as inserted by Bill C-36 s 20.

²³⁰ CEDAW Committee, *Report of the Committee on the Elimination of Discrimination against Women*, UN GAOR, 56th sess, Supp No 38, UN Doc A/56/38 (19 April 2001) [180]. See also CEDAW Committee, *Concluding Comments of the Committee on the Elimination of Discrimination against Women: Mauritius*, 36th sess, UN Doc CEDAW/C/MAR/CO/5 (25 August 2006) [20]–[21]; CEDAW Committee *Concluding Comments of the Committee on the Elimination of Discrimination against Women: China*, 36th sess, UN Doc CEDAW/C/CHN/CO/6 (25 August 2006) [19]; Freeman, Chinkin and Rudolf, above n 88, 187–8; *Jordan v South Africa* [2002] ZACC 22 (South African Constitutional Court, Case No CCT31/01, 9 October 2002) [64], [87] (O’Regan and Sachs JJ).

²³¹ See UNAIDS, ‘Getting to Zero’ (Strategy Report No WC 503.6, UNAIDS, 2010).

²³² *Ibid* 42; Amnesty International, ‘Draft Policy on Sex Work’, above n 24, 4.

²³³ *Missing Women Commission of Inquiry Report*, above n 21, vol I, 98.

²³⁴ *Ibid* 78–9 (emphasis added).

Amnesty International has stated that, ‘while sex work carries certain risk factors, *these are exacerbated by the threat of criminal sanctions and the stigma attached to sex work*’.²³⁵ A key example cited by Amnesty International is the risk of police abuse and extortion, which is given more room to occur in a system of criminalisation, particularly one which imposes criminal measures in a discriminatory manner, as in the case of Bill C-36’s communication and advertising offences.²³⁶

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

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

Moreover, it has been noted that the criminalisation of sex work often means that sex workers feel unable to enforce their basic human rights, as their status

²³⁵ Amnesty International, ‘Decriminalization of Sex Work’, above n 47, 8.

²³⁶ Ibid 14–15; Natapoff above n 184, 1732–3.

²³⁷ Evidence to the Standing Committee on Justice and Human Rights, House of Commons, Parliament of Canada, Ottawa, 41st Parl, 2nd sess, 38th mtg, 9 July 2014, 12 (Sean Casey).

²³⁸ Evidence to the Standing Committee on Justice and Human Rights, House of Commons, Parliament of Canada, Ottawa, 41st Parl, 2nd sess, 38th mtg, 9 July 2014, 21 (Thai Truong).

²³⁹ Ibid 21; *Criminal Code* s 213(1.1), as inserted by Bill C-36 s 15(3); *Criminal Code* s 286.4, as inserted by Bill C-36 s 20; Natapoff, above n 184, 1718.

²⁴⁰ Amnesty International, ‘Decriminalization of Sex Work’, above n 47, 41–2; Human Rights Watch, ‘Sex Workers at Risk: Condoms as Evidence of Prostitution in Four US Cities’ (Report, 2012) 1. See, eg, Natapoff, above n 184.

²⁴¹ Cheryl Auger, ‘Bill C-36: No Safety or Security for Sex Workers’, *Rabble* (online), 17 October 2014 <<https://perma.cc/QXM8-FYG3>>.

²⁴² *Missing Women Commission of Inquiry Report*, above n 21, vol I, 100.

²⁴³ Ibid 107. See also Human Rights Watch, above n 241, 1.

²⁴⁴ *Missing Women Commission of Inquiry Report*, above n 21, vol I, 110.

and work are illegal.²⁴⁵ As recognised by the former UN Special Rapporteur on Violence against Women, although sex workers face constant rights violations as a consequence of violence within the community and from law enforcement, these problems are compounded by the absence of redress and access to justice for violations, as well as the forced detention and rehabilitation of sex workers.²⁴⁶ Sex workers have reported that they are frequently vulnerable to police harassment,²⁴⁷ and yet feel unable to report crimes against them due to stigmatisation, an unwillingness to investigate such crimes, and the potential for extortion and misconduct.²⁴⁸ Accordingly, Catharine Mackinnon has argued that to ‘be a prostitute is to be a legal nonperson in the ways that matter’, illustrating the inherent circularity of abolitionist arguments which operate to further isolate sex workers from the protection of the law and diminish their legal status.²⁴⁹

3 *Bill C-36 and CEDAW Article 5*

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

²⁴⁵ Anand Grover, *Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health*, UN GAOR, 14th sess, Agenda Item 3, UN Doc A/HRC/14/20 (27 April 2010) 13.

²⁴⁶ Rashida Manjoo, *Report of the Special Rapporteur on Violence against Women, Its Causes and Consequences*, 26th sess, Agenda Item 3, UN Doc A/HRC/26/38/Add.1 (1 April 2014) annex I [15], [20].

²⁴⁷ *Ibid*; Natapoff, above n 184.

²⁴⁸ Anna-Louise Crago, ‘Our Lives Matter: Sex Workers Unite for Health and Rights’ (Discussion Paper, Open Society Institute) 31; Goyal and Ramanujam, above n 6, 1110; Natapoff, above n 184, 1715.

²⁴⁹ MacKinnon, above n 9, 15.

²⁵⁰ See generally Alice M Miller and Carole S Vance, ‘Sexuality, Human Rights and Health’ (2004) 7 *Health and Human Rights* 5, 7; Vance, above n 15, 211; Goyal and Ramanujam, above n 6, 1110.

²⁵¹ *Missing Women Commission of Inquiry Report*, above n 21, vol I, 106.

²⁵² Canadian Federation for Sexual Health, ‘Bill C-36: What You Need to Know about the Proposed Law on Sex Work’ (Fact Sheet), citing Ulla Bjørndahl, ‘Dangerous Liasons: A Survey of the Violence Experienced by Women Working as Prostitutes in Oslo’ (Report, Pro Sentret, 2012) 41.

²⁵³ Dodillet and Östergren, above n 19, 21. See also Ka Hon Chu and Glass, above n 3.

perceptions on prostitution' and 'women who engage in prostitution'.²⁵⁴ Likewise in India, where an abolitionist model also operates, the Committee's recent concluding observations express 'concern' at the persecution of women in prostitution as a consequence of anti-trafficking initiatives, including raid and rescue operations.²⁵⁵

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

²⁵⁴ CEDAW Committee, *Concluding Observations of the Committee on the Elimination of Discrimination against Women: Norway*, 51st sess, UN Doc CEDAW/C/NOR/CO/8 (23 March 2012) [26].

²⁵⁵ CEDAW Committee, *Concluding Observations on the Combined Fourth and Fifth Periodic Reports of India*, UN Doc CEDAW/C/IND/CO/4-5 (24 July 2014) [22].

²⁵⁶ CEDAW Committee, *Report of the Committee on the Elimination of Discrimination against Women*, UN GAOR, 59th sess, Supp No 38, UN Doc A/57/38 (2 May 2002) [308]. See also Holtmaat, above n 18, 135; Freeman, Chinkin and Rudolf, above n 88, 180.

²⁵⁷ Holtmaat, above n 18, 135; Freeman, Chinkin and Rudolf, above n 88, 181; *CEDAW* art 5.

²⁵⁸ Holtmaat, above n 18, 96.

²⁵⁹ *Ibid.*

²⁶⁰ *Ibid* 135; Freeman, Chinkin and Rudolf, above n 88, 182.

²⁶¹ *General Recommendation 19*, UN Doc A/47/38.

²⁶² Radhika Coomaraswamy, *Report of the Special Rapporteur on Violence against Women, Its Causes and Consequences*, UN ESCOR, 52nd Sess, Agenda Item 9(a), UN Doc E/CN.4/1996/53 (5 February 1996); Radhika Coomaraswamy, *Preliminary Report Submitted by the Special Rapporteur on Violence against Women, Its Causes and Consequences*, UN ESCOR, 50th Sess, Agenda Item 11(a), UN Doc E/CN.4/1995/42 (22 November 1994).

results in a deprivation of individuals' right to control their own destiny and utilise their human capabilities to lead a meaningful life in accordance with their personal values and perspectives.²⁶³ The concepts of individual autonomy, freedom and diversity are therefore integral to the application of *CEDAW*, and particularly, art 5.²⁶⁴

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

²⁶³ Holtmaat, above n 18, 112.

²⁶⁴ Ibid 96.

²⁶⁵ Showden, above n 14, 141.

²⁶⁶ Ibid.

²⁶⁷ Canada, *Parliamentary Debates*, House of Commons, 11 June 2014, vol 147, no 101, 1710 (Peter MacKay).

²⁶⁸ H Patricia Hynes and Janice G Raymond, 'Put in Harm's Way: The Neglected Health Consequences of Sex Trafficking in the United States' in Jael Silliman and Anannya Bhattacharjee (eds), *Policing the National Body: Sex, Race, and Criminalization* (South End Press, 2002) 197, 206.

²⁶⁹ Showden, above n 14, 140.

²⁷⁰ Ibid.

²⁷¹ See Canada, *Parliamentary Debates*, House of Commons, 12 June 2014, vol 147, no 102, 6654 (Peter MacKay), 6730 (Joy Smith).

²⁷² Munro, above n 10, 238; Janet Halley, *Split Decisions: How and Why to Take a Break from Feminism* (Princeton University Press, 2006) 18.

disposal' and engage in the 'unwelcome solicitation of children', in addition to being (alongside third party 'pimps') the perpetrator of *all* violence against sex workers.²⁷³ In this way, the notion of gender in Bill C-36 reinforces the 'ascribed, social nature of distinctions between women and men — the excess cultural baggage associated with biological sex'.²⁷⁴

It is therefore apparent that the rigid gender paradigm, on which Bill C-36 is based, reconstructs a form of gender asymmetry within the Canadian sex industry, reinforcing outdated stereotypes of both women and men, and entirely erasing the experiences of those who do not fit this rigid gender binary, including male, intersex and transgender sex workers.²⁷⁵ Thus, while an analysis of all the exclusionary effects of this rigid gender framework is beyond the scope of this article (warranting significant attention in its own right), it must be recognised that, from a human rights perspective, the intentional exclusion of an entire class of persons working in the sex industry paints an incomplete picture, and offers little by way of addressing the distinct vulnerabilities and risks they may face.²⁷⁶ For example, it has been noted that in Montreal, transgender sex workers were far more likely to experience violence when being detained in prison cells with men, a common tool used by law enforcement.²⁷⁷ This, in their view, was a more pressing concern than street-based violence, in conjunction with the dehumanising and discriminatory nature of their treatment by the police, both within and outside of custody.²⁷⁸ An unfortunate consequence of locating sex work along gendered lines is that the Canadian Parliament was unable to attend to these urgent human rights concerns.²⁷⁹

Yet even within the female/male dichotomy constructed by Bill C-36, the focus on 'gender equality' produces counterproductive effects, as it reinforces a 'naturalized moorings of sex/gender' and 'supports concomitant conceptions of women (and men) that justify protective ... rather than rights-based, responses to women's human rights violations'.²⁸⁰ The gender paradigm on which Bill C-36 is based assumes that gender is a 'fixed, immutable characteristic', and clearly delineates a social construction of biological difference between men and women by reference to power.²⁸¹ Underlying Bill C-36 is a form of biological essentiality which equates the 'feminine' with notions of powerlessness, helplessness, and victimhood, whereas the 'masculine' delineates 'demand for sex', 'sexual commodification' and 'violence'.²⁸² The problem with this approach is that it limits the possibility for restructuring the social conceptualisation of female sexuality and male dominance, as required under

²⁷³ Canada, *Parliamentary Debates*, House of Commons, 12 June 2014, vol 147, no 102 (Peter MacKay).

²⁷⁴ Susan W Tiefenbrun, *Women's International and Comparative Human Rights* (Carolina Academic Press, 2012) 24.

²⁷⁵ Otto, 'Rethinking Sex/Gender Dualism', above n 16; Human Rights Watch, above n 240, 1–5. See also Canadian Federation for Sexual Health, above n 252.

²⁷⁶ Human Rights Watch, above n 240, 1–5. See also Canadian Federation for Sexual Health, above n 252.

²⁷⁷ Human Rights Watch, above n 240, 1–5.

²⁷⁸ See *ibid.*

²⁷⁹ See *ibid.*

²⁸⁰ Otto, 'Rethinking Sex/Gender Dualism', above n 16.

²⁸¹ Tiefenbrun, above n 262, 24.

²⁸² *Ibid.*

art 5 of *CEDAW*, and restricts the possibility for a new, human rights approach to sex work regulation.²⁸³ Thus, the gender essentialism underlying Bill C-36 obstructs the social change mandated by art 5 of *CEDAW* and ‘slides uncomfortably and exceedingly quickly into socio-biologism which merely puts women back in their place’.²⁸⁴

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

²⁸³ Otto, ‘Making Sense of Zero Tolerance’, above n 15, 261.

²⁸⁴ Carol Smart, *Feminism and the Power of Law* (Routledge, 1989) 75.

²⁸⁵ Miller and Vance, above n 250, 7; Goyal and Ramanujam, above n 6, 1102.

²⁸⁶ Ham and Gerard, above n 145, 300, citing Michel Foucault, *The Archaeology of Knowledge* (Pantheon Books, 1972). See also Miller and Vance, above n 250, 7.

²⁸⁷ Nancy J Hirschmann, ‘Freedom, Power and Agency in Feminist Legal Theory’ in Margaret Davies and Vanessa E Munro (eds), *The Ashgate Research Companion to Feminist Legal Theory* (Ashgate, 2013) 51, 56.

²⁸⁸ See *ibid.*

²⁸⁹ *Ibid.*

²⁹⁰ Showden, above n 14, 155.

²⁹¹ See *ibid.*

IV CONCLUSION

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

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

²⁹² Campbell, 'Sex Work's Governance', above n 25, 41; Goyal and Ramanujam, above n 6, 1110.

²⁹³ Martha C Nussbaum, "'Whether from Reason or Prejudice': Taking Money for Bodily Services' (1998) 27 *Journal of Legal Studies* 693; Goyal and Ramanujam, above n 6, 1110.

²⁹⁴ Otto, 'Making Sense of Zero Tolerance', above n 15, 261.