The Criminalization of Prostitution: Putting Women's Lives at Risk
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Published by: The Department of Historical Studies, University of Toronto Mississauga
Stable URL: http://jps.library.utoronto.ca/index.php/prandium/editor/submission/21843/
The Criminalization of Prostitution: Putting Women's Lives at Risk

Manpreet Abrol

Since the drafting of the Charter of Rights and Freedoms in 1982, there has been an increasing debate regarding the legitimacy of prostitution, and its related acts. Although numerous scholars have made arguments for and against prostitution, it is important to note that the issue is not just a moral one, but also one of safety and equality. The dangers that come with one engaging and/or participating in prostitution are quite evident, and the risks associated with prostitution are not a modern day occurrence. This paper will look at the jurisprudence of prostitution in Canada in order to argue that women, who engage in prostitution, whether it is a choice or a necessity, are the victims of abuse and dangerous conditions created by prostitution laws. In addition, this article will also examine society's preconceived notions behind sex work, whether they are on the grounds of morality or safety. This will be done while taking into account the jurisprudence of Bedford v. Canada, a precedent setting case which helped demonstrate the unconstitutionality of Canada's prostitution laws. The focus will then shift to drawing comparisons between countries and American states (i.e. Holland and Nevada) to consider some of the outcomes of the legalization and decriminalization of prostitution. Finally, recommendations will be made, in lieu of the recent introduction of Bill C-36, as to which laws Parliament should have adopted to make conditions safer, equal and secure for prostitutes. After careful analysis, it will be evident that the criminalization of prostitution actually puts the lives of sex workers in jeopardy, rather than protect them.

Although prostitution itself has never been illegal in Canada, the acts that govern and surround its practice have been, thereby giving it a paralegal status. Scholars agree that this was not done in order to protect women or men from harm, but rather, because prostitution was seen as a societal nuisance. In the second half of the nineteenth-century, Canadian laws were particularly harmful to sex workers in comparison to those of Britain. Not only could both the prostitute and her client be arrested for engaging in the act of prostitution, but also the status of the prostitute alone was legitimate grounds for criminal charges. In addition, efforts to preserve the institute of marriage resulted in a double standard

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that sought to uphold the sexual morality of women, by discriminating against the "impure." This was done through the *Contagious Diseases Act*, one of the many vagrancy laws enacted during this time, which stated that a diseased prostitute could be sentenced up to three months in a hospital. This motion could be put forth by anyone who would be willing to swear under oath to a Justice of the Peace, that a woman had contracted a contagious disease.

The vagrancy laws, which governed how prostitutes conducted their business from 1869-1892, had a negative impact on sex workers well into the twentieth-century. These laws criminalized all types of street solicitation, the engagement of prostitution in a bawdyhouse and/or brothel, and prohibited an individual to live off of the avails of prostitution. Although these particular codes no longer govern the acts related to prostitution, their lasting implications continue to affect sex workers. *Bedford v. Canada* challenged the Criminal Code as it marginalized prostitutes by preventing them from negotiating a price in a public space, thereby forcing them into unsafe areas where they could be victimized; forbidding prostitutes from creating a safe workplace (i.e. hire a bodyguard as he/she would then be living under the avails of prostitution); and by creating "barriers to the creation of a social support network, including forming a family and having children." These laws ultimately force women to work in unsafe places, and could have led to further victimization as crimes against prostitutes would go underreported due to a fear of dual-criminalization. These laws led to the victimization of prostitutes in two primary ways: through health concerns and physical violence.

In December of 2013, the Supreme Court ruled in *Bedford vs. Canada*, and found the pre-existing laws governing prostitution to be unconstitutional, and gave Parliament a one-year “suspended declaration of invalidity.” The provisions under the Criminal Code would remain valid for a period of one year, giving Parliament time to draft new laws in accordance with the Supreme Court decision. Although this was arguably a victory for feminists, the declaration of invalidity still left much ambiguity in terms of dealing with the health concerns and physical abuses experienced by sex workers. According to Kate Shannon, due to the current regulations in place, prostitutes face some of the highest health concerns in Canada. This includes an exacerbated rate of "drug related harms, trauma, and HIV and other sexually transmitted infections." In addition, prostitutes suffer from the highest mortality rate in Canada, in contrast to other victims of homicide. David Hugill would concur with Shannon’s claims on the subject of prostitute mortality. Hugill argues that the former Criminal Code provisions regarding prostitution partially contributed to the serial murders that were committed between 1978-2002 by Robert Pickton, but Hugill also mentions that the Pickton murders must be looked at through a moral lens.

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The media portrayed Pickton's victims as the "typical" prostitute, as woman who was "drugged, dazed, deviant, dissolute and corrupted 'other' whose affiliation with a notorious underworld place[d] her in a constant threat of danger and predation."11 This interpretation shifted some of the blame from the murderer to his victims. Although this was the depiction during the initial stages of the disappearances, Hugill does imply that the attitudes slowly changed into ones where the sex worker was seen as the victim in these crimes rather than the perpetrator of a crime.12

In this change in attitude toward sex workers, Hugill sees a slow shift between public ideology and government policy, an analysis John Lowman, a Criminologist at Simon Fraser University, and a Canadian authority on Prostitution argues contains significant validity. According to Lowman, there has been a drastic shift when it comes to the public policy of prostitution. Historically, the Conservative party has been adamant that most Canadians disapprove of prostitution, and thereby support its prohibition. In contrast to the assertions of the Conservative Party, Lowman argues that the "majority of Canadians do not believe that consensual prostitution should be prohibited."13 In fact, he emphasizes that due to this shift in public opinion, violence towards sex workers has been on the decline since 1985.14

This change in public attitude has come with much debate surrounding whether the legalization/decriminalization of prostitution would exacerbate current conditions for sexual labourers, or in contrast, contribute to the betterment of the lives of sex workers in Canada. Christine Overall argues that there is no simple solution to the question of sex work. In fact, there are numerous feminist viewpoints on prostitution that are meritorious. Whereas some feminists believe that external factors (i.e. racism, poverty, domestic situations, economic hardships, etc.) force women into prostitution, others argue that women enter prostitution out of choice. Overall states that, regardless of the reasons for engaging in sex work, a woman’s decision to do so should be respected.15 With this in mind, one can now see the legitimacy that Bedford v. Canada brings to the legal arena by addressing some of the main concerns prostitutes face on a daily basis. Bedford helped eliminate conditions from the Criminal Code that put women in harm's way (by legalizing brothels, living on the avails of prostitution and allowing sex workers to communicate public with clients16) in hopes that a newly established legislation would enhance the environment and livelihoods of all who engage in the selling of sexual services. In their December 2013 decision, the Supreme Court justices unanimously supported Bedford’s argument on the harms the Canadian Criminal Code brought to sex workers, and found its provisions pertaining to prostitution unconstitutional.17 With Bill C-36 introduced to major discussion in the House of Commons (which essentially keeps prostitution criminalized in Canada), it is important to analyze the potential

11 Ibid., 55.
12 Ibid.
14 Ibid.
16 CBC News “Supreme Court.”
17 Ibid.
ramifications it could have on sex workers and their clients. To answer this, one must look at countries that have legalized prostitution, and assess the situation accordingly.

Before embarking on this exploration, it is important to note that with the laws surrounding prostitution having been ruled unconstitutional, it reopens up room for negativity, much of which can stem from the terminology associated with sex work. According to Janice Raymond, "the term sex work, doesn’t dignify the worker; all it dignifies is the sex industry – the pimps, procurers, and traffickers." Lisa Thompson would argue that this dignification, could promote pimp culture, which could marginalize women. She outlines that the absence of laws that protect women, could further exacerbate the mental and physical torture that prostitutes face at the hands of pimps. These repercussions create a heightened incentive to ensure that the laws that will replace the current Criminal Code provisions address the concerns outlined by Thompson and Raymond. In order to do so, exemplars must be drawn from countries that have legalized/decriminalized prostitution and have established a solid foundation to effectively regulate the practice.

Of those countries that have legalized and regulated prostitution, the Netherlands is highly esteemed due to its success. The Dutch prostitution laws were designed to maintain public order, combat criminality, and restrict illegal immigration. The government wanted to regulate "voluntary prostitution and to fight involuntary prostitution and other criminal abuses." In order to do so, it issued licences to control businesses such as brothels and bawdy houses. These permits forced business owners to maintain healthy and safe conditions for prostitutes in their place of work, as well as follow the criteria outlined by the government (i.e. the prostitute had to be a resident of Holland and over the age of 18). According to the Dutch government, these attempts have virtually eliminated illegal and unlicensed businesses. In addition, legalization promotes a healthy physical working condition for sex workers, whereby their clients must wear a condom, and the workers receive full health benefits from the government, thereby ensuring their wellbeing and safety. Although these laws have ultimately enhanced the living standard of sex workers, there are a few shortcomings that Ine Vanwesebeeck addresses. The regulation of the sex trade has prompted a rise in escort services, which are difficult to monitor. In addition, Vanwesebeeck argues that the policies implemented have not provided sex workers the necessary support to exercise and facilitate their rights (i.e. the ability to form unions), thereby contributing to their marginalization. However, it is important to note that in the Netherlands the regulation of the sex trade is still a relatively new phenomenon. Although strides have been made to protect women in this occupation, it will take some time before the policies can be fully effective.

20 Ibid., 11.
21 Ibid.
22 Ibid., 11-12.
A more local example of a region that has legalized prostitution is Nevada, United States of America. The only state in the United States to do so, Nevada legalized prostitution for economic purposes related to tourism. It is important to note that Nevada only governs the use of brothels and bawdyhouses, while still criminalizing all forms of street prostitution. The stipulations outline that sex workers must receive regular health checks for sexually transmitted infections and HIV/AIDS, as well as require the client to wear a condom. In addition, brothels are regulated through local licences issued by counties and districts, which have pre-existing guidelines that a brothel cannot receive a licence if the owner/operator has been convicted of a felony or has ties to or with illegal business. As well, sex workers are hired as independent contractors and must be a minimum age of 18 or 21, depending on the criteria outlined by the respective county. Although these laws have been effective in ensuring the safety and health of sex workers, the failure to protect street prostitution forces women to negotiate with their clients in private areas, where there are more prone to victimization and physical abuse.

Finally, one of the most successful countries to regulate prostitution is New Zealand. In contrast to Nevada and the Netherlands, New Zealand does not institute rigorous methods of government regulation, but instead has opted for the decriminalization approach. Decriminalization has been argued as a more successful method when governing sexual labour. Prior to the implementation of these procedures, the New Zealand government wanted to tackle issues affecting prostitutes such as: decreasing victimization, enhancing labour rights and the empowerment of women, reducing crimes associated with prostitution, decreasing the number of illegal immigrants in the sex trade, and diminishing the rate of sex trafficking. In consequence, the New Zealand government has been successful in increasing control over the sex trade. As in Nevada, New Zealand requires brothels to maintain health and safety standards for their employees and their workplace. However, instead of regulation being governed through a criminal code, it is regulated through "provincial [labour] standards legislation; occupational, health, and safety codes; and zoning regulations." In addition to what Nevada has done, sex workers in New Zealand have the right to refuse services to any customer or client, and if a client were to engage in unsafe sex (i.e. with no condom), they could face criminal sanctions. These brothels are managed through the issuance of permits and licences that help the government regulate and monitor the sex trade. In addition to this, brothels are subject to health inspections to ensure that government standards are met. As well, police continuously ensure the safety of the workers and managers in the brothels, and the women are protected. In contrast to Nevada and the Netherlands, New Zealand has established an organization that far surpasses what any country has

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24 Ibid., 8.
25 Ibid., 12.
26 Hackler, 223.
29 Weitzer, 99.
30 Ibid., 99.
The formation of the Prostitution Law Review Committee (PLRC), through the Prostitution Reform Act of 2003, is composed of "current and former government officials, sex worker representatives, and members of various nongovernmental organizations." The function of this committee is to review and critique the impact of the laws in place, and if need be, make recommendations to institute new laws and legislations which better the lives of sex workers in New Zealand.

Tabled in June 2014, Canada’s Bill C-36 takes the same approach to criminalization as the previous laws that were deemed unconstitutional by the Supreme Court. In essence, this bill keeps prostitution legal in Canada, however makes it illegal to advertise services or pay for it. As well, Bill C-36 will shift its focus away from sex workers and on to criminalizing the actions of pimps and johns. Furthermore, it prohibits the solicitation of sexual services "in areas where children could be present," (specifically in the proximity of schools and day cares) and also funds $20 million in programs to help sex workers "escape" the profession of prostitution. The Bill does not specifically target sex workers; it focuses on johns and individuals who purchase sex. It categorizes prostitutes as victims and "shields them from criminal prosecution." The Bill also portrays johns as the individuals who further exacerbate the victimization sex workers experience. Similar to the previous laws that forbade the solicitation and negotiation of sexual acts in public spaces, Bill C-36 also contains a provision that criminalizes communicating for the purpose of purchasing/selling sex under certain circumstances. There is much debate among politicians and advocates (from both sides) as to the constitutional legitimacy of this bill. For example, legal expert Gunilla Ekberg argues that Bill C-36 would not withstand a constitutional challenge it "targets those who are victims [of a] human rights violation but also a crime." In contrast, other, such as Vancouver lawyer Georgiadee Lang, argue that this legislation would not constitute a legitimate constitutional challenge as prostitution contributes to the "exploitation of women and the commoditisation of the commercialization of women' bodies, which is just a frontal assault on human dignity and is a breach of human rights."

Shortly after the Supreme Court ruling on the Bedford Case, Justice Minister Peter McKay stated that the new laws developed would "ensure the criminal law continues to address the significant harms that flow from prostitution to communities, those engaged in prostitution and vulnerable persons." Contrary to Minister McKay’s assertions, the criminalization of prostitution does not reduce the harm

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31 Ibid.
32 Ibid.
34 Ibid.
36 Ibid.
37 Ibid.
38 Ibid.
39 CBC News "Supreme Court."
experienced by women. In fact, quite the opposite is true. Every argument thus far has demonstrated that the criminalization of the acts governing prostitution further exacerbates the harms experienced by women. Following the coattails of the previous Criminal Code sanctions on prostitution, it is essential that Canada develop a legislation which guarantees that prostitutes experience the same wellbeing as women who choose a more conventional profession, an area which Bill C-36 fails to address. The latter will explore avenues that would not only enhance equality among women, but also ensure the safety of sex workers. Therefore, it is important to draw arguments from different scholars in order to help determine what is the best legislative solution for Canada to adopt. When assessing possible approaches towards sexual labour regulation in Canada, there are two options that can be considered: decriminalization and legalization.

Both the Netherlands and Nevada have opted for a legalization approach, which brings with it the obligation of regulation. legalization is defined as regulating sex work, "and sex work related activities through the use of criminal law."40 Although there seems to be virtually no downfalls to its regulation, there are a few arguments feminists make in regards to the legitimacy of legalization. When assessing the positives, it comes as no surprise that regulating prostitution would ultimately make it safer than if it were criminalized. As demonstrated above, regulation through criminal law can provide an enhanced health and safety environment in the workplace, ensure women become legitimate employees receiving all governmental benefits and those protections granted to individuals who choose to engage in more conventional means of employment. However, most feminists would argue that although this option far surpasses the idea of criminalization, there are numerous shortcomings to the approach of legalization. Jacqueline Lewis and Frances Shaver argue that although sex work would be regulated, it would still be policed through criminal law, which has been a known harm for prostitutes. Under legalization, the government can still control the work environments of sex workers, as well as regulate the conditions in which prostitutes can work (whether they be indoor/outdoor), where they can advertise, as well as place numerous limitations on bawdyhouses, street procurement, and could ultimately discriminate on-street prostitution while favouring more upscale practices like brothels.41 Those who advocate for legalization, generally support the "stringent regulation of prostitution."42 This can include licensing, taxation, and other legal codes, which dangerously constrain the liberties of sex workers. This is particularly evident in Nevada where numerous requirements must be fulfilled in order to receive a licence to manage a brothel, as well as strict health standards a sex worker must maintain.43 In addition, when a government chooses legalization as its approach, laws are usually written with morality terms that argue for the protection of women, but in reality, instead promote the health and safety of the client. This can be seen in Nevada and the Netherlands, where although female prostitutes must legally receive health checks, johns are not required to do so, thereby focusing on the betterment of the client vis-à-vis the sex worker.44

40 Lewis et al., 244.
41 Ibid., 244.
42 Deborah Brock, Making work, making trouble: The social regulation of sexual labour (Toronto: University of Toronto Press, 2009), 7.
43 Ibid., 7-8.
44 Melissa Hope Ditmore, Prostitution and Sex Work (Santa Barbara: Greenwood, 2011), 91-92.
Taking into account the arguments above, legalization then becomes a new way of controlling women’s actions through the Criminal Code, thereby putting sex workers in further danger.\textsuperscript{45} Legalization then leads to the possibility of recreating the same repercussions that the Supreme Court, and various other feminist groups, has advocated against. In essence, the state now takes over the role of the pimp through the regulation of women’s wages, work conditions, and wellbeing. Legalization therefore represents a shift in responsibility, not necessarily a change in the experience of sex-workers. As it would have the tendency to create another underground market where prostitution could emerge unregulated, it is clear that legalization is not the most effective solution.\textsuperscript{46} Therefore, most scholars argue that the best possible option is New Zealand’s example of decriminalization.

Finally, if considering the option of legalization over decriminalization, the terminology that surrounds prostitution should be taken into account. As Thompson and Raymond suggest, "sex work" needs to be clearly defined as its current usage tends to embody all those who engage in the governance of sexual labour (i.e. pimps) Legislation should be clear about who will be protected under the new regulations, and as a consequence, who will not. It would also need to dictate the roles played by pimps, and how any violent and unlawful actions would be addressed under the new regulations. Arguably, the addition of pimps and their function should be included under the Criminal Code, but in a separate category from sex workers. Pimps could be eliminated from the sex trade if prostitutes received their wage through their place of employment, whether it is a brothel, bawdy house, or another type of institution. With the decriminalization of prostitution, any type of abuse incurred by women would be subject to protection from labour, employment, and general criminal laws as they would be tax-paying employees.\textsuperscript{47} As a result, this would minimize the roles pimps play in the lives of sex workers, and over time, would ultimately diminish their position in the governance of sexual labour.

In contrast to the legalization model, decriminalization does not govern prostitution through the Criminal Code, but rather through specific legislation.\textsuperscript{48} Feminists favour this approach as it involves little to no interference from the government or other third parties in the lives of sex workers. It can also lessen the infringement and victimization caused by police when targeting prostitutes, as well as undermine the role of the pimp as the "protector."\textsuperscript{49} Furthermore, when looking at the example of prostitution in New Zealand, decriminalization allowed for the emergence of agencies like the PLRC, which ultimately look out for the wellbeing of the sex worker, and ensure that if a law or a piece of legislation does put them in harm’s way, it is addressed immediately.\textsuperscript{50} In addition to a different method of regulation, decriminalization allows for more flexibility when it comes to the management of brothels or bawdy houses. In contrast to strict restrictions and rigid codes through legalization, decriminalization gives women a chance to decide which environment is best for them, and ultimately, govern their own welfare. Decriminalization allows brothels to be governed and treated as a business, thereby giving

\textsuperscript{45} Ibid., 90.
\textsuperscript{46} Ibid., 91.
\textsuperscript{47} Ibid.
\textsuperscript{48} Lewis et al., 245.
\textsuperscript{49} Brock, 8-9.
\textsuperscript{50} Weitzer, 99.
them more control over the wellbeing and safety of their employees. Kara Gillies argues that this could lead to many positive outcomes. For example, she states that because brothels are treated as legitimate businesses, they are subject to labour and employment laws, and their employees are eligible for the civil liberties that have not previously been available to sex workers. While at the same time, sex work continues to be monitored by governmental oversight and protected through the practice of policing. It is important to take into account that there are drawbacks to the decriminalization model. For example, extensive licensing of individual sex workers could worsen the current stigma facing prostitutes. According to Gillies, "most sex workers oppose the licensing of individual workers because of the stigma and residual police harassment this would entail."

Based on the analysis above, decriminalization is the best option for Canada; however, this is not to say that aspects from legalization should not be considered. Examples should be taken from the Netherlands, Nevada and New Zealand in order to implement the most effective laws and legislations to protect sex workers, and minimize the possibility of victimization. One of the meritorious elements of legalization is the regulation of brothels through the issuance of licenses. Gilles asserts that the licensing of establishments, their owners or operators, would not pose a drastic threat to the livelihood of sex workers and even has the possibility to enhance their safety. However, it is important that these workplaces not be governed by the Criminal Code, but rather through legislation passed by provinces and municipalities in their respective jurisdictions. Due to the fact that brothels would be governed as a legitimate business, this could lead to the formation of unions, where sex workers could further advocate and promote safety and protection in the workplace. However, one of the most essential changes that could emerge with the decriminalization of prostitution would be that women could now take further control over their bodies. They would have the ability to choose which clients they would want to engage in sexual contact with, as well as ensure that the john himself is free of any communicable diseases. This would all be in addition to regulating their own wages, thereby ensuring that sex worker would not live in poverty. The option of salary regulation would be possible as the government will not be able to implement a minimum wage, which has the ability to exacerbate marginal living standards for sex workers.

For centuries prostitution has been one of the most hazardous professions in which women can engage. Not only are sex workers subject to physical abuse at the hands of pimps and johns, but also they are also vulnerable to atrocious health standards and discriminating criminal codes. The analysis of the jurisprudence indicates that the environment for these sex workers has not gotten better, but rather, conditions have worsened over time. Although the stigma associated with sex work is slowly lessening as society becomes more liberal towards sex work, conservative ideology fails to acknowledge the risks criminalization embodies in terms of the regulation of sexual labour. Prostitutes have never been able to truly embrace and experience the benefits of their civil liberties, as they have been historically limited in

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52 Ibid.
51 Ibid.
one way or another. However, with the Butler decision rendered in favour of sex workers, it is in the 21st century that prostitutes can embrace a glimmer of hope that their lives will only get better. Unfortunately, in its current form Bill C-36 continues to disadvantage and marginalize sex workers due to its punitive attitude towards prostitution. Although the laws pertaining to prostitution continue to raise concern, it is important to address the silver lining, which is that after decades of failed feminist activism, the Charter addresses one of the most pivotal issues addressing women's security: prostitution. While litigation can be painstakingly sluggish, the Charter continues to empower women in their pursuit of equality.