FINDING MIDDLE GROUND: SEX RADICALISM, RADICAL FEMINISM AND PROSTITUTION LAW REFORM IN CANADA

By

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ABSTRACT

In March of 2012, the Ontario Court of Appeal struck down two provisions of Canada’s prostitution laws—those that prohibit common bawdy houses and living off the avails of prostitution. The political and legal debate leading up to the contentious decision reflects the longstanding battle between sex radical and radical feminists. This essay will situate the current debate within the context of historical feminist campaigns for law reform and demonstrate the ways in which sex radical and radical feminist arguments were utilized in *Bedford v. Canada* 2010, and the subsequent appeal. The essay will conclude by considering the implications of repealing the provisions that prohibit bawdy houses and living off the avails, and by assessing the possibility of combining sex radical and radical feminist aims at eliminating the harm experienced by women involved in prostitution.
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INTRODUCTION

In September of 2010, an Ontario Court judge threw out key provisions of Canada’s anti-prostitution laws—communicating for the purposes of prostitution, operating a common bawdy house and living off the avails of a prostitute—arguing that these charges prevented sex workers from working indoors, and so contributed to the risk of harm. In March 2012, the Ontario Court of Appeal upheld certain aspects of the original ruling in *Bedford v. Canada* 2010, by striking down provisions prohibiting bawdy houses and living off the avails of a prostitute. The communicating provisions, however, remained in effect. Almost certainly, this case will proceed to the Supreme Court of Canada, and the federal government will be required to choose between criminalizing prostitution and allowing regulation at the provincial and municipal levels (Lowman 2011). Undoubtedly, this ruling, like similar motions towards legalization or decriminalization, will fuel an already bitter debate among feminist scholars. Much of the disagreement centres on how to conceptualize prostitution: as an expression of women’s agency and empowerment or as a site of oppression. The acceptance or rejection of either position has important real world consequences for legislature that leans towards legalization, criminalization or some variation in between. The purpose of this essay is to address leading and divergent theoretical positions on prostitution, known as the sex radical and radical feminist perspectives, as well as the role of these two paradigms in recent prostitution law reforms. It is important to note, however, that the literature presented for these two positions does not represent an exhaustive list, nor are radical feminism and sex radicalism the only sociological positions on prostitution. An understanding of both perspectives, however, is important because these perspectives
prove to be influential in both academic study and legal reform in Canada (Sutherland 2004).

This essay is organized into three related discussions: Chapter 1 will situate the current feminist challenges to prostitution legislation within the context of historical feminist campaigns or law reform. Chapter 2 aims to explore the ways in which the current legal debates on prostitution reflect the sex radical and radical feminist perspectives on prostitution. Finally, Chapter 3 considers the implications of recent reforms and assesses the viability of feminist strategies for change that incorporate both sex radical and radical feminist insights. Although often framed as two distinct poles, this essay will argue for a middle theoretical ground, one that can inform a viable feminist strategy aimed at reducing the immense harm experienced by women involved in the sex trade.

**Conceptual Distinctions and Definitions**

From a Canadian legal standpoint, the term “prostitution” is not defined in Canada’s *Criminal Code*, but three elements related to the activity have been established in caselaw, including the “provision of sexual services, the essentially indiscriminate nature of the act, and the necessity for some form of payment” (Robertson 2003:82). In academia, the definition of prostitution is contested. Sex radical and radical feminists in particular disagree on the meaning of prostitution. The difference between these two perspectives is reflected in the terminology used to describe the act of selling sexual services. Definitions are important because they “establish the parameters and terms of debate” (Comella 2010: 299). Whether theorists employ the term “sex worker” or “prostituted woman,” for example, can be an indicative of an understanding of
prostitution as either potentially empowering or ultimately oppressive. Yet, both understandings of prostitution are socially constructed and so change depending on the economic, political, historical, and cultural circumstances. Generally, however, a “prostitute” is understood to be “a person who engages in sexual acts for hire” (Simmons 1998:126). Reflecting the belief that prostitution is something done to people, particularly women and girls, some radical feminists prefer the term “prostituted women” (see Barry 1995; MacKinnon 2011). Sex radicals contend that such terms leave little room for consideration of women’s sexual agency or the work involved in prostitution. In the late 1970s Carol Leigh aka Scarlet Harlot, a sex worker and prostitutes’ rights activist, coined the term “sex work” in an effort to “unite all women in the industry—prostitutes, porn actresses, and dancers—who are enjoined by both legal and social needs to disavow common ground with women in other facets of the business” and to recognize the work of women involved in the sex trade (Leigh 1997:230). Sex work is defined as any exchange of sexual service for material compensation, whether contact between buyers and sellers involve direct physical contact or indirect erotic stimulation (Weizter 2010). “Sex Work”, then, is thought to be a more inclusive term than “prostitute” because it encompasses a range of activity in the sex industry, from erotic dancing to operating a phone sex line, to acting in pornographic films. Administrative staff, pimps and customers are also considered actors in the sex work industry (Rubin 1984). The definitions of prostitution are important not only because they establish the boundaries of debate, but also because they inform the way prostitution law is constructed and contested.
CHAPTER I

Feminism and Legal Reform in Canada

Feminist scholars and activists have a long history of engaging with the law. The efforts of first and second wave feminists demonstrate the viability of lobbying and the importance of direct action as a means of bringing about legal reform that is in keeping with select feminist goals (Hamilton 2005). The aims of feminist campaigns, however, have differed historically due to conflicting explanations of why and how women are subordinated, and over the best means for bringing about change (Chunn 1999). Each ‘wave’ of feminism was dominated by a distinct form of feminism accompanied by specific views on women’s oppression and a particular reform agenda. As such, legal reform reflected dominant feminist aims at a particular time and the benefits attained were not shared equally among all women. Indeed, in reviewing the outcomes of legislative change informed by maternal, liberal and radical feminists, it becomes evident that not all women have gained from feminist activism and legal reform.

Beginning in the late 19th and early 20th centuries, first wave feminism, dominated by the maternal feminist perspective, organized around issues of women’s suffrage, reproductive and educational rights (Adamson, Briskin and McPhail 1988). Maternal feminists questioned legislation and policies that granted men absolute legal control over their wives and children, and called for an end to the legal subordination of women, subordination that greatly restricted their parental rights and rights to economic security. Viewing the law as a neutral arbiter, feminists fought for the implementation of legislation and polices that would grant women legal rights in the private sphere, and they were largely successful in their efforts. The Married Women’s Property Act of 1884 for
example, ensured that both husbands and wives had legal rights to property acquired before and during a marriage in the event of divorce. The *Ontario Deserted Wives’ Maintenance Act* of 1888 legally obliged men to support dependents after divorce; a responsibility the state assumed after WWI if the male was unable to provide support (Chunn 1999). First wave feminism in Canada played a major role in reforming family law to protect the rights of married women and ensure state responsibility to care for women deemed worthy of support, yet the overall ‘success’ of reform efforts is questionable. Reflecting the maternal feminist belief in the importance of motherhood, changes to family law functioned to sustain the gendered division of labour by maintaining the nuclear family as a given and by granting women’s rights based only on their status as mothers (Chunn 1999). Moreover, family laws reflected a particular image of the nuclear family that tended to benefit white, middle class, heterosexual women to the continued subordination, persecution and punishment of marginalized women. Those who belonged to a racial minority group, were of Aboriginal status and those with (dis)abilities were largely ignored in the legislative reform efforts (Chunn 1999).

Emerging in the 1960s, second wave liberal feminists sought formal equality in the private and public spheres, and brought reproductive rights and accessible daycare to the political agenda (Adamson et al. 1988). Second wave feminists denounced the domestic sphere as oppressive and saw women’s participation in the labour force as crucial to achieving equality among the sexes. Thus, laws that maintained the gendered spheres were challenged, and more inclusive gender-neutral laws that encouraged women’s participation in the paid labour force were sought. Canada’s *Divorce Act* of 1968, for example, incorporated a more egalitarian model of the family and lessened
women’s enforced dependency on male partners by allowing them to remain attached to the paid labour force while raising children at home (Evens and Pupo 1993; Iyer 1997 cited in Chunn 1999). On-campus day-care, an idea pioneered by feminists at Simon Fraser University in 1968, freed up time for women to pursue post-secondary education and brought issues such as accessible day-care to the national agenda. Reproductive rights were also viewed as essential to women’s equality. Abortion became a central feminist issue and pressure from women’s groups influenced the federal government to legalize birth control and to declare abortions approved by the Therapeutic Abortion Committee (TAC) legal in 1969. Legalizing abortions approved by such committees, however, did not grant women full control over their bodies. TACs were subsequently declared unconstitutional in 1988, largely in response to feminist outrage and campaigns across the country (Adamson et al. 1988).

Despite these achievements, mainstream feminism had yet to consider the ways in which race, class or sexual orientation shaped Canadian women’s experiences and needs. Lesbian feminists were critical to uncovering heterosexism within the feminist movement and insisting that the women’s movement take up issues of lesbianism. Women of colour also began to mobilize, initiating social services and associations to meet the unique needs of their communities, and speaking out against racist assumptions and claims to a ‘universal womanhood’ (Adamson et al. 1988; Hamilton 2005). Yet, these organizations were marginalized by the mainstream women’s movement (Adamson et al. 1988), and it would not be until the late 1980s that analyses of racism would be more fully incorporated into the feminist movement and calls for legal reform.
Among the “fatal flaws” of second wave feminism was the failure to problematize the law and family and to analyze patriarchal relations within these institutions (Chunn 1999). Feminists in the 1980s and 1990s changed the focus from gender similarities and differences to expose laws that supported a system of patriarchy. Research by radical feminists in particular, highlighted the extent of women’s victimization by revealing the realities of domestic violence and sexual assault and played a pivotal role in related legal reforms (see Dobash and Dobash 1979; Shechter 1982).

Much of the research during this period supported an understanding of violence against women as a mechanism of male dominance. Work on domestic violence, for example, challenged the notion that women were to blame for their victimization, revealed abuse as a reflection of male dominance, and critiqued the often ambivalent social and legal response (see, for example, Dobash and Dobash 1979). This work supported the view that mandatory charging in cases of spousal assault would challenge the non-responsiveness of the courts and law enforcement, and in the early 1980s most provincial governments adopted zero tolerance policies that mandated police charge all incidents of domestic violence, regardless of the wishes of the victim. These reforms, however, did not improve the safety of all women and often resulted in women’s criminalization for refusing to testify against their partners and for using violence in self defence (Sinder 1994).

At the same time that mandatory charging policies were adopted, laws surrounding rape were also changed. Radical feminists were adamant that, like domestic violence, rape was a political act that asserts male power over women (Tang 1998). Research highlighted the extent to which rape went unreported, the disproportionately
low conviction rates, and studies exposed discriminatory treatment afforded to victims by
police and the courts (Stuart 1993; Tang 1998). In Canada, the criminal offence of rape
was thus replaced by three new offences of sexual assault in an effort to improve the
treatment of rape victims by both the police and the courts and to increase rates of
reporting (Roberts and Gebotys 1992). The reformed legislation also had the explicit aim
of emphasizing the violent rather than sexual nature of the offence. Yet, the results of
these legislative reforms were also mixed. A study conducted in the years following the
implementation of sexual assault legislation showed that while rates of reporting
increased, rape reform had “no significant effect upon the decision as to whether or not a
particular case is founded and as to whether a charge is laid in the first place” (Roberts
and Gebotys 1992:571). Moreover, rape mythologies continued to plague judicial
reasoning (Busby 1999), and victims continued to have their credibility attacked in court
(Comack and Balfour 2004).

The mixed results of reforms to domestic violence and rape laws mirror the
outcomes of other feminist-inspired legal changes in the first wave and early second
wave feminist movements. Changes to family law, championed by first wave maternal
feminists, did not end women’s subordination to men and the benefits did not reach all
women. Liberal feminists in the early second wave focused on formal equality to the
exclusion of substantive equality. They ignored differences among women in terms of
race and class, and failed to consider patriarchal relations embedded in the law. Radical
feminism in the 1980s shifted the analytical focus to male dominance and patriarchy,
playing a crucial role in reform laws dealing with domestic violence and rape. Yet,
mandatory charging policies did not necessarily make women safer and sexual assault
legislation failed to increase the percentage of rape reports that were founded\textsuperscript{1}, or to rid the legal system of stereotypical assumptions about women’s sexuality.

**Feminist Engagement with Prostitution Law**

The history of feminist campaigns for prostitution reform is no less complex. The issue of prostitution first came to the public agenda in large part due to feminist scholars and activists who lobbied for social support and services for those involved in the sex trade (Jeffrey 2004). Canada’s earliest prostitution laws were derivative of British common law, prioritizing public nuisance concerns and treating prostitution as immoral and as a form of vagrancy (Lowman 2011). Beginning in 1839 in Lower Canada, vagrancy laws sought to prohibit prostitution by authorizing law enforcement to arrest prostitutes unable to account for their presence in a public space (Backhouse 1985). In the latter part of the 19\textsuperscript{th} century, and due in large part to the efforts of first wave feminists, women came to be seen as moral guardians of the home and deserving of state protection. The related “social purity” campaigns fought successfully to reform prostitution law with the goal of preventing the exploitation of women and children and ending the “social evil” of prostitution. In response to public concern over “sexual purity” and the sexual exploitation of women, the newly formed federal government passed *An Act Respecting Vagrants* in 1869, which maintained police power to arrest prostitutes while seeking to protect women from male lust and exploitation. Thus, the law also targeted those living off the avails of prostitution and clients of bawdy houses.

\textsuperscript{1} The term “founded” means that the investigating officers believe a crime has taken place or was attempted (Roberts and Gebotys 1992:559)
Vagrancy laws would continue to be used in an effort to curtail street prostitution until the early 1970s.

During the early 1970s, the legal debate around prostitution was largely focused on addressing public nuisance concerns while maintaining the right to personal freedom. Feminist scholars and activists at the time were intensely critical of vagrancy laws and the discretionary power it afforded policy officers (Jeffrey 2004). As a result of intense lobbying, vagrancy laws were repealed in 1972 on the grounds that they contravened the 1960 Bill of Rights. Immediately afterward, however, the federal government incorporated prostitution into the Criminal Code under a new provision that prohibited public solicitation. This change posed significant interpretive difficulty for both the courts and police in terms of deciding what counted as solicitation and to whom exactly the laws applied. As a result of this confusion, in 1983 the Liberal government formed the Special Committee on Pornography and Prostitution (The Fraser Committee) to consider the exploitation experienced by those involved in prostitution and to make policy reform recommendations (Minister of Justice 1983 cited in Jeffrey 2004:86). Feminists were actively involved in the debate, arguing for decriminalization through studies showing that those involved in prostitution were victims of gender, social and political inequalities. The Fraser Committee’s subsequent recommendations used both criminalization and decriminalization in an effort to address both gender inequities in the law and public nuisance concerns (Jeffrey 2004). The Committee called for complete reformation of prostitution laws to clarify the legal status of prostitution, the decriminalization of sexual activity between consenting adults, provincial regulation of small brothels, and prohibiting living off the avails only if threat or violence were
involved (Lowman 2011). The Committee also highlighted the importance of addressing structural inequalities that lead to involvement in prostitution, and called for social programs to address the needs of marginalized youth and women and assist those wanting to exit the industry. Many activists extolled the report as a positive step towards changing discriminatory laws and incorporating feminist aims (Lowman 2011). The recommendations, however, would never materialize in law. Merely six days after the Fraser Report was released, the Liberals were replaced by a Conservative government, which ignored the recommendations in implementing Bill C-49, the “communicating laws.” Making it illegal to ‘communicate’ for the purpose of selling or purchasing sex, this change expanded the scope of the law and reflected a moralistic condemnation of prostitution (Jeffrey 2004). The Conservative government proved less receptive to feminist involvement in implementing Bill C-49, largely excluding women’s movement activists and national welfare agencies from the proceedings (Jeffrey 2004).

**Current Prostitution Law**

Presently, “anti-communication” laws in Canada ensure that while prostitution is legal, engaging in prostitution related activities, such as soliciting, remains illegal. Sections 210 to 213 of the *Criminal Code* target public nuisance caused by the trade and the exploitation experienced by those involved in prostitution (Longworth 2010). Sections 210 and 211, or “bawdy house laws”, relate specifically to indoor prostitution, while sections 212(1) and (3) “procuring laws” apply to offences involving the procurement of adult prostitutes, including enticing someone to become prostitute or living off the avails (Longworth 2010). Sections 212 and 213 deal specifically with exploitation and public nuisance, respectively. Procuring laws are intended to target the
exploitation experienced at the hands of pimps, while the communicating laws make it a criminal offence for a person to stop or communicate with another individual for the purpose of engaging in prostitution in a public space. Arrests under this latter section of the *Criminal Code* account for 90% of all prostitution related arrests by police, suggesting that street prostitution is targeted far more than indoor prostitution, and that eliminating “nuisance” is prioritized over lessening exploitation (Longworth 2010:64). Critics have also asserted a gender bias in common law in that female street prostitutes tend to be criminalized more harshly than male johns. For example, in 2003-2004, 60% of women charged under section 213 were convicted, while 70% of males charged under the same provision had charges stayed or withdrawn. Upon conviction, just under 40% of women were sentenced to prison compared with just over 5% their male counterparts (Longworth 2010:64).

Due to concern over the discriminatory application of prostitution laws, and in response to public outrage over the murder of women from Vancouver’s Downtown Eastside, in 2006 the House of Commons appointed the Subcommittee on Solicitation Laws to review prostitution laws once again in an effort to improve the safety of sex workers (Lowman 2011). The subcommittee recommendations were in keeping with those of previous review boards in asserting that complete reform was required. Members were conflicted, however, on what changes to make. Reflecting the divide that continues to this day, some members subscribed to the radical feminist perspective and called for the abolition of prostitution, while others drew on liberal feminist views to frame prostitution as a form of sex ‘work’ best handled through decriminalization and government regulation (Lowman 2011). The debate resulted in what Lowman (2011)
deemed a “deadly inertia.” Both camps conceded that legal reform was needed; yet no changes were made. The majority Liberal, Bloc Quebecois and New Democrat members held that prostitution between consenting adults should not be criminalized and favoured a harm reduction approach that would increase services for those wishing to leave prostitution. Conversely, Conservative members opposed any form of legalized prostitution and favoured criminalizing third party facilitators, clients and women convicted of prostitution for a second time. The deadlock meant that the laws remained unchanged.

Sex workers paid the price for the continued disagreement and lack of legal reform. Since the Fraser Report recommended complete overhaul of prostitution legislation to no avail, approximately 300 sex workers have been murdered or are otherwise unaccounted for (Lowman 2011). In 2007, Ontario based sex workers picked up where government appointed committees had left off. Terri-Jean Bedford, Valerie Scott and Amy Lebovich filed a challenge at the Superior Court of Ontario arguing that sections 210 and 212(1), bawdy house and living off the avails provisions, contributed to the danger faced by women involved in prostitution by preventing them from working indoors and from hiring third parties to ensure their safety. The presiding judge agreed, and in September 2010 the court struck down key provisions of Canada’s anti-prostitution laws—communicating for the purposes of prostitution, operating a common bawdy house and living off the avails of a prostitute. In the subsequent appeal, the applicants’ position was buttressed by the involvement of several intervening organizations, including Prostitutes of Ottawa/Gatineau Work Education and Resist (POWER) and Maggie’s: Toronto Sex Workers’ Action Project. Both organizations reflected the “sex work” framework, or an
understanding of prostitution as a legitimate form of labour and not as a criminal activity, in maintaining that prostitution should be legalized. Current legislation, they argued, infringes upon sex workers’ personal autonomy, safety and access to justice and social services. The violence and degradation experienced by some women involved in the sex trade results from laws that prevent women from taking steps to protect themselves and that contribute to social stigma. Moreover, the laws fail to consider that for some women involved in the trade, sex work is a choice and can be a source of empowerment (Galldin, Robertson and Wiseman 2011). In support of Canada’s prostitution laws, the Crown employed the radical feminist argument that prostitution is inherently dangerous and that the harm experienced by women in the trade does not result from law, but from the asymmetrical relationship between prostitutes and customers (Lowman 2011). Also advocating the abolitionist approach was the “Coalition for the Abolition of Prostitution”, which included the Canadian Association of Sexual Assault Centres, the Vancouver Rape Relief Society, the Native Women’s Association of Canada and the Canadian Association of Elizabeth Fry Societies. Rather than maintain the status quo, however, these organizations called for asymmetrical criminalization (that is, criminalizing only the demand side of prostitution). This view reflected the radical feminist understanding of prostitution as a form of violence against women and as stemming from the male desire to dominate and exploit women (Ekberg 2004).

On March 26, 2012, the Ontario Court of Appeal released its decision in Canada (Attorney General) v. Bedford, 2012, upholding the Superior Court Judge’s initial ruling that provisions prohibiting bawdy houses and living off the avails are unconstitutional, while disagreeing that the communicating provisions should be struck down. Almost
certainly, the case will go before the Supreme Court of Canada, and the government will be forced to decide whether or not prostitution should be legalized or criminalized. This decision will have profound consequences on the lives of those involved in the sex trade. Understanding the respective positions of the applicants, Crown and intervening organizations requires further exploration of the feminist perspectives reflected in their arguments.

The next section of this essay will trace the lineage of the sex radical and radical feminist understandings of sexuality and prostitution. This next discussion will also highlight recent empirical work stemming from each tradition.
CHAPTER II

Though feminists have actively engaged with the law for some time, ideas for legal reform have been remarkably varied, and current positions put forth in the courts reflect a history of debate about sexuality and prostitution. Indeed, since the 1980s feminist views on prostitution have constituted what has been described as the “sex wars” within feminism, largely between feminists taking “radical” versus “sex radical” positions (Duggan and Hunter 1995). As described in Chapter 1, debate surrounding the politics of sexuality began in the first wave of feminism, and has not ended. Throughout the 2nd wave in particular, feminists have argued over questions of “power, passion, violence, representation, agency, diversity and autonomy associated with sex” (Duggan and Hunter 1995:16). The radical feminist and sex radical positions on prostitution are inextricably linked to each side’s understanding of sexuality. The sex radical position embraces sexual non-conformism and contends that changing “sex-negative” conceptions of sexuality will ultimately have a positive effect on power dynamics in society (Sutherland 2004:144). This perspective was, to some extent, a reaction to what was viewed as the restrictive and limited understanding of sexuality among mainstream feminists in the 1970s and 1980s. Theorists such as Carole Vance (1984), Gayle Rubin (1984) and activist Pat Califia (1994) were some of the first radical feminists to levy criticism against radical feminism, and to outline a new theory of sexuality.

Sex Radicalism – On Sexuality and Prostitution

In 1982, at the height of the feminist sex wars, Barnard College in New York City hosted the Scholar and Feminist IX Conference entitled “Towards a Politics of Sexuality.” The intention was to explore the “ambiguous and complex relationship
between sexual pleasure and danger in women’s lives” and to expand on feminist analyses of pleasure (Vance 1984:3). In *Pleasure and Danger: Exploring Female Sexuality*, a compilation of essays presented at the conference, Carole Vance critiqued feminism’s failure to theorize sexuality and presented her view of a sex-positive theory of sex. Mainstream feminist positions on sexuality, Vance argued, were guilty of an essentialist and simplistic focus on its oppressive aspects. In focusing solely on the dangers of sex and failing to theorize pleasure, feminists ran the risk of overstating sexual danger and undermining women’s sexual agency (Vance 1984). How, Vance asked, is it possible for women to possess their own sexuality independent of patriarchal culture?

Though feminists have a long history of challenging dominant normative assumptions about gender, of asserting that gender is not a product of biology but rather constituted in and by political, social, economic and historical contexts, feminist theories that considered the social and historical construction of sexuality remained woefully underdeveloped (Vance 1984). There was an urgent need for feminist theory to engage with sexual difference and variation and to learn from women’s lived sexual experiences. According to Vance, adequate feminist theories would embrace sexuality as a source of pleasure in women’s lives while continuing to work for social change to improve women’s position in all aspects of social life. This would necessitate a view of sexuality not merely as a site of oppression, both in terms of male violence and the repression of female desire, but also as a site of empowerment (Vance 1984). Indeed, Vance argued that “[i]t is not enough to move women away from danger and oppression; it is necessary to move toward something: toward pleasure, toward agency, self-definition. Feminism must increase women’s pleasure and joy, not just decrease our misery” (Vance 1984:24).
Paralleling Vance’s criticisms of mainstream feminism, and echoing her call for a more nuanced understanding of sexuality, Gayle Rubin expanded on Vance’s thesis historically and empirically.

Rubin argued for “theoretical as well as sexual pluralism” in both the academic and cultural contexts (1984:309). Her aim was to develop a framework for understanding sexuality that is “accurate, humane, and genuinely liberatory” (Rubin 1984:275). To do this, she traced the lineage of dominant feminist ideas about sex back to 19th century “moral crusades” that encouraged monogamous, heterosexual and procreative sex over less acceptable forms, such as homosexuality, masturbation or prostitution. American obscenity laws in the 1980s, for example, were viewed as an extension of 1950s anti-homosexuality crusades and the child pornography panic of the 1970s (Rubin 1984). These laws functioned to increase police surveillance over sexual “deviants” and had very real consequences for those assigned the label. Particular historical periods, then, influence the formation of laws but also shape dominant ideology about sexuality more generally (Rubin 1984). Rubin attributed the failure to develop a sex-positive perspective of sexuality to several features of Western culture. Sexual essentialism, or the belief that sex is natural, universal and ahistorical does not allow for an understanding of sexuality as resulting from social practices and in specific historical and social contexts. Western culture is also guilty of sex-negativity, or the conceptualization of sex as inherently destructive or sinful and the tendency to view sexual activity outside of heterosexual marriage as particularly problematic. Sex negativity, Rubin (1984) suggested, is a product of the excessive social significance attached to sexuality.
Rubin asserted that traditional feminist theory had been limited in terms of understanding sexuality. She called for feminist analyses that treated sex and gender as separate analytical categories. She contended that a “radical theory of sex must identify, describe, explain and denounce erotic injustice and sexual oppression. Such a theory needs refined conceptual tools which can grasp the subject and hold it in view” (Rubin 1984:275).

Pat Califia (1994) utilizes a sex radical perspective to outline her utopic vision of “whoring.” She asserts that prostitution is shaped by several cultural and political forces, including the stigmatization that prevents sex workers from being open about their occupation, social perceptions of the virgin/whore dichotomy that allows for the criminalization of female prostitutes, drug policies that make street prostitution the only option to support addiction, and lack of employment opportunities that force women to turn to prostitution for survival. For Califia, what is at issue is not prostitution itself, but social perception and macro level factors that construct prostitution as something negative, and the economic and structural factors that make it the only option for many women. If these conditions were to change, however, this does not mean that exchange of money for sex will end. Sexual variation means that prostitution will continue, for there will always be people who prefer paid sex over unpaid sex, those whose disability, age, or sexual dysfunction results in their discrimination and restricts opportunity for sexual activity, and those whose specific sexual needs can only be met through hiring professionals (1994:245). In Califia’s vision for a better world, prostitutes would be viewed as “teachers, healers, adventurous souls who are tolerant and compassionate” (Califia 1994:247). Thus, in a “better world”, prostitution would not be constructed as
something destructive or sinful, and variation in sexual taste and activity would be celebrated, not repressed.

Central to the sex radical perspective is an understanding of prostitution as involving human agency and as potentially empowering. This position is supported by an extensive body of empirical evidence that outlines reasons why some women actively choose to become involved in the trade. When it comes to political activism and policy reform, sex radicals frame sex work as a legitimate form of labour in an effort to decriminalize and regulate the trade.

Researchers (Weitzer 2010; Lowman 2005) are critical of the extent to which analyses of prostitution fail to distinguish between forms of sex work. While an estimated 80-90% of prostitution in Canada occurs in indoor venues such as brothels and massage parlors (Benoit and Millar 2001; Lowman 2005) the experience of street-based prostitutes continues to dominate much of the social scientific literature (O’Doherty 2011; Vanwesenbeeck 2001; Weitzer 2005;). Studies have documented the extensive victimization rates of street-based prostitutes. Many who work on the streets are likely to suffer from poverty (MacKinnon 2011) and mental illness (Barkan and Farley 1998) and are more likely to be assaulted and murdered (Lowman 2000). Yet, many scholars are hesitant to generalize high victimization rates to all women involved in sex work. Ronald Weitzer (2005) suggests that viewing prostitution as inherently violent and exploitative obscures important differences in terms of the women involved and the activities in which they engage. Variables such as income and educational attainment (Bernstein 2007), racial and ethnic composition (Lever and Dolnick 2010), location of sexual encounter (Benoit and Millar 2001), and gender (Koken, Bimbi and Parsons 2010) are
crucial to understanding the degree of consent and power exercised by individual women involved in the trade. Women who work indoors, for example, may be less vulnerable to violence and exploitation than those working on the streets (Benoit and Millar 2001). Because of this, the degree of agency and risk in prostitution could be understood as a continuum (O’Connell Davidson 2002; Sanders 2004).

Indeed, studies suggest that contrary to the conception of prostitutes as victims of circumstance or of their male clients, many indoor sex workers report feeling empowered or validated by the trade. For example, all respondents (n=201) in Benoit and Millar’s study of indoor and outdoor sex workers in Victoria, British Columbia, opposed a victim status and instead “described themselves as active agents” (2001:viii). Qualitative data obtained Lucas’s 2005 study of call girls and escorts (n=30) revealed that some women actively choose sex work over other occupations for reasons of personal enjoyment, financial gain, and flexibility to pursue personal interests. Moreover, several women in her study asserted that sex work improved their interpersonal skills, such as the ability to establish and maintain boundaries and to resist harassment. Sanders (2005) argues that indoor sex workers manufacture an identity specifically for their work complete with fictitious names, personalities, and life stories. By drawing on cultural scripts about femininity and heterosexuality, these “manufactured identities” function as both a viable business strategy and as a means of personal protection. Respondents actively changed their appearance and behaviour in order to conform to their male clients’ expectations, thus securing regular business and commanding higher prices. At the same time, the women were able to maintain a barrier between the roles assumed in their work lives and their personal identities. Under certain conditions, then, a manufactured identity can be
viewed as both a resistance strategy and as a way of capitalizing on male erotic expectations for personal financial gain.

The experiences of indoor sex workers such as these problematize the view of prostitution as inherently exploitive and violent. Indeed rather than being victims, some women claim to have actively chosen to work in the trade citing reasons such as financial gain, flexibility and skill development. The experiences of women working in the off-street sex industry are frequently used when invoking a “sex-as-labour” argument. In an effort to legitimize the sale of sex and to call for legal regulation of the trade, researchers adopting this perspective often draw parallels between the activities of sex workers and conventional service sector employment. Bruckert and Parent (2006:102) liken indoor sex work to other service sector work, such as waitressing, that requires “stamina, physical strength, and endurance,” long shift work, and occasional administrative and housekeeping tasks. In addition to sexual techniques, indoor sex work also requires understanding and anticipating market demands, promotion and networking, activities not uncommon to conventional occupations (Bruckert and Parent 2006; Lucas 2005).

Researches have also documented the extent to which “emotional labour” is required in sex work, particularly for those who work as escorts or call girls. Arlie Hochschild defined emotional labour as “the management of feeling to create a publically observable facial and bodily display” (1983:7). Call girls in particular engage in emotional labour similar to other “listening” occupations such as therapists or bartenders. They can spend a considerable amount of time listening to their clients and expressing interest in their personal lives (Lever and Dolnick 2010). A brothel worker in a study by Bruckert and Parent (2001), for example, recounted spending over two hours playing
cards with a client while he expressed the loneliness he felt since being estranged from his children. Most of the time, indoor sex workers are required to sell both sexual services and emotional intimacy in what is increasingly being sold as “the girlfriend experience” (Lever and Dolnick 2010:187). The nature and scope of activities that take place in some commercial sexual transactions are not dissimilar to what occurs in ‘conventional’ intimate relationships. Sanders (2008) found that regular clients of escorts valued mutual conversation that goes beyond ‘small talk’, public courtship rituals (such as dinner dates), and mutual sexual pleasure. Responding to this market demand, many women involved in the indoor sex industry must work hard in order to feign intimacy, sexual desire, and interest in their customers.

**Sex Radical Legal Strategy**

Based on studies of indoor sex workers and in an attempt to recognize sex worker agency and improve safety, researchers often call for the decriminalization or regulation of prostitution. After interviewing Canadian sex workers, Betteridge (2005), for example, recommended that sex workers rights be protected under occupational health and safety legislation and subject to controls “analogous to other legal business enterprises in terms of zoning, licence conditions and fees, and health requirements” (iv). Similar appeals to reform prostitution legislation were made by the plaintiffs in *Bedford v. Canada* 2010. Reflecting the sex radical perspective, Terri Jean Bedford, Amy Lebovitch, Valerie Scott (2010) argued that stigma and violence are not inherent to prostitution, but rather provisions prohibiting bawdy houses, living off the avails and communicating contribute to the harm experienced by those in prostitution (cited in Galldin, Robertson and Wiseman 2011). Several intervening organizations also purported that nothing is
inherently wrong with prostitution, that it should be considered a choice and a form of
labour and thus protected by law. POWER and Maggie’s, two organization granted
intervener status in the Crown’s recent appeal (2012), argued that sex work is a “valid
and dignified occupation” and that “[t]he decision to pursue sex work is a choice about
one’s body, one’s sexuality and about whom to have sex with and on what terms”
(Gallden et al. 2011:7). Moreover, it is the criminal status of prostitution related activities
that leads to stigmatization and violence, and so laws must be changed to avoid infringing
on sex workers’ autonomy and personal safety. Paralleling Pat Califia’s vision of a
“better world”, “POWER and Maggie’s envision a world where sex work is valued,
rather than being an object of violence and shame” (Galldin et al. 2011:12). The Crown
did not share the opinion that harm involved in prostitution and stigma are the result of
law, rather violence and stigma were argued to be inherent to the trade. In this way, their
position was reflective of the radical feminist perspective on prostitution.

Radical Feminism—On Sexuality and Prostitution

For radical feminists, sexuality is understood as socially constructed under
patriarchy and as a “political fact” of women’s subordination (Barry 1995:26). In 1970
Kate Millett argued that sex is not a personal act but a political one, an act that both
reflects and sustains patriarchal power relations at the macro level. Indeed, she argued
that sexual domination is “perhaps the most fundamental concept of power” and one that
reaffirms male dominance and female subordination (Millett 1970: 175). In this way,
female sexuality is both defined by and controlled by men. Her ground-breaking book,
Sexual Politics, and her argument that sex is political would inform radical feminist
analyses of sexuality for decades. Indeed, subsequent radical feminist perspectives have
retained the understanding of sex as fundamental instrument of women’s oppression. Andrea Dworkin, for example, asserts that the system of patriarchy “exploits [women’s] labour, predetermines the ownership of our bodies” and that “all forms of dominance and submission are tied irreversibly to the sexual identities of men…” (1976:11; emphasis original). Consequently, women are limited in forming their own sexuality since “[m]en have written the scenario for any sexual fantasy” women have or physically engage in (Dworkin 1976:12). Similarly, Catharine MacKinnon (1989:109) identifies “sexuality as the primary social sphere of male power” in that it “fuses the eroticization of dominance and submission with the social construction of male and female” (197). At the same time that sexuality reflects and reproduces the belief in fundamental differences between masculinity and femininity, it also functions to essentialize all women and reduce them to a body. The female body becomes equated with sex in a way that male bodies do not (Barry 1995). The perpetual objectification of women’s bodies at both the societal and personal level then negates consent: “When the human being is reduced to a body, objectified to sexually service another, whether or not there is consent, violation of the human being has taken place” (Barry 1995:23).

If radical feminists understand sexuality in general as an instrument of male dominance and female oppression, prostitution specifically is thought to be the “cornerstone of all sexual exploitation” (Barry 1995:9). In a political system of patriarchy that defines, controls and exploits female sexuality, radical feminists contend that prostitution cannot be defined as anything other than violent and exploitative. Common to all radical feminist analyses of prostitution is the contention that prostitution is by definition a form of exploitation and violence against women, that distinctions
between voluntary and forced prostitution are impossible. In the context of prostitution, free “consent” is non-existent.

In asserting the inherently violent and exploitative nature of prostitution, some radical feminists compare prostitution to rape and slavery, arguing that all are instruments of male domination. Kathleen Barry, for example, argues that prostitution, like rape, requires that victims “willingly subordinate themselves to exploitation”, the former for money and the latter to avoid further harm (Barry 1995:37). Carole Pateman (1999) problematizes arguments that equate prostitution with other forms of labour. She argues that the “sexual services” offered in prostitution cannot be separated from the body. In fact, “no form of labour power can be separated from the body” (60). Thus, what is being sold is sexual access to a woman’s body parts: “In prostitution, the body of the woman, and sexual access to that body, is the subject of the contract. To have bodies for sale in the market, as bodies, looks very much like slavery “(Pateman 1999:60). The sale of female bodies in the market place has symbolic weight as well; it functions to affirm “the law of the male sex right” by publically acknowledging men “as women’s sexual masters” (Pateman 1999:62).

Empirical studies that could support an understanding of prostitution as inherently violent and exploitative abound. Indeed, statistics show that many women involved in prostitution share a common history of physical and sexual abuse prior to their involvement in the trade. In Benoit and Millar’s (2001) study of both indoor and outdoor sex workers, 90% of respondents (n=201) had reported experiencing some form of physical, emotional or sexual abuse in their childhoods (31). Women involved in the sex trade report high rates of past experiences of physical and sexual abuse in particular. Of
130 respondents interviewed by Farley and Barkan (1998), 49% had reported being hit or beaten in their childhood by a caregiver and sustaining injuries as a result. The same percentage of respondents in Kramer and Berg’s 1999 study of street-level workers in Arizona reported being abused by family members as children. In a Canadian study, conducted by Nixon et al. (2002:1023), 90.0% of respondents who discussed their childhoods reported having been previously abused.

Once involved in the trade, prostitutes are more likely to be murdered than non-prostitutes (Special Committee on Pornography and Prostitution 1985) and report high levels of violence at the hands of pimps and customers. In Canada, individuals involved in prostitution are 40 times more likely to be murdered than the general population (Special Committee on Pornography and Prostitution 1985:350). In the most recent Canadian Centre for Justice Statistics report on street prostitution, it was reported that 60 known prostitutes were murdered between 1991-1995, 50 at the hands of customers, 8 by pimps or drug-related incidents and the remaining 5 by their intimate male partners (Duchesne 1995:8). A high number of these cases (54%) go unsolved, compared to 20% of murders committed against the general public (Duchesne 1995:8). Of those who are currently in the trade, many report experiencing physical and sexual violence at the hands of pimps and clients. In a 2004 study of 854 people involved in prostitution spanning nine countries (Canada, Columbia, Germany, Mexico, South Africa, Thailand, Turkey, United States and Zambia), it was determined that 71% of street workers had been physically assaulted and 63% had been raped during their time in prostitution. Of the 100 women interviewed in Vancouver, Canada, 76% reported being assaulted at the hands of clients or pimps (Farley et al. 2004: 55).
Despite changes to prostitution legislation that were intended to assure gender neutral application, that is, both female prostitutes and male clients would be arrested, charged and convicted at similar rates, enforcement continues to focus on female prostitutes. Women are more likely to be charged with prostitution related offences (Boritch 1997), to be convicted in court and receive longer sentences than their male counterparts (Longworth 2010). Boritch (1997) attributes differential enforcement to “deeply ingrained police perceptions that the prostitute is somehow more culpable and blameworthy than the customer” (123). While male customers are seen as generally law-abiding and no more deviant than any other male, women in prostitution become defined by their involvement in the activity and subsequently shoulder the criminal blame. The result is that many women involved in prostitution are viewed as inherently criminal and as “throw away people”— their claims of violence are not taken seriously by police or the public more generally (Skelton, 1999 cited in Lowman 2000).

Perhaps the most glaring evidence of police failure was the reluctance to investigate the disappearance of at least 61 women known to prostitute in Vancouver’s Downtown Eastside, despite numerous appeals for help from family members and friends (Culhane 2003). Following the 2007 conviction of Robert Pickton for the murder of six women known to work in the Downtown Eastside sex trade, a public inquiry was set up to examine why the Vancouver Police Department (VPD) and RCMP failed to stop Pickton in the late 1990s and early 2000s. The inquiry was told that the VPD was generally reluctant to investigate the disappearance of women known to have drug addictions or to be involved in the sex trade, and the police department indeed admitted
that it did not do enough to investigate reports of the missing women or the possible connection to Pickton (Keller 2012).

Women who work in the sex trade face higher than average risks of murder, report high incidence and physical and sexual assaults and are often viewed as undeserving of legal protection by law enforcement officials and the courts. Those involved in prostitution are also more likely to be economically disadvantaged and of a racial minority status (MacKinnon 2011). Based on this evidence, radical feminists oppose distinctions between voluntary and forced involvement in prostitution because they view consent as a product of oppression. Consent is constrained or coerced by conditions of gender inequality (Barry 1995) and interrelated experiences of racial and class discrimination (MacKinnon 2011). Barry (1995) argues that exploitation occurs irrespective of consent because of the ways in which “sexuality is used as an instrument of women’s oppression” (65). MacKinnon (2011) contends that financial strain coerces women’s consent to become involved in prostitution. Overwhelmingly, she asserts, women cite poverty and urgent financial need as the primary reason for their involvement in the trade. Financial destitution is exacerbated by experiences of racism and by the effects of colonialism, which make Aboriginal women particularly vulnerable to sexual exploitation. MacKinnon’s argument that involvement in prostitution is related to larger systems of inequality, racism and colonialism is supported by empirical research conducted in Canada. Aboriginal women are overrepresented as street-level sex workers, are particularly vulnerable to physical and sexual violence (Lowman, 2000) and are subjected to greater criminalization than their non-native counterparts (Razack 1991). For these reasons, researchers argue that it is imperative to situate prostitution within a
historical context that acknowledges the long-term effects of colonialism including poverty, discrimination and cultural degradation (Farley et al. 2005; Razack 2000).

**Radical Feminist Legal Strategy**

In terms of legal strategy, radical feminists call for the abolition of the trade by criminalizing clients, pimps and traffickers while eliminating the criminal status for those in prostitution (MacKinnon 2011). Legalization or decriminalization of client and third party involvement are rejected as legislative options because they function to normalize prostitution and perpetuate related harms (Farley 2003). The radical feminist calls for abolition are echoed in the Crown’s arguments in *Bedford v. Canada* and in the subsequent appeal. Indeed, the Attorneys General drew on research conducted by Melissa Farley in arguing that prostitution is inherently dangerous. The Intervener Attorney General of Ontario submitted:

> [P]rostitution involves the use of a person’s body, most often that of a woman, by another person, most often a man, for his own sexual satisfaction. Prostitution is not a mutually pleasurable exchange of the use of bodies but the unilateral use of one person’s body by another in exchange for consideration, usually money. The physical violence and psychological harms experienced by prostitutes stem from *inherent* inequality that characterizes the prostitute-customer relationship, and not from the provisions of the *Criminal Code*.  

Moreover, entry into prostitution is precipitated by “economic disadvantage, and histories of prior physical, sexual and emotional abuse.” Similar to radical feminists, the Crown argued the female prostitute-male customer dyad reflects gender inequality at a structural level, that women engage in prostitution as a result of traumatic histories or economic strain, and that violence is a result of the institution of prostitution, not of law. For these

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reasons, the Crown opposed legal reform demanding regulation or decriminalization, and argued instead for criminalizing all aspects of the trade.

Certainly, some empirical evidence supports radical feminist claims that sex is political. Larger systems of gender inequality, racism, and income inequality structure who becomes involved in prostitution, or at least what position a woman will hold within the hierarchy of the trade (O’Connell Davidson 1998). How else are we to explain why women are predominantly the sellers of sex rather than the buyers, that prostitutes share a common history of abuse and poverty, and that, in Canada, the most vulnerable sex workers are overwhelmingly First Nations women? Empirical evidence, however, also supports the sex radical contention that there is great diversity in the personal histories, experiences, and motivations of those in the trade. Research in this vein demonstrates that venue is crucial in terms of women’s safety, and that indoor as opposed to outdoor sex work is more conducive to protecting women from violence. Where radical feminists argue that violence is inherent to prostitution, sex radicals purport that the laws contribute to harm and that laws can be changed to mitigate risk. What we have, then, is an impasse. With compelling evidence for both perspectives on prostitution, how should it be decided which legal strategies will best deal with the ‘issues’ inherent or related to prostitution? Is there a middle ground that would satisfy both radical feminists and sex radicals? Are the two views compatible?

The aim of the next section of this paper is threefold: (1) to identify the limitations of both the sex radical and radical feminist perspectives on prostitution; (2) to assess the implications of repealing the bawdy house and living off the avails provisions;
and (3) to discuss a possible middle ground approach to improving the lives of Canadian sex workers that might function to satisfy both sex radical and radical feminist agendas.
CHAPTER III

Limitations of the Sex Radical and Radical Feminist Paradigms

Perhaps the greatest strength of the sex radical perspective is that it grants agency to women who have been historically framed as victims. Feminist scholars have attested to the importance of empowering women in any academic or political endeavour (Brooks and Hesse-Biber 2007; Devault 1999). Though much variation exists in terms of methodology and epistemology, feminist scholarship generally aims to challenge “the basic structures and ideologies that oppress women” and in doing so, “foster[s] empowerment and emancipation for women and other marginalized groups” (Brooks and Hesse-Biber 2007:4). By looking at the variety of pathways to prostitution and the subjective experiences of women involved, sex radical research locates agency and experiences of empowerment that may be overlooked in theories or studies that begin with the assumption that prostitution is inherently violent and that all women in the trade are victims. Yet, the sex radical perspective does not escape the risk of over-generalizing the experiences of women in prostitution or of normalizing harms related to the trade (Farley 2003; Weitzer, 2010). Some indoor sex workers note particular benefits and feelings of empowerment (Lucas 2005), but there is no way of knowing if this is the case for more than a minority of women because the clandestine nature of the trade makes it difficult to access representative samples (Weitzer 2010). Despite this, some analysts make “bold claims that romanticize sex work” (Weitzer 2010:6). Pat Califia’s (1994:247) assertion that women involved in prostitution should be thought of as “teachers, healers, adventurous souls who are tolerant and compassionate” can function to obscure trauma, violence and exploitation experienced by many of those in prostitution. Moreover, Farley
(2003) questions the extent to which terms such as “teachers”, “healers”, “escorts” and “managers” normalize prostitution within academia, public opinion and law. Focusing on the experiences of a few, privileged women at the apex of the prostitution hierarchy (those that work indoors and for themselves) can be particularly problematic for those who occupy the lowest echelons of the trade.

The radical feminist position on prostitution can also be scrutinized. Ronald Weitzer (2010) for example, criticizes the radical feminist paradigm (or “oppression paradigm”, as he calls it) as “one-dimensional and essentialist” (26). He argues that radical feminists are guilty of sensationalism by telling “[a]necdotal horror stories” of women in prostitution, and of utilizing “emotionally laden constructs” when describing prostitution as a form of rape and clients as predators (Weitzer 2010:26). Moreover, Weitzer suggests, particularly traumatic experiences are generalized to all women in prostitution. Certainly, some radical feminists recount horrific stories of abuse and victimization. Catharine MacKinnon, for example, argues that prostitutes are routinely subjected to “…rape, beaten to stay, prevented from looking into other options” and that they sustain “the trauma of a war zone or torture chamber” (2011:2008). MacKinnon is also guilty of generalizing her claims beyond the cultural and historical context from which her data are obtained. She holds that prostitution is always violent and exploitative across cultures and historical periods, though her assertion is based primarily on evidence from India. The structural conditions that shape one’s entry to and experience of the sex trade are different based on cultural, historical, and geopolitical environments (Barton 2002). The economic, political and social circumstances in India and Canada, for
example, are markedly different and seriously call into question the validity of generalizing the findings from one nation to another.

Both the sex radical and radical feminist paradigms then carry the risk of over-generalizing to all prostitutes the experiences of a few. In the efforts of sex radicals to bring women’s agency and empowerment to the foreground, there is a real danger that violence and exploitation will be obscured. Conversely, by generalizing experiences of victimization to all prostitutes, radical feminists overlook the reality of individual experiences of agency and empowerment. In actuality, the structural conditions that compel women to enter into the trade, individual histories, and experiences are complex and varied. Certainly, arguments about prostitution must be specific to the cultural, historical and geographic arenas that are studied. This is particularly important when theoretical accounts of prostitution and related empirical studies inform policy change.

**Implications of Recent Prostitution Law Reform**

If the history of feminist-inspired legal reform illustrates anything, it is that legislative change can function to better the situation of an elite group of women to the continued detriment or exclusion of another. In Canada, law reforms championed by first and second wave feminists had mixed results in terms of advancing the rights of all women. The benefits of family law reforms in the first wave of feminism were generally afforded to those who were white, middle class, heterosexual and married (Chunn 1999). The push for ‘equality’ in the second wave was premised on an “essential womanhood” that obscured important differences among women in terms of race, class and sexual orientation. Mandatory charging legislation for domestic assault, introduced in the early 1980s, was intended to protect women and punish their male abusers, however, in
practice this legislation did nothing to reduce the likelihood of subsequent assaults and it ended up criminalizing many women (Snider 1994). Similarly, changes to sexual assault legislation failed to result in more convictions or to eliminate stereotypical assumptions about women’s sexuality in the justice system (Busby 1998). The history of feminist inspired legal reform (and perhaps legal reform more generally) thus demonstrates the limitations of using the law for social change. In law, a privileged perspective tends to get heard first, most and best (Razack 1991). The most marginalized members of society, those that are poor and racialized, tend to have their experiences of oppression obscured and their interests ignored (Razack 1991). Moreover, law is constituted in and constructed by dominant ideologies, thus changing the laws will not necessarily translate to changing hegemonic beliefs about women, influence judicial reasoning or alter enforcement practices (Comack and Balfour 2004; Boritch 2007; Dellinger 2010).

Unfortunately, the recent decision in Canada (Attorney General of Ontario) v. Bedford indicates that not much has changed. Repealing the bawdy house and living off the avails provisions may be lauded by some radical feminists as a positive step towards recognizing sex work as a form of legitimate labour and protecting those in the trade. However, since the new provisions will apply only to the indoor sex trade, a particular (and relatively “privileged”) group of sex workers will be legally protected. As will be demonstrated next, the most marginalized and vulnerable sex workers in Canada, those who work on the streets (also poor and racialized), will not necessarily stand to gain from these particular reforms.

Historically, the law has tended to favour particular women over others. Those that who are white, middle class, and who fit dominant sexual stereotypes have been
more successful at having their interests incorporated into law (See Chunn 1999; Razack 1991). In Canada, prostitution is a racialized and classed institution; women who are poor and of aboriginal status are overrepresented among street-based sex workers (Farley 2003). Outdoor prostitutes are the most vulnerable to violence, and have much less control over their working conditions compared to their indoor counterparts (O’Connell Davidson 1998; Weitzer 2010). Their visibility on the streets also makes them more susceptible to arrest. Street prostitutes make up as estimated 20% of the trade in Canada, but represent over 90% of all prostitution-related arrests (Lowman 2011:38). Conversely, women who work indoors report more control over their working environments and their interactions with clients, and show that it is entirely possible not to experience any violence while working in the trade (O’Doherty 2011). Recent changes to prostitution laws, that is, the repeal of the bawdy house and living off the avails provisions, benefit those who work indoors and thus are arguably in a privileged position relative to street-based prostitutes. Importantly, the communicating provisions (which are invariably applied to street prostitutes) have not been revoked despite studies (Lowman 1996), demonstrating that these provisions render street prostitutes more vulnerable to violence and criminalization.

As mentioned above, though sexual assault laws were reformed in an effort to change the way courts dealt with victims, rape mythologies continued to permeate judicial reasoning (Busby 1998) and a woman’s credibility continued to be attacked in court (Comack and Balfour 2004). This may be particularly true in criminal cases involving violence against prostitutes. In R. v. Kummerfield and Ternowetsky 1996, for example, a case involving the murder of an Aboriginal street prostitute at the hands of
two young, white, middle class men, both the Crown and Defence maintained that the fact George was a prostitute was something to be considered in the case, and the presiding judge instructed the jury to keep this in mind when deciding the outcome (Razack 2000). Razack argues that the culpability of the accused (two young, white male university students) was diminished because George was “considered to belong to a space in which violence routinely occurs, and to have a body that is routinely violated, while her killers were presumed to be far removed from this zone…” (2000:93). All the legal actors in the case failed to situate the victim and accused within their respective historical contexts, and

[a]s abstractions, neither could be seen in the colonial project in which each was embedded. The history of dispossession, and its accompanying violence, that brought both Pamela George and her murderers to the Stroll; white people’s historic participation in and benefit from that dispossession and violence; the law’s complicity in settler violence, particularly through an insistence on racelessness and on contact, all remained invisible (Razack 2000:94-95).

What the Pamela George case illustrates is that dominant ideology (characterized by racist and sexist assumptions) still permeates judicial reasoning and sentencing decisions despite the law’s claims to universality and impartiality.

Discrimination against those involved in prostitution happens at the level of enforcement as well. Police officers are embedded in larger social system and are therefore not immune to dominant social perceptions of women (Chan, Devery and Doran 2003). Though laws can be changed to be gender neutral, there is no guarantee that there will be corresponding change in police attitude or enforcement practices. Particularly in the case of prostitution, the law is differentially enforced; women are arrested, charged and convicted at higher rates than their male clients or pimps.
(Longworth 2010). If the law were enforced impartially it would not be the case that a disproportionate number of those charged for prostitution related infractions are women, are street based prostitutes and are racial minorities (Longworth 2010; Farley 2003). Police generally perceive prostitutes as less deserving of protection or as somehow responsible for their victimization (Boritch 1997). In a recent U.S. based study, for example, it was found that the 93% of police officers interviewed (n=891) believed any woman could be raped, but 44% admitted they were unlikely to believe a prostitute who made a rape claim (Dellinger 2010:325).

Academics studying prostitution in Canada should recognize the specific vulnerabilities of marginalized populations, particularly Aboriginal women, a group overrepresented among street-based sex workers. First Nations women have a particular vulnerability to sexual exploitation, violence, and murder (Culhane 2003; Lowman 2000; Razack 2000). Their entrance into prostitution and experiences of violence in the trade are fundamentally tied to structural factors, that is, the effects of colonialism, poverty, and racism (MacKinnon 2011). The current changes to prostitution legislations do not show recognition of these macro-level factors, that shape who becomes involved in prostitution and their risk of violence and criminalization. Moreover, these recent reforms will not necessarily change dominant ideologies about prostitution. These resilient ideologies continue to inform judicial decisions and enforcement practices. While some relatively privileged sex workers stand to gain from these reforms, the most marginalized and vulnerable will not likely see improved conditions. An improved legislative strategy would have incorporated both radical and sex radical feminist analyses of prostitution, so
as to allow for the possibility of agency and empowerment while acknowledging larger systems of inequality.

**Sex Radicalism and Radical Feminism: Strategies for Change**

The fundamental difference between the sex radical and radical feminist perspectives lies in their respective levels of analysis. To reiterate, while the sex radicals tend to base their arguments on individual experiences of resistance, empowerment and agency enjoyed by predominantly indoor sex workers; radical feminists maintain that structural factors such as racism, sexism and income inequality fundamentally predict and shape the basic institution of prostitution. It is possible, however, to create a feminist paradigm that considers the possibility of individual empowerment while also acknowledging how prostitution is connected to larger systems on inequality. Weitzer (2010) offers the polymorphous paradigm as an alternative. This perspective “…holds that there is a constellation of occupational arrangements, power relations, and worker experiences… [and] is sensitive to complexities and to the structural conditions shaping the unequal distribution of agency, subordination, and workers’ control” (6; emphasis added). Such an approach considers individual choices, agency and experiences of exploitation or empowerment in the context of the type of sex work engaged in, as well as structural conditions and geographic location.

Combining the radical feminist and sex radical paradigms is, in fact, necessary in order to gain a more nuanced understanding of a woman’s experiences in the trade. Barton (2002) holds that “…acts and behaviors can have multiple, not singular, meanings and consequences…” (586-587). She concedes that what may be experienced as empowering at the individual level may be constituted by, and maintain, larger systems
of inequality based on gender, race, class, age and sexual orientation. Based on her interviews with exotic dancers, Barton found that particular aspects of the sex radical and radical feminist paradigms are salient at different moments in the dancers’ lives. She concluded that over time, an exotic dancer moves from feeling empowered to feeling oppressed. Many respondents who were interviewed earlier in their careers stated that they “enjoyed the sexual abandon and ego gratification” inherent in their jobs, thus supporting the sex radical claim that sex work can be rewarding and empowering (599). However, Barton found that “…the longer a woman strips, the more her feelings about her labor reflect the validity of the radical feminist perspective” (2002:599). The sex industry generally, and the experiences of women involved in prostitution specifically, are tremendously complex. On their own, neither the sex radical or radical feminist paradigms are sufficient to understand this complexity. Theoretically combining the sex radical and radical feminist paradigms may be useful in advocating policy reform. Next, this essay will explore common terrain between the sex radical and radical feminist perspectives, and the possibilities of an agenda for change.

**Possibilities for Feminist Strategy**

In Canada, variation in terms of racial and economic background of sex workers, and their associated risks of violence, exploitation and criminalization, mean that neither full-scale legalization nor criminalization will provide a solution for all women. However, as Satz (2010) argues, “…narrowing the discussion of solutions to the single question of whether or ban or not to ban prostitution shows a poverty of imagination” (149). Laws that contribute to the harm experienced by those in prostitution, such as communicating provisions, certainly need to be addressed, but the law should not be
relied on as the only way to enact positive social change. As radical feminists would argue, the cultural values and systems of inequality that perpetuate prostitution as a racialized, classed and gendered institution must also be reformed, and this necessitates using resources other than the law. Consciousness raising groups, public awareness campaigns and educational programs are just some of the ways in which cultural values that promote and sustain prostitution as gendered, race and class-specific institution can be challenged. Particularly important are educational programs for police officers to increase their awareness of sex workers’ needs and vulnerabilities. Despite the myriad of possibilities for change that exist outside of the legal arena, a decision does need to be made as to which legal strategy best deals with the ‘issues’ of prostitution and will help those who are most vulnerable in the trade (Satz 2010).

Laureen Snider (1994) is critical of feminist strategies for social change that engage the law. She holds that “[l]aw reform…is best envisaged as a defensive tactic, to be used only when it cannot be avoided” (97). If, however, engagement with the law is necessary, Snider suggests that feminists should aim to secure concrete rights such as those that ensure access to day care and minimum wage, over abstract equality rights. This is because:

First, abstract laws tend to benefit, at least initially, those who need them least. Second, costly legal battles are not usually necessary to determine the meaning of concrete rights because they are less opaque…Third and relatedly, it is harder for reactionary forces to launch counter-hegemonic struggles to change the meaning of the “right”, or use it to strengthen conservative forces (1994: 98).

Snider’s argument is particularly salient in the case of prostitution reform. In March 2012, the Ontario Court of Appeal agreed that provisions criminalizing living on the avails of a prostitute and prohibiting brothels were a violation of section 7 of the
Canadian Charter of Rights and Freedoms, that states the right to life, liberty and security of the person. As argued earlier in this section, decriminalizing these aspects of the trade most benefit those who need the law’s protection the least. Those who work indoors already enjoy safer working conditions and are far less likely to be criminalized than their street-based counterparts. These reforms follow a pattern in legislative change whereby laws benefit relatively elite women as opposed to those who are poor, racialized, and disproportionately criminalized. Structural forces of inequality, emphasized by radical feminists, are ignored in this ruling. Seeking concrete rights, however, would advance the aims of both sex radical and radical feminists.

Both sex radical and radical feminists are in agreement that economic need is a primary motivator for women entering the trade (see, for example, Lucas 2005; MacKinnon 2011). Securing concrete rights to a livable minimum wage, to employment, affordable housing and education would provide options for women with few choices outside prostitution. At the very least, this would empower women to decide whether or not sex work is a viable option, one free from economic coercion. As mentioned earlier in this paper, street-based prostitutes share a common history of childhood abuse (Benoit and Millar 2001) and, in Canada, are predominantly of First Nations descent (Lowman 2000). Increasing resources to child abuse intervention programs, and to social services for First Nations women are thus crucial to improving the situations of these vulnerable populations. Concentrating resources in social services to help those currently in or leaving the sex trade is also a strategy both sex radical and radical feminist could agree on. Social services that facilitate access to doctors and mental health counselors and that help women transition from the sex trade into stable employment are crucial. Securing
CONCLUSION

The history of feminist-inspired legal reform questions the viability of feminist strategies for social change that employ the law (Snider 1994). First and second wave feminist reform efforts did not benefit women of all social locations. Women that were poor and racilaized often had their particular experiences obscured and their interests ignored (Chunn 1999; Razack 1991). Though it will be some time until we see the results of the Ontario Court of Appeal’s decision to repeal elements of prostitution law, it could very well be that the effects of these reforms will mirror those of feminist change efforts in the past. Repealing the bawdy house and living off the avails provisions may benefit women who work indoors, but they will not necessarily help street-based prostitutes that are exposed to relatively higher rates of violence, exploitation and criminalization. An alternative, and potentially more effective strategy, would consider the insights of both radical and sex radical feminists.

Sex radical feminists have been instrumental in terms recognizing the agency of women involved in sex work and identifying laws that contribute to the harm in trade. However, structural conditions of inequality play an undeniable role in shaping women’s involvement in prostitution. Radical feminists show that major social change is required to end the harms related to prostitution. Gender inequality, racism and poverty must be targeted if women are to be empowered to make the decision to engage in prostitution free from coercion. Though often framed as two distinct poles, sex radical and radical
feminists share a similar goal: to improve the welfare of sex workers and to end violence and exploitation (Simmons 1998). Looking to strategies for change outside of the justice system, consciousness-raising groups and improving social services for those engaged in prostitution, for example, are just some of the ways in which radical feminist and sex radical aims can be achieved. If the law must be employed, securing concrete rights is crucial to providing women with work options other than prostitution. Regardless of the changes made, feminist activist and academics should make every effort to assess the differential effects of legislative reform. In the case of prostitution law reform, this requires playing close attention to the vulnerabilities of First Nations and economically disadvantaged women—those overrepresented in the street-based sex industry and in Canada’s criminal justice system. One can only hope that if Bedford v. Canada gets appealed to the Supreme Court of Canada, ending the immense harm and empowering all women in the trade will be a priority.
References


(http://www.ontariocourts.ca/decisions/2012/2012ONCA0186.pdf)


