Reorienting Feminist Strategies Relating to Adult Transactional Sex

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ABSTRACT:

Feminist-informed policies around transactional sex continue to highlight and reinforce the ontological, epistemological and aesthetic disagreements between abolitionists and sex workers’ rights advocates. In this paper, I examine the Canadian context to provide some geographic and social specificity to such debates occurring through the global West. I review the anchoring concepts of feminist perspectives on the sale of sexual services by adults. I then suggest an intersectional understanding of sex work and deploy it to provide guidelines for addressing feminist concerns around commercial sex that avoid checkmated arguments and binary distinctions that do little to reduce the conditions of oppression that women selling sex experience. I argue that feminist still need to reorient strategies and policy proposals in a number of ways. First, we should acknowledge that many sex-workers already make up a jurisgenerative community. Second, we must recognize that the sex worker community cannot be limited to people who are the provision side of the transaction. Third, feminist should favour an ethos of respectful dissensus rather than the more orthodox feminist model of consensus.

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Introduction

In this paper, I examine the Canadian context to provide some geographic and social specificity to a discussion occurring through the global West. Namely, feminist activists and academics continue to debate principles and strategies around formal legal responses to prostitution/sex work. The policies that are generally recommended highlight and reinforce the ontological and epistemological disagreements between abolitionists and sex workers’ rights advocates.

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2 Sex work is a multifaceted phenomenon and encompasses a broad range of practices; people involved in various modes of transactional exchanges navigate varying degrees of control over their work conditions. For two excellent empirical studies, see Julia O’Connell Davidson, *Prostitution, Power and Freedom* (1998) (on the variegated nature of transactional sex); and Maggie O’Neill, *Prostitution and Feminism* (2001) (on the structural factors that make sex work a viable option for particular women). See also the recent collection of essays in Melissa Ditmore, *Encyclopedia of Prostitution and Sex Work, Volumes 1 and 2* (Greenwood, 2006). Sex work remains gendered: women who sell sex still vastly outnumber men who do. While there are important differences between female, male, and trans sex workers, there are also commonalities regarding social exclusion and stigma. P. Aggleton, *Men Who Sell Sex* (1999); Don Kulick, *Travesti: Sex, gender, and culture among Brazilian Transgendered Prostitutes* (1998). Some sex workers’ rights organizations emphasize the specificities of male prostitution; many, such as Montreal’s STELLA, and Sweden’s ANS, encourage men’s and transgendered people’s active participation. See for review of literature, infra “Anchor Concepts.” On the importance of including an interrogation of local sexual norms when constructing theories around sex work, see Kamala Kempadoo & Jo Doezema, *Global Sex Workers: Rights, Resistance and Redefinition* (1998).

3 Depending on which side of the debate one falls, the options include: decriminalization (a removal of transactional sex from the realm of the criminal law); legalization (a system of formal government regulation and control through legal measures such as zoning, health and safety standards, licensing and registry systems); or maintenance of the status quo (what some abolitionists call ‘partial decriminalization’ or what others call ‘neo-abolitionism’. On how various (Anglo-American) feminist approaches translate into concrete legal practices, see Kate Sutherland, *Work, Sex, and Sex Work: Competing Feminist Discourses on the International Sex Trade*, 42 Osgoode Hall L.J. 139 (2004). Various jurisdictions have formal and official policies on prostitution. Sweden is often held up as the model for prohibiting the “purchase and promotion” of transactional sex, based on the normative assumption that sex work harms women: *Swedish Penal Code*, chapter 6. Critics have found that the law decry the shaming tactics promoted by the government that reinforce stigma against women selling sex and force regular dates to stay away for fear of arrest. Consequently, sex workers are forced to work in more remote, poorly lit areas to avoid their clients’ detection by police. This in turn will afford them less time to assess dates and negotiate terms with them before getting into their cars and renders them more vulnerable to physical, sexual and economic violence, see Jane Scoular, *Criminalising Punters: Evaluating the Swedish Position on Prostitution*, 26 J Soc’y Welfare & Fam. L. 195 (2004). Of the jurisdictions that have legalized some aspects of the exchange of sexual services for money, policy ground include the protection of public health and safety and the protection of individuals who sell sex, for instance, see Netherland’s *Penal Code* and *Brothel Act* in 2005. Regimes tend to require brothel workers to register with municipal authorities and carry identification. While workers can access to unemployment insurance and disability benefits, sex work itself is usually not included as an employment option within the government’s eligibility protocols. The income-generation strategies of people who do work within the sex industries is recognized, as a result, but at the same time, sex work is denied full legitimacy as an employment option. There are also restrictions on foreign workers (especially workers from outside the European Union) and barriers to their obtaining work visas and strict penalties for working in the illegal and unregulated sector. See generally A.L. Daalder, *Prostitution in the Netherlands Since the Lifting of the Brothel Ban* (Netherlands Ministry of Justice and Documentation Centre ed., 2007); and Ronald Weitzer, *Legalizing Prostitution: Morality Politics in Western Australia*, 49 Brit. J. Criminology 88 (2009).
Discussions on Canadian feminist list-serves, in op-ed pieces, and through reports issued by non-profit organizations seems to indicate that the most vocal in this discussion continue to adopt one of two diametrically views of sex work. According to a now familiar story, each ‘side’ deploys a particular rhetoric – women are prostituted or they are entrepreneurs; each at times reinforces dualistic views about women’s agency and autonomy -- or lack thereof. Each views the other as a fringe minority whose policies harm vulnerable groups.

These ‘governing narratives,’ however, have run their course. On the whole, advocates of both positions can agree that that political decision-making around sex markets occurs without adequate consultation with the women most affected – though their view of who that is varies considerably; that the politics of sexuality as fertile terrain for grappling with broader gender oppression; that the current enforcement of Criminal Code provisions discriminates against women; that the women who bear the brunt of the Criminal Code provisions against prostitution are racialized in particular ways, are poor women, women who use drugs and who engage in street level

Footnotes:

4 What the concept of ‘agency’ means has been the subject of lengthy debate. In feminist philosophy and jurisprudence, a theory of women’s agency presupposes, for instance, women’s capacity to make individualized choices and to act in accordance with those choices. On the distinction between feminist and liberal understandings of agency, see Kathryn Abrams, Sex War Redux: Agency and Coercion in Feminist Legal Theory, 95 Colum. L. Rev. 304 (1995). The etymology of the term – from the medieval Latin agentia, facultas agenda – suggests that agency is the state or the faculty of an agent to act. The Oxford English Dictionary 2nd ed., s.v. “agency.”

5 ‘Autonomy’ is also a highly contested concept; at its root, autos is the Greek for self, while nomos is law or rule; autonomy, accordingly, refers to the making of own rules: Gerald Dworkin, Theory and Practice of Autonomy 13 (1988). See also The Oxford English Dictionary 2nd ed., s.v. “autonomy.”

6 Governing narratives, Des Pres explains in a different context, are the fictions that permit us to “behold ourselves and make sense of the historical world”; through them, truth and knowledge is “affected in intimate ways.” These narratives are “mythical” but that does not “diminish our need to have them inform our thinking and organize our actions.” Terrence Des Pres, On Governing Narratives: The Turkish Armenian Case, 75 Yale Rev. 517, 521(1986).

7 Sex worker advocates rely on empirical data indicating that the vast majority of women selling sex are not street level prostitutes and that approximately 80 percent of women work in other segments of the industry such as internet pornography, telephone sex, erotic dancing, erotic massage, and escorts services, see John Lowman, Notions of Formal Equality Before the Law: The Experience of Street Prostitutes and Their Customers, 1 J. Hum. Just. (1990). Abolitionists focus on quantitative longitudinal studies that show that the entry age for most street level prostitutes is fourteen; they argue that to focus on other segments of the trade ignores the plight of the most vulnerable segments of society, including children involved in prostitution. Lee Lakeman, Lee Alice & Suzanne Jay, Resisting the Promotion of Prostitution in Canada in Not for Sale: Feminists Resisting Prostitution and Pornography, (Christine Stark & Rebecca Whisnant eds., 2004).

8 Though sex workers’ rights activists correctly argue that the current regulation of prostitution work also renders male and trans workers vulnerable to criminalization.
prostitution;\textsuperscript{9} and the sex workers experience violence and are more likely to be murdered than cohorts of the same gender, age and race.\textsuperscript{10}

I encourage a reorientation in feminist theorizing and activism away from these artificial binaries. Several thoughtful conspectuses of feminist scholarship on prostitution that summarizes and critically engages with what has come to be known as the ‘choice’ v. ‘constraint’ debates already exist,\textsuperscript{11} I build on their work and agree that the that dominant framing of feminist perspectives in relation sex work has served its term. I insist that the violence / choice dichotomy is a false one and inaccurately frame the terms of the current discussion in feminism. Few if any sex workers’ rights activists deploy strict liberal notion of ‘choice;’ instead, they locate the daily negotiations of sex workers as part of a broader spectrum of income-generating activities. The issues that concern sex workers most are those of recognition (as persons, as citizens, as rights-bearers) and of respect (as individuals exercising – an always already – relative autonomy and agency). Thus, if we must speak in terms of dualism, the more accurate distinction is between feminists who view prostitution as violence and those who view it as work.

I draw on intersectional feminisms that engage with socialist, critical legal, queer, postmodern, anti-racist and anti-colonial analyses. Not only do these accounts enrich feminist understandings of the sex industries, they invite feminists to reorient our strategies to provide a more complex view of sex work which will ultimately guide the policy proposals we craft and endorse. The starting point of my discussion of sex work is that women exercise agency within broader social conditions of constraint. That is, one’s relative position along varying axes of disadvantage, including, among others, class, gender, race, age, sexual orientation, culture, and (dis)ability will render some choice more appealing than others. My position is that to attempt to abolish prostitution through criminal law removes sex work as one option that women may choose. Moreover, social profiling and criminalization of prostitution, at best, stigmatizes sex workers. It certainly does little, if anything, to alleviate the conditions that render transactional sex the best some women believe they have. At its worst, the continued criminalization of prostitution renders their living conditions even more precarious.

\textsuperscript{9} It has long been documented that the police enforce prostitution laws in gendered ways that result in the prosecution of women selling sex rather than their male clients, see Frances Shaver, \textit{Prostitution: A Female Crime?}, in \textit{IN CONFLICT WITH THE LAW: WOMEN AND THE CANADIAN JUSTICE SYSTEM}. (Aldeberg & Currie eds., 1993). A recent decision in the province of Manitoba puts into sharp relief how the criminal justice system continues to discriminate against women. In \textit{R. v. Baumgartheuder}, the court held that section 213 of the \textit{Criminal Code} (communicating) only created one offence and that it should fall to the person selling sex: \textit{R. v. Baumgartheuder}, CanLII 45735 (M.B. P.C. 2006)

\textsuperscript{10} For empirical research in the United States, see John Potterat et al., \textit{Mortality in a Long-term Open Cohort of Prostitute Women}, 782 Am. J. Epidemiology (2004); in Canada: Shari Allinott et al., \textit{Voices for Dignity: A call to end the harms caused by Canada’s Sex Trade Laws}, PIVOT: Equality Lifts Everyone http://www.pivotlegal.org/Publications/Voices/index.htm.

My prejudice exposed, in the next section, I provide a thumbnail sketch of one of the cases that is generating new interest in sex worker coalitions. In the second section, I revisit some of the anchor concepts deployed by the two dominant feminist positions on sex work. The third section explores new generative ideas around sex work through the lens of intersectional feminist analyses.

As noted, most feminists who examine the issue of commercial sex will agree that some aspects of adult prostitution must be decriminalized. Disagreement emerges around whether or not decriminalization should be limited to people who sell sex or whether it should extend to those who purchase it. I find that these debates center on ontological and epistemological concerns for feminists. By way of conclusion, I suggest how feminist movement can syncretize divergent feminist schools of thought on selling sex, break down old hostilities and create new feminist policies and networks.

The Current Configuration in Canada

In August 2008, former and current sex workers\(^\text{12}\) in Vancouver, British Columbia deposited a statement of claim before the British Columbia Supreme Court to challenge the constitutionality of certain Canadian Criminal Code provisions regulating adult prostitution.\(^\text{13}\) While transactional sex is not in itself illegal, the interpretation and application of Canadian Criminal Code provisions operate to indirectly target most conduct associated with sex work / prostitution and especially to criminalize sex workers. The Sex Workers United Against Violence (SWUAV) - a coalition of sex workers primarily from Vancouver’s Downtown Eastside\(^\text{14}\) - requested that provisions relating to running a bawdy house,\(^\text{15}\) procuring,\(^\text{16}\) living off the avails,\(^\text{17}\) and communicating for the

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\(^{12}\) ‘Sex worker’ for our purposes refers to an adult who exchange sexual services for remuneration where parties consent to and negotiate the terms of the transaction.

\(^{13}\) Sex Workers United Against Violence (S.W.U.A.V.) and Sheryl Kiselbach v. A.G. Canada, B.C.S.C. 1726 (B.C.S.C., 2008) [hereinafter, SWUAV]. SWUAV is a non-profit organization comprised of street-level sex workers and Ms. Kiselbach is a former sex worker with 30 years of experience within the sex industry.

\(^{14}\) The Downtown East Side (DES) spans approximately 15-block. While it is made of a heterogeneous community of working-class and working poor, community activists, migrant workers, poor families, people with intellectual disabilities, artists, and students, its notoriety stems from one section that is home for street-involved people and drug users. Approximately 40% of residents receive income assistance, there is a high unemployment rate, and 62% of residents are male. The lion’s share of the city’s affordable housing – usually in single-room occupancy hotels - is located in the DES: City of Vancouver, Downtown East Side Monitoring Report (Planning Department, 2006). The city’s drug market, and especially the sale and purchase of heroin, is concentrated at the DES’ main intersection, with an estimated 6000 interventous drugs users in the area. There is an incredibly high rate of Hepatitis C and HIV seroprevalence. There is a high level of drug and alcohol use. Vancouver police patrol the neighbourhood as a ‘skid row’ district: Laura Huey, Negotiating Demands: The Politics of Skid Row Policing in Edinburgh, San Francisco and Vancouver (2007).


210. (1) provides that: Everyone who keeps a common bawdy-house is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years (…) and

211 provides that: Everyone who knowingly takes, transports, directs, or offers to take, transport or direct, any other person to a common bawdy-house is guilty of an offence punishable on summary conviction.

\(^{16}\) 212. (1) provides that: Everyone who (a) procures, attempts to procure or solicits a person to have illicit sexual intercourse with another person, whether in or out of Canada, (b) inveigles or entices a person who is not a prostitute to a common bawdy-house for the purpose of illicit sexual intercourse or prostitution,
purposes of prostitution be struck down provisions of the *Criminal Code* on the basis that they subject sex workers to increased likelihood of physical, sexual, and economic violence. They argue that these provisions violate the *Charter of Rights and Freedoms*, and especially, sections ss. 2(b) (freedom of association) and 2(d) (freedom

(c) knowingly conceals a person in a common bawdy-house,  
(d) procures or attempts to procure a person to become, whether in or out of Canada, a prostitute,  
(e) procures or attempts to procure a person to leave the usual place of abode of that person in Canada, if that place is not a common bawdy-house, with intent that the person may become an inmate or frequenter of a common bawdy-house, whether in or out of Canada,  
(f) on the arrival of a person in Canada, directs or causes that person to be directed or takes or causes that person to be taken, to a common bawdy-house,  
[…]

(j) lives wholly or in part on the avails of prostitution of another person,  
is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years. *Id.*  
17 212(2) provides that despite paragraph (1)(j), every person who lives wholly or in part on the avails of prostitution of another person who is under the age of eighteen years is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years and to a minimum punishment of imprisonment for a term of two years. *Id.*

18 213. (1) provides that Every person who in a public place or in any place open to public view […] (c) stops or attempts to stop any person or in any manner communicates or attempts to communicate with any person for the purpose of engaging in prostitution or of obtaining the sexual services of a prostitute is guilty of an offence punishable on summary conviction. *Id.*

19 This is not the first time Canada’s prostitution laws have been called into question. In the 1980s, the Fraser Committee was appointed to investigate pornography and prostitution. Its report recommended, inter alia, that prostitution related activity of both clients and workers be removed from the *Criminal Code* “except insofar as they contravene non-prostitution related Code provisions …” and that provinces allow and regulate “small-scale, non-residential commercial prostitution establishments employing adult prostitutes.” 2 Pornography and Prostitution in Canada: Report of the Special Committee on Pornography and Prostitution (the “Fraser Committee”) (1985). Shortly thereafter, the Supreme Court of Canada was asked to grapple with the legal regulation of prostitution in the late 1980s. In 1990, it upheld both the then ‘communicating’ and ‘bawdy house’ provisions as constitutional because its purpose and effect (reducing street nuisance associated with street-level prostitution) outweighed any infringement of the *Charter of Rights and Freedoms* and especially sections 2(b) (freedom of expression) and 7 (life, liberty and security of the person). In *Reference Re s. 193 and s.195 (1)(c) of the Criminal Code* [1990] 1 S.C.R. 1123, the Supreme Court of Canada dismissed a constitutional challenge seeking to invalidate ss.210 (bawdy house) and s. 213(1)(c) (communication) of the *Criminal Code*. While the communication provisions were found to violate s.2 of the *Charter*, the infringement of freedom of expression was upheld as constitutionally valid as a reasonable limit in a free and democratic society (under s.1). Since then, sex workers and researchers have noted that this decision was made in the absence of any empirical evidence regarding the practical applications of the law to their daily lives; had that evidence been available the court may well have decided differently. It is important to note that the only two women sitting on the bench dissenting with the majority. Justices Bertha Wilson and Claire l’Heureux-Dube found that the prostitution provisions breached sex workers’ right to freedom of expression. Moreover, both judges found that prostitutes should be legally treated as economic actors rather than victims. *See for instance, Federal/Provincial/Territorial/Working Group on Prostitution- Report and Recommendations in respect of Legislation Policy and Practices Concerning Prostitution-Related Activities*, 1998. Finally, in 2006, the Federal Committee on Human Rights tabled a report which iterated previous recommendations that Canada change its solicitation laws to improve the safety of sex workers.

of expression), s.7 (right to life, liberty and security of the person), and s.15 (right to equality).21

According to SWUAV, the communication law restricts the content of expression by prohibiting a particular message sought to be conveyed (here, for the purpose of engaging in transactional sex). The Criminal Code provisions prevent sex workers from pooling resources, engaging in associational activity or getting otherwise organized and doing collectively what they legitimately do individually in order to further common goals, interests, and needs (here, improving and controlling their working conditions); that prostitution law increase risk of physical and sexual violence, psychological injury, kidnapping and death, as well as other threats to their security, health and safety; and that the prohibitions against prostitution discriminate against sex workers (here, the individual members of SWUAV) because they are interpreted and implemented in ways that disproportionately target and impact people who sell sex either on the basis of their status as sex workers, or because they are women, as compared to people who buy sex (who are overwhelmingly men).22

The Attorney General of Canada challenged SWUAV’s standing, claiming that better and more effective ways to raise the constitutional validity of the provisions existed, namely by a private litigant during his or her prosecution under the Criminal Code.23 The Court accepted the Federal Crown’s argument and denied SWUAV ‘public interest standing’ to bring forth the challenge.24 Justice Ehrcke’s order was successfully appealed, however.25 In March 2011, the Supreme Court of Canada announced that it would hear the federal government’s appeal of that decision.

21 Section 2(b) states that: Everyone has ...freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication; (...) and (d) freedom of association. (...).

Section 7 states that: Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice (...)

Section 15.(1) provides that: Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability (...) Id.

22 SWUAV, supra note 2 paras 20-27.

23 SWUAV, supra note 2.

24 Whereas public standing in Canada was historically limited to the Attorney general maintaining an action in the public interest, the Supreme Court of Canada decided in Thorson v. Attorney General of Canada, 1 S.C.R. 138 (1975) that such as rule left citizens at the mercy of the Attorney General and immunized legislation from judicial review. With Thorson, three other common law cases have articulated the test for public interest standing as follows:

1) Is there a serious issue as to the invalidity of the legislation?; 2) Is the plaintiff directly affected by or does s/he have a genuine interest in the validity of the legislation?; and 3) Is there no other reasonable and effective manner in which the issue may be brought before the Court?


Around the same time as the litigation began, the Coalition of Experiential Communities organized to have co-operative sex work facilities legalized in British Columbia. The West Coast Co-operative of Sex Industry Professionals was officially incorporated by the British Columbia government in 2007. It is owned and operated by a broad spectrum of members of the sex working community: women, men and transgendered people; workers from multiple sectors of the industry; and “multi-literate and culturally diverse” workers. The Cooperative aims to improve and sustain “the occupational health, safety and capacities of sex industry professionals as employees and contractors within a legitimised profession”; empower and nurture the sex working community; provide services, training and education; and emphasize the importance of harm reduction frameworks for achieving social justice for sex workers.

Finally, in 2010, Terri Jean Bedford (who worked as a dominatrix), Valerie Scott (Executive Director of Sex Professionals of Canada) and Amy Lebovitch (a current in-call sex worker) initiated an application in the Ontario Superior Court of Justice. The applicants sought the constitutional invalidation of the provisions relating to keeping a common bawdy house, living on the avails and communicating for the purpose of prostitution.

Madam Justice Himel held that the provisions effectively endangered sex workers by preventing them from engaging in actions that could shield them from violence. Namely, the bawdy-house provision (intended to protect the public from nuisance, and other health and safety concerns) force sex work into more remote areas and especially on the streets by making it illegal to practice in-call prostitution. The avails provision (intended to protect sex workers from the exploitation of ‘pimps’) effectively prevents sex workers from hiring a driver or bodyguard to protect themselves from violent clients. The communication provision hinders their ability to screen their clients for signs of a risk of violence. These separate provisions, may not endanger sex workers when applied in isolation. They do nevertheless work conjunctively in ways that put them at greater risk of violence. Bawdy-house provisions make safer transactional practices illegal. This fact is exacerbated by sex workers’ being barred access to hired protection under the avails provision; sex workers move to the street as a result and are at risk of violating the communication and nuisance provisions. Consequently, these provisions are arbitrary and they violate the principles of fundamental justice: the actions they prohibit have no rational connection to their objectives. Moreover, the same provisions are overbroad. First, tenants, employees, children, and spouses who share work or living spaces with people working in the sex industry may be charged under bawdy house or living off the avails provisions. Second, the communication provisions make the task of screening clients almost impossible for sex workers or at the very least “moving prostitution

26 Who We Are, West Coast Co-Operative of Sex Professionals (June 9, 2011), http://www.wccsip.ca/whoWeAre.html.
27 Id.
28 The litigants did not frame prostitution in terms of an equality issue. This rhetorical move has, rightfully, raised concerns for feminist legal theorist, see generally Sex Trade Workers to Fight Canada’s prostitution Laws, CBC Canada News (June 9, 2011), http://www.cbc.ca/canada/story/2009/10/05/prostitution-law005.html.
29 Bedford et al v Canada, 2010 ONSC 4262.
30 Ibid at paras 385-88.
31 Ibid at paras 401 and 402.
activities to isolated industrial areas”.

32 Their overall effect is that sex workers are threatened with criminal sanctions if they take actions to protect themselves. As a consequence, the Criminal Code sections infringe upon the principles of fundamental justice and they cannot be saved under section 1 of the Charter as sex workers’ rights are more than minimally impaired. Finally, while the communication provision had previously been upheld as a valid infringement of sex workers’ freedom of expression, Justice Himel relied on international evidence to determine that other, more effective means existed to achieve the governmental goal of removing prostitution from the public view. She also found that in those jurisdictions that allowed for safe-house brothels, sex workers reported “greater comfort” in communication sex safe practices. Finally, the negative repercussions of a ban on communication, as discussed above, outweigh their valid legislative objective.

As a result, the laws were a “serious violation” of the Charter, and especially the principles of fundamental justice. Justice Himel deferred to the federal government to “fashion corrective action.” The outcome aside, the decision is also noteworthy for the meaningful manner in which Justice Himel engaged with the overwhelming expert testimony (88 volumes of evidence) and international examples (from several other jurisdictions including Australia, the Netherlands, Sweden, and New Zealand). The case is currently before the Ontario Court of Appeal. It has drawn a number of interveners, including the Attorney General of Ontario (who supports the current legal framework) and the Prostitutes of Ottawa / Gatineau Work, Educate Resist (who raise the issue of autonomy and bring an equality rights analysis to sex work). Interestingly, a number of national feminist organizations have opted to ‘take no position’ on the Bedford decision – a position in itself in a somewhat volatile environment.

These three mobilizations - both through and beyond the formal justice system - have refueled the sometimes vitriolic debate within the Canadian feminist community as to whether or not to support sex workers’ coalitions. To this end, Canada is representative of other late-capitalist, post-industrial states currently rethinking the governance of transactional sex. The tenor of two most widely held feminist perspectives on prostitution is suggested in large part by the proponents’ starting point: that prostitution is either a denial of women’s civil rights or its criminalization is an infringement of women’s human rights; put differently, it is inherently violent against women or it is a form of negotiation in which women engage. In the next section, I situate these feminist perspectives in relation to other social and political frameworks.

32 Ibid at para 409 and 410.
33 Ibid at paras 439 and 441.
34 Ibid at paras 474 and 479.
35 Ibid at 504.
36 Ibid.
37 Britain and South Africa are currently proposing an overhaul of their laws regulating prostitution. Governments are grappling with, among other things, the reality that the sex industry is transnationalized, that multiple actors involved in transactional sex are increasingly less retained by state boundaries, and that there are complicated intersections between commodified sex and tourism.
Anchor concepts of feminist perspectives on selling sex

**Prostitution is inherently violent**

The conceptual focal point for many mainstream, institutionally organized abolitionist feminists is that sex work is an inherently violent form of dominance and abuse by men of women and children. ‘Pimps’ necessarily abuse women either physically, economically, psychologically, sexually or a combination thereof. The mere fact that ‘tricks’ / ‘johns’ have the economic power to purchase sex from women is a form of violence and is our one of the most blatant contemporary male privilege.

To this effect, prostitution also inflicts a secondary harm to other women and society altogether. The assumptions upon which this consideration of commercial sex rests are the following. Sexual exploitation is a universal, global political condition that transcends race, ethnicity, age, and class; it is the foundation of women’s inequality; and prostitution is the “cornerstone of all sexual exploitation.” Any form of prostitution is in itself inherently and universally a form of violence against women.

From this perspective, it is entirely unimaginable that sex work is a profession or an income-generating activity; all women involved in prostitution are recruited, trafficked, duped, defrauded or otherwise forced into it by coercion, control, and violence at a young age. These women have already experienced sexual victimization and are additionally victimized through physical, emotional, and economic violence and the possibility of death with every transaction. Victims of prostitution must be helped to leave prostitution (saved) and given the tools necessary to rehabilitate and reintegrate into society.

Prostitution is a part of broader gendered “inherently asymmetrical” or hierarchical system of sexuality. The eroticization of power differentials embodied in

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38 There is little empirical research on ‘pimps’; several abolitionist scholars rely on anecdotal evidence such as Jody Raphael, *Listening to Olivia: Violence, Poverty, and Prostitution* (2004).
39 To Jeffries, even the figure of the ‘john’ is insufficient for conveying the inherent violence of the transaction. A “prostitution abuser,” she writes, is “any man … who, for the purposes of his sexual satisfaction, habitually or intermittently reduces another human being into a sexual object by the use of money or other mercenary considerations.” Sheila Jeffrie, *The Idea of Prostitution*  4 (1997).
44 Overall, supra note 36, at 719.
pornography does not merely arouse or entertain; instead, it “distributes power.” Women’s objectification in pornography, in turn, encourages men to “buy sexual access to women’s bodies.” Access to purchasable sex is consequently an integral component of contemporary masculinity worldwide; a masculinity that reflects and reproduces a “pure hatred for the female body.”

Women’s social and economic marginalization renders all prostitution forced; women are prostituted or pimped, survivors or sex slaves rather than individuals engaging in anything that can resemble a ‘professional activity’. While providing no empirical basis for the claim, some abolitionists argue that there is a “sexually exploited elite” which makes up two percent of all sex workers; even these women, who “service a few men for a lot of money in a short period of time” eventually “get out” or more commonly “are bought by one man who supports them.”

Thus, to abolitionists, concepts like ‘sex trade’ and ‘erotic labor’ anesthetize, naturalize and mask the violence that is inherent to prostitution. Rather than an equal exchange between consenting adults, the practice of prostitution is sexual slavery and akin to rape because prostitutes are always “disembodied” and “do not exist as human beings”.

Any legitimating of the sex industry in Western countries will increase numbers of prostitution by increasing the incidence of trafficking of ‘third’ world women.

Women, according to abolitionist discourse, may believe that they have chosen prostitution among other options, but the economic and sexual coercion implicit in commodified sex reduces any pretension of choice to a kind of ‘false consciousness.’ Instead, scholars who take this perspective argue that the notion of choice “implies the existence of at least two options;” and correspondingly, the choice between “starvation, abuse, homelessness and death” or prostitution is an empty one.

Further, women in the sex trades who frame prostitution as work reinforce – unwittingly perhaps - male hegemony.

Scholars who present challenges to the abolitionist perspective are not feminists; rather they are advocates of prostitution who purport to be feminists in order to

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46 Pateman, supra note 36, at 189.
47 Dworkin, Life and Death, supra note 36, at 145.
48 A key rhetorical device in radical, dominance or abolitionist work is to highlight how it is ‘not just another job.’ Of course this approach is intended to water down the more subtle argument made by sex workers’ rights groups that it is a job, albeit one that may be chosen for pragmatic purposes, in light of less than complete range of options; and one that includes alienation and exploitation, like other forms of work.
49 Prostitution’s Hierarchy of Coercion, Prostitution Research & Education (June 9, 2010) http://www.prostitutionresearch.com/ProstitutionCoercionHierarchy.pdf. While this argument gestures towards the claim that all marriage is a form of prostitution, it seems doubtful that that is the intended tone.
51 Among many problematic aspects of the direct correlation drawn between trafficking and sex work is the deployment of two discursive figures. First, there is the voluntary sex worker, caricatured as the westerner making empowered decision. Second, there is the victimized exploited ‘third’ world other, as vulnerable, passive and preyed upon by traffickers. On the problematic representation of ‘third’ world women generally, see Chandra Talpade Mohanty, Under Western Eyes: Feminist Scholarship and Colonial Discourses, in DANGEROUS Liaisons: Gender, Nation and Postcolonial Perspectives (Aamir Mufti, Anne McClintock & Ella Shohat eds., 1997).
53 MacKinnon, supra note 39.
further their agenda. Prostitution and trafficking are intrinsically linked. The traffic of human beings for sexual purposes cannot be eliminated unless the international community “takes a rigorous stand” and implements measures to abolish prostitution. Finally, prostitution is not inevitable; the view that men have uncontrollable ‘natural desires’ is a patriarchal myth that naturalize the sexual violence men commit against women. Prostitution is unacceptable in a society that promotes substantive gender equality; it can and should be abolished, even at the risk of rescinding certain women’s exercise of autonomy.

The abolitionist perspective has had considerable currency with non-profit organizations working with women who experience marginalization and criminalization. Vancouver’s Aboriginal Women’s Action Network and the Rape Relief & Women’s Shelter have issued media statements that “oppose … any state regulation of prostitution that entrenches Aboriginal women and children in the so-called ‘sex trade’”. Feminist who support this position argue that the coalitions of sex workers and non-sex workers mobilizing to strike down Criminal Code provisions do not speak for or represent ‘prostituted women;’ or, if they do represent women in the sex industry, the women they speak for are not the most marginal and vulnerable women – street level prostitutes. Yet, one of the most devastating critique of the radical / dominance feminist perspective is, as I elaborate, that it reinforces as it tries to dismantle, phallocentrism: recasting myths about inherently submissive and asexual women and violent and viral men.

Another point of contentious is that abolitionists argue that concept of harm-reduction is based on the assumption that prostitution is inevitable (Jeffreys, 1997). In a press release condemning a proposal in Vancouver that would allow sex-workers to run co-operative brothels, the Ex-Prostitutes Against Legislated Sexual Servitude writes: We are not impressed with lip service proposals to make prostituted women’s lives “safer”. Safer is not good enough … not only is this violence not recorded, not prosecuted, not punished. We are now being told that we chose it (2008, p.1).

This view of harm reduction strategies is misleading, however. Rather than merely suggesting that worker-run bawdy-houses will eliminate violence in the sex trade, sex worker coalitions globally, offer a variety of services designed to reduce women’s marginalization and criminalization. Many of these proposals mirror those deemed ‘exiting’ strategies by abolitionists. Namely, in Sydney, Australia, the Sex Workers Outreach Project provides information on sexually transmitted infections, occupational health and safety, the legal regulation of the sex industry; it has implemented needle and Syringe outreach programs; and it offers counseling and support for sex industry workers.

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54 Dworkin, Pornography (1989).
55 Ekberg, supra note 37, at 1190.
59 For a similar critique, see N. Zatz, SexWork/Sex Act: Law, Labor and Desire in Constructions of Prostitution, 22(2) Signs 277 (challenging the distinction between erotic life and economic activity); D. Cornell & Drucilla Cornell, At the Heart of Freedom: Feminism, Sex, & Equality (1998); Jane Scoular, The Subject of Prostitution: Sex/work Law and Social Theory (2011).
The Sex Workers Project in New York provides legal services, legal training, and policy advocacy for sex workers. And, in Montreal, Quebec, STELLA does outreach and sensitizing education, provides legal information and support, mobilizes to fight discrimination and promotes the decriminalization of adult sex work. Compare these endeavours to the findings of a longitudinal empirical study in Spain has found that agencies promoting exiting strategies and “declaring themselves to be helpers” actively reproduce the social exclusion of women in the sex trade through a range of theoretical and practical moves whose object is ultimately the management and control of particular women. 

Finally, the reality that the radical feminist position remains in step with neo-conservative ideologies and policies remains unaddressed by dominance theorists. For instance, former U.S. President George Bush’s “Anti-Prostitution Pledge” requires any organizations receiving HIV/AIDS funding to explicitly oppose prostitution.

**Selling sex is work**

The view that prostitution is inherently violent is deeply entrenched in feminist political struggles that emerged in the 1960s. This perspective is often placed in counterpoint to the position that deploys libertarian and, more recently, sex workers’ rights discourses. Here too we can find a number of assumptions about commercialized sex.

Contra the view that women in sex industries are located on the slave end of the master-slave dialectic, libertarians argue that women are selling specific services rather than their bodies, and that they are engaging in an economic transaction: an exchange of services for money. Feminists building on libertarian arguments are often referred to as ‘sex radicals.’ They argue that it is a woman’s right to determine her own sexual behavior, which includes commercial sexual exchanges. Yet, as noted above, under the

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60 Laura Maria Agustin *Sex Work at the Margins* (2007) at p. 5.

On the ways in which certain (more orthodox) feminist discourse are state-friendly in advanced capitalist and liberal democracies, see Susan Boyd, *(Re)Placing the State: Family, Law and Oppression* 9 C.J.L.S. 39 (1994).

62 ‘Sex radicals’ draw on queer theories to argue that sex work can be transgressive. Sex work, is sometimes compared to other ‘deviant’ sexualities in that it also destabilizes traditional notions of respectability and femininity. It can operate in ways that subvert normative heterosexuality. It can be a source of sexual pleasure for women. It can increase their self-esteem and foster a positive body-image. Moreover, the continued demands for sex by men are such that women who wield their sexual wiles are exercising agency and using sex to gain considerable social and economic power and “charge for what other women give for free.” *Sex Work: Writings by Women in the Sex Industry* 273 (Frederique Delacoste and Prescilla Alexander, eds., 1987). Gayle Rubin argues, however, that we must untangle work and sexual preference. Sex workers do not necessarily embody ‘deviant’ sexualities; unlike queer and other sexual performances, “sex work is an occupation.” G. Rubin, *Thinking Sex: Notes for a radical Theory of the Politics of Sexuality, in Pleasure and Danger* 267, 286 (Carol Vance ed.).
current legal regime in Canada and elsewhere, these commercial agreements often remain unenforceable for policy reasons.\(^\text{63}\)

Consequently, rather than using libertarian or contractual discourse, the ‘sex workers’ rights’ perspective often emphasizes human rights and especially around safer working conditions.\(^\text{64}\) These two different branches make up a critical response to abolitionism. Moreover, both emerged primarily from people who have engaged in transactional sex.\(^\text{65}\)

Briefly put, the position is that people working in the many segments of the industries – especially those who are not street-level prostitutes - form part of a growing non-standard labor sector.\(^\text{66}\) Sex workers, like other marginal workers, are managed and subjected to labor-specific expectations; they are also denied wages, benefits, and stability generally associated with employment.\(^\text{67}\) The figure of the sex worker as anyone who provides sexual services for material compensation has been deployed to subvert the moral and psychological stigma associated with the concept ‘prostitution’ or the figure of ‘the prostituted’ woman / child. Labor discourse emphasizes that sex workers are engaging in ways of generating necessary income.\(^\text{68}\) Sex work becomes part of a broader and global discussion on human rights generally and workers’ rights especially.

According to the sex workers’ rights discourse, women selling sex negotiate the same gender and class disadvantage than other women do but they are additionally subjected to stigma. The 'whore' label especially interferes with their ability to have access to resources available to real or imagined 'other' women when they experience economic, physical or sexual abuses. Further, while violence occurs within the sex trades, violence is not endemic to transactional sex. Instead, violence is systemic to commercial sex because of the moralistic regulation of the industries, police enforcement

\(^{63}\) For a thought-provoking feminist analysis of contract law: Gillian Hadfield, The Dilemma of Choice: Feminist Perspective on the Limits of Freedom of Contract, 33 Osgoode Hall L.J. 337 (1996). “The feminist argument that a woman’s consent to engage in prostitution” she notes “does not demonstrate that these activities improve her well-being.” She explains that to orthodox ((Marxist and dominance) feminist approaches, a basic level of economic well-being is required in order to validate the choices women make. She concludes that a sex worker’s “freedom to choose between her body and her economic survival” does not provide normatively acceptable options, and cannot be justified as promoting her welfare (at p. 344). I find Hatfield’s summary persuasive but disagree that the fundamental choice a sex worker makes is between survival and ‘her body.’ I will return to this point below.

\(^{64}\) There is increased critical assessment of the interventions on behalf of “women’s rights” and the way such discourse is used as justification for military and economic institutions’ imperialistic practices. See for instance: M. Hardt & A. Negri, Empire (2000).

\(^{65}\) The sex radical perspective (in the Global West at least) is often attributed to founding mothers like Carol Queen and Carol Leigh and the sex as work perspective to Norma Jean Almodovar and Margot St James.


\(^{67}\) Christine Bruckert & Colette Parent, Criminalized Women Workers: The In-call Sex Industry, in CRIMINALIZING WOMEN: GENDER AND (IN)JUSTICE IN NEO-LIBERAL TIMES (Elizabeth Comack & Gillian Balfour eds., 2006).

\(^{68}\) Some empirical research indicates that women working within the sex industries refer to themselves sex workers or working women rather than the victimizing terms circulated in radical feminist discourses. For instance, Steven Kurtz et al., Sex Work and ‘Date’ Violence, 10 Violence Against Women 357 (2004) (qualitative interviews with 294 sex workers).
(namely the harassment and prosecution of sex workers rather than their clients). Formal and informal obstacles to making claims to public benefits further exacerbate matters. Because of the criminal nature of their work, sex workers are also very unlikely to report violence or abuse at the hands of clients, strangers, partners and especially the police; this reluctance reinforces their vulnerability to violence.

Some theorists and activists also distinguish between forced or coerced or survival sex on the one hand, and free, voluntary and consensual exchanges on the other. Though they also point out the more subtle binaries such distinctions may reinforce, such as bad girl, on the other hand, who are voluntary sex workers, and good girls, on the other, who are victimized, trafficked, forced, prostituted girls and women. That is, the anti-trafficking discourses and policies promoted by abolitionist feminists have historically been used to police, shame and punish women workers rather than protect them from violence. Instead, the violences of sex work result from the discriminatory legal regulation of sex work based on a moral system which shapes and reflects the view that sex workers are “the culprits.” Others may use the forced / voluntary discourse as a way of legitimizing women working within the sex industries, support better working conditions for them, while refusing to legitimize the profession itself – recognizing the existence of a social fact without conceding that it is desirable.

Finally, sex as work advocates challenge the radical assumption that women selling sex are necessarily passive victims, rather than political actors developing and deploying feminist analysis and practices in making decisions regarding their lives and livelihood.

**New generative ideas for feminist approaches to prostitution**

The abolitionist or radical feminist perspective on prostitution has been most effective in highlighting the physical and emotional violence experienced by women who sell sex. Many abolitionists in Canada advocate what in the United Kingdom would be called a ‘coordinated’ strategy to end prostitution, foregrounding: prevention, ‘exiting’ strategies, and community protection. Some abolitionist work has provided complex and nuanced gendered analysis of the relationship between male privilege and

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69 Shaver, *supra* note 9; Allinott et al., *supra* note 10.
70 Baldwin, *supra* note 11.
71 Allinott et al., *supra* note 10.
72 Jo Doezema, *Forced to Choose: Beyond the Voluntary v. Forced Prostitution Dichotomy,* in Kempadoo & Doezema, *supra* note 1. Jill Nagle, *Whores and Other Feminists* (1997); Laurie Shrage, *Feminist Perspectives on Sex Markets,* The Standford Encyclopedia of Philosophy (June 11, 2011), http://plato.stanford.edu/entries/feminist-sex-markets. The pragmatic distinction between forced prostitution and voluntary sex work has been adopted by the Netherlands. The former refers to child prostitution and trafficked individuals, whereas the latter category indicates the government’s recognition of sex workers as engaged in an occupation and deserving of equal protections and social benefits. Nevertheless, sex workers are required to practice under regulatory conditions (municipal licensing and mandatory identification) and the criminal law applies to victims of exploitation or coercion; [Cite]
75 This is a position I have taken in earlier work. I am more ambivalent about this view as I currently write.
commodified sex. However, it is problematic on a number of fronts. First, the anti-prostitution discourses draw on highly emotive - hyperbolic and vitriolic even - language that stultifies any attempts by feminist theorists and activists to imagine prostitution on different terms than those proposed by abolitionists. For instance, feminists who cast a critical lens on the institution of prostitution who also call into question the abolitionist perspective or strategies are, for instance, “tricking” women and reduce prostitution to an academic question when it is “more like gang rape than anything else.”

Sex workers rights’ proponents argue that radical feminists draw on the “worst available examples” of violence in the sex trades and make generalized claims about prostitution. In much of the radical feminist research, anecdotal evidence is presented as conclusive and counter-claims are ignored or dismissed. Abolitionists tend toward straw arguments that reduce the work paradigm to one that assumes prostitution to be ineradicable. Yet, that is a view more frequently circulated in mainstream media rather than a discourse deployed by sex workers themselves. Third, the radical feminist view is essentialist in orientation: all women, in any context, that sell sex, are considered passive victims being enacted upon by men. This view denies that sex workers’ have and exercise the ability to self-define, to mobilize, and to exercise agency.

In response, the sex workers’ rights movement centers individual agency rather than viewing sex workers as sexual subordinates enacted upon by men. This perspective adds complexity to the feminist view of the sale of sex. To be sure, the sex workers’ rights movement has at times reproduced a caricatured view of the anti-sexual feminist ‘other’ and dismissed work done by allies within the mainstream feminist movement. It has also, at times, romanticized sex work’s transgressive or spiritual potential for women. Accounts that associate the criminalization of sex work with the suppression of female desire, tend to draw somewhat spurious parallels between the restrictions on women’s sexual activity with the suppression of an already existing ‘natural’ sexual drive. As a consequence, some of the discourse circulated to further sex workers’ rights may also reinforce dominant assumptions about essentialized sexuality, namely, as central to identity and ignores the material structures that shape and constrain sexual activity.

78 Dworkin, Life and Death, supra note 36, at 140.
79 Rubin, supra note 56, at 301.
81 See for instance, Mary Powell who begins an article with the unsubstantiated and highly contentious claim that “there is little doubt that prostitution is the oldest profession:” Mary Powell, To Whisper or to Howl 1 Liberator 1 (2005).
82 Well-being does not necessarily result from agential action. The consequences that derive from anyone’s exercise of agency depends on their particular social location, the re-evaluation of consent in light of changed circumstances, and the ability to assess and pursue outcomes that are in one’s best interest: M.J. Trebilcock, The Limits of Freedom of Contract 77-101(1993).
83 Feminists Advocating for Rights and Equality for Sex Industry Workers (FIRST) for instance is a coalition of Vancouver academics and activists which has mobilized to have prostitution decriminalized. FIRST invites you to join us!, Sex Worker’s Rights Advocacy Network (July 12, 2011), http://swannet.org/en/node/1159.
84 For positive (though nuanced) readings of women’s experiences in various forms of sex work, see Annie Sprinkle, Hardcore from the Heart: Pleasures, Profits and Politics of Sex in Performance (2006).
85 Jane Scoular, The Subject of Prostitution: Sex/Work Law and Social Theory (2011).
preferences. For instance, while the sex ‘radicals’ often does not engage with the ways in which capitalism and neo-capitalism contributes to the gendered nature of commercialized sex, the ‘workers’ rights’ perspective does not necessarily grapple with the ways in which sexuality and sexual preferences are themselves socially constructed through, among other things, legal discourse, and as a consequence, historically and culturally contingent.

With these critiques in mind, I suggest an intersectional understanding of sex work and use that framework to provide guidelines for addressing feminist concerns around commercial sex that avoid checkmated arguments and binary distinctions that do little to reduce the conditions of oppression that women selling sex experience.

**Intersectional Theorizing**

Feminist movement might be able to engage with the choices women make when engaging in the sale of sex without relying either on radical feminists’ victim subject or on existential humanisms’ autonomous individual subject. Choices women make should be conceived in terms that are situational, contextual, relational, that is, they are depending on the power dynamics that exist in any given moment or situation. Apprehending these power dynamics requires a shift away from more dogmatic positions to more nuanced intersectional and relational approaches that allow for more fluid understandings about relationships.

Intersectionality, Patricia Hill Collins explains, is unlike “additive models” of oppression which remain rooted in “either/or dichotomous thinking of Eurocentric, masculinist thought”. The interlocking or "both/and" feminist method opens the possibility for understanding how "race, class and gender as interlocking systems of oppression"; further, it furthers a “paradigmatic shift of thinking inclusively about other oppressions, such as age, sexual orientation, religion and ethnicity.” Similarly, Justice Mari Matsuda challenges academics and activists to adopt a "multiple consciousnesses".

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86 Id.
87 Despite disagreement on many issues, most scholars and activists engaging with the question of sex work will conceded that in Canada approximately seventy-five to eighty-five percent of commodified sex is offered by women: Report of the Standing Committee on Justice and Human Rights; Report of the Subcommittee on Solicitation Laws. The Challenge of Change: A Study of Canada’s Criminal Prostitution Laws (Communication Canada – Publishing, Ottawa, Canada, December 2006), available on-line: http://www.parl.qc.ca. Trans/women and transvestites make up approximately twenty percent of people engaged in sex work: id.
88 M. Foucault, History of Sexuality (1978); As Shrage maintains, sex work is cultural institution which is produced by and reproduced through repressive norms about female sexuality. Laurie Shrage, Moral Dilemma of Feminism: Prostitution, Adultery and Abortion (1994).
89 Patricia Hill Collins, Black Feminist Thought: Knowledge, Consciousness and the Politics of Empowerment 225-26 (1990). See also Kimberle Crenshaw, Demarginalizing the Intersection of Race and Sex: a Black Feminist Critique of Antidiscrimination Doctrine, Feminist theory and Antiracist politics, University of Chicago Legal Forum, 1989, at 139; and Adrienne Rich, Compulsory Heterosexuality (1980). Similarly, Sherene Razack (1998) has argued that either violence or choice understandings that focus solely on gender, do not take into account other major hegemonic systems, and especially class and race: at pp. 335-39. She is critical of arguments that relegate race and class as ‘complications’ to the more central gender domination or that conceptualize prostitution as an “effect of sexual power relations” that are exacerbated by racism and economic exploitation: supra note 86, 339.
90 Id.
method, or to make a deliberate decision to “see the world from the standpoint of the oppressed.” 91 This approach involves more than “consciousness-shifting” and requires “the search for the pathway to a just world.” 92

A more measured view that is intersectional in standpoint refuses that gender is a single analytical category and examines commodified sex as a continuum that spans from coercion (in the form of child prostitution, slavery, debt bondage, domestic and international trafficking) to survival sex (because of drug dependence or addiction, financial need or dire poverty, as means of escape from abusive families or partnerships), to visual experiences (through internet pornography and some erotic dancing) to the voluntary exchange of sexual services for money with varying specificities of labor (as erotic masseuses, escorts, or prostitutes). These specificities are highly relevant for feminist theorizing and activism because the women who are located at one spectrum risk death and violence on a daily basis, those on the other a profound sense of pride in their work, and the vast majority experience stigma and alienation in some form. Regardless of where one is located, the decision to provide sexual services for money requires, “inconsiderable courage, as an assertive and autonomous attempt to support oneself [or] one's child in face of unappealing alternatives such as benefit dependency, depending on an absent partner or badly paid and insecure job. 93

Understanding the choice to sell sex as one that is made within limited alternatives allows for a more contextual understanding of autonomy that emphasizes allows for ambivalence and negotiations as well as an understanding that choice qua choice does not amount to agency when made in the face of unpalatable options. However, it also highlights that despite the fact that women are located within marginal legal, social, economic, and political spheres, they do resist violence, ‘talk back’ to stigma, and subvert legal regulation. While women selling sex may not have control over broader economic circumstances, or sometimes the actual conditions of their working environment, they can and do make choices and exercise power in their relations with clients.

**Guiding Assumptions for reconfiguring feminist approaches to prostitution**

In an earlier instantiation of this article, I drew on the literature that distinguishes the choice from the constraint paradigms of prostitution, in order to come, as other


92 *Ib.* at 9. For more recent deployment of the intersectional method, see: Carol Aylward, *Intersectionality: Crossing the Theoretical and Praxis Divide*, 1:1 J. Critical Race Inquiry 1 (2010) (to understand the particular vulnerability to sexual assault that is experienced by women who are Aboriginal, disabled, or Black); and Leslie McCall, *The Complexity of Intersectionality*, 3 Signs: Journal of Women in Culture and Society 1771 (2005) (on some of the unintended consequences of various intersectional methods). Cynthia Chandler endeavours an intersectional approach (though not explicitly stated as such) to suggest that feminist movement should examine both discourses and adopt an approach that looks at choices and conditions of constraint; one that is “is mindful of its own exercise of power.” That is, both choice and constraint discourses exclude some women’s stories in order to sustain group solidarity. Their ‘truth’ rhetoric seeks to 'help' women selling sex but function to silence particular women and ignore their unique concerns: Chandler, *supra* note 11, at 164.

feminists have attempted to do, to a ‘middle ground’. Since then, I have I am no longer convinced that a compromise is possible or even desirable. Having reviewed a full palette of feminist theories and proposals regarding the on-going criminalization of commercialized sex, having worked with various feminist non-profit organizations and sex-worker affiliations that have done the same, I attempt here to develop a feminist understanding that adheres to a number of guidelines. I rely on the insight of the intersectional feminist approaches I reviewed above to suggest assumptions that should inform substantive-equality approaches and theorizing about transactional sex.

1. Sex work occurs in local and translocal contexts

Feminist theorizing of sex work must pay attention both to localized meanings and specificities as well as the material effects and real consequences of local and globalized racism, militarism, imperialism and colonialism, urban transformations and environmental disasters.

Part of understanding the broader material structures in which women exercise agency requires feminist movement move away from monolithic, ahistorical, and decontextualized view of women’s oppression. Such monocausal theories, as Sherene Razak argues, do not allow for an examination of how some women, middle-class white women predominantly, are “stakeholders” in a system of commercial sex that has as much to do with economic exploitation as it does with sexual inequality. Feminist, as a consequence, need to develop an analysis that acknowledges specificities (that sex workers are not a homogeneous group), while avoiding much of the pitfalls of identity politics (whether the ‘sexual’ identity of sex radical or the ‘economic’ identity of sex worker.

In Canada, this perceptual framework requires us to begin from understand that there is overrepresentation of aboriginal women engaging in street-level prostitution in Canada. Second, it demands that we implement policies that understand migrant women from the other jurisdictions are often fleeing the economic violence of imperialism that directly benefits women in the ‘first world’ as much as they are fleeing patriarchal violence. Third, it forces feminist to take seriously the reality of transgendered and trans-sexual sex workers, who, for instance, have among the highest

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94 See Razack, supra note 86.
95 On the ways in which the hetero-masculine military institution relate to women’s displacement from support system, increased subsistence responsibilities and consequent funneling into transactional sex, see generally: M. Hawkesworth, War as a Mode of Production and Reproduction: Feminist Analytics, in WAR & TERROR: FEMINIST PERSPECTIVES 18-31(K. Alexander & M. Hawkesworth eds., 2008).
97 Lisa Law, Sex work in Southeast Asia: the place of desire in a time of AIDS (2000).
98 On the tensions between social movements and individual identities, see Martha Minow, Not Only for Myself: Identity, Politics and Law (1997).
99 Some studies have found that aboriginal women make up between seventy and eighty five percent of women engaging in street-level prostitution are of first nations descent: House of Commons Standing Committee on Justice and Human Rights, Subcommittee on Solicitation Law (2006)
100 at p. 354.
seroprevalence of any community and who have, as a result, been instrumental in organizing the broader sex worker community around HIV-prevention.\textsuperscript{101}

Intersectional feminist thinking about sex work must also take into consideration the race and cultural identity of clients as well. Some studies indicate that, contrary to the archetypal story of power white man purchasing the services of a racialized woman, clients are neither monolithically white; nor are they necessarily socially powerful.\textsuperscript{102} The trope of the white powerful man purchasing sex from a poor racialized woman carries currency for a reason. However, it does not necessarily capture the experiences of racialized women, especially when examined within a context of global racism, colonialism, imperialism, and militarism.\textsuperscript{103} The same trope is being reconfigured in some feminist discourses to further dichotomies between emancipated sex workers from the West and victimized and trafficked women from the ‘third world.’\textsuperscript{104}

When we move away from seeing sex work must simply as sexual objectification, however, and concede that it is labour which is performed by already marginalized labourers, and with some frequency, by migrant labourers.\textsuperscript{105} When understood in terms of marginal work, improving the lived conditions of workers becomes a question of generating better conditions rather than enforcing moral codes enshrined in the criminal law.

2. The Criminal Law should be a policy instrument of last resort

In December 2007, a man suspected of kidnapping and killing over forty women from Vancouver’s downtown East Side was found guilty of second-degree murder in the deaths of six of those women. The trial is a painful reminder that women who assume ‘bad girl’ roles are targets for sexual and physical violence and are dismissed as having

\textsuperscript{101} According to an epidemiological study based in Lisbon, Portugal in 1998, 46.4% of trans sex workers were HIV seroprevalent; while in 1993, a similar study in Atlanta, Georgia found HIV seroprevalence rates of 68% among trans sex workers: J. Campos Bernardo et al., \textit{The Portuguese Transgender Community: An Unknown Reality}, 12 Int Conf AIDS (1998); K. W. Elifson et al., \textit{Male Transvestite prostitutes and HIV risk}, 83 Am. J. Pub. Health 260 (1993); Sex work, according to Namaste, provides an important means of economic subsistence, and more importantly perhaps, the means through which trans women maintain their identity: “Prostitution enables transsexual women to enact our physical transformations – to pay for hormones, reconstructive surgeries, breast augmentation, electrolysis, and / or genital reconstruction.” Vivane Namaste, \textit{Undoing Theory: The Transgender Question’ and the Epistemic Violence of Anglo-American Feminist Theory}, 24 Hypatia 11, 19 (2009).

\textsuperscript{102} For an early, yet still meaningful, deconstruction of the “male seducer” and “female innocent” from a historical perspective: Judith Walkowitz, \textit{Male Vice and Female Virtue: Feminism and the Politics of Prostitution in Nineteenth-Century Britain}, in \textit{POWER OF DESIRE} 419-38 (Ann Snitow et al. eds., 1983).

\textsuperscript{103} Kempadoo & Doezema, \textit{supra} note 1, at 35.


\textsuperscript{105} Kempadoo & Doezema, \textit{supra} note 1.
consented to any violence they endure by virtue of their choices.\textsuperscript{106} It is, as noted above, also a reminder that the majority of women selling sex who are disappeared – in this case the vast majority of which were of aboriginal ancestry - are racialized and classed in particular ways.\textsuperscript{107} Most glaringly, however, it is a reminder that the criminal law is a precarious and deeply flawed tool for furthering women’s equality and security and that the criminal justice system is “at worst abusive and at best inattentive to … the needs of women and victims of violence.”\textsuperscript{108}

The criminal law should be the policy instrument of law resort. Feminist theorists and activists have long decried the gendered nature of the common law criminal justice system; that goals of deterrence and rehabilitation have never been met; and that retribution does not further feminist movement; and that the criminal law has rarely benefitted women.\textsuperscript{109} The discriminatory application of prostitution laws against sellers (primarily women, trans women, or transvestites) rather than buyers (primarily men) is increasingly a point of agreement among feminists grappling with the ‘prostitution question.’\textsuperscript{110} That it is used to harass sex workers and enforced in ways that render their working conditions more dangerous, remains, a major point of disagreement. Yet, if we continue to frame prostitution as “morally undesirable” because it is one mode in which male violence against women is performed, we remain within the realm of sexist regulation.\textsuperscript{111}

3. The politics of representation remain relevant

Sex workers have the right to self-define and self-represent; this requires the “moral space” necessary for making normative evaluations - as legal agents – of the formal policies that guide our interactions.\textsuperscript{112} It is not up to the state to decide, define, or impose the nature of women’s legal agency or sexual identity. Rather, it is up to each individual sex workers to determine what selling sex means to her or him. Allies must denounce any further exclusion of sex workers and their organizations in policy-making, research, and popular debates around transactional sex. Indeed, longitudinal qualitative and quantitative empirical research has found that when sex workers are not included in political discussion and policy development, decision are made that result in workers who

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\textsuperscript{106} Shaver, \textit{supra} note 9.
\textsuperscript{107} TURTLE ISLAND NATIVE NETWORK, (2003).
\textsuperscript{109} \textit{Id.}
\textsuperscript{110} I aver that it is for this reason that the abolitionists have, as I note earlier, shifted their discourse from ‘abolitionism’ to ‘partial decriminalization’ – which would keep intact the Criminal Code provisions that outlaw the purchase of sexual services in addition to the keeping of a common bawdy house. The response by sex workers is, of course, that partial decriminalization amounts to no decriminalization and effectively sustains the criminalization of their labour.
\textsuperscript{111} See for instance Pateman as well as Carter and Giobbe who organize their ideas about prostitution through morality discourse: Pateman, \textit{supra} note 36, at 56; Carter & Giobbe, \textit{supra} note 36.
\textsuperscript{112} Drucilla Cornell, \textit{At the Heart of Freedom: Feminism, Sex, & Equality} 10 (1998). Cornell does concede that as bodily integrity is also a representation of self, women who sell sex may have disrupted sense of self.
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occupy the most marginal positions within the industry – especially migrant workers – being rendered more vulnerable to exploitation. Feminist movement must respond to the specific demands by various sex worker organizations including the right to formally organize, the right to health and safety standards in the workplace, the right to access basic social benefits, etc.

Feminist must also be mindful of the power of naming. Referring to prostitution as sex work is a feminist rhetorical move designed to avoid the moral denunciation of prostitution and the silencing involved in blanket statements such as ‘prostituted women.’ It also highlights that commercialized sex is an economic activity and thereby influenced by global market forces, including the laws of supply and demand. That being said, centering women’s agency does not mean that prostitution is a job just like any other, and that selling sex is always a valid career move. Therefore, feminist movements must be prepared to acknowledge, denounce, and address situations where a woman is deceived about the nature of the work she will be performing; subjected to violence or threats directed at herself or her family; held against her will through violence or by withholding of a passport; rendered - through addiction for instance - unable to refuse to perform particular acts or to refuse particular customers.

4. Relational approaches can further feminist praxis

To further conditions of agency for women who sell sex, we need to move away from rights frameworks and reinterpret interactions in terms of relationships. There has already been considerable critical engagement with ‘rights discourse’ or the reliance on particular conceptualizations of rights within feminist movement. This complex theorizing has not, however, been integrated in our understandings of sex work. Rather than focusing on the protection of self from intruding others (whether violent persons or the state), sex workers’ autonomy can be enhanced through the recognition and fostering of relationships. Dependence is not inherently a hindrance to autonomy; on the contrary,

115 Patricia Williams succinctly recounts the critique of rights theory that emerged from Critical Legal Studies: rights are indeterminate, contradictory, reified and of limited value as decisive in social behaviour. This now familiar view of rights is, to Williams, very different for racialized people, for whom “relationships are frequently dominated by historical patterns of physical and psychic dispossession”; entrenched rights therefore remain of fundamental importance to “blacks, other minorities, and the poor”: Patricia Williams, Alchemical Notes: Reconstructing Ideals from Deconstructed Rights, 22 Harv. C.R.-C.L. L. Rev. 401, 410 (1978) [hereinafter, Williams (Alchemical)]. Martha Minow makes a claim for an interpretive framework that grounds rights in a process of communication and the construction of meaning instead of in abstract or enduring foundational propositions: Martha Minow, Interpreting Rights: An Essay for Robert Cover, 96 Yale L. J. 1860 (1987). Jennifer Nedelsky proposes a radicalized inter-subjective conception of rights (rights as relationships or a “dialogue of democratic accountability”) as an alternative to the view that rights are a trump on state power: (Rights), supra note 108, at 71. Finally, Wendy Brown has charted out “the conundrums of rights” as a means of articulating inequality and oppression in liberal States: Wendy Brown, Suffering the Paradoxes of Rights, in LEFT LEGALISM / LEFT CRITIQUE 420 (Wendy Brown & Janet Halley eds., 2002).
argues Jennifer Nedelsky, dependence by way of security and nurturing is the preconditon to autonomy. She explains that:

[The view that] rights define boundaries others cannot cross, and it is those boundaries, enforced by the law, that ensure individual freedom and autonomy. This range of rights fit well with the idea that the essence of autonomy is independence, which thus requires protection and separation from others. My argument is that this is a deeply misguided view of autonomy. What makes autonomy possible is not separation, but relationships.

Feminists need to reconceptualize relationships in the context of sex work in three ways. First, we must acknowledge that many sex-workers already make up a jurisgenerative community. They have, by virtue of a shared social practice that occurs in a particular localized context, common purposes: to remain safe, to access the same services as everyone else, to attain a measure of economic stability, and a sense of mutual responsibilities. Second, we must acknowledge that the sex worker community cannot be limited to people who are the provision side of the transaction. Women working within the erotic industries have highlighted over the last few decades that mainstream feminist inquiry has often ignored their voices and experiences and denied the possibility that women can be sex workers and feminists simultaneously. Nevertheless, some sex worker feminists still consider themselves “feminists in exile.” Non-sex worker feminists must recognize and meaningfully support sex workers’ endeavours as equal and essential members of a broad-based, complex, shifting and dynamic movement. Third, feminist should favour an ethos of respectful dissensus rather than the more orthodox feminist model of consensus. Such an approach to sex work requires and facilitates rigorous, but courteous debate that challenges divergent viewpoints on key questions surrounding its governance or regulation. It must also, however, be done with the shared understanding that feminists who are attempting to meaningful grapple with transactional sex does so with great personal investment and we must grant one another due regard in this respect.

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116 Nedelsky, supra note 108.
117 Ibid at 71.
118 To Fuller, community entails a morality of duty and morality of aspiration. Within a ‘functioning community’ that is held together by mutual interests, drafting moral codes is relatively easy. Where there are no ‘rational principles’ for establishing who is within the community, the morality of duty - which presupposes explicit or tacit reciprocity - cannot be relied upon to resolve conflict. The morality of aspiration is, as a consequence, what guides our ability to determine who is our ‘other’ and who is our ‘neighbour.’ As influential as Fuller’s work has been to my understanding of community, my view is equally informed by Young’s skepticism vis-à-vis such idealized conceptualizations of community. She deploys ‘social group’ as the relational outcome of interactions, meaning and affinities through which people identify with each other. See respectively, Lon Fuller, The Morality of Law (1964); and Iris Marion Young, Justice and the Politics of Difference (1990).
119NAGLE, supra note 66.
120 They are, in Gayle Pheterson’s terms, nonetheless “feminists in exile”: Gayle Pheterson, A Vindication of the Rights of Whores 6 (1989); see also Laurie Bell, Introduction to GOOD GIRLS / BAD GIRLS: SEX TRADE WORKERS & FEMINISTS FACE TO FACE, 17 (Laurie Bell ed., 1987).
121 On dissensus generally, see: The J. Hillis Miller Reader.