16 Pornography and Prostitution and Canada: The Dangers Ahead

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When it comes to sex equality, Canada is held out by many American women as a model nation whose laws and policies should be emulated. By many conventional measures, this is true: Canada decriminalized abortion in 1988 and now has no laws at all restricting abortion; it is a publicly-funded medical service.[1] The Canadian government is poised to formally approve same-sex marriage; such marriages have been legally performed in several provinces for a number of years.[2] The federal government provides women who work outside the home with job protection for 52 weeks of maternity leave, with partial salary replacement.[3] Four of the nine justices on the Supreme Court of Canada, including the Chief Justice, are women.

The prostituted women of Canada don't benefit much from these laws. They do not, as a rule, take maternity leave, or sit on the Supreme Court, or register for gifts of fine china and silver before their same-sex marriages. Instead, like prostituted women in other countries, they are bought, sold, confined, and abused. They are disproportionately immigrant women with precarious status and First Nations (Aboriginal) women.[4] Their

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[1] Although not always available in practice; for example there are no doctors in the province of Prince Edward Island who perform abortions. Women must leave the Island and go to Nova Scotia or New Brunswick to access this service.

[2] The Liberal governments move has met with strong opposition from the Conservative Party, and several Liberal members have vowed to break ranks and vote against the law.

[3] Most women can afford to take only a fraction of the leave, however. Women who work seasonally or part-time may not be entitled to the benefits at all.

[4] The peoples Americans refer to as "Native Americans."

mortality rate has been estimated to be 40 times greater than the national average.[5] They disappear and are murdered a lot.[6]

In truth, the legal landscape in Canada as it relates to prostitution and pornography is a confused one. The place to begin is with the *Butler* case, a 1992 decision of the Supreme Court of Canada.[7] The case concerned a constitutional challenge to a provision of the *Criminal Code of Canada* that prohibited the making and distribution, but not the possession, of obscenity, defined as the undue exploitation of sex. The video storeowner charged under the section for selling hundreds of pornographic magazines and videotapes at his store argued that the provision infringed his freedom of expression. The Court found that any act or publication that carried with it the intent to convey a meaning was expression, and so Butler's rights were *prima facie* infringed. But thee Court went on to find that infringement to be a reasonable limit on expressive freedom in light of the harms of pornography, and especially its harm to women. In the course of its reasons, the Court defined obscenity to include material that violates community standards because it presents sex and violence, sex with children, or degrading and dehumanizing sex where there is a risk of harm.

Ironically, the decision that was hailed as a victory for feminists because of its acceptance of the link between pornography and harm to women produced a quite different result. After *Butler*, the amount of pornography legally available in Canada exploded. Prior to *Butler*, police used a morality-based standard for judging when sexually explicit materials were obscene. Courts tended to find any presentation of sexual acts outside of intercourse in heterosexual marriage to be immoral. Convictions were easy to get and stores were careful about what they sold. In *Butler*, the Court rejected a morals-based approach and stated clearly that sexual explicitness was not itself obscene.

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[5] The Fraser Committee on Pornography and Prostitution in Canada (1985) reported this figure. Pornography and Prostitution in Canada: Report of the Special Committee on Pornography and Prostitution, Vol. 2, p 349 (1985) (the Fraser Committee).

[6] Robert Pickton is currently facing trial for the murder of more than two dozen prostituted women on his farm outside Vancouver.

[7] *R. v. Butler*, [1992] 1 S.C.R. 352

This should have made it easier and clearer for police, who could now target violent, degrading, and dehumanizing material as criminal. The problem, however, was that the *Butler* decision was not exactly clear in its wording. In some parts of the judgment, the Court appeared to be recognizing that there is a general link between pornography and attitudinal harm that may in turn result in the mistreatment of women by men. However, parts of the decision can also be read as suggesting that the Crown has to prove the risk of harm for each item in question. In a 1995 case called *Jorgensen*, this latter approach was repeated.[8] In that case, the retailers argued that the Crown had to prove that the retailers knew that the contents of the tapes they sold were obscene. The Court held that it was not necessary to prove that the retailers knew that the content was legally obscene, but it was necessary to prove that they were aware of the content generally, such that they knew what the tapes presented. To deal with the likely case where the retailer simply declined to screen the tapes in his inventory, the Court held that willful blindness would suffice to prove knowledge.

Ultimately, after the case was returned to the lower courts, the accused were acquitted in respect to the tapes that contained positive outcome rape scenarios because there was no proof that each of those specific titles posed a risk of harm to women on the part of male consumers. The only convictions registered were in respect of tapes depicting necrophilia and vampirism. Subsequent cases have followed this approach, requiring the Crown to lead expert evidence that proves the harm of the specific titles at issue. As a result of these limitations, there have been no successful obscenity prosecutions for materials involving adult women since Butler. One recent conviction involving Internet photos of naked women pierced with arrows was overturned on appeal and sent back for re-trial.[9]

For the most part, police anti-pornography units in Canada now focus exclusively on child pornography. This is because in 1993 Canada passed a law criminalizing the making, selling, or possession of child pornography. The law does not require proof of

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[8] *R. v. Jorgensen* (1995) 102 C.C.C.(3d) 97 (S.C.C.).

[9] *R. v. Smith*, Ontario Court of Appeal, unreported, July 7, 2005 (No. C39287)

harm in each prosecution. The law has been subject to constitutional challenge and read down to restrict its application, but has overall survived.[10]

Until the widespread use of the Internet, almost all of the commercially-produced pornography sold in Canada was manufactured in the United States.[11] This dependence is not unique to the pornography industry; most of the music, movies, and television programs Canadians consume are American in origin as well. For this reason, the role of Customs officials assumed considerable importance, as they acted as the gatekeepers of much of the pornography entering Canada. Customs officials have the power to deny entry into Canada goods falling into a number of prohibited categories, including obscenity.

Beginning several years prior to the *Butler* decision, a store selling books, magazines, and videos to the gay and lesbian community, Little Sisters, argued that they were being targeted by Customs, who were improperly delaying and prohibiting their imports on the ground that they were obscene. Little Sisters launched a court challenge to the actions of Customs and to the Customs act itself, which also made its way to the Supreme Court.[12] Little Sisters arguments before the Supreme Court attacked the *Butler* decision directly, arguing that it should be reversed and that pornography was not harmful. In the alternative, the bookstore argued that gay and lesbian pornography was different than heterosexual pornography, and could not be obscene within the meaning of *Butler*.

Taking advantage of the "Blame it on *Butler*" climate fostered by pro-porn academics and writers in both Canada and the United States, those supporting the store continuously repeated the falsehood that *Butler* had created some sort of new law that was used to target gays and lesbians. The *Little Sisters* case was used as a weapon to shame feminists into renouncing their work against the sex industry, or at a minimum,

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[10] *R. v. Sharpe*, [2001] 1 S.C.R. 45.

[11] Obviously, lots of Canadian men were making pornography of Canadian women and children, and sometimes other men, using their home video and still cameras. Some of these pictures and films were traded, shown and sold to others. But there was little 'commercial' Canadian pornography in the sense of productions with packaging, titles, plots, etc., made with the express purpose of widespread sale to others.

[12] *Little Sisters Book and Art Emporium v. Minister of Justice*, [2000] 2 S.C.R. 1120.

keeping silent. The Women's Legal Education and Action Fund, the leading national organization litigating for legal sex equality, partially renounced its position in *Butler* and tried to argue that lesbian pornography, including sado-masochistic pornography, was not harmful and should be constitutionally protected.

I was fortunate to have represented an intervention by the international women's equality organization, Equality Now, that argued that while Customs had acted in a discriminatory fashion against the store, such actions were based on a refusal to follow *Butler*, rather than the reverse. In addition, Equality Now argued that gay and lesbian pornography also promoted inequality on the basis of sex and sexual orientation. The Supreme Court of Canada accepted these arguments and told the Customs agency to follow the original order of the trial judge, which instructed them to stop their differential treatment of the bookstore and to make its decisions to refuse importation in accordance with *Butler*.

Once again, however, the result of this apparent victory has been mixed. In its reasons, the Supreme Court of Canada left open the possibility of Little Sisters renewing its attack on the legislation if further evidence revealed that Customs was not capable of properly applying it, even in the face of these new directions from the court. Little Sisters has indeed renewed its litigation efforts and is trying to use the conduct of Customs after the decision to once again bring down the legislation.[13]

In addition, the Glad Day gay bookstore in Toronto successfully launched a constitutional challenge to Ontario's Film Review Board, which required all films and videos to be screened and rated before sale.[14] The Board had the power to order modifications to films if they present certain content, including explicit sex with violence, or to refuse to allow films with such content to be screened or sold.

Glad Day, funded largely by the business organization for the major commercial adult porn distributors and strip club owners, was successful in arguing that the powers were an unconstitutional restraint on freedom of expression. Once again, the government led no direct evidence of harm. Glad Day is lobbying for a system in which only those

[13] *Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)* (2005), 193 C.C.C.(3d) 491 (B.C.C.A.), application for leave to appeal filed April 19, 2005.

[14] *R. v. Glad Day Bookshops Inc.* (2004), 70 O.R.(3d) 691 (S.C.J.).

films and videos that the retailer seeks to show or sell to persons under 18 would need to be rated and classified. Knowing full well the practical impotence of the criminal obscenity law, Glad Day is arguing that police must wait until films are shown or offered for sale, and then lay criminal charges if films are obscene.

One of the great deficits in the Canadian case law is that the only harm of pornography recognized by the courts is attitudinal harm to consumers that may promote the real life mistreatment of women. There has been a complete failure of Canadian courts to recognize that adult pornography harms the persons used to make it. Similarly, there has been no acknowledgment of the relationship between pornography and prostitution. Because pornography is not often made commercially in Canada, there has been no attempt to argue that the making of pornography is a form of prostitution and therefore subject to regulation. The courts have been similarly confused in their treatment of cases involving women used in live sex shows and lap dancing, holding variously that they are or are not indecent and therefore prohibited.[15] The availability of pornography on the Internet has made matters much worse. More pornography is now being made in Canada and posted on the Internet, and few restrictions exist on its availability, at least as it involves women who are ostensibly adults.

I should make clear that I am not saying that these problematic outcomes were caused by *Butler* or *Little Sisters*, or the acceptance in principle of the feminist arguments advanced in those cases. Without those arguments the results might have been much worse, with the obscenity law struck down and nothing else put in its place, or the border completely opened to the importation of pornography. The problem is that acceptance in principle has not really led to implementation in practice.

Prostitution has a similarly mixed treatment by the law. Prostitution is prohibited in Canada indirectly, through laws that criminalize communicating in a public place for the purposes of prostitution and also criminalize keeping or being found in a bawdy house, defined as a place kept for the purpose of practices of indecency.[16] Both of these provisions are currently under attack. A Parliamentary committee is currently studying

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[15]Compare *R. v. Tremblay*, [1993] 2 S.C.R. 932; *R. v. Mara*, [1997] 2 S.C.R. 630; *R. v. Pelletier*, [1999] 3 S.C.R. 863.

[16]*Criminal Code of Canada*, R.S.C. 1985, c. C-46, ss. 210 - 213.

these laws; the chair of the committee has said publicly that she favors a complete decriminalization of street prostitution. The committee has sought out the opinion of pro-prostitution groups and has given very little time to women's groups opposing prostitution. In addition, the chair, an out lesbian, has encouraged gay and lesbian groups to support repeal of the bawdy house laws because they have been used by police against gay and lesbian strip clubs and sex clubs. Attached as an appendix to these remarks is my submission to the Committee opposing the decriminalization of men who buy women for sex.

The Canadian government has collaborated directly with pimps in the creation of a special immigration category for exotic dancers. Club owners were able to convince the government that there was a shortage of Canadian women for these positions and got special permits to traffic thousands of women from Asia, Eastern Europe, and Mexico, among other places, to Canada to work in their clubs. At one point, some embassies were requiring applicants to provide stage photographs to prove that they were experienced performers.[17] The government defended the requirement on the ground that it was designed to prevent the exploitation of women. Many of these women ended up in prostitution as well as stripping.

On a more positive note, Canada recently had its first conviction under its child prostitution tourism laws. Donald Bakker pleaded guilty to a number of counts of forcing young girls in Cambodia into performing fellatio. His offenses were discovered after he beat and raped a prostituted woman in a Vancouver park. Police officers found videotapes he had made of the offences in Cambodia as well as other rapes and assaults on adult prostituted women in Canada. He was sentenced to ten year's imprisonment.[18] The Bakker case underscores the links between the sexual and physical abuse of women and children, prostitution and pornography. So far, these links have not been well-recognized in Canada.

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[17] Camille Bains, "Canada scrutinizes new strippers", BBC News, 28 July 2004, available online at www.bbc.co.uk.

[18] "Vancouver man given 10 year sentence for sex crimes in Vancouver and Cambodia" Canadian Press, 2 June 2005, available online at www.news.yahoo.com.

There are a number of lessons to be learned from the Canadian experience. First, it is crucial for women to control the terms of debate and the evidentiary record. In many cases, women's groups have used the strategy of appearing before appellate courts as interveners (amicus curiae) and presenting briefs and oral argument supporting or opposing constitutional challenges brought by others. The problem is that when pro-prostitution and pro-pornography groups bringing challenges to legislation, they are parties to the proceeding, not mere interveners. That means that they can lead evidence, call expert witnesses and shape the record that is placed before appellate courts.

Women's groups are left relying on the government to create a strong evidentiary record in support of the legislation. Unfortunately, this is often not done, or the evidentiary record is not informed by feminist principles. In some cases, such as the Glad Day challenge to the film review board, the government is not appealing at all. The intervention strategy is also being compromised by the fact that the Supreme Court of Canada is placing increasingly tight deadlines on interveners and denying them permission to make oral argument. Women's groups may have to shoulder the costs and risk of being primary litigants. If so, their claims will be made more complex by the fact that they will often be pointing at the failure of government to act, rather than at existing laws that discriminate against women.

I am also increasingly certain that another major stumbling block for women working against pornography and prostitution is that we have been embarrassed into silence, such that our views can be portrayed as anachronistic. Women who speak out against pornography and prostitution pay a high price, politically and personally. In Canada, at least, the price is often exacted in subtle ways. Many of the women who used to fight prostitution and pornography have turned their attention to other problems that do not carry this stigma. The women's anti-pornography and anti-prostitution movement in Canada is no longer well-organized and visible. Women have been fooled into accepting an apparent offer that we can have what we want with respect to child care, sexual assault, sexual harassment, and so on, so long as we leave the pornography and prostitution untouched. It is time for Canadian women to emphatically reject this empty deal.

One of the reasons that women who speak out against prostitution have been stigmatized and silenced is that the Canadian public continues to labor under certain delusions regarding the legalities of prostitution and its ultimate effect on women. In order to understand the growing acceptance of prostitution, it is necessary to explore some of the more popular myths about prostitution in Canada.

Six Myths About Prostitution in Canada (and a Rebuttal)

Myth 1: Prostitution between adults is "legal" in Canada, therefore any laws restricting it are inherently unfair or suspect.

While it is true that the acts of buying and selling sex are not prohibited *per se* in Canada unless the person being bought is under the age of 18, this does not mean that prostitution is necessarily considered beneficial or harmless as matter of public policy. It means that Parliament has chosen to prohibit prostitution indirectly by targeting its public manifestations through the communicating and bawdy house laws.[19] The fact that it is practically impossible to engage in acts of prostitution without committing a *Criminal Code* offence tells us that in fact prostitution is not a legal activity.

There is nothing particularly remarkable about a criminal law that targets an undesired activity indirectly. If Parliament has the constitutional authority to criminalize prostitution outright under its criminal law power[20], then it also has the authority to do so indirectly, in effect prohibiting street prostitution through the communicating offence and brothels through the bawdy house laws. While it is important question whether such laws have achieved their purpose fairly or effectively, it is misleading to see these provisions as encroaching on a legal activity, since the legality of prostitution is not free-standing, but is in fact determined by the parameters of the *Criminal Code*.

By way of analogy, suicide is not an illegal activity, but assisting suicide is an indictable offence.[21] To say that is always "unfair" to prohibit a person from assisting

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[19] Despite the short hand name of the Subcommittee, there are no longer any solicitation offences in Canada.

[20] *Constitution Act, 1867*, Section 91(27); *R. v. Westendorp*, [1983] 1 S.C.R. 43.

[21] *Criminal Code*, R.S.C. 1985, c. C-46, §. 241.

someone else to carry out a lawful activity would be to confuse the fact that suicide is "lawful" with a conclusion that suicide is harmless or beneficial. In the same way, merely because prostitution is not unlawful *per se*, this does not make it unfair to criminalize those who communicate in a public place for the purpose of prostitution. Such a conclusion would require proof that prostitution is either harmless or beneficial. In fact, prostitution is extremely harmful to women.

The focus on the supposed "lawfulness" of prostitution is a red herring. The current structure for restricting prostitution tells us nothing about whether prostitution itself is harmful, harmless or beneficial to those involved in it and those otherwise affected by it.

Myth 2: It would be unfair and possibly unconstitutional to criminalize the buying of another person for sex while decriminalizing the "selling" of sex.

There are many criminal laws that target only part of a transaction or activity, often with the recognition that imbalances of power mean that not all parties are equally culpable, or culpable at all. The recent proposal to decriminalize the possession of marijuana, while retaining the penalty for trafficking in marijuana, is an example of such an approach. Similarly, it is a criminal offence to make or sell obscenity, even though possession of obscenity is not itself unlawful.[22] Other criminal offences exhibit a similar asymmetry: loan sharking [criminal interest rate]; incest; gaming offences, etc.

To criminalize the buying of sex and not the "selling" is not a form of entrapment.[23] The defense of entrapment is based on the principle that the police should be fighting existing crime, not creating crime. Entrapment amounting to an abuse of process occurs when the police induce individuals into criminal activity they would not otherwise have committed.[24] Entrapment does not occur every time police engage in undercover operations. It is not entrapment, for example, for the police to place an undercover order for obscene materials from those willing to sell them, and to charge the sellers with an offence. Similarly, if the selling of sex is decriminalized, but the buying

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[22] *Criminal Code*, R.S.C. 1985, c. C-46, § 163
[23] Submission of Professor John Lowman, page 10.
[24] R. v. Mack, [1988] 2 S.C.R. 903

remains criminalized, it will not be entrapment for undercover police offers to arrest those men who offer them money for sex.

A related argument that is made, typically without foundation, is that criminalizing only the buying of women for sex, and not the selling, would be unconstitutional.[25] While the source of the unconstitutionality is not really explained, I can only guess that the objection is that since the buyers of women for sex are men, and the prostituted are mostly women, this would be a form of sex discrimination against men, notwithstanding that the offence would be drafted in gender-neutral terms.

If prostitution is recognized as a form of violence against women, there can be no equality-based objection to criminalizing the prostituting of women and decriminalizing the women themselves. The offence of sexual assault is a facially gender-neutral offence that in practice is applied almost exclusively to men. This does not make it discriminatory or in violation of the *Charter*. The purchase of women for sex is an entirely voluntary and unnecessary activity for men (see the discussion of "choice," below). To suggest that buying women for sex is linked in any way to the full participation of men in the economic, social, or cultural life of the community, and to the realization of their full human potential, is ludicrous.

The ability of men to buy women for sex does nothing to remedy the harmful effects of sexism or hyper-masculinity on men. Instead, it entrenches a view of male sexuality as dominant, destructive, violent and controlling. The prostitution of women by men causes harms to women that are sex-based. It is a form of sex discrimination against women and to prohibit it is consistent with and promotes the values underlying, s. 15 of the *Charter*.

The claim that decriminalizing prostituted women creates "asymmetry" is not accurate in any event, since the decriminalizing of the prostitutes themselves would still mean that the selling of other human beings for sex (pimping) and the buying of other human beings for sex would both be unlawful. This punishes the culpable parties on both sides of the transaction.

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[25] Submission of Professor John Lowman, page 10.

Myth 3: Whether prostituted women "choose" to be prostitutes is central to the analysis of how the law should treat prostitution.

Much of the focus of pro-prostitution advocates has been on proving that many women "choose" to prostitute for financial rewards, personal fulfillment or other reasons and that the right to be a prostitute is an expression of individual freedom and autonomy, or a form of "work." In so doing, supporters of the prostitution industry mischaracterize the position of those working to abolish prostitution as turning on proof that all prostituted persons are entirely without autonomy, agency, or individual will. This position is, in turn, maligned as disrespectful to women.

This distinction is not particularly helpful for understanding the harms of prostitution or evaluating the best legal and social responses to it. All human actions and decisions are made along a spectrum of coercion and constraint. A variety of factors make the exercise of human will more or less free, including one's financial position, sex, sexual identity, age, racialized position, aboriginal status, psychological integrity, education, etc. It is hard to deny that the vast majority of women in prostitution have experienced significant constraints on their "choice" to prostitute or not. It is not coincidental that most of the women in prostitution began as adolescents, that most had low levels of education, were poor, and are often racialized women, in Canada, immigrant women and Aboriginal women, and that they therefore do not have a lot of other viable choices for survival.

Debating the threshold of free will required before a person can be said to have truly chosen to enter prostitution is not a helpful line of inquiry. It is much more telling to focus on the constraints on the choices of those women currently in prostitution to remain or to leave. Research has consistently shown that the vast majority of women in prostitution (89% of women surveyed in nine countries, including Canada) want to leave prostitution immediately, but that they do not see viable exit strategies available to them.[26] This makes clear that staying in prostitution is not an ongoing "choice" for the vast majority of women, however they might have got there in the first place. There is

[26] Dr. Melissa Farley, "'Bad for the Body, Bad for the Heart:' Prostitution Harms Women Even if Legalized or Decriminalized" (2004) 10 *Violence Against Women* 1087, 1095.

nothing disrespectful about wanting to direct resources to helping women leave prostitution and to make better lives for themselves.

If prostitution is a true "choice" for a few individuals, in the sense that they have other viable sources of income, then such individuals are not harmed by the criminalization of "johns" in aid of those women who did not have similar options to avoid entering prostitution and who do not have similar options to leave. Those individuals who are truly "choosing" to prostitute can simply choose to pursue one of their other viable career options. Once again, there is nothing inherently illegitimate about limiting the conditions under which a person can earn income in the interests of their health and safety or that of others. Individuals cannot agree to work in contravention of human rights legislation: for example, they cannot validly be bound by an "agreement" to be paid less because of their disability, or to tolerate racial harassment on the job, even if they have other options and have weighed the pros and cons. Instead, we have recognized the potential for exploitation and the need to identify a societal "bottom line" that does not tolerate degradation, discrimination, and abuse by mistakenly calling it freedom.

The real choice in prostitution is exercised by the customers. Men choose to force women to perform sexual acts, in which women would otherwise not engage, in exchange for token compensation. The men who use prostitutes include judges, surgeons, and police officers.[27] They have real choices about whether to buy women for sex, and they can be deterred from doing so.

Myth 4: The purported harms of prostitution are nothing more than moral judgments about casual and extramarital sex.

Objections to prostitution should be grounded in the protection for women's equality guaranteed in the *Charter*, not in notions of morality. The point is not that sex outside of marriage or a committed relationship is immoral; that is a personal judgment that can be left to individual conscience. The harm of prostitution is to the women in prostitution, who suffer from high rates of post-traumatic stress disorder, rape, traumatic

[27] For example, Senator and surgeon Wilbert Keon in 1999 and former B.C. judge David Ramsay in 2004.

brain injury, verbal abuse, poverty, homelessness, and death from suicide and homicide.[28] The Fraser Committee reported that the mortality rate for prostituted women was 40 times the national average.[29] Homicide is one of the leading causes of death for women in prostitution. These are harms of inequality on the basis of sex, not matters of morality.

The public nuisance of prostitution to residents and property owners in neighbourhoods where prostitution is concentrated, while a valid concern, should similarly not be the main focus of the harm analysis. A focus on these effects is concerned simply with banishing the public manifestations of a real and pressing social harm from view. In the same way that removing the indigent from streets and parks and banning panhandling does not cure the problem of homelessness, confining prostitution to underground brothels or red-light districts does not address the central harms of prostitution. These harms are inherent to the act of buying women for sex, independent of the location where it takes place.

Myth 5: The bawdy house laws should be repealed because they discriminate against gays and lesbians.

A lot of prostitution takes place in massage parlours, strip clubs and through escort services. Many of these business pimp women who are trafficked across Canada from other cities or who are trafficked into Canada from other countries. These women find themselves confined to windowless rooms where they must sexually service large numbers of men to work off debts to their pimps. Many are afraid of reporting this abuse for fear of arrest or deportation. Canada has failed to meaningfully address this problem, and has instead compounded it through the immigration program for "exotic dancers."[30] It is sadly ironic that in response to efforts of the Canadian women's movement to improve the conditions of women's lives, such that the domestic supply of women for

[28] See Farley, supra note 11 (citing various studies)
[29] The Fraser Committee, supra n. 5.
[30] "Canada scrutinizes new strippers", BBC World News, 28 July 2004, available online at www.bbc.co.uk; "Ottawa shuts loophole for exotic dancers", CBC News 2 December 2004, available online at www.cbc.ca. At least 500 - 600 women from Eastern Europe alone were trafficked into Canada annually through this program.

prostitution has decreased, the government decided to make up the shortfall by importing women from abroad to sexually service Canadian men.[31]

To date, Canada has not lived up to its international obligations to stop the trafficking of women for prostitution. These obligations include the 1949 *Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others*, which requires states to prohibit the exploitation of persons in prostitution "even with the consent of that person", and article 9 of the 2000 United Nations *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children* (Palermo Protocol), which requires states to implement measures to prevent trafficking of women in prostitution, including changing legislation and addressing those factors which make women and children vulnerable to trafficking, including poverty and inequality.

Studies show that women in prostitution are often trafficked through various forms of prostitution and may move from massage parlors to the street and back again. It is inadequate to focus only on street prostitution in crafting a legislative and policy response. Women in all forms of prostitution experience high levels of violence and abuse from pimps and customers. It is a myth that street prostitution is always more violent, more abusive, and generally worse than indoor prostitution.

With these harms in mind, the fact that the police in some cities have differentially or over-policed gay and lesbian clubs is not a justification for eliminating the bawdy house laws. If the police are harassing clubs where individuals can socialize and meet prospective sexual partners of the same sex, then action must be taken to stop this discrimination. But this can be done without wholesale repeal of legislation prohibiting brothels.

If the argument is instead that gay and lesbian "sex clubs" and sex shows are never harmful and therefore should not be subject to legal scrutiny, there is no foundation for such a claim. While the history of raids on gay bars is an important part of the historic oppression of gay men by the state, and should make us view with caution police action in this area, this does not mean that same-sex sexual acts are *never* harmful.

[31] The government has continued to act as an apologist for the industry, with Immigration Minister Joe Volpe describing strip clubs as "legitimate" business in the announcement canceling the program, and leaving open the ability of club owners to prove in individual cases that there is no "qualified" Canadian woman to to the job.

Commercialized sexual activity between members of the same sex gives rise to many of the same concerns as between members of the opposite sex. For example, the global trafficking of young men for prostitution to other men remains a pressing concern. The Committee should not permit the prostitution industry to use a supposed concern for gay and lesbian rights as a smokescreen for the goal of pimping women (and men) without interference by the state.

Myth 6: Prostitution will always be with us; therefore we should focus on measures that reduce harm to women within the current system.

There are no legal, logical, or constitutional constraints that require us to accept the unsupported but often-repeated claim that prostitution will always exist. There is no reason that social attitudes cannot change such that men will no longer be sexually aroused by the prospect of a sexual act with a woman who does not want to have sex with them, and who needs to be coerced by the promise of money. There is no reason that social attitudes cannot change to recognize that prostitution harms women.

Unfortunately, the continued normalization of prostitution in popular media, including a wholly unrealistic depiction in movies and television of life in prostitution, is having the opposite effect. It is the responsibility of government to counter these inaccurate and misleading messages with information about the reality of prostitution and the commercial sex industry. Recent efforts in Sweden, as well as international efforts to combat prostitution tourism, show the gains that can be made in this area.[32]

So-called harm reduction approaches that advocate for the complete decriminalization of prostitution will neither reduce the amount of prostitution that takes place, nor will they reduce the harm to those involved in it. The complete decriminalization of prostitution, including a moratorium on enforcement of the communicating law against johns as well as women, will hardly serve to reduce the violence and abuse experienced by prostitutes. It will allow prostitution to flourish

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[32] Gunilla Ekberg, "The Swedish Law that Prohibits the Purchase of Sexual Services", (2004) 10 Violence Against Women 1187.

without any scrutiny, and the rape, verbal abuse, physical abuse and transmission of sexually transmitted diseases that are endemic to prostitution will continue.

The argument is made that only by decriminalizing prostitution entirely will prostituted women be able to come forward and report to police the experiences of abuse they suffer. This argument misses the point that prostitution itself is an abuse of women. It also ignores the fact that women who are being pimped, women who are not citizens or permanent residents, women who risk losing custody of their children; and women who have seen police and judges buy women for sex, among others, are unlikely to want to come forward to the police for assistance in any event. Nonetheless, this barrier to reporting can be removed by decriminalizing the women only, without decriminalizing the buying of those women for sex.

A more important barrier for women is that there is still no remedy for women whose pimps or johns film or photograph their acts of prostitution to make pornography. About 50% of women in prostitution report that they were used to make pornography.[33] Making pornography of women in prostitution, and threatening to distribute the pictures, is frequently used to secure their compliance. One useful legal change would be to provide a cause of action that would allow women to recover these materials and enjoin their future distribution.

Advocates of decriminalization argue that so long as the buying of sex remains illegal, women will be forced by customers into secluded locations, increasing the risk to their safety. Decriminalizing prostitution is not likely to encourage most johns to take women to "safer" places, because there are no safe places for women in prostitution. These women will still be alone with these men in private places: cars, motel rooms, alleyways, etc. Even if the buying of sex were decriminalized, it is unlikely that most men who purchase women on the street want the sexual acts to take place in well-lit, well-populated areas. It is equally unlikely that decriminalization will have any effect on whether a woman who is desperate for money will get into a man's car.

Decriminalizing prostitution is unlikely to have stopped the "missing women" of Vancouver from ending up at the Port Coquitlam pig farm. Men who view prostituted

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[33] Dr. Melissa Farley, reporting on a survey over 800 prostituted women in 9 countries, including Canada, speech presented at the conference "Pornography: Driving the Demand for International Sex Trafficking," March 2005, Chicago, Illinois.

women as legitimate targets for violence and abuse will benefit from a complete absence of state scrutiny of their actions. They are equally unlikely to be deterred in their actions by the presence of a licence to prostitute in a woman's wallet. Taking seriously the buying of women as an act of violence against them, and punishing those responsible, would have been far more useful in stopping the disappearances.

Decriminalizing prostitution will not encourage street prostitutes to move to indoor venues for prostitution. Currently, street prostitutes are heavily policed, while escort services operate in most jurisdictions with little interference. If the legality of prostitution was a significant factor in where women are prostituted, they would all be working for escort agencies. In any event, the notion that indoor prostitution is "better" than street prostitution is false and must be resisted.

Some have advocated for the legalization of prostitution in the vain hope that women's safety can be assured if the state apparently collaborates with pimps to share in the profits of trafficking through taxes and licensing fees. The experience of jurisdictions that have legalized prostitution makes clear that violence against women does not decrease when prostitution is legalized.[34] Brothel owners will still operate in the shadows, because they want and need women who are in the country illegally, drug dependent, young and vulnerable. They and their customers do not want state oversight. No jurisdiction in which prostitution is legalized tests the male customers for sexually transmitted diseases, because it is not possible to do so.

Any legal prostitution industry would be accompanied by an illegal prostitution industry. Those customers who will pay more to have sex without a condom, with a young girl, with accompanying physical abuse or degradation, etc., will still be serviced by a market that will provide women to them if the price is high enough. Similarly, as is presently the case today, women will still turn to unregulated street prostitution for a variety of reasons, including because pimps find it convenient to have them on the street.

But the most important argument against legalized prostitution in the name of harm reduction is that prostitution is itself harmful. Indoors or out, legal or illegal, prostitution causes grave mental and physical harm to women. In her extensive

[34] Sheila Jeffreys, "Prostitution as a Harmful Cultural Practice" in Not for Sale: Feminists Resisting Prostitution and Pornography, Christine Stark and Rebecca Whisnant, eds. (Melbourne: Spinifex, 2004) 386-396.

worldwide survey of prostituted women, Dr. Melissa Farley found high (68%) rates of post-traumatic stress disorder among prostitutes. These rates did not vary according to the legal status of prostitution.[35] Many prostituted women report that they developed drug addictions to maintain the mental dissociation required to prostitute, rather than turning to prostitution to support drug addiction, as is commonly believed. Legalizing prostitution makes the state complicit in the mental and physical abuse of women.

Conclusion

As described above, these six popular justifications for "liberalized" approaches to prostitution are nothing more than damaging myths. As demonstrated by the expert testimony of Ms. Gunilla Ekberg of the Swedish Ministry of Industry, Employment and Communications, and the work of Dr. Melissa Farley, so-called harm reduction strategies not only do not work, but cause increased harm to women in prostitution. The Swedish model is a groundbreaking and humane approach to the legal regulation of prostitution.

For those truly interested in the welfare of women trapped in prostitution, the following policies should be adopted:

(i) deter men from buying women and girls for sex by prohibiting this activity outright, in public and in private, and by consistently enforcing the laws such that men believe that there is a reasonable prospect that they will be punished for doing so;

(ii) educate boys and men that it is harmful to women, and to men themselves, to prostitute women;

(iii) decriminalize the women used in prostitution; and

(iv) provide meaningful exit strategies to women currently in prostitution including adequate levels of social assistance; safe housing; addiction treatment, recovery of pornography made of women in prostitution; and protection from pimps.

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[35] Supra note 11.