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**Policing the grey zone**

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## *INTRODUCTION*

Sheri Kiselbach worked in the sex industry for more than thirty years. When she later joined a prostitution advocacy and support group in Vancouver's Downtown Eastside, these three decades worth of experience as a sex worker helped her to effectively address many of the safety issues faced by the individuals working the streets in her native city. Her life story, the many challenges she had to face in the context of her work, the violence she experienced as well as her knowledge about what being a street based sex worker entails gave her the necessary insight for her to be able to craft programs aiming to create a safer work environment for people in the sex trade. Her contribution has been praised by her peers and many of those measures, such as the publication of a weekly bad date list<sup>1</sup> or the inclusion of female police officers in the shelters, became celebrated strategies for dealing with the violence faced by people in the sex industry. However, while her years of experience as a sex trade worker served well in her efforts to help her community, when she decided to challenge Canada's prostitution laws which, in her opinion, contribute to the current climate of violence, the court dismissed her case and stated that to be valid, it had to be presented by a current sex worker who was criminally charged. She unsuccessfully tried to overturn this decision. She argued that during the thirty years she worked the streets, she was frequently forced to compromise her safety because of Canada's legal restrictions. She stressed that the laws regulating prostitution forced her into unsafe situations which led to her

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<sup>11</sup> A *Bad Date List* is a list of descriptions of clients (or people posing as clients) who have threatened, assaulted, harassed or stolen from prostitutes. Lists Reports are usually collected by outreach workers who are distributing the list. Sometimes information comes from the police or the media, complete with composite drawings or photos. *Bad Date Lists* can serve as a warning system, so that sex workers can avoid cars and clients who fit descriptions on the list. Bad Call Lists have also been made available to sex workers who advertise and work over the phone, and reports are often collected over the phone (<http://www.baddates.ca/>)

experiencing assault and rape. These laws also made it difficult for her to go to the police when she was victimized since, when she did come forward, she was regarded as a criminal and her complaints were not taken seriously. Moreover, she continues to see this harmful implication of Canadian legislation in the context of her work in Vancouver downtown East Side. That being said, Judge William Ehrcke still ruled that since these laws no longer directly affect her (she is no longer working in the sex industry and isn't currently facing criminal charges), she was not in a position to be launching a constitutional argument<sup>2</sup>. Nor did *Downtown Eastside Sex Workers United Against Violence* who did not qualify for public interest standing, which enable individuals or groups who are not facing a legal case to still challenge the constitutionality of the laws. At the time of writing, the legal continues

According to Katrina Pacey of Pivot Legal Society, which is heading the case, it is unjust to call for working prostitutes to take on such a complex legal matter that would require facing public censor. Pacey pointed out that

Kiselbach's thirty years of experience in sex work should qualify her for a challenge to the laws that criminalized her for thirty years. You have sex workers who are subject to criminal laws, are seriously marginalized, suffer incredible discrimination and stereotyping. For them to come forward and participate in a major legal proceeding is very difficult.<sup>3</sup>

As of today, the fight is still being fought.

While no federal or provincial regulation officially and openly restrains an individual who consentingly engages in sex work from accessing the Canadian justice

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<sup>2</sup> <http://www.cbc.ca/canada/british-columbia/story/2009/05/28/bc-canada-prostitution-laws.html>

<sup>3</sup> <http://www.cbc.ca/canada/british-columbia/story/2009/05/28/bc-canada-prostitution-laws.html#socialcomments>

system (or any other resources for that matter) situations like the one recounted above, speak to how embedded assumptions and a lack of judicial sensitivity to the unique challenges confronted by the workers in the sector, render it unsafe and difficult for these particular individuals to exercise their constitutionally protected rights.

### ***POSITIONING THE RESEARCH***

While the story recounted above speaks more specifically about challenges derived from the enforcement of criminal code provisions, this essay will focus on the diverse strategies used to police sex work in Canada. A great divide seems to exist between sex workers, their realities, their needs and how the State and society deal with the industry and those who work within. Increasingly, the fight for the destigmatization of sex work, as well as the continuous debate on how to manage this particular commerce, brings to the public's attention many of the contradictions embedded in the laws, bylaws and policies. Despite many differences in opinion and opposing points of view in the way prostitution is defined and conceptualized, there seems to be a strong agreement amongst the various philosophical approaches that violence, discrimination and intimidation against individuals selling sexual services must not be tolerated. However, the current situation does not protect workers but renders them more vulnerable to violence<sup>4</sup>. As the evidence from countries that have decriminalized the

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<sup>4</sup> Canadian HIV/AIDS legal network, *Sex, Work, Rights: reforming Canadian criminal law on prostitution*; 2005.

industry attest<sup>5</sup>, violence is not inherent to the work but a result of a particular social and legal context in which it is positioned. That being said, violence is a common characteristic of sex work in Canada<sup>6</sup>, a situation that demands for the examination of what constitutes the regulatory context in which Canadian sex workers are situated.

In Canada, morality is federal jurisdiction. However, in addition to the *Criminal Code of Canada*, we see diverse regulatory measures effectively create a grey area in which sex workers are hyper regulated at the same time as they are unprotected and rendered vulnerable. It also appears that in the web of regulatory tactics employed to manage sex workers, there is an underlying de facto denial of citizenship. To look at the policing of the sex trade through the lens of citizenship and what such a concept entails in regards to an individual's rights and responsibilities, shows the need for an exhaustive review of the various measures presently in use, including those surpassing the criminal code. It was with this goal in mind that the research paper was conceptualized.

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<sup>5</sup> The evidence from New Zealand and Australia (New South Wales) suggests that the way the sex trade is regulated matters a great deal in terms of the violence experienced by sex workers. Both these experiences indicate that decriminalization produces clear benefits in terms of protecting the safety and the rights of sex workers. Decriminalization in New Zealand appears to have enhanced sex workers' sense of well-being, increased willingness to report violence and somewhat improved conditions.

- <http://ojs.unbc.ca/index.php/cpsr/article/viewFile/48/168>

- Jeffrey, Leslie Ann; Sullivan, Barbara; *Canadian Sex Work Policy for the 21st Century: Enhancing Rights and Resistance, Lessons from Australia and New Zealand*; Paper presented at the International Law and Society Conference, Humboldt University; Berlin; 2007.

- Abel, Gillian; Fitzgerald, Lisa; Brunton, Cheryl; *The Impact of the Prostitution Reform Act on the Health and Safety of Sex Workers*; Report to the Prostitution Law Review Committee; New Zealand; 2007.

- Dept. of Public Health and General Practice. University of Otago, New Zealand.

<sup>6</sup> Lowman, John; Laura Fraser. 1995; *Violence Against Persons Who Prostitute: The Experience in British Columbia*; Ottawa: Dept of Justice.

### ***PROBLEMATIQUE (research question)***

The policy response to sex work in Canada is increasingly acknowledged as being problematic and that, by the various camps representing the vast array of positions on the matter<sup>7</sup>. Is this the case because the existing policies and regulations interfere with what are established as the rights and responsibilities associated with a Canadian citizenship? Which consequences associated with the various programs designed to directly or indirectly deal with prostitution actually intersect with these rights and responsibilities in the first place? Which aspects of the web of regulatory measures currently in place would corroborate the claim that there is indeed a de facto denial of citizenship associated with an engagement in sex work? Which ones would negate it? All these questions speak to the need to define the implications of the policing of an occupation that is not illegal but whose work practices are criminalized. In this essay, I consider the existent programs currently in place in the city of Ottawa to police sex work. Ultimately, the goal is to shed some light on how each specific programs and policies relate to what a citizenship status entails as well as draw attention to potential consequences policies and programs can have on the lives of sex workers.

### ***Research question***

What are the strategies employed to regulate sex work and sex workers in Ottawa, Canada and what are the implications of these measures in regards to citizenship and the violence they experience?

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<sup>7</sup> Hanger, Art; MP, et al, *The Challenge of change: A study of Canada's criminal laws prostitution laws; Report of the Subcommittee on Solicitation Laws*, Report of the Standing Committee on Justice and Human Rights, House of commons of Canada, 2006

## ***METHODOLOGY***

In Canada, sex workers are positioned within a regulatory web, the strands of it consisting of not only the criminal law but provincial health and labor law, municipal bylaws, community actions (some of which state sponsored) as well as police action. With what tool could I make sense of this regulatory web? Citizenship certainly provides an innovative lens to look at it. In the context of this research paper, I will be analyzing the components of these regulatory measures in terms of their upholding of the protection of sex workers' rights as enunciated by the *Charter of rights and freedoms* since the granting of citizenship entails such a protection. To achieve such a feat, I will be focusing on adult female prostitution and how it is regulated in the city of Ottawa, Canada. A documentary analysis will also be conducted to achieve a contextual understanding of the policy and practice environment within which sex work is regulated. Relevant documents will be analyzed. The relevant documents include the 2006 report from the *Subcommittee on Solicitation Laws*, the *Fraser Report*, *SCAN legislation*, the *Canadian Charter of rights and freedoms*, the *Criminal Code of Canada*, documentation from *Together for Vanier*, documentation from the *Hintonburg Community Association*, the *Community Safety letter*, documentation from the *Ottawa police service*, documentation on the *Sex Trade Education Program* and reports from the *Canadian HIV / AIDS Legal Network*.

## **CHAPTER 1**

### ***Literature review: Competing discourses on sex work***

Sex work can be defined as the exchange of sex for something else, most often financial compensation. It is common to hear it referred to as the ‘world’s oldest profession’, however, this does not mean it has been recognized as a profession like any other. Over time, how the sex industry has been conceptualized evolved and changed numerous times, shifting from a celebrated necessity to a cultural evil to being the linchpin of women’s subordination<sup>8</sup>. Today, people have very different views on this matter. Ways of thinking and talking about sex work certainly informs the policies adopted to regulate it and the people practicing it so to understand how this issue is addressed by our policy makers and Canadian society as a whole, it is necessary to look at these competing discourses. They indeed have proved to be significant forces when it comes to legal reform and policy making which then translate into practices.

In this chapter, I will be focusing my attention on the literature speaking to the main voices within the broader feminist movement: the radical feminists and the sex radicals

#### *Competing feminist discourses on sex work*

There are many feminist voices engaged in debates about the sex trade. However, two strands, namely those enunciated respectively by the radical feminist movement and the sex radical fraction, have dominated these ongoing debates and both proved to be

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<sup>8</sup> [http://www.cwrl.utexas.edu/~ulrich/femhist/sex\\_work.shtml](http://www.cwrl.utexas.edu/~ulrich/femhist/sex_work.shtml)

significant forces in terms of legal reform (metaphorically speaking). The Radical Feminist position was first articulated in the 1970s while, in sync with the development of the gay movement, the sex radical developed theirs in the 1980s. That is when they butted heads for the first time in regards to the legal regulation of pornography. Taking a brief look at this first *mêlée* between the champions of these two perspectives will provide an insightful look on what exactly first permitted the rising of these specific takes on sex work.

### *The legal regulation of pornography*

In her book entitled *In harm's way: The pornography civil rights hearings*, American feminist scholars Catharine MacKinnon and Andrea Dworkin, detail their crusade for the use of federal civil rights litigation to combat pornography in the United States. The novelty of MacKinnon's strategy was her opposition to:

traditional arguments against pornography based on the idea of morality or sexual innocence, as well as the use of traditional criminal obscenity law to suppress pornography. Instead of condemning pornography for violating "community standards" of sexual decency or modesty, [she] characterized pornography as a form of sex discrimination, and sought to give women the right to seek damages under civil rights law.<sup>9</sup>

Examining the hearings<sup>10</sup> that took place in Minneapolis, Indianapolis and Los Angeles during the 1980s, they questioned the very notion of consent in the context of pornography, linking it to a state of 'false consciousness' nurtured by those who benefit from the subordination of women. Andrea Dworkin launched an attack on the emerging

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<sup>9</sup> [http://en.wikipedia.org/wiki/Catharine\\_MacKinnon](http://en.wikipedia.org/wiki/Catharine_MacKinnon)

<sup>10</sup> In 1983, the Minneapolis city government hired Catharine MacKinnon and Andrea Dworkin to draft an anti-pornography civil rights ordinance as an amendment to the Minneapolis city civil rights ordinance. The amendment defined pornography as a civil rights violation against women, and allowed women who claimed harm from pornography to sue the producers and distributors for damages in civil court. The law was passed twice by the Minneapolis city council but vetoed by the mayor. Another version of the ordinance passed in Indianapolis, Indiana, in 1984. [http://en.wikipedia.org/wiki/Catharine\\_MacKinnon](http://en.wikipedia.org/wiki/Catharine_MacKinnon)

sex radical discourse when she argued that “it is free speech or free sexuality in a free marketplace of ideas”<sup>11</sup>.

In Canada, this debate is embodied by the *R. v. Butler ruling*, a 1992 Supreme Court of Canada decision on state censorship and pornography. The Court was asked to balance the rights to freedom of expression under section 2 of the *Canadian Charter of Rights and Freedoms* with women’s rights. The outcome has been portrayed as “a victory for anti-pornography feminism (...) but a loss for alternative sexualities”<sup>12</sup>. Indeed, the court aimed to minimize dangers to society as they considered obscenity as possibly promoting degrading views of women, a situation that could lead to violence. This ruling linked pornography with harm. A state of affairs sex radicals deem as highly problematic since “sex radicals opposed censorship, challenging the monolithic nature of the radical feminist account of the meaning of pornography, and expressing grave doubts as to the capacity of state regulation to serve women's erotic interests.”<sup>13</sup>

Having reviewed how each of these perspectives tackled the issue of pornography gives us preliminary insights on where they stand on issues regarding women’s sexuality, lets move on to the core of issues at hand, their respective views on the sex industry and the women engaging in sex work.

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<sup>11</sup> MacKinnon, Catharine; Dworkin, Andrea; *In harm’s way: The pornography civil rights hearings*; Harvard University Press, 1997, p. 25.

<sup>12</sup> [http://en.wikipedia.org/wiki/R.\\_v.\\_Butler](http://en.wikipedia.org/wiki/R._v._Butler)

<sup>13</sup> Sutherland, Kate, Work, Sex, and Sex-Work: Competing Feminist Discourses on the International Sex Trade, *Osgoode Hall Law Journal*, (2004) 42 Osgoode Hall L.J., p. 2.

*A radical feminist lens*

Radical feminism who define prostitution as a violation of human rights even when the sex workers claim it was freely chosen, fight for its eradication. Such a strong position is rooted in their particular approach view sexuality. It is indeed conceptualized as the “the linchpin of gender inequality”<sup>14</sup> and treated as a social construct at the basis of male power. Catharine MacKinnon, a prominent radical feminist theorist, identifies sex as constitutive of gender inequality and therefore defines “the sexuality of dominance and submission as crucial, as fundamental, as on some level, definitive in the process [of gender construction]”<sup>15</sup>. She points out that the genius of such a system, which exerts constant and total control over women, is that through the construction of gender and gender roles, women are made to willfully abide to their own subordination.

In her paper entitled *Work, Sex, and Sex-Work: Competing Feminist Discourses on the International Sex Trade*, Kate Sutherland speaks of Andrea Dworkin’s comparison of the process by which women’s resistance is broken down under patriarchy with the way Marx depicts how workers’ resistance is broken under capitalism. According to Dworkin, women are bound by law to perform sex-labor for the benefit of men mainly through marriage as this institution establishes that women’s bodies belong to their husbands and not themselves. To that, the author adds her concept of internalized powerlessness:

The contract fiction comes into play to suggest that women at least enter into marriage voluntarily, but material circumstances belie the notion that women and men negotiate with one another on an

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<sup>14</sup> Idem, p.

<sup>15</sup> Sutherland, Kate, *Work, Sex, and Sex-Work: Competing Feminist Discourses on the International Sex Trade*, Osgoode Hall Law Journal, (2004) 42 Osgoode Hall L.J.

equal footing. Women have been kept ignorant of technology and economics, indeed, of "most of the practical skills required to function autonomously."<sup>16</sup>

More similarities can be found between Marxism and Radical Feminism as they both theorize the state and the law in a way reminiscent of each other's approach. Indeed, while Marxism conceptualizes the state and the law as reflecting the interests of the dominant class, Radical Feminism sees it as reflecting male interests. Indeed, MacKinnon declares that "the state is male in the feminist sense: the law sees and treats women the way men see and treat women. The liberal state coercively and authoritatively constitutes the social order in the interests of men as a gender."<sup>17</sup> MacKinnon further argues that the state and the law do not serve male interests in a straightforward instrumental sense but, by abiding to principles such as objectivity and neutrality which are measured in accordance with masculine ideals, they are simultaneously coercive tools and legitimating ideology.

#### *The construction of a sex radical response*

Contrary to the cohesive framework provided by the radical feminist movement, the sex radical perspective, emerging from a loose alliance of feminist academics, queer theorists, sex trade workers and others, is much more fragmented. That said, they share the positive assessment of sexual non-conformism and the belief that altering the discourse about sex can change our experience of sex itself and subsequently, the balance of power in society. Consent is the fundamental component in all sexual activities that

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<sup>16</sup> Sutherland, Kate, Work, Sex, and Sex-Work: Competing Feminist Discourses on the International Sex Trade, Osgoode Hall Law Journal, (2004) 42 Osgoode Hall L.J., p. 4.

<sup>17</sup> Sutherland, Kate, Work, Sex, and Sex-Work: Competing Feminist Discourses on the International Sex Trade, Osgoode Hall Law Journal, (2004) 42 Osgoode Hall L.J., p. 4.

sex radicals champion, whether it be commercial sex, gay and lesbian sex, public sex, polyamorous sex and sadomasochistic sex<sup>18</sup>. Their concept of consent is not based on the presumption that everyone enters the negotiations with the same power and instead incorporates the notion “that sexuality and sexual activity is experienced in complex and contradictory ways and that it can serve simultaneously as a site of exploitation and victimization and as a site of subversion and agency”<sup>19</sup>.

Sex radicals, like radical feminists, are deeply skeptical of state regulation which they perceive to be a coercive tool defining ‘normal’ sexual behaviors. In her article, Sutherland quotes Gayle Rubin, an influential theorist of sex and gender politics who calls for theoretical pluralism in the defense and promotion of sexual non-conformism. This element speaks to the fact that sex radical theory is postmodern feminist theory as it makes room for a wealth of sexual voices and incorporates various elements of opposing ideologies. For the purpose of this present paper what really sets it apart is the refusal to rely on totalizing structures such as patriarchy in order to make sense of sex work. Indeed, post modern sex radicalism draws attention to “the plural and diffuse character of power and the complex, multiple, and fragmentary nature of the subject”<sup>20</sup>. Accordingly, postmodern sex radicals analyze the discursive effects of the law, turn their attention to the context in which it has been constructed and work towards revealing the biases therein. This characteristic leads Sutherland to depict sex radicals’ legal projects as mostly deconstructive in nature instead of reformist.

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<sup>18</sup> Idem, p. 5.

<sup>19</sup> Idem.

<sup>20</sup> Sutherland, Kate, Work, Sex, and Sex-Work: Competing Feminist Discourses on the International Sex Trade, *Osgoode Hall Law Journal*, (2004) 42 *Osgoode Hall L.J.*, p. 6.

### *Views on prostitution*

One would assume that given the materialistic focus of radical feminism, importance would be given to the labor aspect of sex work. However, this is not the case as for these theorists, sex is afforded a completely different status. Catherine MacKinnon argues that since women's sexuality is what is most taken away from women under patriarchy as it can't be said to be women's at all. She departs from Marxist theory by asserting that in this case, women are not workers but nature, the matter, the acted upon. It follows that prostitution cannot be simply regarded as a form of employment with the same risks of alienation and exploitation as any other. She stresses that "sex as 'that which is most one's own' turns out to mean that sex is something that, for women, is somehow natural and integral to the self, and therefore more damaging when alienated than other human activities"<sup>21</sup>. Radical feminists portray prostitution as the most severe type of objectification as it dissociates women from their bodies and sexualities through marketing, a situation that annihilate their dignity. In their minds, sex is inherently exploitive and degrading to women under patriarchy therefore prostitution is viewed as the most extreme and crystallized form of all sexual exploitation.

Sex radicals have focused on the sexual component of sex work as well but from a completely different point of entry. They link prostitution to other marginalized sexualities and make sure that the money as well as the pleasure components of this work are accounted for. In the case of their political activism, they mainly focus on the work element of the equation. They stress that from a perspective that takes into account a

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<sup>21</sup> Sutherland, Kate, Work, Sex, and Sex-Work: Competing Feminist Discourses on the International Sex Trade, Osgoode Hall Law Journal, (2004) 42 Osgoode Hall L.J., p. 6.

prostitute's rights, what makes sex work abusive and builds in violence in her work description has to do with the conditions in which the work takes place. What is proposed is that instead of stigmatizing sex work because of its sexual aspect, its complex and sometimes contradictory nature should be recognized as well as regulated like any form of labor as it is susceptible, like other type of work, to exploitive practices. This would make it possible for sex workers to be included and protected under already existing measures in regards to the protection of workers from exploitation and women from discrimination.

### *Legal strategies*

In the context of this inquiry, it is of utmost importance to decipher the essence of both discourses' influence on policy. To do so, it is necessary to look further into the way these two camps engage with the law as it is at the heart of how their respective influences play out during the regulation process. Their respective legal strategies as well as their varying rates of success can be appreciated through the rapport they both have with what Sutherland refers to as the 'Official version of the law', at the center of which is the rule of law that dictates that no one is above the law and everyone is equal before the law. This legal system "presumes the existence of a particular kind of individual and a particular form of society (...) where the subject of law is a universal abstract person"<sup>22</sup>, a concept that is problematic for both the radical feminists and the sex radicals. That entails that both camps are dubious about a full on engagement with the law. In the case of the radical feminists their discomfort comes from what they identify as a male bias

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<sup>22</sup> Sutherland, Kate, Work, Sex, and Sex-Work: Competing Feminist Discourses on the International Sex Trade, Osgoode Hall Law Journal, (2004) 42 Osgoode Hall L.J., p. 6.

engrained in the liberal law's claim to objectivity which hinders its capacity to truly be an emancipatory tool for women. As for the sex radicals, they challenge the official version of the law as well, however they do so by stressing how there is no single truth to be told but rather multiple and often competing truths, a position that distinguishes them from the radical feminists who push forward another all encompassing reality.

That being said, both camps are fully aware that they cannot afford to refuse to engage with the law at all. Consequently, radical feminists have put great efforts into pursuing legal struggles, especially in regards to protecting women from sexual victimization. As for the sex radicals, they too have been more and more active on that level; however, their approach is more timid, reflecting their apprehensiveness regarding the creation of more laws when they deem the existing laws as already negatively affecting women and others whose sexualities have been marginalized. This means that they have been forced into the legal forum in what Sutherland qualifies as a defensive (and largely ineffective) mode as their attempts to tackle legal issues by recounting complicated and intricate stories that embody the multiplicity and diversity of sexual experiences is met with little consideration. By contrast, radical feminists have been surprisingly successful in their endeavors, winning major legal battles on issues ranging from the creation of legal recourses for women having been victims of sexual harassment to the reform of sexual assault laws and the refinement of case law regarding obscenity.

So, what exactly would explain the disparity in the way both strands of theory have been received in the legal forum? It is of interest to look into this state of affairs

because while the sex radical discourse on human rights has been gaining grounds on the grass roots level, radical feminists have been and still are disproportionately influential in policy making. In the Sutherland article, Lise Gotell argues that their success is explained by the fact that despite their differences, law and radical feminism share the same modernist foundations, a modernist world view's main components being the existence of a coherent individual with an established identity, for example a Marxist collectivist subject whose identity is linked to class or in the case of radical feminism, linked to gender, a reliance on the scientific method which presents the truth as established through the application of logic and empirical study. It is also characterized by the development of grand theories making normative claims. By making these truth assertions about women's experience, radical feminists become comprehensible in legal contexts unlike postmodern sex radicals' discourse which is almost entirely unintelligible and ineffective in such contexts as it doesn't abide to the canons of modernism. Indeed, unlike radical feminists' legal claims which are positivistic and categorical, the tenants of sex radicalism formulate complex and contingent demands, a state of affairs that partly explains the differing success rates between the two camps. It can be said that in both cases, their claims are more likely to be heard "when the stories they are telling and the outcomes they are seeking resonate with the understandings and goals of dominant constituencies (...) [or in other words], when they sound most liberal and most in tune with capitalist free market principles"<sup>23</sup>.

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<sup>23</sup> Sutherland, Kate, Work, Sex, and Sex-Work: Competing Feminist Discourses on the International Sex Trade, *Osgoode Hall Law Journal*, (2004) 42 *Osgoode Hall L.J.*, p. 8.

*When theory is translated into activism*

When lobbying for the adoption of policies or advocating for legal reforms, the role accorded to the sex worker differs greatly in both camps. On the radical feminist side, women in the sex trade are objects not subjects. As commodified objects, they cannot speak for themselves therefore radical feminists occupy the field as representatives. There is room for these women to voice their experiences in so far as they share about the harsh reality of prostitution. Radical feminists condemn those who speak of prostitution as being work with liberatory potential as this false consciousness leads them to sell out all women when selling their sexual services. This feeds a dichotomy between deserving women and bad women that becomes apparent in the crafting of policies and programmes:

This binary classification does a disservice to both sides. The "bad women" have to bear the stigma of the label as well as the legal consequences of their transgressions. Those exalted as "deserving victims" in this scenario are simultaneously denigrated as incapable of agency, and they too have to endure legal surveillance, no less onerous for being imposed in the name of their protection. In the end, both "bad women" and "deserving victims" are silenced.<sup>24</sup>

Sex radicals take a different approach and make room for sex workers to speak for themselves. This perspective, which is centered on the human rights of sex workers, permits an opening that is characteristic to the larger postmodern challenge to conventional feminism by allowing for a multiplicity of voices, sometimes competing ones, to be heard. The creation of such a space was, among other things, motored by the active involvement sex workers took in the development of this approach. Some questions have been raised about which voices exactly were more likely to be heard as existing class and race divisions can easily be replicated in such discussion. This

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<sup>24</sup>Sutherland, Kate, Work, Sex, and Sex-Work: Competing Feminist Discourses on the International Sex Trade, *Osgoode Hall Law Journal*, (2004) 42 *Osgoode Hall L.J.*, p. 12

problem is taken very seriously by sex radical theorists and efforts are made to include an array of points of views when crafting potential policies. Then again, the statement on “how under certain circumstances, prostitution may be empowering or liberatory and under other circumstances it can be the most disempowering of exchanges particularly for the already desperate and weak”<sup>25</sup> is reinforced and calls for the inclusion of these varying standpoints when advocating for a change in the regulation of the trade.

### *Impacts on policy making*

Having built a comprehensive portrait of the theoretical insights that informs the larger debate concerning public policy regarding prostitution in Canada, it is now of utmost importance to evaluate how these perspectives translate into real life politics as it is at that level that they have the most impact on the lives of the individuals engaging in sex work. Looking at the actual consequences of the policies regulating sex work in Canada, the justifications put forward in regard to their adoption as well as the mapping out of strategies presented as possible ways to be tackling this issue will be of help in the understanding of the imprint both of these approaches left in the existing web of regulations.

To get a better grasp of their respective weight in the process of policy making, the first step will be to take a closer look at the latest report of the Subcommittee on Solicitation Laws that was published in 2006. In June of that year, following the government’s acknowledgement of the shortcomings of the existing laws regulating

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<sup>25</sup> Sutherland, Kate, Work, Sex, and Sex-Work: Competing Feminist Discourses on the International Sex Trade, Osgoode Hall Law Journal, (2004) 42 Osgoode Hall L.J., p. 13.

prostitution and aiming to change the status quo, the Subcommittee on Solicitation Laws was given the mandate to present a report on these laws and their effects on both the individuals involved in the sex trade and the communities in which it takes place. By doing so, they were dealing with a motion presented in the House of Commons in February 2003 by MP Libby Davis for Vancouver-East who had expressed concern over the safety of sex workers and communities overall in the context of the enforcement of the present legislation and aimed to recommend changes that would decrease the exploitation and the violence against sex workers. The subcommittee used the extensive testimony collected across the country to get a better grasp on the various takes on the matter in order to incorporate these voices in the construction of an agenda for change.

In order to carry out its mandate, the Subcommittee reviewed the relevant literature and heard testimony from approximately 300 witnesses at public and private hearings and meetings in Ottawa, Toronto, Montréal, Halifax, Vancouver, Edmonton and Winnipeg, from January 31 to May 30, 2005<sup>26</sup>. This report also includes an overview of prostitution in general, its effects on society, on women, on residents of neighborhoods where street prostitution occurs and on the workers involved in the sex trade. It also discussed the legal response to prostitution, more precisely the history of its criminalization, the present legislative framework and the problems associated with its enforcement. It then examined the evidence from other countries in regards of the distinctive legal approaches favored in each of them. The subcommittee concluded by

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<sup>26</sup> Hanger, Art; MP, et al, *The Challenge of change: A study of Canada's criminal laws prostitution laws; Report of the Subcommittee on Solicitation Laws*, Report of the Standing Committee on Justice and Human Rights, House of commons of Canada, 2006, p 17.

presenting an array of recommendations to the House of Common in order to adjust a status quo that is acknowledged as problematic.

This report is of an utmost importance for grasping in what ways the different opinions on the matter can affect the regulation of sex work in Canada. Indeed, as it is not just an academic piece but a real life effort to recommend changes in the current legislation, it gives us insights on the debate taking place on a political level and how it influences policy making. It paints a comprehensive portrait of all the aspects that come into question when trying to accommodate the views of the multiple segments of Canadian society involved or affected by the practice of prostitution. Indeed, the consultations with private citizens and different advocacy groups provides a clearer picture of how the proponents of each philosophy phrase their concerns when offered the opportunity of exerting leverage in the process of policy making. For example, a serious effort to build a policy alternative to the current legislation has to accommodate citizens whose views ranges from those who regard prostitution as an act of violence against all women and therefore do not wish to see it decriminalized to those who portray it as legitimate work and who argue that what threatens communities is not the exchange of sexual services for money itself but rather the violence that comes from the way it is set up to be dealt with. At the table also sits legitimately concerned community members who deal with the negative effects the practice of street prostitution can have on their neighborhoods as well as members of political parties who need to be taking their party line into account. The arm wrestling between these participants as well as the power each of them is granted during negotiations is what shaped up the final recommendations.

What these recommendations ended up being in this particular case is quite indicative of such a struggle.

All through its report, the Subcommittee presents two ‘philosophies’ of sex work with which most witnesses identified with, namely sex work as victimization and sex work as work. In their final chapter, the Subcommittee acknowledges that they failed to bridge the gap between these two irreconcilable positions which rendered the crafting of undisputed recommendations extremely difficult to achieve. Nevertheless, six unanimous proposals are comprised in the report, as well as a majority one (supported by all but the Conservative Party) and a Conservative dissent to the majority recommendation. Here they are briefly summarized:

1. That the Government of Canada ensure that the commercial sexual exploitation of minors “remains a serious crime subject to severe penalties.”
2. That the Government of Canada ensure that the problem of trafficking in persons remains a priority.
3. That the Government of Canada “recognize that the status quo with respect to Canada’s laws dealing with prostitution is unacceptable, and that the laws that exist are unequally applied.”
4. That the Government of Canada establish and develop education campaigns to prevent people from entering prostitution, and “develop exit strategies to assist those involved in prostitution who wish to leave in regaining control of their lives.”
5. That the Government of Canada fund research on sex work “to obtain a clearer picture of prostitution activities in the country, the associated problems, and the needs of people involved in those activities,” and that it conduct a legal analysis of the Criminal Code provisions related to sex work.
6. That the Department of Justice “coordinate research on prostitution on a priority basis with other levels of government, institutions, and non-governmental organizations, as well as persons selling sexual services.”

### *Majority recommendation*

The Liberal, New Democratic and Bloc Québécois members of the Subcommittee “strongly believe that prostitution is above all a public health issue, and not only a criminal law issue” (p. 89). They propose a “pragmatic approach” that would include services for those who wish to exit prostitution, as well as “harm reduction measure[s] to address the underlying concerns of poverty and social inequality and to meet the needs of individuals engaged in prostitution with respect to their health and safety (including sex education, distribution of condoms, bad date list, etc.).”

Their recommendation (no. 7 in the report) calls for concrete efforts to be made immediately to improve the safety of individuals selling sexual services and assist them in exiting prostitution if they are not there by choice. In addition, the federal government should consider increasing transfer payments to the provinces to enable them to provide significant resources for income support, education and training, poverty alleviation and treatment for addictions, while respecting provincial areas of jurisdiction (p. 89). The majority members assert that the current legal framework for sex work in Canada is contradictory, as sex work is legal but impossible to practice without breaking the law. They say “the Canadian government must come to terms with this contradiction and the inefficiency of the law, and engage in a process of law reform that will consider changes to laws pertaining to prostitution” (p. 89), but they do not make concrete recommendations in this regard. They conclude that “sexual activities between consenting adults that do not harm others ... should not be prohibited by the state” (p. 90). General provisions of the Criminal Code should be relied on to target “exploitation and violence in the context of prostitution, rather than criminalizing consenting adults who engage in sexual activities for money” (p. 90).

### *Minority dissent*

The Conservative members of the Subcommittee essentially asserted their agreement with the paradigm of “sex work as victimization” described above, noting that “the most realistic, compassionate and responsible approach to dealing with prostitution begins by viewing most prostitutes as victims” (p. 90). They question whether there is real consent to sex work — that is “how often ‘consent’ is truly given out of choice, and not necessity” (p. 90). Moreover, they assert that “because of the negative elements it attracts, prostitution is unacceptable in any location” (p. 90), whether on the street or in a home or massage parlour. They regard the Criminal Code provisions on sex work as imperfect but “believe that marginalization [of prostitutes] is not a function of the laws themselves but of attempts to circumvent them” (p. 91). They call for reforms that would criminalize the “abusers (johns and pimps)” and “improve the ability of those engaged in prostitution — the victims— to quit” (p. 91). They

reject the majority recommendation (no. 7) on the grounds that “it enables prostitutes to remain in a dangerous and degrading lifestyle” (p. 91)<sup>27</sup>.

Shortly after the publication of the Subcommittee’s report, Stella, Maggie’s and the Canadian AIDS legal network published a response entitled “The Challenge of Change”. This critique addresses what its authors perceive as the major shortcoming of the Subcommittee’s efforts. They analyze the recommendations pushed forward by the report and come to the conclusion that it does not address how some of the Criminal Code provisions and the way they are enforced places sex workers in an extremely vulnerable place where violence becomes an intrinsic element of their work. The authors indeed argue that the subcommittee devaluates human rights and by doing so, undermines the idea that all Canadian citizens are entitled to equal respect and dignity: “Rather than seeing the fulfillment of human rights as a baseline standard to be met by all Canadian laws, the report characterizes human rights — particularly those of sex workers — as just one “philosophy” of sex work”<sup>28</sup>. The Subcommittee was mandated to study the ways in which the prostitution related sections of the Criminal Code fall short to prevent - and sometimes even contribute - to human rights abuses against sex workers and to advise ways to address these abuses, a task that, according to the authors, it fails to carry out as the report does not contain a single proposal for concrete legislative reforms.

This piece allows us to understand how the Subcommittee on Solicitation laws’ report is read and analyzed from a sex radical standpoint which in turns gives us better

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<sup>27</sup> Canadian HIV/AIDS Legal Network, Stella, Maggie’s; Not Up to the Challenge of Change: An analysis of the report of the Subcommittee on Solicitation Laws, Briefing paper, 2007, p. 2.

<sup>28</sup> Idem

insight on the works of this particular discourse. It also corroborates Sutherland's argument on how sex radicalism cannot be conceptualized simply as one of the 'philosophies on sex work' by showing how problematic it is to treat it as such. Indeed, unlike the rigid framework provided by the radical feminists, this approach's fluidity, its focus on human rights as well as its embrace of sexual and theoretical pluralism, all contributing to the creation of space for accommodating the complex life stories of sex workers, does not format it in a way that makes them easily comparable. This report also highlights the numerous efforts that have been made in the past in order to push legislative changes, all of them presenting evidence of the violence sex workers experience, all of them, the 2006 one included, falling short of inducing far-reaching reform, a state of affairs that indicates how the power struggle at the political level can prevent real measures to be taken.

One of the main problems they identify in regards to these recommendations is the fact that the Subcommittee's falls back on empty calls for more research (recommendations no. 5 and no. 6) when such research already exists; a situation that serves only to perpetuate a highly problematic status quo. Numerous papers and field studies containing lots of evidence in that regards could have served as the basis for meaningful recommendations. One of them is the 2005 HIV/AIDS legal network's detailed analysis of the effects of the Canadian criminal laws on prostitution on the health, safety and welfare of sex workers. It indeed provided an extensive legal and policy analysis to the Subcommittee on Solicitation laws in order to see its research inform policy makers' efforts in the reducing of the harm its authors found to be linked to

the current legislation. This report looks at every section of the Criminal Code and explains how each one of these measures (section 210 to 213) affects sex workers and the communities in which sex work takes place. The authors assert that because of their effects, the four sections of the *Criminal Code* effectively violate sex workers' rights as they are enunciated in the Charter, "particularly their rights to freedom of expression, freedom of association, security of the person (i.e., protection of their physical and mental integrity), presumption of innocence, and, especially for women engaged in sex work, equality under the law"<sup>29</sup>. This piece also provides an array of recommendations for an evidence-based and a human rights-based approach to law reform.

Its thorough presentation of the actual consequences of the policies regulating sex work in Canada, the justification put forward in regard of their adoption as well as its mapping out of a strategy in tune with a human rights-based approach containing actual Criminal Code reforms could have been a template for much needed changes in the current way Canadian authorities deal with sex work and the women in the sex trade. It is, indeed, an effort to give a voice to sex workers and their experiences which is extremely valuable to get a better grasp of how the women in the trade can be affected by different approaches to the policing of their lives and what they view as possible strategies to stop the harm done to them.

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<sup>29</sup>Canadian HIV / AIDS legal Network; *Sex, Work, Rights: Reforming Canadian Criminal Law on prostitution*; 2005

*Different avenues in the conceptualization of sex work*

Sex radicals are gaining more and more ground at the grass roots level, recruiting allies and coming up with increasingly precise and sophisticated tactics in regards to reforming both how sex work is perceived and the laws regulating it. One example of such an effort is provided by a research published in 2003 in response to a call for submissions on marginalized labor. As the literature on prostitution as ‘labor’ chosen by adult citizen is still very scarce, the authors took this opportunity to explore the structures and processes of work within the sex industry using theoretical insights from the sociology of labor. Before turning more specifically to this topic, the authors, Christine Bruckert and Colette Parent, outline the contribution of the main theories having played a part in the portrayal of the field, namely the traditional criminology perspective, radical feminist analyses and sex radical analyses, in order to have a better grasp of the notions that inform how sex work is currently conceptualized.

The authors’ main findings are that the characterization of these practices as deviant behaviors, a traditional criminology assumption, still informs much of the research on the matter. Most of the feminist analyses in regards to prostitution sanction this moral condemnation while victimizing the worker. Neither of these approaches bases their studies on the assumption that sex work is a form of work, a situation which deters the possibility of fostering a meaningful relationship with sex workers, a crucial step to the adoption of measures and regulations that would favor and protect them as workers and as citizens. Indeed, by taking a closer look at the laws and measures regulating sex work in Canada, they also observed that while the Criminal Code is the

main form of control for this particular sector, municipal regulations and health measures play a significant role in the management of this trade. The authors stress that these laws and regulations and the stigma they feed have a great impact on the workers involved in this type of work on both a professional and a personal level as they are denied access to the benefits associated with salaried employment and the rights attached to a citizenship status.

This paper successfully demonstrates how the assumptions having informed policy making in this particular case criminalized the lives of the women in the sex trade as well as made their working conditions unsafe. The use of the theoretical insights of the sociology of labor creates a space in which the authors attempt to legitimize the labor of these women as well as highlight how their work is hindered by the moral condemnation entrenched in the policies actually in place. This article brings an original contribution to the debate on whether or not to consider sex work as work which could have been used during the Subcommittee's attempt to recommend changes to the current laws on sex work.

As we look at Canadian policy, it becomes clear that it is Radical Feminists and not Sex Radicals who have been effective. The above noted reflections regarding modernity may provide a partial, albeit only a partial explanation. Others include some opportune alliance with the religious conservative right as their criminalizing agenda is perceived as grounds for an ultimately fruitful collaboration. Even this is not enough. In

order to understand and examine why, in spite of the Fraser committee<sup>30</sup>, the death of 65 women in Vancouver<sup>31</sup> and the testimony of 300 witnesses who, for a vast majority, problematized the law<sup>32</sup>, our strategies to regulate sex work are not undergoing substantive reform. We need to think about other factors as well. The next section will provide us with a point of entry in regards to potential factors.

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<sup>30</sup> In June 1983, the Minister of Justice established a special committee to enquire into the issues of prostitution and pornography. That body, known as the Fraser Committee after its chairman, issued its report in April 1985. Its recommendations addressed economic and social reforms that might alleviate the causes of prostitution. For example, the Committee recommended that governments in Canada strengthen their moral and financial commitment to the removal of social inequalities between men and women, ensure that there are adequate social programs to assist women and young people in need, and direct more funding to community groups involved in the care and welfare of both practicing and reformed prostitutes. <http://dsp-psd.pwgsc.gc.ca/Collection-R/LoPBdP/CIR/822-e.htm>

<sup>31</sup> The BC Missing Women Investigation is an ongoing criminal investigation into the disappearance of at least 60 women from Vancouver's Downtown Eastside from the early 1980's through to 2002. The investigation is headed by a task force of members from the RCMP and the Vancouver Police Department. Many of the missing women were impoverished, drug-addicted sex workers from Vancouver's Downtown Eastside. Much of the investigation centered on Robert William Pickton and his Port Coquitlam pig farm. In 2007, he convicted of the second-degree murder of six women. He is also charged in the deaths of an additional twenty women. The Crown stated he confessed to forty-nine murders to an undercover police officer posing as a cellmate. <http://www.ag.gov.bc.ca/courts/other/pickton/index.htm> and [http://en.wikipedia.org/wiki/B.C.\\_Missing\\_Women\\_Investigation](http://en.wikipedia.org/wiki/B.C._Missing_Women_Investigation)

<sup>32</sup> Hanger, Art; MP, et al, *The Challenge of change: A study of Canada's criminal laws prostitution laws; Report of the Subcommittee on Solicitation Laws*, Report of the Standing Committee on Justice and Human Rights, House of commons of Canada, 2006, pp. 1-139.

## ***CHAPTER 2***

### ***Theory***

Contemporary prostitution studies reveal the regulation of sex work to be a multidimensional phenomenon that involves cultural, economic, political, and sexual dynamics<sup>33</sup>. The purpose of this section is to outline and analyze the theoretical underpinnings of some of the factors used to frame my interpretation of the regulations used to police sex work. I begin by taking a look at the Charter of rights and freedom as it was drafted to be a foundation of Canadian citizenship. In principle, the rights embedded in the Charter are protected but in reality, when it comes to sex workers, it appears that this may not be the case. What could explain such a situation?

A point of entry to answering this question requires that we think about the ways sex workers are discursively constructed and the assumptions embedded in this discursive construction. To this end, I consider a number of potentially relevant areas. I start with the conceptualization of crime and criminals to understand what are the potential consequences of portraying a group of people as such. I then turn to the concepts of risks and vulnerability to consider the commonly made link between the spreading of HIV and sex work. Finally, I portray two competing analyses of the basic nature of sex work, namely sex work as work and sex work as victimization, to better grasp their respective influence on the efforts to reform the current policies related to sex work.

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<sup>33</sup> Grant, Diane; *Sexin' Work: The Politics of Prostitution Regulation*; Journal of Marxism and Interdisciplinary Inquiry Vol.2, No. 1 (November 2008) P, 61-74)

## **Citizenship and Human Rights**

In the introduction I recounted the B.C. Supreme Court's decision to deny former sex workers' right to challenge the criminal laws relating to adult prostitution. It suggested that the current way Canada polices sex work may prevent sex workers from accessing these constitutionally protected rights. All Canadians have certain rights and responsibilities. Many of these rights are defined in the *Canadian Charter of Rights and Freedoms*, which is part of *Canada's Constitution* since 1982. The Charter was crafted to legally protect the basic rights and freedoms of everyone in Canada. While citizenship entails both rights and responsibilities, in the context of this paper, I will mostly focus on the former. That being said, it is of interest to note that one of the responsibilities associated with Canadian citizenship is to eliminate discrimination and injustice<sup>34</sup>.

The fundamental human and legal rights of individuals in Canada are spelled out in the Charter. The *Constitution of Canada*, including the Charter, is the supreme law of Canada. Its scope is indeed vast: "the Charter applies not only to law enacted by Parliament and provincial legislature but also to any body that exercises authority under such laws"<sup>35</sup> Pivot Legal society identified rights that are potentially being violated by the web of regulatory measures currently in use in Canada. According to them, "the prostitution laws infringe upon sex workers' constitutional rights to life, liberty and security of the person, their freedom of communication, and their right to equality and

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<sup>34</sup> <http://www.cic.gc.ca/english/resources/publications/look/look-20.asp>

<sup>35</sup> Canadian HIV/AIDS legal network; *Sex, Work, Rights: reforming Canadian criminal law on prostitution*; 2005, p. 55.

dignity”<sup>36</sup>. Before further discussing this matter, it is important to present how these particular rights are formulated in the *Canadian Charters of rights*<sup>37</sup>. In addition to the rights identified by Pivot, I will list a number of potentially relevant sections.

1. In section 2 (b), guarantees citizens’ freedom of expression.
2. In section 2 (d) protects citizens’ freedom of association.
3. In the section 7 (on legal rights), it is explicitly declared that every citizen has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
4. In the section on proceedings in criminal and penal matters, the Charter states that every citizen has the guaranteed right to be presumed innocent until proven guilty according to the law in a fair and public hearing by an independent and impartial tribunal. (section 11-d)
5. Section 15-1 deals on equality rights, states that every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, color, religion, sex, age or mental or physical disability.
6. Section 24-1 on enforcement asserts that anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances (section 24-1)

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<sup>36</sup> Pivot Legal Society; *The Impact of Criminalization on the Health Status of Sex Workers*; 2004; Unpublished.

<sup>37</sup> [http://laws.justice.gc.ca/en/charter/1.html#anchorbo-ga:l\\_I](http://laws.justice.gc.ca/en/charter/1.html#anchorbo-ga:l_I)

7. Finally, section 1 permits the government to justify a law or action that otherwise violates a charter right if the government can demonstrate that the following conditions are met: a) the violation or limitation of the right is authorized by a written law; b) the law relate to a pressing and substantial legislative objective; c) the law is rationally connected to the legislative objective; d) the law impairs the right no more that is necessary to accomplish the legislative objective and e) there is a proportionality between the harmful and positive effects of the law.

Why mention these specific sections of the *Charter of rights and freedom*? While every Canadian citizen is entitled to have these rights protected and while nowhere is it mentioned explicitly that a Canadian citizen engaging in sex work will not benefit from this protection, it appears that the web of regulatory measures used to police this particular trade has that exact consequence. The protected rights identified above seem to be the ones particularly threatened by the strategies adopted to regulate sex work, a state of affairs that will be further investigated in the section on findings and analysis.

Now moving on to a section defining the notions of crime and criminals as what is defined as a crime and who is defined as a criminal may afford a partial explanation about why this particular population experience barriers in accessing the protection granted by the Charter of rights.

## Crime and Criminals

The characterization of sex work as a deviant behavior still informs much of the literature on the response to sex work<sup>38</sup>. Many arguments are evoked by those who wish to see the criminalization of this activity sustained:

1. It is the responsibility of the government to regulate public morals in the interest of the public good; hence to make prostitution a punishable offense;
2. The abolition of the legal ban against prostitution will merely replace prostitution by more flagrant prostitution;
3. It would be difficult to enforce regulatory provisions against prostitution, when prostitution itself is not considered a punishable offense;
4. Women and girls on the borderline will be encouraged to take up prostitution by the mere fact that it is legal;
5. The absence of laws against prostitution will be interpreted by the public as the government's support of commercialized vice as a 'necessary evil';
6. Humanistic concerns for the prostitute, the prostitute's family, her children and her customers favor outlawing prostitution;
7. Criminalizing prostitution will inhibit the commission of other crimes associated with its practice; or
8. To outlaw prostitution is to reduce the presence of a public nuisance. Ninth, keeping prostitution illegal is no more intrusive than to seek to protect people from self inflicted torments and deprivations, and much the same as efforts to protect them from eating adulterated food or buying flammable pajamas<sup>39</sup>

Arguments like those, which were compiled by Gilbert Geis and Robert Meier, still inform the continued criminalization of sex workers' lives.

What is a crime and what does being defined as a criminal entail? A literal answer to the first question would be to characterize crime simply as something that is against the law. However, what gives meaning to crime and its control are broader social processes as law both shapes and is shaped by the society in which it operates. As

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<sup>38</sup> Bruckert, Chris; Parent, Colette; Robitaille, Pascale; *Erotic service/Erotic dance establishments: two types of marginalized labour*; Research funded by the Law Commission of Canada, University of Ottawa and Status of Women Canada, 2003, pp. 1-50.

<sup>39</sup> Meier, Robert; Geis, Gilbert; *Criminal Justice and Moral Issues*, Library of Congress, Roxbury publishing, 2006, p. 55

explained in the Law Commission of Canada's document entitled *What is a crime:*

*Defining criminal conduct in contemporary society:*

Before a criminal statute is even contemplated, there are a whole host of social forces and events that both shape how we conceive of a particular behavior and influence our decisions on how to respond. In addition, many of these social forces continue to shape our response strategies well after the social wrong becomes part of our legal lexicon<sup>40</sup>.

In other words, crime is not an objective phenomenon but rather a reflection of how a society is structured and of which social values are accorded significance. Moreover, our notions of crimes and criminals are formed by how we perceive certain behaviors and what is designated as being acceptable or unacceptable actions which are both historically rooted processes as well as the product of those previously mentioned power relations within a given society. Scholars are increasingly pointing out the contextual nature of crime and its control: "that is, that crime is a product of power relations within society and that the possibility of experiencing conflict with the law is inversely related to one's social standing"<sup>41</sup>. All of this brings us to the following question: what are the criteria for making a given behavior a crime and by extension, an individual a criminal? In the following section, I examine the issues of harm, morality, the victim and criminalization.

*The notion of harm*

When one speaks of crime and criminals, the notion of harm often surfaces. Therefore, before going any further, it is essential to define it as it is a key concept in the understanding of why certain actions are to be prohibited by law and subjected to

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<sup>40</sup> Law Commission of Canada (ed); *What is a crime? Defining Criminal Conduct in Contemporary Society*; Legal Dimensions, 2004, Introduction.

<sup>41</sup> Law Commission of Canada (ed); *What is a crime? Defining Criminal Conduct in Contemporary Society*; Legal Dimensions, 2004, Introduction., p. ix

punishment in the context of community living. According to the Law Commission of Canada, harmful behaviors characteristically mean physical injury, death, or the loss of property that the owner has legal rights to possess. In addition, some offenses are associated with the state as a whole. At times, other offenses may not harm either an individual or the state but may seem to harm this nebulous thing, society.

### *Crimes and moral issues*

Here we see justifications put forward to rationalize the control of behaviors that are deemed to be immoral. The rationale behind controlling legally what are seen as immoral behaviors is that they are perceived as inflicting harm on those who engage in them as well as being a threat to the moral order holding a nation together. The champions of this position indeed believe that “social harm will result if we fail to secure adherence to a general standard of morality and that such harm threatens a society’s survival”<sup>42</sup>. Reconciling judgments of harm with state intervention into our private lives is even more of a subtle balancing act when a moral dimension is added to the equation.

The moral component of criminal law affirms the subjective nature of law and leads one to wonder exactly what and who influenced the laws under which all Canadians must abide. It is truly difficult to determine to what capacity moral issues should be addressed by the law. Not only is consensus close to impossible to achieve but the concept of “harm to others” allows so many interpretations that people may disagree when confronted with the same set of facts. Geier and Meis present an approach crafted

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<sup>42</sup> Meier, Robert; Geis, Gilbert; *Criminal Justice and Moral Issues*, Library of Congress, Roxbury publishing, 2006, p.4.

by Herbert Packard who came up with four conditions that need to be present in order to determine if a behavior should be criminally sanctioned:

Firstly, the conduct must be regarded by most people as socially threatening and must not be accepted by any significant segment of the society; secondly, the conduct can be dealt with through even handed and nondiscriminatory law enforcement; thirdly, controlling the conduct through the criminal process will not expose that process to severe qualitative and quantitative strain; and lastly, no reasonable alternatives to the criminal sanction exists for dealing with the behavior<sup>43</sup>.

While these conditions leave space to interpretation, they are still useful for pinpointing some of the concerns that come into play when people ponder on the necessity of criminalizing certain behaviors.

### *Victimization*

In the quest to identify what makes someone a criminal, it is of interest to take a look at the victim character as it will give us more indications on what it entails to be a criminal offender.

A behavior that causes harm or material damage to others is a crime under two conditions: (1) if the person being harmed was not in the process of criminally aggressing another person – who would then be acting in self-defense; or (2) if the person is not being harmed by a punishment after a public conviction for a crime in accordance with the canons of due process<sup>44</sup>.

In other words, a harmful conduct is only a crime if the victim is innocent and can then demand that legal sanctions be applied on the offender. It will be of great interest to look into these criteria when it comes to the regulation and policing of sex work as it is sometimes described as a “victimless crime” a polemical term employed to describe illegal acts for which there is no complaining witness<sup>45</sup>. Here comes in the morality

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<sup>43</sup> Meier, Robert; Geis, Gilbert; *Criminal Justice and Moral Issues*, Library of Congress, Roxbury publishing, 2006, p. 23.

<sup>44</sup> *Idem*, p. 8.

<sup>45</sup> *Idem*, p. 6.

dimension of criminality under which behaviors like prostitution, the consumption of drugs, gambling and homosexuality, amongst other things, are criminalized under the guise that they fall outside of a set of moral values. In those cases, some would argue that the victim could be said to be society itself.

### *Criminalization*

The criminalization process has serious implications as it demands the exclusion of the individual perpetrating the targeted behavior. One problematic dimension of the act of legally defining crime is the vast gap that exists between the law as it is written and the law that is enforced. So, not only is the law the product of subjective social processes, its enforcement or the response deemed adequate to what is defined as criminal behaviors, is also subjected to the same societal and institutional pressures<sup>46</sup>. This is known as “police discretion”. This particular aspect of law enforcement, namely the subjective processes that influence the decision to criminalize certain individuals, leads to problematic situations such as the overpolicing of specific groups or an application of that law that is gender biased.

With this in mind, it is of utmost importance to reflect on who has a voice in this criminalization process as it strongly imprints this subjective process. The Law Commission of Canada highlights the heterogeneous nature of criminal offense by noting that the wide variety of behaviors that are criminalized via their inclusion in the *Criminal Code of Canada* makes it impossible to find any intrinsic characteristic they would all

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<sup>46</sup> Law Commission of Canada (ed); *What is a crime? Defining Criminal Conduct in Contemporary Society*; Legal Dimensions, 2004, Introduction., p.xvii

share. The only aspect that could potentially be said to unify these behaviors is indeed that “it is felt desirable to avoid them”<sup>47</sup>. In sum, as the formula “it is felt” suggests, what makes for an act to be deemed punishable comes from the outside: “there is no inherent characteristic of a behavior that would imply total disapproval”<sup>48</sup>, a state of affairs that points to the centrality of the role society and the state play in determining who and what are to be subjected to criminal sanctions.

Another dimension of crime and its punishment that I will touch on before moving on to the next section is the notion of ‘governance beyond government’<sup>49</sup>. How Foucault has so well demonstrated, the punishment of a crime is not an exercise of power exclusively by the state. Indeed, crime and its control are not conceived as the sole responsibility of the state anymore who instead works through civil society through an array of complex power relations and control and coercion strategies. This form of control reveals itself quite clearly in the case of the regulating of sex work, something that will be further discussed at a later point in this essay. A culture of criminalization is launched through legislation as it creates and legitimizes assumptions about certain groups which are then picked up by civil society who then plays a role in the constitution of the criminal subject. This culture of criminalization also translate in the over use of the law to resolve complex social issues, a situation that most often than not exacerbates problematic assumptions and beliefs about marginalized populations that permeate our society.

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<sup>47</sup> Law Commission of Canada (ed); *What is a crime? Defining Criminal Conduct in Contemporary Society*; Legal Dimensions, 2004, p. 5.

<sup>48</sup> Idem, Introduction, p. xx.

<sup>49</sup> Idem

The selling of sexual services is legal in Canada. However, most of what it entails is not<sup>50</sup>. The effects of criminalization on one's health, safety and social status are said to be tremendous<sup>51</sup> which brings us back to sex workers' human rights being infringed while there is no provision preventing them from benefiting of the protection of these constitutionally protected rights per se. That being said, it is important to mention that on top of the criminalization of virtually every aspect of their work, other factors are crucial in the construction of sex workers and hence equally influence the crafting of measures aiming to control them, namely their personification as vectors of diseases and competing philosophies on the nature of their work, two elements that will be presented in the following sections.

### **The concept of vulnerability and risk: HIV/AIDS and sex workers**

The connection often made between sex workers and infectious diseases is certainly another one of the factors that inform the crafting of policies and regulations. This supposed link also feeds the stigma and violence sex workers experience in society at large which in turn increases the difficulty for them to exercise their constitutionally protected rights. This is why, in the context of this paper, it is of importance to assess the veracity of this proposition. In July of 2005, The Canadian HIV/AIDS legal network published a report entitled *Sex, Work, Rights: Reforming Canadian criminal law on prostitution* in which they express serious concern about the problematic ways in which HIV/AIDS and sex work have been linked. In their chapter on 'prostitution, sex workers and HIV/AIDS', they examine the relationship between these three elements in order to

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<sup>50</sup> Canadian HIV / AIDS legal Network; *Sex, Work, Rights: Reforming Canadian Criminal Law on prostitution*; 2005

<sup>51</sup> Idem.

counteract vastly spread misconceptions with evidence and analysis. The first problem they address is the one of stigma and discrimination. In Canada, the available epidemiological evidence suggests that the depiction of sex workers as vectors of diseases is not justified. Indeed, in both the 2008 epidemiology of HIV infection in Ontario<sup>52</sup> and the information on the epidemic provided by the Public Health Agency of Canada<sup>53</sup>, at no point are sex workers mentioned as a high risk group. Despite the lack of data linking the two phenomena, namely sex work and the spread of HIV, the individuals in the sex trade have been the scapegoat of the epidemic, a situation that dramatically increased the stigma and discrimination they face which in turn, raised their vulnerability to HIV infection. Ironically enough, having been the target of numerous prevention campaigns as well as being sex professionals, it is believed that sex workers are generally better informed than the general public about modes of HIV transmissions and safer sex practices. Participants in the Legal AIDS network's research study stated that, not only is prostitution but one part of a sex worker's identity, "HIV transmission is about unprotected sex, not prostitution, and that prostitution does not inherently carry a risk of HIV infection"<sup>54</sup>. In this section, participants also comment on the paradox that constitutes HIV related funding for organizations that provide support services to sex workers. Indeed, despite the fact that HIV is not the most pressing issue for sex workers and the organizations supporting them, the main source of their funding comes from HIV prevention programs, a situation that reinforces the stigmatizing association. This state of

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<sup>52</sup> [http://www.phs.utoronto.ca/ohemu/doc/HIV%20epi%20Ontario%202007\\_Nov212008.pdf](http://www.phs.utoronto.ca/ohemu/doc/HIV%20epi%20Ontario%202007_Nov212008.pdf)

<sup>53</sup> <http://www.phac-aspc.gc.ca/aids-sida/populations-eng.php#wo>

<sup>54</sup> Canadian HIV / AIDS legal Network; *Sex, Work, Rights: Reforming Canadian Criminal Law on prostitution*; 2005, p. 26.

affairs can also be said to be taking away from other broader and more pressing health and safety issues faced by sex workers.

In their section on risk and vulnerability, the Legal AIDS network publication addresses the question of whether or not it is accurate and appropriate to say that sex workers in Canada are vulnerable to HIV infection and AIDS. It is indeed a common practice among those conducting research on the epidemic to state that certain populations are more at risk in regards to HIV transmission<sup>55</sup>. In this context, vulnerability is defined as “the extent to which individuals are capable of making and effecting free and informed decisions about their life (...) and also as the conduct of empowerment”<sup>56</sup>. It goes on stating that, when analyzing vulnerability to HIV/AIDS, three interdependent levels of vulnerability need to be taken into account, namely a personal level, a programmatic level and a societal level. Personal vulnerability involves cognitive and behavioral dimensions:

The cognitive dimension relates to the information needed to reduce vulnerability to HIV infection. The behavioral dimension consists of two overlapping categories: personal characteristics (including emotional development, perception of risk and attitude towards risk taking, history of sexual and substance abuse) and personal skills (including the ability to negotiate sexual practices and the skills needed to use condoms). In the context of HIV, people are more or less vulnerable to infection depending on whether they lack information, or possess the characteristics and personal skills necessary to protect themselves. However, people who have access to the same information and share many of the same personal skills and characteristics may nonetheless engage in different risk behaviors for reasons unique to each person<sup>57</sup>.

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<sup>55</sup>Canadian HIV / AIDS legal Network; *Sex, Work, Rights: Reforming Canadian Criminal Law on prostitution*; 2005

<sup>56</sup> *Idem*, p. 28.

<sup>57</sup> *Idem*.

With that in mind, many of the participants stressed that vulnerability, when applied to a group of people instead of on these factors unique to each individual, takes the focus away from high risks behaviors, a practice that is not conducive to effective prevention programs and further stigmatize already marginalized populations.

Programmatic vulnerability:

focuses on the contribution of HIV/AIDS programs towards reducing or increasing personal vulnerability. Numerous key informants (of the Legal AIDS network research study) and consultation participants stated that the criminal law and its enforcement create a context that undermines and sabotage safer sex practices<sup>58</sup>.

It does so by making it more difficult to reach sex workers with safer sex information and support services as well as by creating barriers for sex workers when it comes to negotiating and practicing safer sex as fear of arrest can leave little time and space for them to do so during the initial contact with a customer. Societal vulnerability:

recognizes that personal and programmatic vulnerability are both strongly influenced by social context. Social context is made up of factors such as governmental structures, gender relationships, attitudes towards sexuality, religious beliefs and poverty, which can all influence a person's capacity to reduce his or her vulnerability to HIV.<sup>59</sup>

Vulnerability, when framed this way, provides a point of entry for the understanding and assessment of sex workers' risk of HIV infection. Regardless of individual sex worker's level of risk which is influenced by variables such as endemic poverty or drug use, something can be said about how the Criminal Code's prohibition of prostitution related activities, in addition to stigmatic assumptions about sex work, affect their societal vulnerability to HIV infection. Societal vulnerability does not equate to being vectors of diseases. Indeed, while it provides insight about how individual sex workers may be

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<sup>58</sup> Canadian HIV / AIDS legal Network; *Sex, Work, Rights: Reforming Canadian Criminal Law on prostitution*; 2005, p. 28.

<sup>59</sup>Idem

vulnerable to HIV, there is no evidence that they infect a large number of clients<sup>60</sup>. Knowing that, what exactly informs the crafting of the web of regulatory measures used to police sex work in Canada? Historically, sex workers have been subject of stigma and discrimination based on stereotypes, prejudice and attitudes about sexual expression<sup>61</sup>. The link believed to exist between sex workers and the spreading of HIV and the subsequent diffusion of this belief via formal and informal routes is, among numerous other elements, at the root of the stigma they face<sup>62</sup>.

This state of affairs led to public debates on the matter to be tainted with fear based and/or moralistic views rather than to be guided by evidence-based decision making<sup>63</sup>. Multiple voices have shaped the present array of measures currently in use in Canada, some of them having had more impact than others in the adoption of strategies aiming to police sex work as it was showcased in the review of the literature on competing feminist discourses on sex work. The next section is devoted to the presentation of the two main conceptual tools used to frame the basic nature of sex work. To do so, I will draw from the literature reviewed in Chapter one.

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<sup>60</sup> Canadian HIV / AIDS legal Network; *Sex, Work, Rights: Reforming Canadian Criminal Law on prostitution*; 2005.

<sup>61</sup> McLaren, John, *Recalculating the wages of sin: the social and legal construction of prostitution in Canada, 1850-1920*, University of Victoria, 1990.

<sup>62</sup> *Idem*.

<sup>63</sup> Canadian HIV / AIDS legal Network; *Sex, Work, Rights: Reforming Canadian Criminal Law on prostitution*; 2005.

## **Sex work as work / Sex work as victimization**

In this section, I will provide an overview of the different ways the basic nature of prostitution and those who engage in it are conceptualized as each one carries specific assumptions leading to a different read of the measures used to regulate sex work as well as the favoring of different sets of policies in regards to its regulation.

### *Sex work as work*

The adoption and propagation of the term sex work was the feat of sex worker groups who, around the 1970s, began to frame sex work as a labor issue in order to subvert all the negative connotations associated with the term ‘prostitution’ and to highlight that women in the sex trade are workers who provide a legitimate service<sup>64</sup>. “The sex work as work discourse that emerged in the West (...) is a point of departure for sex workers’ activism which include: framing sex workers as workers rather than victims, lobbying against intrusive state regulation of sex workers, addressing worker vulnerability to violence and distinguishing between ‘survival sex’ and ‘sex work’”<sup>65</sup>. A first component of this particular stance is women’s right to choose ‘prostitution’ as an occupation while also recognizing the context in which such a choice occurs, namely one that includes broader struggles women face in our society. Proponents of this approach acknowledge the violence that occur within the sex trade but argue that this violence is not something that is necessarily inherent to the sex trade but rather a consequence of society’s treatment of this particular occupation which is tainted by moralistic views and

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<sup>64</sup> Bouclin, Suzanne, *Organizing resistance: the case of erotic dancers*; University of Ottawa, 2004.

<sup>65</sup> *Idem*, p. 39.

discriminatory legal regulation<sup>66</sup>. In their minds, sex work should not be stigmatized because of its sexual aspect and therefore, rather than being subjected to heightened surveillance as a sex crime, it should be regulated like any other form of labor<sup>67</sup>. In this vein, Jo Bindman, in a piece entitled *An International Perspective on Slavery in the Sex Industry*, asserts the necessity of identifying prostitution "as an occupation susceptible like the others to exploitive practices" so that "sex workers can be included and protected under the existing instruments which aim to protect all workers from exploitation and women from discrimination"<sup>68</sup>.

### *Sex work as victimization*

Prominent feminist theorists such as Andrea Dworkin, Catharine MacKinnon, Sheila Jeffrey and Kathleen Barry, define prostitution as a violation of human rights in any case even when it is said to be willfully chosen by those involved. Therefore, they advocate for its eradication<sup>69</sup>. Debra Satz argues that contemporary prostitution introduces and contributes to the perception of women as socially inferior to men<sup>70</sup>. The champions of this position have had a substantial impact on the elaboration and the adoption of an array of laws in regards of sex trafficking which in turn influenced the

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<sup>66</sup> Wendy Chapkis, *Live Sex Acts: Women Performing Erotic Labor*; New York: Routledge, 1997

<sup>67</sup> Grant, Diane; *Sexin' Work: The Politics of Prostitution Regulation*; Journal of Marxism and Interdisciplinary Inquiry Vol.2, No. 1 (November 2008)

<sup>68</sup> Sutherland, Kate, Work, Sex, and Sex-Work: Competing Feminist Discourses on the International Sex Trade, *Osgoode Hall Law Journal*, (2004) 42 Osgoode Hall L.J.

<sup>69</sup> Barry, Kathleen; *The Prostitution of Sexuality*; New York: New York University Press, 1995.

Dworkin, Andrea; *Pornography: Men Possessing Women*; New York: Putnam, 1981.

Dworkin, Andrea, *Life and Death* (New York: Free Press, 1997).

MacKinnon, Catherine, *Feminism Unmodified*; Cambridge, Massachusetts: Harvard University Press, 1987. and

MacKinnon, Catherine; *Toward a Feminist Theory of the State*; Cambridge, Massachusetts: Harvard University Press, 1989.

<sup>70</sup> Debra Satz; *Markets in Women's Sexual Labor*; Ethics 106 (1):63-85; 1995.

response to prostitution in several countries, Canada included<sup>71</sup>. In a few words, this particular understanding of sex work depicts the selling of sexual services as the consequence of the social and economic subordination of women as well as of the ongoing demand by men to access women's bodies<sup>72</sup>. MacKinnon and Dworkin argue that patriarchy creates, legitimates and sustains the need for the sex industry and women are the victims of this broader gendered structure. Here, the purchase of women's bodies by men is perceived as being a part of the contemporary expression of hegemonic masculinity<sup>73</sup>. Their favored approach to the regulation of sex work is not one that includes decriminalizing the sex trade as this course of action would legitimate the maintenance of a problematic commodification of women's bodies<sup>74</sup>. The violation of sex workers' human rights is thought of as being intrinsic to the nature of prostitution itself as sex work is the epitome of women's subordination, degradation and victimization in a male dominated society.

Although they are often pictured as pitting against one another, the philosophical views on sex work that are the portraying of sex work as work and sex work as victimization are not two rigid poles with the efforts to grapple the realities of the sex industry drawing exclusively from one or the other. However, the portrayal of sex workers as victims, who are here powerless and without agency, has certainly heavily

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<sup>71</sup> Sutherland, Kate, Work, Sex, and Sex-Work: Competing Feminist Discourses on the International Sex Trade, Osgoode Hall Law Journal, (2004) 42 Osgoode Hall L.J and Grant, Diane; *Sexin' Work: The Politics of Prostitution Regulation*; Journal of Marxism and Interdisciplinary Inquiry Vol.2, No. 1 (November 2008) P, 61-74

<sup>72</sup> MacKinnon, Catherine, *Feminism Unmodified* ; Cambridge, Massachusetts: Harvard University Press, 1987 and Dworkin, Andrea; *Pornography: Men Possessing Women*; New York: Putnam, 1981.

<sup>73</sup> MacKinnon, Catherine and Dworkin Andrea; cited in Sutherland, Kate, Work, Sex, and Sex-Work: Competing Feminist Discourses on the International Sex Trade, Osgoode Hall Law Journal, (2004) 42 Osgoode Hall L.J

<sup>74</sup> Idem

shaped the discursive construction of sex work<sup>75</sup>. Having taken a look at these perspectives on sex work, looking more closely at the existent programs used in Ottawa to police this trade will be of great help as it will make it possible to define the concrete implications of the portrayal of sex workers as victims, as criminals and as vectors of diseases on how individuals in the sex trade are dealt with and how it affects their lives. Indeed, this could allow for a further understanding towards exactly how each specific programs and policies reflect these discursive constructions as well as highlight the very real consequences policies and programs having been informed by specific views can have in the lives of the Canadian citizens engaging in sex industry.

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<sup>75</sup> Lowman, John; *Violence and the Outlaw Status of (Street) Prostitution* in Canada in *Violence Against Women*. 6.9 (September); 2000; pp. 987-1011

## **CHAPTER 3**

### ***Putting the pieces together: A closer look on regulatory tactics***

To illustrate the intricacy of the regulatory tactics used to regulate sex work and in order to postulate on the implications for sex workers' access to their constitutionally protected rights, I will discuss an assortment of measures in effect in the city of Ottawa. In the interest of conceptual clarity, I divided this section into four levels; the federal level, the provincial level, the municipal level and governance at a distance. The latter refers to strategies that are not directly managed by the state apparatus. The chapter concludes with some reflections on the link between sex workers' access to their citizenship rights and violence.

#### **Federal level**

Since its adoption in 1892, at no point did the *Criminal Code of Canada* prohibit the buying and selling of sexual services. Sex work is indeed legal in all of Canada, a situation that opened the door to a hybrid form of criminalization since most activities necessary to the work are criminalized. The main criminal laws dealing with sex work are sections 210 to 213 of the Criminal Code, which prohibit communicating in a public place for the purpose of selling or buying sex (Criminal Code section 213), keeping or using a 'bawdy house' (Criminal Code sections 210 and section 211), and procurement (Criminal Code section 212). In the following section, I will be looking into each one of these laws as well as how they translate into the lives of sex workers in regards to their constitutional rights.

*Section 213 of the Criminal Code of Canada*

Criminal Code Section 213, also known as the communicating law, is the most frequently used. In fact, it makes up more than ninety percent of all prostitution related charges<sup>76</sup>. Section 213 was introduced in 1985 and criminalizes communication for the purpose of prostitution in a public space which is defined as "any place to which the public have access and any motor vehicle located in a public place or in any place open to public view"<sup>77</sup>. The introduction of this law means that an individual can be charged for stopping or attempting to stop a vehicle, or communicating or attempting to communicate for the purpose of engaging in sex work or obtaining sexual services. The communicating law is a summary offence, meaning that the penalty for a conviction cannot exceed a \$2,000 fine or six months imprisonment, or both<sup>78</sup>.

The communication law has prompted much criticism as it is used to control street prostitution and nuisance rather than contributing to the safety of sex workers<sup>79</sup>. A number of studies have indeed pointed to the fact that, in fear of being charged for communicating, sex workers relocate into isolated areas, thereby increasing their risk of abuse and violence. As STAR (Sex Trade Advocacy and Research) argues:

Working in an isolated area discourages attention from police and residents but increases risks from bad dates and other aggressors; working in a well-lit, populated area discourages bad dates but often leads to unwanted attention from police and residents<sup>80</sup>.

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<sup>76</sup> Canadian HIV / AIDS legal Network; *Sex, Work, Rights: Reforming Canadian Criminal Law on prostitution*; 2005

<sup>77</sup> [http://www.owjn.org/index.php?option=com\\_content&view=article&id=121&Itemid=107](http://www.owjn.org/index.php?option=com_content&view=article&id=121&Itemid=107)

<sup>78</sup> Idem.

<sup>79</sup> Canadian HIV/AIDS legal network; *Sex, Work, Rights: reforming Canadian criminal law on prostitution*; 2005

<sup>80</sup> Report of the Subcommittee on Solicitation Laws. (2006). "The Challenge of Change: A Study of Canada's Criminal Prostitution Laws." 6th Report of the Standing Committee on Justice and Human Rights, p. 62

The enforcement of section 213 has a tremendous isolating effect on sex workers. By driving these women away from populated areas, their access to protection services as well as social and health services are indeed dramatically reduced. Sex workers also become isolated from one another, a state of affairs that prevents the sharing of crucial information on clients, bad clients, access to social and health services and safety. Furthermore, in order to steer clear of police attention, sex workers are forced to rush the assessment of prospective clients which occurs during the initial negotiation, something that greatly increases the risk of experiencing violence and abuse<sup>81</sup>.

Section 213 violates four of the rights protected by the Charter. Firstly, section 2 (b) is breached by the communicating provision because:

It restricts the content of expression rather than seeking to the physical consequences of a certain expressive activity. (...). The fact that a person can be convicted even when there was no link between the expressive activity and the perceived harm (i.e., public nuisance associated with street based prostitution) offends the guarantee of freedom of expression.<sup>82</sup>

Guaranteeing one's right to communicate for economic purposes, even when it involves a sexual encounter, indeed falls under this section.

Secondly, section 2 (d) which guarantees freedom of association is infringed because:

As long as it remains lawful to sell sex for money, there is a right to associate with others, i.e. potential customers, in order to reach an agreement for this purpose, regardless of whether the common purpose is commercial in nature<sup>83</sup>.

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<sup>81</sup> Pivot Legal Society. *The Impact of Criminalization on the Health Status of Sex Workers*. June 2004. Unpublished.

<sup>82</sup> Canadian HIV / AIDS legal Network; *Sex, Work, Rights: Reforming Canadian Criminal Law on prostitution*; 2005, p. 58.

<sup>83</sup> *Idem*, p. 59.

In other words, this provision may be violating the right to freedom of association of sex workers and their clients.

Thirdly, section 7 which guarantees everyone's right to life and safety is breached by section 213 as it is hinted in the above portrayal of this provision's consequences on sex worker's ability to work in a safe environment. This particular section protects both the physical and mental integrity of Canadian citizens. The considerable evidence showing a causal relationship between the enforcement of section 213 and the high rates of violence and murder faced by sex workers and the fear associated to such threats, certainly shows the violation of such a right<sup>84</sup>.

Lastly, section 15 which guarantees everyone's right to equality on the basis of sex is infringed as a result of the methods used to enforce section 213. Indeed, a law can be found to violate a person's right to equality based on the impact of the law on a member of an already disadvantaged group<sup>85</sup>. Relying on decoys, female officers posing as sex workers and male officers posing as clients has proven to be a flawed method. Where this technique is being used, it is shown that women are being charged at a much higher rate than men<sup>86</sup>. While the total number of men and women charged under section 213 across Canada is more or less equivalent, upon conviction, more differences arise. Women tend to receive much harsher penalties. For example, "women who are

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<sup>84</sup> Shaver, Frances.; *Prostitution: A Female Crime?* In *In Conflict with the Law: Women and the Canadian Criminal Justice System*, eds. Ella Adelberg and Claudia Currie. Vancouver: Press Gang; 1993 -Lowman, John; *Violence and the Outlaw Status of (Street) Prostitution in Canada* in *Violence Against Women*. 6.9 (September); 2000; pp. 987-1011.

<sup>85</sup> Canadian HIV / AIDS legal Network; *Sex, Work, Rights: Reforming Canadian Criminal Law on prostitution*; 2005 p. 64.

<sup>86</sup> Canadian HIV / AIDS legal Network; *Sex, Work, Rights: Reforming Canadian Criminal Law on prostitution*; 2005.

sentenced to a fine are sentenced to pay higher fines than men; women go to prison more frequently than men; women receive longer prison sentences than men, and for the most part they are not given the option of diversion programs such as John School”<sup>87</sup>. We should also consider the social barriers to a fair enforcement. Street based sex workers who have had negative experiences with the law because of their work tend to be economically marginalized. They may have no way to get to court for their hearing, they may not have the money to pay fines and this may lead to being jailed for non payment of said fines. In short, in practice, if not in policy, they suffer harsher punishment than their more affluent clients.

Once a violation of rights protected by the Charter has been established, section 1 provides the government with the opportunity to justify such a state of affairs by proving that the legislative objective is “pressing and substantial” and that the beneficial effects of preventing the nuisance is proportionate to the harmful effects (in this case is the violation of sex workers’ rights). In that regards, the Canadian AIDS / HIV legal network found that the communicating section cannot be legitimized because it is not rationally connected to its legislative objective in the first place. Enforcement has

has tended to move street based prostitution from neighborhood to neighborhood, displacing rather than eliminating the nuisance and that sex workers run the risk of being arrested for communicating in a public place for the purpose of prostitution even when no nuisance result<sup>88</sup>.

They also found that section 213 infringe on Charter rights more than it is required to accomplish its legislative objective:

There is a significant body of evidence that points to a complex, if somewhat indirect, causal relationship between the Criminal Code and health and safety risks (and negative outcomes) for sex workers; Section 213 and its enforcement contribute to the marginalization of sex workers; and

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<sup>87</sup> Idem, p. 65.

<sup>88</sup> Idem, p. 68.

Section 213 and its enforcement encourage violence against sex workers, contribute to the continued poverty of sex workers who have few options but to work on the street, and increase street based workers' risk of being exposed to HIV<sup>89</sup>.

Finally, the harmful effects of this section on sex workers do not outweigh its beneficial effects for Canadian society as a whole as the Canadian HIV / AIDS legal Network points out that police enforcement of this section has not suppressed street based sex work, in fact, it merely moved it from one area to another, therefore displacing the problem. Furthermore:

Police enforcement of section 213 has resulted in street based sex workers working in greater isolation, which increases their health and safety risks. These health and safety include more dangerous working conditions; less money available, resulting in greater likelihood of accepting clients who are potentially dangerous; changes in hours or day of work to avoid police; working in remote areas to avoid police; and not having sufficient time to properly negotiate safer sex with clients. Section 213 and its enforcement deprive sex workers of the full protection of the criminal law when they have been the victim of a violent or other crime while engaging in prostitution. Sex workers are reluctant to go to the police for assistance, and many of those who have done so report that their concerns were not taken seriously by police solely because they were identified as sex workers. [Lastly], a criminal record or large debt resulting from convictions for prostitution related offenses makes it more difficult for sex workers to obtain another type of employment, within or outside of prostitution. A criminal record will be an obstacle to those sex workers who wish to work in a work place or obtain a license that requires a criminal records check, or to work in occupations that require international travel.<sup>90</sup>

In addition, a criminal record can also have grave consequences on the health and security of sex workers such as probation conditions. For instance, red zones<sup>91</sup> undermine sex workers' ability to work at all, or force them to work in another area; and isolate them from friends, services and the security afforded by familiarity with the environment. These findings point towards the fact that the violation of *Charter rights and freedoms* by the communicating provision of the Criminal Code cannot be justified by the section 1 of the Charter.

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<sup>89</sup> Canadian HIV / AIDS legal Network; *Sex, Work, Rights: Reforming Canadian Criminal Law on prostitution*; 2005, p. 68.

<sup>90</sup>Idem

<sup>91</sup>Idem.

*Section 210 and 211 of the Criminal Code of Canada*

I will now move on to discussing section 210 of the Criminal Code which criminalizes the keeping (owning, managing or assisting in the management) of a bawdy house as well as section 211 which criminalizes an individual transporting or directing another person to a bawdy house.

A bawdy house is defined as a place that is kept or occupied, or resorted to by one or more persons, for the purpose of prostitution or to practice acts of indecency. Any space can be defined as a bawdy house – including a house, a hotel, or a parking lot — provided that it is used frequently for sex trade work, or for the practice of “acts of indecency,” and that the premises are “controlled or managed” by sex workers or other participants.<sup>92</sup>

A number of problems stem from the enforcement of this particular provision, all of them further feeding the isolation experienced by sex workers as well as undermining a worker’s ability to work safely. For example, a sex worker using her own residence (where she feels in control and is familiar with the environment) for the purposes of sex work, can be charged under this provision. The same problem arises if a sex worker rents a hotel room or decides to rent a studio and share it with her peers. Testifying in front of the Subcommittee, sex workers raised concern in that effect: “as the law is now, the only possible way to carry out sex work is by going to home of a client. The unknown factors involved in a home visit create a dangerous situation.”<sup>93</sup> Under this law, “it is also an offence to be an “inmate” of a bawdy house, to be “found in” a bawdy house, or to knowingly permit anyone to use or lease premises for the purposes of keeping a bawdy house. An “inmate” is defined as any resident or regular occupant.”<sup>94</sup> These provisions reify sex workers’ isolation by criminalizing personal relationships, causing significant disruption in the family, social and work relationships of sex workers by prohibiting

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<sup>92</sup> [http://www.owjn.org/index.php?option=com\\_content&view=article&id=121&Itemid=107](http://www.owjn.org/index.php?option=com_content&view=article&id=121&Itemid=107)

<sup>93</sup> Idem.

<sup>94</sup> [http://www.owjn.org/index.php?option=com\\_content&view=article&id=121&Itemid=107](http://www.owjn.org/index.php?option=com_content&view=article&id=121&Itemid=107)

visits to any place where sexual services are sold and making it hazardous to rent an apartment.

With that in mind, there is a strong case that these two sections of the Criminal Code violate both section 2 (d) and section 7 of the Charter. In the case of the former, one's freedom of association for the purpose of gaining a livelihood is not protected. In the case of the latter, by making indoor work illegal in almost every conceivable circumstance, sex workers' right to have their physical and psychological integrity is violated and it increases the likelihood as that these women, especially the most disadvantaged ones, will end up on working on the street while street based prostitution carries much greater health and safety risks<sup>95</sup>. In regards to section 1 of the Charter, the Legal AIDS network argues that

there is a lack of proportionality between the harmful and positive effects of the laws as regards to freedom of association: the harmful effect of the law is that it prevents sex workers from working indoors in almost every circumstances, leaving them less able to protect their health and safety. It also puts them at risk of losing their shelter if they are convicted of keeping a bawdy house in a rented unit where they live. The positive effect of the law is presumably to prevent any nuisance that could be associated with the operation of a bawdy house, although there is little evidence about what such nuisance might be.<sup>96</sup>

There is also a good argument in regards to the violation of sex workers' Charter section 7 not being justified by section 1. Indeed, "the bawdy house sections significantly impair sex workers' right to security of the person. The impairment results from the operation of the 'legislative scheme' involving both the communicating section and the bawdy house section"<sup>97</sup>.

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<sup>95</sup> Lowman, John; *Violence and the Outlaw Status of (Street) Prostitution in Canada* in *Violence Against Women*. 6.9 (September); 2000; pp. 987-1011

<sup>96</sup> Canadian HIV / AIDS legal Network; *Sex, Work, Rights: Reforming Canadian Criminal Law on prostitution*; 2005, p. 74.

<sup>97</sup> *Idem*.

*Section 212 of the Criminal Code of Canada*

Section 212 is the final criminal law specifically concerned in sex work in Canada. This particular section criminalizes the act of procuring or “obtaining or purchasing or attempting to procure a person for illicit sexual acts, including forcing an employee to have sex with prospective clients. In addition to procurement, section 212 also criminalizes the following acts: enticing a person who is not a sex worker to a “common bawdy-house” for the purpose of procuring sex, concealing a person in a common bawdy-house, procuring or attempting to procure sex outside of Canada, procuring a person to enter or leave Canada for the purpose of prostitution; and giving or causing a person to take drugs or alcohol to enable any person to have illicit sex. Additionally, a person can be charged under section 212 for living off the avails of a sex worker if that person lives with a sex worker, is found to be in the company of a sex worker on a regular basis and/or lives in a common bawdy house, and lives directly off the earnings of a sex worker. Some precautions are taken by the courts in order to reduce the scope of this particular statute as it has the potential of criminalizing legitimate living arrangements where expenses are shared for mutual benefit. That being said, the very broadness of this law as well as the possibility of seeing it being used against anyone in a sex worker’s life such as roommates, partners or security guards, both prevent them from working safely and benefiting from working alongside a peer in order to support one another’s safety by using a buddy system and referring of good clients and it also legitimates the stigma attached to sex work by potentially criminalizing getting involved with an individual in that trade.

The enforcement of section 212 clashes with the protection of three constitutionally protected rights. Firstly, according to section 11 (d) of the Charter, everyone is entitled to be presumed innocent until proven guilty. The Legal AIDS network pointed out that Section 212, which is characterized as a reverse onus crime presumes a:

a person who lives with or is habitually in the company of an adult prostitute or lives in a common bawdy house, in the absence of evidence of the contrary, to be guilty of living on the avails. It effectively reverses the standard burden of proof under the criminal law such that the Crown prosecutor does not have to prove every element of the criminal offense beyond a reasonable doubt.<sup>98</sup>

Secondly, under section 2 (d), all Canadian citizens' freedom of association is protected, however, this is not the case for sex workers under section 212. Sex workers interviewed by the Legal AIDS network argued that "the Criminal Code makes illegal relationships into which sex workers choose, or would choose, to enter into if not illegal"<sup>99</sup>. Moreover, since prostitution is legal in Canada, preventing them from associating with other individuals for the purpose of earning a livelihood by criminalizing noncoercive, business relationships, such as a relationship with an escort agency or a security agency, violates this protected right.

Finally, the enforcement of section 212 infringes on section 7's right to liberty. Indeed, this offense with its presumption of guilt has the potential to significantly disrupt sex workers' personal relationships. As the Legal AIDS Network reports:

These Criminal Code provisions invite scrutiny of sex workers' sexual, spousal and romantic relationships and living arrangements. (...) Persons who are supported by a sex worker, where there is no legal or moral obligation to do so, are seen as 'idle parasites' and risk being charged

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<sup>98</sup> Canadian HIV / AIDS legal Network; *Sex, Work, Rights: Reforming Canadian Criminal Law on prostitution*; 2005, p. 76.

<sup>99</sup> *Idem*.

and convicted under section 212. (...) The right to liberty guaranteed under section 7 of the Charter is not restricted to freedom from state interference with a person's physical liberty; it applies whenever the law prevents a person from making fundamental personal choices. The living on the avails and reverse onus provisions clearly limits the ability of sex workers to choose the type of relationships they enter into. More specifically, they criminalize and thereby limit sex worker's ability to choose whom they wish to support financially, (...) a choice available to all other people.<sup>100</sup>

In regards to section 1 of the Charter, the many negative effects of this provision certainly outweigh its positive effects. Available evidence shows that clients and predators, not necessarily managers and pimps, present the greatest risk for sex workers. Moreover, the fact that the majority of adult sex workers are not in violent, exploitative relationships with pimps, a mistaken belief that is reinforced by the 'prostitutes as victims' discourse, is one that is increasingly called into question by research into sex workers' accounts of their own experiences in prostitution.<sup>101</sup> It should also be noted that other sections of the Criminal Code, which are not specific to prostitution, prohibit for example sexual assault, kidnapping, assault. These could and should be used against a person who exploits or is violent towards a sex worker in lieu of these discriminatory measures.

### **Provincial level**

In this section, I will discuss a provincial measure implemented to regulate sex work.

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<sup>100</sup> Canadian HIV / AIDS legal Network; *Sex, Work, Rights: Reforming Canadian Criminal Law on prostitution*; 2005, p. 78.

<sup>101</sup> Hanger, Art; MP, et al, *The Challenge of change: A study of Canada's criminal laws prostitution laws*; Report of the Subcommittee on Solicitation Laws; Report of the Standing Committee on Justice and Human Rights; House of commons of Canada; 2006

*Safer Communities and Neighborhood Act (SCAN)*

On October 2nd, 2008, the Liberal MPP for Ottawa Centre, Yasir Naqvi, introduced the *Safer Communities and Neighborhood Act (SCAN)*, a private member's bill which aims to enable municipalities to "appoint a Director of Safer Communities and Neighborhood' that will accept anonymous allegations of unsafe or illegal activities occurring on or near specific properties". Under the law, the SCAN Director would have far-reaching powers to conduct surveillance of accused tenants and homeowners and could apply to the Superior Court in order to evict the tenant or close the targeted property for up to 90 days through a 'Community Safety Order'<sup>102</sup>. With its built-in presumption of guilt, Bill 106 will permit faster and easier evictions which, in the context of a shortage of affordable housing, would lead to more homelessness and prevent sex workers from working in an environment they deem safe. Bill 106 allows for people to make anonymous complaints against tenants and disregards their rights to fully respond to these allegations and in light of the many misconceptions about sex workers, this particular strategy could very easily lead to the over investigation of certain groups, including sex workers.

The adoption of Bill 106 (currently in committee) is in conflict with the protection of two constitutionally protected rights. First of all, according to section 11 (d) of the Charter, everyone is entitled to be presumed innocent until proven guilty, a right that is infringed by the assumption of guilt of this particular measure. Second of all, by

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<sup>102</sup> In response to the introduction of this measure, POWER (Prostitutes of Ottawa, Work Educate Resist), a social rights group by and for sex workers of the Ottawa region, has been demanding that the money budgeted for running SCAN be put towards social housing, alcohol and drug addictions programs and the development of community dispute resolution programs; initiatives which, according to them, would better address the root causes of the problems targeted by SCAN.

creating more barriers to prevent sex workers from working indoor violates sex workers' right to have their physical and psychological integrity protected which is a right protected under Section 7 of the Charter. Bill 106 would make it more likely that these women, especially the most disadvantaged ones, will end up on working on the street with all the risks it entails in regards to their health and safety. It also puts them at risk of losing their housing which would of course further marginalize them.

### **Municipal level**

In Canada, morality falls under federal jurisdiction. Nonetheless, municipalities use their provincially mandated authority (under the provincial municipal acts) to regulate, for example, planning and licensing. As a result, each city has its own array of bylaws, programs and regulatory measures to supplement or permit the enforcement of the criminal law in order to control the practice of sex work on its territory. In this section, I will discuss some of the strategies used in the city of Ottawa.

#### *The Street Crime Unit (Street Sweeps)*

In November 2007, Ottawa Police Services<sup>103</sup> announced the creation of a new nine-member Street Crime Unit that would target drug users and sex workers. Established as a pilot project, its impact was to be reevaluated in the fall of 2008: an evaluation that is still unavailable to the public while the task force is still fully operational.

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<sup>103</sup> Policing is under provincial jurisdiction but each municipal police force is autonomously managed.

By conducting these sweeps<sup>104</sup>, the Ottawa Police Service is aiming to be reducing “the harms associated with street-level prostitution which include an increase in street crime, public nuisance and safety and security concerns in affected neighborhoods”<sup>105</sup>. This street crime unit is indeed conceived as a tool used to fulfill their mandate in regards to the Criminal Code enforcement of street-level prostitution and related crimes, as well as to address the concerns of residents, associations and businesses in affected neighborhoods. With just one year for the new unit to prove the need for its own existence, the street sweeps began soon after its creation and are still, at the time of writing scheduled on an approximately monthly basis, effectively moving street based sex workers to more remote and unpopulated areas of the city.

In addition to dispersing these women and pushing them to even less inhabited areas, these sweeps also draw attention to the similarities that exist between early twentieth century reports of prostitutes being locked up in accordance with public health measures written up to protect citizens from diseases and today’s locking up of sex workers (in overwhelmingly overcrowded prisons) for the purpose of having cleaner and safer streets<sup>106</sup>.

To really grasp the philosophy behind such initiatives, one can read one of Mayor of Ottawa, Larry O’Brien’s public statement on the situation, which claims that the city is

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<sup>104</sup> The scheduling of these sweeps is said to be based on community complaints as well as on crime analysis and entail the participation of undercover police officers who target particular areas in the downtown core in order to enforce the Criminal Code offences of soliciting and communicating for the purposes of prostitution.

<sup>105</sup> [http://www.ottawaprojects.org/CPC2/johnschool.html#p7EPMc1\\_2](http://www.ottawaprojects.org/CPC2/johnschool.html#p7EPMc1_2)

<sup>106</sup> <http://www.canada.com/ottawacitizen/news/city/story.html?id=9c67999c-c8ed-4d6c-82e6-2baa73f725d3>

now a cleaner place, thanks to the street sweeps<sup>107</sup>. An even more direct connection to the necessity of managing sex workers as public health hazards is highlighted by the explanation Ottawa police Chief Vern White provided by the *Ottawa Citizen* in regards of the holding of street based sex workers in jail: "There are bigger issues involved with prostitution than just prostitution," he said. Far from recognizing that the problem with subsistence prostitution is not transactional sex but poverty, homelessness and a lack of resources and opportunities, he went on to argue that "a lot of them have either addictions or medical issues -- mental health or other."<sup>108</sup> This implies that prostitution in and of itself is not grounds for incarceration, as the women charged solely for prostitution offenses can be sent to diversion programs like '*Jane School*' which focuses on presenting exit strategies as well as lectures on HIV and HCV (Hepatitis C Virus) to women in the sex trade. He seems instead to suggest that it is when prostitution intersects with addictions or mental health issues, diversion programs are inappropriate and incarceration is required. It is important to appreciate that mental health issues are a disability, not a criminal offense and alcoholism and drug addiction are now clearly defined as disabilities under Ontario's Human Rights Code, a decision that was upheld by the Supreme Court in 2006<sup>109</sup>. That being said, this state of affairs doesn't seem to curb this rehabilitative urge which translates in supposedly curative prison sentences when it affects people in the sex industry.

The *Street Crime Unit* can be said to be violating the Charter of rights on two counts. First, Section 7 of the Charter which protects everyone's right to life, liberty and

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<sup>107</sup> <http://www.mayorlarry.ca/category/safety/>

<sup>108</sup> <http://www.canada.com/ottawacitizen/news/city/story.html?id=9c67999c-c8ed-4d6c-82e6-2baa73f725d3>

<sup>109</sup> [http://www.faslink.org/Supreme\\_Court\\_rules\\_addiction\\_is\\_disability.htm](http://www.faslink.org/Supreme_Court_rules_addiction_is_disability.htm)

security is infringed in a similar fashion as in the case of the enforcement of Section 213 of the Criminal Code. Indeed, monthly street sweeps have not suppressed street based sex work, it merely moved it from the Market area to more remote areas. They result in street based sex workers working in greater isolation which increases the risks they face in regards to their health and safety (in ways described in the section on the communication provision). Second, Section 15, which guarantees everyone's right to equality on the basis of sex, is violated as a result of the ways the street sweeps are conducted which is reminiscent of the problems encountered by the enforcement of Section 213 as well, that it is a gendered enforcement that disproportionately impact on female sex workers and their male clients.

*John Letters (see appendix one)<sup>110</sup>*

The *Community Safety Letter*, or *John Letter*, is one of Ottawa Police Service's most recent initiatives. It was implemented in 2007 to reduce unwanted traffic and sensitize sex work consumers and drug users of the impact of their activity on local communities. By undermining their anonymity, this letter aims to deter clients from visiting some target neighborhoods for solicitation. Each letter is tailored to the community where the incident occurs and is sent to the driver of any stopped vehicle who appears to be soliciting. These letters are seeking to address the community's desire for greater safety and security by reducing that particular type of traffic and resulting in a decrease in littering of the streets with needles and used condoms. The latter is premised on the police service's belief that there is a clear correlation between "street prostitution

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<sup>110</sup> [http://www.ottawapolice.ca/en/crime\\_prevention/safety-letters/pdf/Community%20safety%20letter-sample\\_Eng.pdf](http://www.ottawapolice.ca/en/crime_prevention/safety-letters/pdf/Community%20safety%20letter-sample_Eng.pdf)

and drug use, including crack cocaine, as well as a variety of health concerns including HIV and Hepatitis”<sup>111</sup>.

In order to gather support for this new program, the Ottawa police service provides a FAQ sheet that gives more information on how the implementation of this particular measure occurs as well as the reasons that prompted its creation. Looking closely at the wording used in this FAQ sheet certainly sheds light on the philosophy behind such an initiative and the problems that can potentially arise from its usage. Question number two addresses how the police identify a potential recipient of a Community Safety letter. In order to send the Community Safety Letter, a police officer has to have encountered the consumer when they were either picking up a sex worker, were found in the company of a sex worker, found continually driving around the area frequented by sex workers or routinely stopping and talking to sex workers. This speaks to an assumption of guilt in regards to the offense of solicitation, a state of affairs that can have grave consequences not only for the targeted clients but for the women working the streets as well. It indeed further reified the divide between the women and their community since one can be targeted by the police for interacting with them. For example, if a known sex worker is in need of assistance and flags down a car in order to get help, the individual responding to this need can face potentially negative consequences. In a more social setting, if a fellow community member befriends a known sex worker and stops to socialize, possibly while she is working or even when she is simply running an errand, this individual too may be sanctioned. This particular feature of the Community Safety Letter program feeds into the institutionalization of the

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<sup>111</sup> [http://www.ottawapolice.ca/en/outreach/community\\_partnerships/success\\_safety\\_letters.cfm](http://www.ottawapolice.ca/en/outreach/community_partnerships/success_safety_letters.cfm)

discourse of disposal<sup>112</sup> that is implicated in these women's experience of violence and abuse. In other words, a prostitute is a prostitute at all time, a status that overrides any other element of her identity.

Turning back to the FAQ sheet, question number three further illustrates this problematic assumption of guilt as well as it reaffirms the divide between sex workers and their community by informing the public that anyone can call in the licence plate of a suspected client. In question number eight, when responding to inquiries about their motives, the Ottawa Police Service makes it clear that their goal is to educate clients about the negative impact they have on communities 'affected' by the sex industry, sex workers here being depicted as the active agents of a phenomenon likened to a disease since by definition 'affected' means to 'attack or infect, as a disease'<sup>113</sup>. In question ten and eleven, questions are asked in regards to the awareness and approval of the community leaders. On their website, the Ottawa Police Service assures the public that, in this particular case, they are working in close collaboration with, and have the approval of, community leaders. The question that could be asked here is: exactly which leaders in the community are we talking about? It indeed seems pretty obvious that the street involved population has not been included in the crafting of strategies aiming to deal with street prostitution and street drug use. This shows a process of 'othering' this population as they are portrayed as not being a part of the community. By making street based sex workers and their customers, "others", it is easier to implement a war rhetoric directed against them as we can see in the answer to question number fifteen which is about

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<sup>112</sup> Lowman, John; *Violence and the Outlaw Status of (Street) Prostitution in Canada* in *Violence Against Women*. 6.9 (September); 2000

<sup>113</sup> <http://www.thefreedictionary.com/affected>

whether or not street prostitution is a problem in the city of Ottawa. According to the Ottawa police service, street prostitution is a ‘chronic problem’ demanding that neighborhood officers “spend time organizing and conducting John Sweeps in order to *combat* the sex trade”<sup>114</sup> and therefore “improve the quality of life of communities impacted by the sex trade”<sup>115</sup>.

In addition to this FAQ section, quotes from community organizations such as *Vanier’s B.I.A* (Business Improvement Area) are included, praising the initiative: “We applaud the Ottawa Police's new initiative to fight prostitution,” noted Suzanne Valiquet, of *Vanier B.I.A*. “We need to do more to eliminate the customer in order to help women involved in the sex trade who are often victims of drug addiction.” From a labor perspective, everybody can agree that taking one’s customer away is hardly helpful especially if, in the case of dire poverty, it is the only way to provide for oneself and/or one’s family. Moreover, sex workers are clearly perceived and depicted as victims here, needing to be saved both from their work and their drug addiction by the means of taking their resources away and criminalizing them via other avenues.

The use of *John letters* could be said to infringe sex workers’ Charter rights on three counts. Firstly, according to section 11 (d) of the Charter, everyone is entitled to be presumed innocent until proven guilty, a right that is violated in the context of the use of this measure. Secondly, section 2 (d) which guarantees everyone’s freedom of association could be said to be violated because it impedes the freedom of association of sex workers and their clients by making them a target of this measure if they do associate. Thirdly,

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<sup>114</sup> [http://www.ottawapolice.ca/en/outreach/community\\_partnerships/success\\_safety\\_letters.cfm](http://www.ottawapolice.ca/en/outreach/community_partnerships/success_safety_letters.cfm)

<sup>115</sup> *Idem*.

section 7 which guarantees everyone's right to life and safety could be thought of as being breached as it effectively prevents sex workers from working in a safe environment by isolating them from their community and making them more vulnerable to violence and abuse.

### **Beyond the state**

In this section, I take a closer look at strategies originating from the community and which involve the state 'governing at a distance'<sup>116</sup>. A spectrum of tactics aimed at regulating sex work can be connected to agencies and associations that are not state agents but that are linked to it in various ways. These relationships range from being unapologetically financed by the state and working in close collaboration with police services to being related to it via funding while not overtly administered by the state. Community based efforts to police the sex trade play a crucial role in how the regulation of sex work plays out as they intersect with, as well as complement, the actual legal framework in which it occurs.

#### *The Sex Trade Education Program (STEP) program*

In 2000, the Salvation Army, in collaboration with the Ottawa Police Service who provides resources to support the program, launched the *Sex Trade Educational Program* (STEP) which seeks to educate about the risks associated with the work as well as empower those who are considering leaving the industry. To do so, they offer information on appropriate services and resources available to women in the sex industry

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<sup>116</sup> Foucault, Michel; *Discipline and Punish* ; NY: Pantheon; 1975.

as well as presentations done by agencies such as the Aids Committee of Ottawa and the Elisabeth Fry society on topics like child care, drug treatment or HIV and HCV. Individual and group support is also offered by the Salvation Army staff who provide life skills and various other educational workshops to the participants. This program is said to be attended solely on a voluntary basis by any sex trade workers regardless of past or current criminal history, or lack thereof<sup>117</sup>. That being said, it is of interest to point out that this is a diversion program offered as an alternative to jail time to women who are being charged with prostitution related offenses. As it is a program for first time offenders, one cannot avoid prison by attending *Jane School* if charged a second time for the same offense but will sometimes be presented with the option in the case of being charged for a different one. Also, women are often pressured to attend Jane School as a condition of their probation, a state of affairs that also renders the voluntary aspect of attendance questionable.

While the STEP program does not deny sex workers' rights in a direct way, it does feed a problematic conception of sex work, namely sex workers as victims who need to be 'educated' on why they need to not engage in sex work. Not only does it deny these women any agency, it shows a lack of a structural lens in their analysis of these women's situation.

### *Together for Vanier*

*Together for Vanier* is a resident association which "envisions a community that is recognized and celebrated as a diverse, inclusive and safe place where individuals and

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<sup>117</sup> [http://www.ottawaprojects.org/CPC2/johnschool.html#p7EPMc1\\_4](http://www.ottawaprojects.org/CPC2/johnschool.html#p7EPMc1_4)

families thrive--where residents work together to maximize the inherent potential of the community and recognize Vanier's rich history"<sup>118</sup>. Their listed objectives are "to establish and operate a Community Association for the purposes of: leading the on-going development of the Association; promoting the best interests of the community; acting as a voice for the membership and the community as a whole; organizing workshops, programs, or events for the benefit of the membership and citizens of Vanier; and collaborating with other community organizations"<sup>119</sup>. The organization put together a Prostitution Committee which provides the neighborhood's residents with strategies to use in case they encounter street based sex workers: "Although it is not illegal to stand on the street, if you suspect a prostitute is working a street in your neighborhood you should still report it! Call the police at 613-236-1222 ext 7300 to report your concerns. You will not get an immediate response, but it is important to get your concerns on record. You can notify your Community Police Centre of suspicious activity such as men who might be "johns", that is men using the prostitutes, at 252 McArthur Road or by calling 613-236-1222, ext. 5823. Try calling in the licence plate if you can see it without confronting him"<sup>120</sup>

In the section on political representatives, Vanier's representatives from the three levels of government are given a chance to express their support for the association, which translated, at least for the municipal councilor, Georges Bédard, in the funding of the initiative. Provincial MPP for Ottawa-Vanier, the Honorable Madeleine Meilleur, who is also our provincial Minister of Community and Social Services, states that:

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<sup>118</sup> [http://www.togetherforvanier.com/en/togetherforvanier/resident\\_association.php#Objectives](http://www.togetherforvanier.com/en/togetherforvanier/resident_association.php#Objectives)

<sup>119</sup> Idem.

<sup>120</sup> <http://www.togetherforvanier.com/en/togetherforvanier/prostitution.php>

It is up to every single one of us to do our part to ensure that our community is a safe place to work, live and play. Together for Vanier offers an invaluable service to our community. By reporting drug abuse and prostitution, we can all work together to help beautify our community overall.<sup>121</sup>

Federal MP for Ottawa-Vanier, Honorable Mauril Belanger's discourse is similar:

It gives me great pleasure to salute *Together for Vanier*, an initiative by engaged citizens concerned about the well-being of our community. Seeking to beautify Vanier and fight prostitution and drug dealing, *Together for Vanier* provides hope for a better future for many people throughout the neighborhood.<sup>122</sup>

Again, we see sex workers presented as undesirable outsiders who are certainly not a part of the community which is to be recognized and celebrated as a diverse, inclusive and safe place where individuals and families thrive. They may live in the same geographical limits as their fellow non-sex workers and aspire to live and work in a safe environment, they are to be policed by their fellow community members who are instructed to contact the Ottawa Police Service if seen "standing on the street". Indeed, eliminating them from the specific urban landscape is considered a step towards enhancing the community members' quality of life. The method used here to control street based sex workers in order to beautify the neighborhood, which is to have the police called if an individual is suspected perhaps committing a crime, certainly infringes on section 11 (d) of the Charter which protects everyone's right to be presumed innocent until proven guilty.

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<sup>121</sup> <http://www.togetherforvanier.com/en/politics/provincial.php>

<sup>122</sup> <http://www.togetherforvanier.com/en/politics/federal.php>

*ACO's Women's outreach worker*

“The AIDS Committee of Ottawa (ACO) is funded by the Aids Bureau which is the Ontario government's ministry of health's AIDS department. It is a community-based, non-profit organization providing free, confidential services for people living with, affected by and at risk of HIV in the Ottawa area<sup>123</sup>”. Since its beginnings, ACO has worked to offer support, prevention and education services to the Ottawa community. In addition to catering to people living with HIV and AIDS, they provide services as well as outreach to groups considered to be at elevated risk for HIV transmission. The ACO women's prevention project aims to develop HIV prevention initiatives which are geared to women in the Ottawa community. As it was noted in the section on the concept of risks and vulnerability, sex workers are not a high risk group for HIV transmission, a fact that is backed by the available epidemiological data for Ontario<sup>124</sup>. However, according to the Women's outreach worker's job description, sex workers as well as injectable drugs users and women from countries where HIV is endemic, are to be targeted. Notably, only the latter two populations are actually identified as high risk groups by epidemiological data. In practice, the Women's outreach worker presents workshops at various events and programs directed at sex workers such as the Sex Trade Education Program, a diversion program for sex workers being charged with prostitution related offenses, does street outreach work in areas frequented by sex workers and offers ‘train the trainer’ workshops to other service providers on how to better serve sex workers, all for a population that is in fact not at elevated risk of HIV transmission.

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<sup>123</sup> <http://www.aco-cso.ca/whoweare.htm>

<sup>124</sup> [http://www.phs.utoronto.ca/ohemu/doc/HIV%20epi%20Ontario%202007\\_Nov212008.pdf](http://www.phs.utoronto.ca/ohemu/doc/HIV%20epi%20Ontario%202007_Nov212008.pdf)

Before moving on to the next example, it is also worthy to note and discuss the Women's outreach worker's task that consists of 'training the trainer'. The debunking of myths about sex work as well as the identifications of strategies in regards to the better provision of services to sex workers was identified as being a need since most sex workers have expressed problems in accessing sex worker friendly services in the city of Ottawa. Their inability of being provided with judgment free services or services that respond adequately to their specific needs makes it more difficult for them to receive the health and social services they are entitled to as Canadian citizens and members of their communities. This state of affairs has a great impact on their health and security a situation that plays into the systematic infringement of these individuals' rights to have those protected as it is included in the Charter.

#### *Hintonburg community association*

The *Hintonburg Community Association* is structured in a similar fashion than *Together for Vanier* and uses similar methods to control the presence of sex workers in their neighborhood. However, unlike the former which is funded by *Crime Prevention Ottawa*, this group is entirely self financed. On their website, they outline the mandate given to their security committee which actively works with local government, police and the community to ensure that what they identify as nuisances are effectively and expediently addressed:

This committee is a key part in the effort to work with police, the city, and others to keep problems like crime from destroying the free enjoyment of our neighborhoods. The primary focus of the committee is the report of crime and bylaw nuisances. (...) A representative from the Police is typically in attendance for the first half of our meeting during discussions on crime and suspicious activity. Representatives from the committee, outside of the monthly meetings, do act to inform various governments and groups of the concerns and views of the community. In this

way the committee has had a real impact in supporting things such as; the Ottawa John and STEP programs, the “Detox” center”<sup>125</sup>

In their pamphlet *Dispelling the myths*<sup>126</sup>, the *Hintonburg Community Association* spells out why street-level prostitution is a problem that has significant impact on communities across the country and throughout the world. The purpose of this project was to give a voice “to the countless innocent people in various Ottawa communities whose lives and livelihoods have been negatively affected by street-level prostitution”<sup>127</sup>, in order to counteract the idea that prostitution is a victimless crime. They do so by recounting the stories of two dozen Hintonburg residents in order to provide specific examples of how a single person or family can be affected by street prostitution. The negative impact they highlight range from divorce, to HIV scares, to children having to see therapists to the unraveling of one’s dream of owning a home. Through the personalization of these negative outcomes, the association justifies the implementation of regulatory measures that effectively violates the rights of their fellow community members who engage in sex work as well as eliminate any possible channels of communication between the two camps, a situation that could lead to the identification of common concerns. Here are some of the myths the Hintonburg Community Association aims to dismiss<sup>128</sup>:

**1.What is the harm?** The harassment of ordinary women on the street, the recruitment of neighborhood children to run drugs, the crack house next door, all these harms follow street prostitution into a community.

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<sup>125</sup> [http://hintonburg.com/SC\\_start.html](http://hintonburg.com/SC_start.html)

<sup>126</sup> <http://hintonburg.com/prostitution.pdf>

<sup>127</sup> Idem.

<sup>128</sup> Idem.

**2. It is the prostitutes' choice.** The majority of street prostitutes are heavily involved in drugs. They have a high incidence of sexually transmitted diseases, hepatitis and HIV. Working the streets is not a safe activity, but prostitutes have no choice, as they are trapped in a life in which they must make money to buy drugs or to supply a pimp.

**3. It is just an act between two consenting adults! It is no one's business. Keep out of the bedrooms of the nation!** But this act is conducted in residents' backyards, in the parks and back lanes. The condoms, syringes and drug paraphernalia that are left behind litter the street and the children's parks. It degrades the neighbourhood.

**4. It could be a tourist attraction.** Ordinary businesses suffer, as shoppers prefer to go where they won't be harassed. Consequently, businesses eventually close, and empty stores signal a neighbourhood's decline.

**5. It won't go away, legalize it!** Finding a place where prostitution will be accepted is difficult. Where will the women with sexually transmitted diseases work? In Nevada, illegal street prostitution flourishes around the legal brothels. Women who would not be eligible to work in a legitimate establishment undercut the brothel prices. Some men prefer the anonymity of the street to the visibility of a brothel. The illegal trade flourishes.

To address the harms they associate with the presence of sex workers in their neighborhood, they present an array of strategies endorsed by the *Hintonburg Community Association*: cooperating with various agencies and landlords to improve the housing stock, *Jane School*, *John School*, collecting licence plate numbers of clients, calling the police every time you see a sex worker working the street, using web sites of johns' licence plate numbers and eliminating public phone booths.<sup>129</sup> Indeed, these strategies are thought as a step towards avoiding the community's demise:

Street prostitution causes a community to lose its freedom and confidence, its residents' ability to move about their own streets. This allows the prostitutes, pimps and drug dealers, even more room to operate freely and with impunity. This can be a vicious cycle, in many cases a slow, sure death for the community, unless a strong community can retake control.<sup>130</sup>

By facilitating the implementation of discriminatory measures as well as reporting the mere presence of sex workers on their streets, whether they are in the midst of

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<sup>129</sup> <http://hintonburg.com/prostitution.pdf>

<sup>130</sup> Idem

committing a crime or not, infringes section 11 (d) of the Charter which protects everyone's right to be presumed innocent until proven guilty.

Reviewing the array of measures used in the city of Ottawa to regulate sex work hints to having had some of the problematic assumptions identified in the previous section informing the drafting of these strategies. Having established that some of them do in fact interfere with the protection of sex workers' right, the next section will focus on taking a further look at the nature of this possible relationship between what feeds the stigma sex workers face and the regulation of the industry.

## CHAPTER 4

### *Pulling the threads together: reflecting on a denial of citizenship and violence*

This research paper sought to provide an answer to the following question: “what are the strategies employed to regulate sex work and sex workers in Ottawa, Canada and what are the implications of these measures in regards to citizenship and the violence they experience?” As it was mentioned in the problematique, the policy response to sex work is increasingly acknowledged as being problematic and I wished to explore if the existing policies and regulations were consistent with the existing the established rights and responsibilities associated to Canadian citizenship and if as a result, there is a de facto denial of citizenship in said strategies. I was also interested in thinking about what implications of such a tension might have for women’s vulnerability to violence.

In chapter two, I provided theoretical insights on elements I identified as possibly having had some weight in the determining of a policy response to sex work in Canada such as the notions of crime and criminals, the concepts of risk and vulnerability in regards to the relationship between sex work and HIV transmission and the portrayal of sex workers as victims. Firstly, I touched on the rights protected by virtue of their inclusion in the *Charter of rights and freedoms* as well as on the scope of this protection which is vast since the *Constitution of Canada*, including the Charter, is the supreme law of Canada. That indeed means that the Charter applies to law enacted by Parliament and provincial legislature and also to any body that exercises authority under such laws. In principle, that entitles Canadian citizens who engage in sex work, which is legal in Canada, to the full protection of the rights included in the Charter. It was indeed found that there is no clear provision preventing sex workers from fully benefiting from this

protection. However, in the previous chapter, we saw that the laws related to prostitution in Canada, along with the provincial and municipal regulations, because of the way they are formulated and enforced do infringe on sex workers' Charter rights. Facing such a problematic state of affairs, Canadian sex workers are increasingly vocal<sup>131</sup> on the unacceptable nature of this policy response which hyper regulates them at the same time as it denies them their rights. This situation creates a grey zone in which sex workers are made to be incredibly vulnerable to violence because of these regulations which also have the added consequence of increasing the difficulty of accessing services that could help them overcome this lack of safety, while being denied protection.

Conscious of their precarious situation, a rising number of Canadian sex workers are trying to bring their plea to the Canadian Justice System in order to see it rectified. In the section covering human rights and citizenship, I included a passage of the Charter which protects everyone's right to undertake such a corrective process. Indeed, according to section 24 (1) of the Charter, anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances. While again there is no provision preventing sex workers from taking on such a course of action, multiple barriers effectively produce the same effect and therefore violate this charter right.

This brings us back to the introduction in which I recounted Sheri Kieselbach's efforts to challenge the laws related to prostitution. She is indeed well positioned to

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<sup>131</sup> In February of 2008, a new social right's group sprung to life in Ottawa, namely POWER (Prostitutes of Ottawa/Gatineau Work Educate Resist), a non-profit organization open to individuals of all genders who self-identify as former or current sex workers.

champion such a challenge, having worked in the sex industry for three decades and having had her rights infringed on a regular basis. More to the point, she has lived the consequences of such violations, being raped, assaulted, harassed, criminally charged and jailed. However, she was not granted the right to take action while, as Katrina Pacey of Pivot Legal Society argues, it is unjust to call for a currently working prostitute to take on such a legal matter when they are being subjected to criminal laws, being seriously marginalized and suffering incredible discrimination and stereotyping, all of which makes coming forward and participating in a major legal proceeding exceedingly difficult. In other words, while not explicitly preventing sex workers from seeing section 24 (1) protected, creating such barriers effectively equates to such a violation.

Comparing the information provided in the section on rights and citizenship to the actual lived situation of sex workers in Canada provides a first response to the question regarding the consequences of the regulatory measures employed to police sex work on sex workers and on the violence they experience. However, because sex workers are not excluded from accessing the Charter rights, it is of utmost importance to revisit the three other elements identified as possibly informing the policies that denies them the rights associated to citizenship. In order to define how today's perception of sex work came to be, which would allow for a further understanding of what informed the drafting of the Criminal Code provisions related to sex work, a historical review of the social and legal construction of prostitution in Canada would be necessary. Such a review is not included in this paper, however, the current and generalized resistance to address the known shortcomings of these laws and the regulations they spawn could possibly be explained

by the impact of portraying sex workers as vectors of diseases, constructing them as criminals and describing them as powerless victims.

While not rendering it illegal per se, the *Criminal Code*'s provisions related to sex work effectively and successfully criminalized many aspects of this activity. Moreover, the majority of Canadians are not even aware of the fact that prostitution is legal in their country<sup>132</sup>. This situation effectively constructs sex workers as criminals with all the negative connotations such a status carries. Being deemed a criminal entails the exclusion of the individual, relegating him or her to society's margins, a position that has very real consequences. Sex workers are still thought to be stepping out of social and occupational norms and rules and therefore, the legitimate targets of sanctions, mistreatment, stigmatization and verbal or physical assault. As it was argued in the section on crime and criminals, these two notions are both directly influenced by existing legislation which in turn influences law enforcement meaning neither are objective phenomena but products of power relations within society. The possibility of experiencing conflict with the law being inversely related to one's social standing means that by relegating sex workers to society's margins because of a generalized anxiety about sex work, a vicious circle is created: sex workers constructed as criminals are subject to control, excluded but not protected. Street based sex workers being fined for loitering, jaywalking, spitting or disturbing the peace at a ratio that is much higher than the general public further evidence such a dynamic<sup>133</sup>

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<sup>132</sup> Special Committee on Pornography and Prostitution. *Pornography and prostitution in Canada* [report]. Ottawa: Canadian Government Publishing Centre, 1985.

<sup>133</sup> <http://www.chezstella.org/stella/?q=en/constellation2009>

Because the punishment of unacceptable behaviors is not conceived as the sole responsibility of the state, civil society plays a role in the control of criminals through the exercise of complex power relations and coercion strategies. The process of constructing sex workers as criminals and then the maintenance of that construct creates and legitimizes assumptions about sex workers, assumptions which were then picked up and internalized by social actors. Civil society then fleshes out this criminal subject. *Together for Vanier* as well as the *Hintonburg Community Association's* efforts, as well as the inclusion of the community in the implementation of measures such as SCAN or the *John letters*, are great examples of such a process. The fact that the street sweeps are said to be scheduled according to complaints made by the public also shows this dynamic at work. Furthermore, in the section on crimes and criminals, it was mentioned that this culture of criminalization often translates in the over use of the law to resolve complex social issues, a situation that most often than not exacerbates problematic assumptions about marginalized groups. POWER's response to the introduction of Bill 106, which was to demand that the money budgeted for it be redirected towards social housing, treatment beds for those who suffer addiction and dispute resolution channels, speaks to the real problems at the root of the tensions in the targeted neighborhoods are not sex work per se but poverty. Sex workers become the scapegoat of very complex social issues hence their control is being seen as an easy way to rid neighborhoods of the visible manifestations of such issues, a strategy that further reifies the divide between them and their communities and increases the stigma they face.

In the case of sex work, an element of morality comes into play, which then certainly plays a role in the particular way it is policed and, though very rarely

acknowledged, in the reluctance to revisit prostitution laws. To do so would indeed necessitate addressing the moral component of these laws. The refusal to take into account the considerable evidence pointing to the harm inflicted on sex workers as well as the inefficacy of the tactics employed to control the sex trade, may be explained by this. Moral precepts that ruled North American colonial life certainly left an imprint on the crafting of the laws regulating sex work which means that, as of today, the management of sex workers is tainted by a belief that their mere existence causes social harm. To reopen this proverbial can of worms in order to reassess the necessity of criminalizing sex work when trying to obtain consensus on what or if moral issues should be addressed by the law is certain to be a long and complicated struggle. The Subcommittee on Solicitation's report certainly speaks to just how thorny such a task may be.

The presence of a moral component paralyzing the attempts to redress the harm caused to sex workers by the enforcement of the criminal laws related to prostitution certainly shines through when using the approach Herbert Packers came up with in order to determine if a behavior should be criminally sanctioned. Sex work certainly does not fit the bill at least on three counts. He first argues that the conduct must be regarded by most people as socially threatening and must not be accepted by any significant segment of the society. This condition may be met because of the portrayal of sex workers as criminals and vectors of diseases and sex work as the linchpin of women's exploitation. Also playing a role is a generalized sex negative attitude rooted in our religious past or, in other words, moral considerations. That being said, the following conditions are not met:

1. Demonstrating that the conduct can be dealt with through even handed and nondiscriminatory law enforcement;
2. Proving that controlling the conduct through the criminal process will not expose the targeted individuals to severe qualitative and quantitative strain and finally;
3. Showing that no reasonable alternative to the criminal sanction exists for dealing with the behavior.

The fact that only the first condition is met but that the behavior is still criminalized (a process that has its own set of consequences) shows the extent to which the elements feeding the stigma faced by sex workers play a role in the refusal to address what seems to be a flagrant denial of citizenship embedded in our policing of sex work.

The section on sex workers' role in the HIV epidemic debunks the myth that they are a vector of diseases. That being said, they are still portrayed and treated as such, a situation that, with the anxiety it carries, feeds the perceived need to control and criminalize them despite the fact that the measures favored to achieve such a goal impede on constitutionally protected rights. It is seen as necessary to do so in order to protect the common good.

Lastly, it is of utmost importance to understand the disproportionate weight given to the discourse that constructs sex workers as victims. This approach certainly hinders sex workers' plea to the decriminalization of their work in order to see their human rights protected. It does so because, for the individuals who perceive sex workers as victims, such a course of action would validate sex work as an option for women as well as

obscure how harmful prostitution is for all women. What could explain the limited impact Sex Radicals and their decriminalizing agenda have when it comes to seeing their view meaningfully included during the policy making process? In the chapter reviewing the literature on competing discourses on sex work, Kate Sutherland certainly provides a partial explanation when she talks about the unintelligibility of a post modern approach in legal forums as sex radicals do not share the modernist foundations of a liberal approach to the law. However, another explanation for the disproportionate weight radical feminists have had is provided by what seems to be the successful appropriation of the radical feminist discourse on the matter by a right wing criminalizing agenda. As argued by S. Laurel Weldon in her book *Protest, Policy and the Problem of Violence against Women*, three phases were identified in the fight for the end of violence against women, namely a fight for formal equality, followed by a phase of equality with a vengeance which is associated with the beginning of a backlash and finally, an appropriation phase<sup>134</sup>, a notion which in this case can be used to understand the unexpected alliance between radical feminists and conservative policy makers. It is of great interest as both forces influenced and shaped each other's discourse as their alliance was at times seen as ultimately fruitful in the attainment of their respective goals. This becomes apparent when looking at the Subcommittee on the solicitation laws' recommendation. The minority dissent voiced by the Conservative Party (hardly an ally of feminists) actually reflects a position pushed forward by the Radical Feminists. Radical feminism's advocacy efforts have also successfully blocked any sex radical efforts at prompting legal changes. For example, it is MP Libby Davis of the NDP, a fervent harm reduction

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<sup>134</sup>Weldon, S; *Protest, Policy and the Problem of violence against women*, University of Pittsburg Press, 2002.

advocate, who pushed for the *Subcommittee on the Solicitation Laws* to be formed. In the end, the human rights approach was painted as one ‘philosophy’ of sex work and a report without any concrete proposition was produced.

The battle surrounding the legal regulation of pornography as recounted in the chapter on the literature on competing discourses on sex work, provided us with a good point of entry on how these two positions first expressed their concerns and then, how it later played out when the focus shifted from pornography to prostitution. It also allowed us to take a look at the legal reforms Radical Feminists were able to push forward and facilitated the appreciation of their influence. That being said, there are not two rigid poles opposing each other and putting forward two rival sets of measures for the policing of sex work. There are lots of variations in what informs the construction of each actor’s ideal set of policies and programs. However, it becomes obvious that strategic alliances play a role in the shaping up of the measures put forward. The disproportionate influence of the radical feminist discourse when, on a grassroots level, more and more legitimacy is given to a human rights-based approach to the regulation of the sex trade in Canada, illustrates this state of affairs. That being said, while the literature on sex work is still sparse, original material, such as the one that approaches it as ‘labor’ present a new way of going about this issue, one that could challenge the existing denial of citizenship embedded in the current legislation.

Painting the portrait of the regulatory web used to police sex work as well as their consequences on sex workers’ lives clearly show the problem that is posed by their presence in societies that seem inherently opposed to the trade. Such a frame of mind

results from the intermingling of all elements exposed in the above sections. In addition to the problematic nature of what has been informing the crafting of our policies, it remains true today that the police are still the principal agents of social and legal policy in relation to prostitution, a situation which does not permit a deep and meaningful reflection on how we could deal with this particular issue in the most constructive way. Indeed, the lens through which the nature of sex work is analyzed by most parties almost always completely obscures structural elements from the equation. The economic and social structures of Canada, as well as the policies mirroring them, all representative of choices that we make as a people as well as of all the beliefs and assumptions we hold as true in regards to the nature of sex work, are responsible for the hardship, shortcomings and lack of opportunity of those who engage in the sex trade industry for the purpose of survival. Then and now, even when environmental conditions are exposed as being a factor in the impoverishment and disadvantage of certain classes of citizens, it is approached in ways that deny these particular actors any kind of agency. Indeed, some stereotypes allow the profound stigmatization of sex workers. Their institutionalized pariah status relegates them to being one-dimensional characters, ‘Prostitutes’, who, at all time, even when they are not working, deserve moral and social blame in lieu of the possibility of contributing to their own empowerment as well as it further rigidifies the divide between them and their fellow citizens.

These barriers, constructed between those in the sex trade and their community, contribute to a climate of violence and abuse. Larry O’Brien’s claim that the city is now a cleaner place, thanks to the street sweeps, helps to shed light on some of problematic assumptions guiding much of the crafting of regulatory measures about sex work. These

assumptions can have dire outcomes. Indeed, such a choice of words has immense consequences for the women working our streets. Simon Fraser University Criminology

Professor John Lowman, says:

The police, the politicians, actively created a problem they're now trying to fix (namely the escalating number of disappearing or murdered women in the sex trade). The rhetoric of the '80s and early '90s was: 'We'll get rid of the prostitutes.' I call it: The Discourse of Disposal. The idea of eliminating prostitution in Vancouver has translated tragically into really getting rid of prostitutes. We chase them from one area to another. They find themselves in dark streets in defenseless situations. There are no eyes there. But there are predators, misogynists, serial killers, men who get off on violence. They see the women's vulnerability<sup>135</sup>.

This discourse of disposal, which basically results from the intersection of all problematic elements identified throughout this paper, is still very much present in the media today as well as underlying many of the strategies adopted by police services, neighborhood associations and policy makers. Those who abuse or murder sex workers often "rationalize their violence with beliefs that sex workers are worthless human beings and deserving of punishment"<sup>136 137</sup>.

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<sup>135</sup> Lowman, John; *Violence and the Outlaw Status of (Street) Prostitution in Canada* in *Violence Against Women*. 6.9 (September); 2000; pp. 987-1011.

<sup>136</sup> Lowman, John; *Violence and the Outlaw Status of (Street) Prostitution in Canada* in *Violence Against Women*. 6.9 (September); 2000

<sup>137</sup> Gary Leon Ridgway (born February 18, 1949), known as the "Green River Killer", is an American serial killer. In November 2003 he pleaded guilty to 48 counts of aggravated murder, although he says he actually killed 90 women or more, almost all prostitutes.

<http://www.seattlepi.com/dayart/20031107/ridgwayletter.pdf>

## CONCLUSIONS

Such beliefs are deeply lethal. These convictions are rooted in the criminalizing of the individuals in the sex trade, religious beliefs, philosophical beliefs in regards to the nature of sex work and fueled by fear based health campaigns which often create a link between AIDS and other sexually transmitted diseases and sex workers. This permits the existence of the socially accepted and very common “anti prostitution rhetoric” vehiculed by ‘respectable citizens’ such as policy makers, media people and police officers. This discourse feeds and promotes an insidious climate of hate which puts these women in great danger. In the Encyclopedia of Prostitution and Sex Work edited by Melissa Hope Ditmore, John Lowman exposes in more details what constitutes “a discourse of disposal”. In Canada, he associates it with the rising of demands for ‘cleaner streets’ made by Canadian media and action groups opposed to street prostitution. Lowman found compelling evidence of a connection between the overwhelming rise in the murder rates of prostitutes and the normalization of a discourse that equates sex workers with litter, polluting the rest of the society.

“Statistics Canada estimates that between 1991 and 2004, 171 female sex workers were murdered. Simon Fraser University criminologist John Lowman has estimated that street sex workers are 60 to 112 times more likely to be victims of fatal violence than non-sex workers.”<sup>138</sup> It goes full circle: the way our society chooses to regulate the trade is directly informed by such a discourse while the discourse is legitimated by the laws

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<sup>138</sup>Lowman, John; *Violence and the Outlaw Status of (Street) Prostitution in Canada* in *Violence Against Women*. 6.9 (September); 2000; pp. 987-1011. cited in <http://www2.canada.com/ottawacitizen/views/story.html?id=3984b99a-f7f1-492c-bfa5-742379bb4ef2&k=12117>

that are its logical embodiment and which not only criminalize every aspect of the sex workers' lives but further stigmatize those who engage in the trade. This shows the very clear impact of social attitudes on these women's vulnerability as it legitimizes the violence of those who attack and kill them. This gruesome portrait leads me to conclude that our current way of regulating sex work is informed by the multiple elements feeding this discourse of disposal, the implications of such a state of affairs being the violation of sex workers' Charter rights which I liken here to a de facto denial of citizenship. It also leads me to conclude that both this denial of citizenship and being the subject of such a discourse, are crucial components in the violence sex workers experience.

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APPENDIX 1

## **OPS SAMPLE Community Safety Letter**

yyyy/mm/dd

Dear,

**RE: HINTONBURG NEIGHBOURHOOD CONCERN**

**Your Vehicle:**

**Location Stopped:**

**Date & Time Stopped:**

The Hintonburg community in conjunction with the Ottawa Police Service is committed to improving the safety and security of the communities and streets within the City of Ottawa. Numerous residents and business people have expressed their concerns regarding street prostitution in their neighbourhoods. This Community Safety Letter is our way of informing you of the important initiative underway within this neighbourhood and to seek your support.

There is a clear correlation between street prostitution and drug use, including crack cocaine, as well as a variety of health concerns including H.I.V. and Hepatitis. Community members including their children are frequently finding used needles and condoms in playgrounds and public areas. The increased pedestrian and vehicle traffic has a direct effect on the quality of life for the community and we need your help to improve this community.

In order to maximize the efforts of community leaders in securing safe streets for their families, the Ottawa Police Service kindly asks that you help the members of these communities. You can do your part by refraining from bringing your vehicle into this area unnecessarily.

The Ottawa Police Service applauds the efforts of this neighbourhood in attempting to make it a safe community for its families and children. On their behalf, we welcome your support for this important community safety initiative.

If you have any questions, you may consult the Ottawa Police website ([ottawapolice.ca](http://ottawapolice.ca), see Community Safety Letters under Crime Prevention) or you can call me directly at (613) 236-1222 extension 5234. Your cooperation in this matter is appreciated.

Yours truly,

Gilles Larochelle,  
Superintendent (Central Division)