

Analyzing *Bill C-36*: The Duality of Women's Rights in the Canadian Sex Trade

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Abstract

In 2014, *The Protections of Communities and Exploited Persons Act* was enacted in response to *Bedford v. Attorney General of Canada* which criminalized the purchasing of sexual services, and decriminalized the selling of sexual services, on the basis that women in the sex trade are victims in need of protection. The purpose of this study is to explore the context in which *Bill C-36* emerged, analyze its claims and highlight its impact on the status of women. This research began with a literature review of the three dominant models of prostitution: Prohibition, Legalization and the Nordic model, with a great focus on the work of Martha Nussbaum and Catharine MacKinnon. This literature was then used to analyze the gendered implications of prostitution laws in Canada. The research findings present an inherent contradiction in *Bill C-36*, which aims to protect the rights of all women, but simultaneously restricts the rights of female sex workers. In conclusion, it is found that *Bill C-36* is ignorant to the rights of sex workers, at the cost of protecting victims of sex trafficking. Due to the restriction of women's rights, *Bill C-36* actually perpetuates the same female subordination it claims to oppose.

December 11, 2019

Introduction

Historically, women's treatment under the Canadian Law has been controversial, but there is no more controversial topic than women's treatment with regards to sexual autonomy. I have heard various accounts of women in the sex trade, some of which were victims of sex trafficking, some who were killed during their engagement and others who felt this was their life work. Their accounts motivated this research, and manifested a desire to understand how gender and autonomy operate under Canadian prostitution laws. In 2009, the *Bedford v. Attorney General of Canada* case challenged three sections of the Canadian Constitution, on the basis that it contributed to unsafe working conditions, for legal sex work. This challenge resulted in the emergence of *Bill C-36 The Protections of Communities and Exploited Person's Act*, which is the subject of this research. *Bill C-36* is analyzed through themes of gender, patriarchy, autonomy, rights and subordination to answer the questions: How does *Bill C-36* restrict female autonomy through the criminalization of buying sex? How does this further perpetuate female subordination? This work primarily draws on the feminist perspectives of Martha Nussbaum and Catharine MacKinnon to form its findings.

Background:

Bedford v. Attorney General of Canada

Before beginning an evaluation of *Bill C-36, The Protection of Communities and Exploited Persons Act* which is the principle subject of this

paper, it is vital to understand the aims of the *Bedford v. Attorney* case, which challenged the *Canadian Constitution* and led to the emergence of *Bill C-36*. This summary will provide the context for *Bill C-36*, and will demonstrate how the aims of *Bedford* are blatantly disregarded in the government's creation of the law.

Prior to the *Bedford v. Attorney* case, prostitution was legal in Canada but surrounding laws had made almost all activities within prostitution illegal. The *Bedford* case challenge was brought forth by three women: Terri Jean Bedford, Valarie Scott and Amy Lebovitch. Terri Jean Bedford has experience as a sex worker, but at the time was working as a professional dominatrix. Similarly, Valarie Scott has experience as a sex worker in a variety of locations, but since then has become an activist supporting the rights of sex worker. Amy Lebovitch has studied Criminology and Psychology at University of Ottawa, and Social Work at Ryerson University, and was active in the sex trade at the time of this case. The three sections of the *Criminal Code*, called into question were: Section 210, prohibition on keeping or being in a "bawdy house" for purposes of prostitution, paragraph 212(1)(j) procuring and living on the avails of prostitution, and paragraph 213(1)(c) prohibition on communicating in public for the purposes of prostitution. *Bedford* argued that these laws were a violation of sex workers rights under the *Charter of Rights and Freedoms* (National Film Board of Canada, 2013). Specifically, the sections above were thought to be in violation of Section 7 of the *Canadian Charter of Rights and Freedoms*, relating to life, liberty and security of person, as well as freedom of expression.

Laws such as these, resulted in unsafe work conditions, stigmatization and treatment of those in the sex trade as criminals. *Bedford* argued that because sex

work is legal the law is obligated to assist them in making sex work as safe as possible. Section 210 perpetuated dangerous conditions by making it illegal for sex work to occur inside, forcing all women to work in the streets. The procurement law (paragraph 212(1)(j)) made it illegal to live off the avails of prostitution, which was intended to target pimps; however the law was too broad and as a result made it illegal for sex workers to legitimately higher security, secretaries or for their family to benefit from their income. Lastly, the prohibition of communication in public for the purposes of prostitution (paragraph 213(1)(c)) made it difficult for women to screen their clients before meeting with them, in turn, putting them at risk. "In the words of Justice MacPherson, this created, "an almost perfect storm of danger for prostitutes" (Ontario Women's Justice Network, 2015, p.4).

In 2010, the Ontario Superior Court of Justice found the three laws to be a violation of sex workers constitutional rights and decided they should be struck down. This was appealed to a higher court in March 2012, when the government found Section 212 and paragraph 212(1)(j) to be unconstitutional. The government decided that the bawdy house law should be struck down, the living off the avails law should be changed to only apply in situations of exploitation and deemed the communicating law to be constitutional. On June 13, 2013 the *Bedford* case went to the Supreme Court of Canada. On December 20, 2013, the Supreme Court released their decision in agreement with the Ontario Superior Court, that all three laws were unconstitutional as they violated Section 7 of the *Charter of Rights and Freedoms*. The Supreme court rejected the governments argument that sex workers engage in sex work by choice and positioned that

some enter sex work by choice, while others enter by circumstance, but ultimately all parties are worthy of legal protections (Ontario Women's Justice Network, 2015). This was a positive decision for sex work advocates; however, it caused an uproar for some women's groups, particularly those who support abolition. The Supreme Court gave the government one year to respond.

Emergence of *Bill C-36*

Bill C-36 was created as the government's response to the findings of the *Bedford v. Attorney General of Canada* case. The bill was Introduced June 4 2014, received royal assent on November 6 2014 and came into force December 6 2014 (Department of Justice, 2017). Overall the bill presents a shift away from treating prostitution as a community nuisance and toward the treatment of prostitution as a form of sexual exploitation which primarily negatively impacts women. The main objectives of the bill are summarised as follows:

- The majority of prostitutes are women and girls, with a disproportionate number being marginalized women
- Entry into prostitution is influenced by one's economic position, relating to poverty, youth, level of education, and childhood sexual and non-sexual abuse.
- Prostitution is dangerous, causing both physically and psychological harms
- Prostitution reinforces gender inequalities; in that it normalizes the treatment of women and girls as commodities who can be bought and sold

- Prostitution negatively impacts the communities in which it takes place through related criminality, human trafficking, drug related crime etc.
- Third parties capitalize off of the exploitation of women by facilitating the prostitution of others

(Department of Justice, 2017)

Overall, the *Bill C-36* criminalizes the purchasing of sexual services, but decriminalizes the sale of sexual services on the basis that prostitutes (predominately women) are “victims” (Department of Justice, 2017, p.3) in need of legal protections, while buyers of sexual services (predominantly men) are guilty of sexual exploitation and domination. The bill does not condone prostitution and in-fact is largely focussed on persuading women to leave the sex trade, and to diminish the demand for sexual services, under the assumption that availability of sexual services raises the demand for sexual services.

It is vital to this paper, to understand the context in which *Bill C-36* emerged and to acknowledge that its abolitionist aims greatly reflect the initial laws, which were challenged by *Bedford* and deemed unconstitutional by the Supreme Court of Canada. Terri Jean Bedford, Valarie Scott and Amy Lebovitch challenged the laws initially, on the basis that they restricted sex workers access to security of person and freedom of expression. Although the sections of the *Criminal Code* that were in question have been struck down, the government of Canada has resorted to further regulating the sex trade, with little regard for the position of Bedford, Lebovitch and Scott. This research intends to examine the

relationship between *Bill C-36* and women's position in society, particularly female sex workers.

Limitations

I have identified two main limitations of this study and for the purposes of reflexivity, it is important that they are articulated here. Firstly, this research is heavily derived from white Western women, and therefore may be subject to my own bias, or the bias of Nussbaum and MacKinnon, who provide the theoretical basis for this work. Although my work is focused on Canadian legislation, I rely on international literature (ex. from the US and New Zealand), therefore it is important to note that my literature review disregards the many non-English speaking academics that have spoken on this topic, and have made valuable contributions to the field. It is vital to acknowledge that conclusions made regarding the sex trade, may not be applicable cross culturally, because sex work is highly dependent on the context in which it takes place, and women's rights vary greatly across borders.

Secondly, due to the complex legal aspects of my research, I am identifying problems that at this point, I am unable to solve. The research has benefited me in that I have gained an understanding of the types of questions, which need to be articulated for future work in constitutional or critical legal theory – for example competing rights. From this I know the intellectual space where these questions can be addresses, and under the correct legal contexts. In this respect, this research acts as a stepping stone for more in-depth analysis to be conducted in the future.

Authority

While writing this I pondered why I even have an authority to speak on this topic, considering the push for feminist research to derive from within its population. I am a white privileged woman, who has never interacted with the sex trade personally, which is why I must support my work with evidence from women who are engaged with the sex trade, such as Amy Lebovitch and the teen female victim of Renee Allison Webber – who was coerced and manipulated into the sex trade. Alternately, as a woman living in Canada, among laws such as *Bill C-36*, I do have a right to speak on this topic. This bill limits my ability to choose what I can and cannot do with my own body and on that basis my voice is valid.

Findings

Critique #1: Sex Work Versus Sex Trafficking

My first critique of *Bill C-36*, is its broad definitions which lump-together the multiple experiences of women in the sex trade. This is harmful because each party experiences the sex trade uniquely, and therefore has independent expectations of the law. The prohibition of both positions upholds rights to security of person, by criminalizing coercive sexual practices experienced by some women, while simultaneously restricting the rights and autonomy of other women.

Bill C-36, broadly defines prostitution as “the exchange of sexual services for payment” (p.3) and states “This new offence makes prostitution itself an illegal practice; every time prostitution takes place, regardless of venue, an offence is

committed” (Department of Justice, 2017, p.3). This definition is problematic because it conflates experiences of victimhood with the experiences of autonomous women in the sex trade, or potentially does not acknowledge that there are autonomous women in the sex trade. The bill criminalizes the purchasing of sexual services and states “To determine whether a particular act constitutes a “sexual service for consideration” or “prostitution”, the court will consider whether the service is sexual in nature and whether the purpose of providing the service is to sexually gratify the person who receives it” (Department of Justice, 2017, p.3). Although the government claims to restrict the purchasing of sexual services on the basis that it victimizes the prostitute, this statement reflects the government’s aims to restrict and regulate sexual gratification, with no consideration for how the delivering of sexual services is internalized by the prostitute. Purchasing sexual gratification from another party is illegal, regardless whether harm is caused to the providing party, and despite any potential reciprocal gratification.

Here I hope to make a distinction between sex work, and trafficking. The Canadian Public Health Association (2014) makes the following assertion “Sex work refers to the consensual exchange of sexual services between adults for money or goods. The trade involves female, male or transgender individuals, and can be undertaken in a variety of venues, such as working as escorts, from private homes, in strip clubs, in brothels, and seeking clients in public locations” (p.3). They then divide sex work into two categories: consensual and exploitive and assert that it is very important we distinguish between sex work and sex

trafficking. "It is, however, becoming more difficult to differentiate between consensual and exploitative sex work, as many sex workers find themselves forced into the trade due to the effects of social determinants or structural violence* or as a means of survival" (Canadian Public Health Association, 2014, p.3). Firstly, an attempt to categorize sex work as consensual or exploitive, violates their own definition of sex work as a "consensual exchange" (Canadian Public Health Association, 2014, p.3), assuming that exploitive sex work is non-consensual in their perspective. I deny the notion that we must separate consensual sex work from exploitative sex work, which implies that one cannot consent to their own exploitation, on the basis that sex work is work, and under capitalism all labour is exploitive (this will be discussed further in relation to Marx). Going forward I will utilize the definition of Sex Work as provided by the Canadian Public Health Association, but I stress that in order for a transaction to be deemed sex work it must be consensual, and is not dependent on exploitation, therefore no further categorizing is necessary.

Alternately, the United Nations *Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime* (implemented in November 2000) utilizes the following definition:

Trafficking in persons "shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or

of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs; (United Nations Office on Drugs and Crime, 2004, p.42).

This definition differs in its approach because it highlights three elements that constitute human trafficking in persons: the act, the means, the purpose (United Nations Office on Drugs and Crime, 2019). Examples of the 'act' include recruitment, harbouring or transportation of persons. The 'means', refers to threat, use of forces, coercion, abduction, deception etc. and the 'purpose', "includes exploiting the prostitution of others, sexual exploitation, forced labour, slavery or similar practices and the removal of organs" (United Nations Office on Drugs and Crime, 2019, p.2). The definition of trafficking is dependent on the presence of all three elements, which assists us in separating victims of sex trafficking, from those who choose to work in the sex trade. Given that one cannot consent under conditions of coercion, deception, fraud etc. non consensual sex work is not sex work at all, it is sex trafficking. *Bill C-36* draws a distinct link between exploitation and victimhood, and refuses to acknowledge the divide between exploitation (which is present in most labour under capitalism) from force, deception, coercion etc. as it is outlined by the *UN Protocol*.

The distinction made by the *UN Protocol* is important given that sex work is paid work, and paid work (for the proletarians) under capitalism is always exploitive, it cannot be deemed sex trafficking without the elements of force, coercion, abduction, fraud, deception, abuse of power etc. Definitions such as this, could be empowering in that they provide protections to victims of sex trafficking, without disregarding the rights and autonomy of sex workers such as Terri Jean Bedford, Valarie Scott and Amy Lebovitch. Blanket definitions, such as the definition of prostitution as provided by *Bill C-36*, fail to acknowledge the diverse experiences presented by women in the sex trade. This paper in no way denies the experiences of coercion and violence reported by many, but on the contrary recognizes that the experiences of the sex trade are intersectional and diverse in their affect.

A woman who autonomously and consensually chooses to engage in sex work is stigmatized by this law because it situates her as a victim, and formally discourages her practice of providing sexual gratification. Sex workers who experience misconduct, are unlikely to report violence because law enforcement is not required to support her decision to work in the sex trade. Additionally, when sex work is criminalized in any form, the interaction must be done secretly in order to conceal the identity of the buyer. Overall, when a sex worker is highly stigmatized and has no legal protections, she is more vulnerable to violence and manipulation by clients and third parties.

Stepping Stone

Stepping Stone is a not-for-profit organization in the Canadian Maritimes which supports sex workers (the consenting adult) and those at risk

of being sex trafficked, and operates using the harm reduction model. Stepping Stone (2018) supports making a distinction between sex work and prostitution, and employs the following definition: "Trafficked persons, unlike sex workers, enter/ed the sex trade through coercion, force, manipulation or threats. When sex work and sex trafficking are conflated, or lumped together as one, it causes serious harm. By denigrating sex workers, we are also denigrating the ones engaged in sex work unwillingly" (Stepping Stone, 2018, p.1). In order to assist both sex workers and those who have been human trafficked, Stepping Stone (2018) suggests that we separate those who were forced into that trade, from the consenting adults, who are willingly engaged in sex work. Plett (2014) concurs and states "To conflate sex work and trafficking is both lazy and dangerous. Proponents of this idea rarely provide evidence that legalizing sex work actually increases trafficking. In New Zealand, where they have implemented decriminalization, that hasn't happened" (p. 2). These two perspectives were included to support the need for more clear distinctions in the law. Treating the conditions of sex trafficking and sex work as synonymous is harmful to women's autonomy and reflects how the abolitionist position is taken in the creation of *Bill C-36*.

Throughout my literature review, it became evident that there are conflicting definitions regarding sex work, sex trafficking and prostitution, both internationally and nationally. This is problematic in that we cannot protect, enforce, research or remedy something, which we cannot define. The Canadian Public Health Association (2014) is in agreement that unclear definitions result in ineffective anti-trafficking efforts and policing efforts

focused on shutting down brothels and arresting sex workers, rather than targeting the more elusive traffickers.

In conclusion, by denoting both sex work and sex trafficking we are encouraging the further regulation of autonomous female bodies. Those who have experienced coercion, force, manipulation and overall harm by means of sex trafficking, certainly deserve our support as allies and protection by the legislation. That being said, we must acknowledge that by lumping together women who autonomously choose sex work and those who are victims of sex trafficking, and then discouraging all forms of paid sexual services, we are not protecting victims and we are simultaneously restricting the bodily rights of women in sex work. I cannot support the restriction of women's autonomy and bodily control at the cost of other women's victimization, especially when criminalizing the buyers of sex, has not stopped sex work or its demand, it has simply made it more unsafe. For *Bill C-36* the focus has always been on 'saving' women from the sex trade, rather than acknowledging and supporting the rights of sex workers.

Critique #2: Sex Work and Capitalism

My second critique is *Bill C-36*'s evaluation of exploitation and denial of sex work as legitimate work. *Bill C-36* relies on the notion that prostitution is exploitive and always a result of constrained opportunities, which is a common position in the abolitionist perspective. *Bill C-36* heavily discourages prostitution with no recognition of sex work as legitimized work and persists that women in prostitution are exploited as

sexual commodities. Firstly, I will point out the presence of this notion within the legislation, and then analyze it through a capitalistic framework. Then, I will discuss the work of Nussbaum, which explores sex work in comparison to other forms of legitimized labour and refer to the "Prostitution Reform Act" (Parliamentary Counsel Office, 2018, p.1), which serves as an example of the legalization model by legally treating sex work as work.

It is stated that "Bill C-36 reflects a significant paradigm shift away from the treatment of prostitution as "nuisance", as found by the Supreme Court of Canada in *Bedford*, toward treatment of prostitution as a form of sexual exploitation that disproportionately and negatively impacts on women and girls"(Department of Justice, 2017, p.2). Additionally, the legislation posits "Entry into prostitution and remaining in it are both influenced by a variety of socio-economic factors, such as poverty, youth, lack of education, child sexual abuse and other forms of child abuse, and drug addition" (Department of Justice, 2017, p.2).Both of these excerpts were selected because they demonstrate the government's position that prostitution is exploitive and a result of limited socioeconomic opportunities. My rebuttal to this is that under capitalism all work is exploitive (although there are varying degrees of exploitation) and chosen as a result of the socioeconomic opportunities available to the subject. Our opportunities are limited by our educational credentials, the class in which we belong, our age, level of experience, and ultimately our physical and mental capacity to participate in an opportunity. A person with little work

experience, no high school diploma and piling bills, may have work in the low-paid sector as a cashier, not because they desire that work, but because that work is within their socioeconomic reach. With regards to sexual abuse in childhood, Stepping Stone (2018) says that 1/3 women will be sexually assaulted in their life time (p.1), which means that in fact some sex workers have been victims of sexual assault during childhood, however this does not apply to all sex workers. "The majority of sexual assault victims do not work in the sex industry" (Stepping Stone, 2018, p.1).

Bill C-36 asks us to refer to Section 279.04(1) of the *Criminal Code* for the definition of "exploitation" as used in this legislation. The definition reads "a person exploits another person if they cause them to provide, or offer to provide, labour or a service by engaging in conduct that, in all the circumstances, could reasonably be expected to cause the other person to believe that their safety or the safety of a person known to them would be threatened if they failed to provide, or offer to provide, the labour or service" (Justice Laws Website, 2019, p.1).

Marx evaluation of exploitation under capitalism, demonstrates how the bourgeoisie (production owners) can pay the worker very little, maximize production and profit greatly. Additionally, Marx says that capitalism alienates the worker from the product, from the means of production, from their species being and from themselves (Dillon, 2014). The prostitute, in legitimized circumstances, could actually fare better (in multiple aspects), than those in widely accepted working class roles,

making prostitution a more desirable occupation. When a prostitute is in control of her own business, she has many choices in when she will work, which clients she will accept, where she will work and how much she will charge. Unlike the cashier, the prostitute is fully engaged with the entire process, she can work creatively and build/maintain relationships. The prostitute could be considered a "petty bourgeoisie" (Dillon, 2014, p.144) in the sense that she owns the service and is in control of the surplus value. One may rebuttal that reformulating the social conditions that prevent women from achieving equality may reduce the effects of economic disparity, but Marx points out how even the highly educated/skilled (ex. professional athletes) are subject to the exploitation of the bourgeoisie, just on a larger scale. Marx would argue that under the framework of capitalism there is no free-will, never mind a discussion of free-will in prostitution.

It must be made clear, that I am not attempting to justify or romanticise one's engagement with prostitution, for its financial benefits. It would be far too capitalistic to associate one's quality of being and value with their financial capabilities, especially if other aspects of their work were harmful. The point of this section is to demonstrate that exploitation is present in all labour under capitalism, and that while there may be some financial benefits to entering the sex trade (or any job), there is space to argue that legitimizing sex work has the potential for better working conditions (relating to control and relationship to production), than some other legitimized positions.

To conclude the discussion on exploitation, I will clarify that I do not deny the existence of exploitation or socioeconomic constraint in prostitution, I am simply pointing out that a critique of exploitation (as defined in the *Criminal Code*), is a critique of the capitalist framework in which we operate. While it is valid to point out the harms of exploitation, we cannot justify the prohibition of sex work on the basis of exploitation, because exploitation is unavoidable under capitalism.

Martha Nussbaum

Martha Nussbaum is a philosopher and Distinguished Service Professor of Law and Ethics at the University of Chicago. She was born in America in 1947, during the first wave of feminism. Nussbaum (1999) takes a philosophical approach when studying the prohibition and stigmatization of sex work in "*Whether from reason, or from prejudice?*": *Taking Money for Bodily Services*. In this Nussbaum addresses prostitution by woman of the age of consent, usually in great economic distress.

Nussbaum (1999) supports Liberalism for its protection of the sphere of choice, and identifies three elements of Liberalism which relate to this discussion on prostitution. Firstly, Liberalism is in opposition to any approach to politics that turns "morally irrelevant differences into systematic sources of social hierarchy" (Nussbaum, 1999, p.57). This would entail opposition to that naturalizing of hierarchy, which is present in caste systems, feudal systems, and most relevant for this topic, gender hierarchy. Secondly, Liberalism is opposed to corporatist political

organization, meaning that it does not support the good of the group as a whole, if that disregards the well being or agency of individual group members. Lastly, Nussbaum (1999) says Liberalism is opposed to ideologically based politics because of the restriction on individual conscience (ex. religious intolerances).

Nussbaum (1999) would argue that prostitution is alike any other form of labour by comparing prostitution to the following occupations: the factory worker, the domestic servant, a night club singer, a professor of philosophy, a skilled masseuse, and a theoretical position called "the colonoscopy artist" (p.281). The factory worker is subjected to the same health risks and limited economic opportunities as the prostitute, although the prostitute may have better hours of operation and improved working conditions. Nussbaum (1999) admits that the prostitute is more likely to encounter violence in the work place, but says that legalisation would allow for the implementation of safety measures. The factory worker does not address the gendered components of prostitution and therefore is not an all-encompassing comparison. Next, the prostitute is compared with the domestic servant, due to the lack of respect in the workplace and limited mobility in careers. The domestic servant may experience similar gendered components in her position, but will receive less pay and exercise less autonomy over her work. Both of these occupations are under a great deal of social stigma. Nussbaum (1999) compares the prostitute and the night club singer, on the basis that both use their bodies to provide pleasure, may have compromised work conditions and must

respond to the requests of customers. Nussbaum acknowledges that the nightclub singer is not subjected to health risks or bodily invasion. Her comparison between prostitution and the philosophy professor demonstrated an occupation that requires an invasion of intimate thoughts and feelings, but a professor has much better pay and work conditions. The prostitute and the masseuse are most closely related in that they both provide services using their bodies, to deliver bodily satisfaction. The masseuse must be responsive to the requests of the client and utilize intimate bodily contact. The main difference between the masseuse and the prostitute is respectability according to Nussbaum (1999), but this is due to legitimization of their work and asserting their position among medical practitioners. Lastly, is the theoretical role of the colonoscopy artist, who essentially allows medical training to be practiced on her, including the internal probing required for this medical procedure. This occupation was included because it mimics the same bodily invasion required in prostitution. Nussbaum (1999) realizes that we may prohibit or regulate this type of work due to its health risk, but we would not prohibit it for its moral violation or attribute this type of work with “fallen women” (p.285).

Nussbaum (1999) has demonstrated that there is no notable difference between sex work and any other industry. The take-away from Nussbaum's work is that our concerns for bodily invasion, health risks and economic constraint are present in other bodily labour, but under prostitution there is a great deal of stigmatization, which is a barrier to its

legitimization. This perspective does not deny the complex elements of prostitution, but explores how these elements compare with already legitimized labour.

The Prostitution Reform Act

The Prostitution Reform Act (2003) of New Zealand has been recognized as a prevailing model of the legalization of prostitution. "Over 90 percent of sex workers believed the PRA gave them employment, legal and health and safety rights. A substantial 64 percent found it easier to refuse clients. Significantly, 57 percent said police attitudes to sex workers changed for the better" (Crichton, 2015, p.4). The purpose of the act is "to decriminalize prostitution (while not endorsing or morally sanctioning prostitution or its use)" (Parliamentary Counsel Office, 2018, p.3). Outlined below are its main component:

- (a) safeguards the human rights of sex workers and protects them from exploitation
- (b) promotes the welfare and occupational health and safety of sex workers
- (c) is conducive to public health
- (d) prohibits the use in prostitution of persons under 18 years of age
- (e) implements certain other reforms (Parliamentary Counsel Office, 2018, p.3)

This act includes clauses such as: refusal to provide commercial sexual services, refusal to work as a sex worker does not effect entitlements, clauses protecting those under 18 years of age, powers to enter and inspect compliance with health and safety requirements, and clauses regarding the proper certification of a business providing sexual services.

This act legalizes prostitution, recognizes the autonomy of women in

prostitution and most importantly explicitly provides rights and protections to sex workers under law. This legislation situates the state as an ally of women in sex work. With regards to *Bill C-36*, it is not enough to claim the law is in the best interest of women if it does not legitimize women's sexual choice.

To conclude my second critique, it is important to recognize that although one could argue that prostitution is exploitive, to prohibit it on this basis, undermines the exploitation present in all other forms of labour. A counter argument may be that prostitution is not alike other forms of labour, but Nussbaum has argued otherwise. Grounds to differentiate prostitution from other legitimized forms of labour derive from prejudice positions, which undermines their validity. The Prostitution Reform Act, represents an alternative legislation that upholds female autonomy while simultaneously providing legal protections for victims of sex trafficking, but the goal is never to increase institutional powers over women's body.

Critique #3: Patriarchy and Subordination

My third and final critique of *Bill C-36*, with regards to this research, pertains to its evaluation of prostitution as it exists within patriarchy, and as a perpetrator of male domination. There are abolitionist arguments present in the legislation, which persist that the buying and selling of sexual services upholds patriarchy and female subordination, on the basis that women's bodies are thought of as commodities which can be bought and sold on the market. I will

utilize the work of Nussbaum and MacKinnon, and evidence from the Prostitution Reform Act to explore this topic.

Prostitution reinforces gender inequalities in society at large by normalizing the treatment of primarily women's bodies as commodities to be bought and sold. In this regard, prostitution harms everyone in society by sending the message that sexual acts can be bought by those with money and power. Prostitution allows men, who are primarily the purchasers of sexual services, paid access to female bodies, thereby demeaning and degrading the human dignity of all women and girls by entrenching a clearly gendered practice in Canadian society (Department of Justice, 2017, p.2).

I have examined prostitution's likeness to all other forms of labour; however, prostitution is approached differently due to the sexual aspects, and its position within gender hierarchy. Nussbaum (1999) argues that prostitution:

is shaped by the perception that female sexuality is dangerous and needs careful regulation; that male sexuality is rapacious and needs a "safe" outlet; that sex is dirty and degrading, and that only a degraded woman is an appropriate sexual object (p.294).

Traditionally men have control over female sexuality (ex. abortion laws and women's reproductive rights), but prostitution violates this male control and as a result has been highly stigmatized. Prostitution is not the single outlet of shaping and reinforcing the gender hierarchy, when we consider institutions such as marriage. On the other hand, to criminalize the tradition of marriage, based on its entwinement with the gender hierarchy would be deemed excessive. Alternately, there has been a great push to legitimize prostitution, which Nussbaum (1999) agrees would result in dignity and control over women's engagement in the sex trade, and gradually alter the perceptions of sex workers and their subordination. The only way in which this gender

subordination is going to be dismantled in this instance, is by giving women control over their bodies legally and socially.

Tim Barnett is a former MP and the general secretary of the Labour Party in New Zealand who opposes the Swedish model (criminalization of buying sex, and decriminalization of selling sex) after enacting The Prostitution Reform Act (2003). Barnett sees the continued campaign for the Swedish model as misguided, as the criminalisation of sex workers increases their vulnerability by reinforcing the perception that they are somehow victims.

Some of the people who are sellers are personally really vulnerable, but it is the law that can protect them. It is the law and their legal status that can uphold their rights", he said. "[Their] lack of humanity is reinforced by bad law. [In these cases,] the state is actually helping the objectification, the state is helping the oppression". Barnett opposes demand-focused legislation as he believes its only effect is to drive workers underground. (Chrichton, 2015, p.5)

Ultimately, criminalizing the purchasing of sex and formally discouraging prostitution has done nothing but legitimize the stigmatization of prostitution. The social meanings attached to prostitution must be altered in order for treatment of women in prostitution to improve. Nussbaum does not deny that prostitution has been shaped by male domination, however the perceptions society has of female sexuality uphold the female subordination present in prostitution, therefore the conditions can only improve when societies perceptions are altered.

Sex hierarchy is the source of stigmatization in all female roles, that are a reflection of patriarchy. Nurses and secretaries are displays of overwhelmingly female occupations and reflect patriarchy; in that they play a

supportive role to their male counterparts. For example, a nurse plays the role of the caretaker and tends to all of the needs of the patient, until the male doctor arrives. The doctor is superior to the nurse in terms of pay, respect and authority. The ideal secretary is a well dressed, friendly woman who mediates the needs of the clients, while upholding the needs of the executive. She is expected to serve the executive, but is paid minimally and receives minimal respect. It is important to note that the secretary and the nurse are often over sexualized roles, when in reality their jobs are not the least bit sexual. My intention in pointing out the patriarchy present in other female dominated roles, is to demonstrate that regardless of women's occupation, her role in society is subordinate to that of men. Female subordination is reality for women in ever-day life, regardless of their interaction with the sex trade, therefore abolishing sex on the basis of its interaction with the gender hierarchy would undermine the legitimization of other female dominated labour.

Catharine MacKinnon

Catharine MacKinnon is a well recognized radical feminist and legal scholar. She is a tenured law professor at the University of Michigan Law School and a visiting professor of Law at Harvard Law School. Her focus is in Women's Rights in the areas of sexual harassment, rape, prostitution, sex trafficking and pornography. She was born in America in 1946, during the first wave of feminism. Stemming from her radical feminist perspective is her abolitionist position on prostitution and her anti-porn movement, both of which will be discussed here.

For MacKinnon, equality under the law has been defined through male standards. This entails that any woman who is the same to a man, is equal based on male standards, while women who are not alike men are unequal. For example, girls in Canada are provided the same legal rights to public education as boys, on the basis that girls and boys both have educational needs. Alternately, women have had to fight for their reproductive control, access to abortions and access to maternity leave because men and women differ in their roles in reproduction. MacKinnon rejects Liberalism on the basis of its individualism and reliance on sameness and difference. Instead MacKinnon advocates for feminist collectivism, which claims to always have women's best interest in mind and treat each woman as all women. For MacKinnon, unity among women also includes diversity.

Andrea Dworkin and MacKinnon created the *Antipornography Civil Rights Ordinance* in America, which proposed to treat pornography as a violation of women's civil rights and to allow women who have been harmed by pornography to seek lawsuits. Their goal was to expose the sexual subordination in pornography, which is one extension of prostitution. MacKinnon insisted that a civil law would empower women by providing them the opportunity to report harms by the porn industry, and to seek legal redress. This is vital to her approach in that a constitutional law would enhance state regulation, and state interpretation of harms. The *Dworkin-MacKinnon Antipornography Civil Rights Ordinance* refers to several ordinances associated with anti-pornography feminism, on the basis that pornography is harmful to women. The law stated "sexual subordination of women through pictures and words, this sexual traffic in

women, violates women's civil rights" (MacKinnon, 2005, p.264). The law was opposed by Feminist Anti-Censorship Task Force (FACT) on the basis that women need freedom and a socially recognized space to appropriate what has been a traditionally male language (MacKinnon, 2005). The FACT brief meant equal access to pornography for women who felt porn was erotic, liberating or educational (MacKinnon, 2005, p.266). MacKinnon (2005) responded by saying "In other words, an entire population of women must continue to be treated in the ways the ordinance makes actionable so that this other population of women can experience eroticism, liberation, or education at their expense" (p.266). The main hindering of this law for the American Supreme Court, was that it was a violation of the First Amendment, which protects freedom of speech. For MacKinnon this implied that protection of freedom of speech was prioritized over the protection of women, and she persisted that porn is an action not a speech. In her view, when we position porn as a speech, we treat abusive actions as opinions or ideas.

While the law may not have been successful in America, the Canadian Supreme Court adopted some of MacKinnon's approaches to equality and pornography in the *R. v. Butler* case. The main difference between the legal framework in Canada and America is that the rights laid out in the *Charter of Rights and Freedoms* (including freedom of speech) are unbounded and therefore have reasonable limits (Bennett, 1997). Additionally, Section 7 of the *Charter of Rights and Freedoms*, pertaining to, 'the right to Life, Liberty and Security of Persons' is explicitly inclusive of both men and women. These rulings formed the basis for Canada's Supreme Court ruling against pornography.

Indeed, the Justices made it very clear that the suppression of free speech or expression was not the ultimate goal in maintaining the legislation as it stood. The prevention of harm to women, it concluded, was crucial to the maintenance of a free and democratic society where every individual has equal access to the law's protection: "if true equality between male and female persons is to be achieved, we cannot ignore the threat to equality resulting from exposure to audiences of certain types of violent and degrading material. (Butler) (Bennett, 1997, p.225).

While this was thrilling for MacKinnon, Bennett (1997) discusses two fundamental issues present with Canada's application of this law, which need to be addressed. Firstly, in Canada the *R. v. Butler* case was a constitutional ruling, not a civil one, therefore it does not empower victims, and it allows the institutions to further regulate at their own discretion. Secondly, the laws which *Butler* enforces against pornography are obscenity laws, which MacKinnon rejects "as a standard based on an unjust and unrealistic male-oriented morality" (Bennett, 1997, p.226). Although she deems obscenity laws to be counter-productive, it is the only avenue in which her ideas have been implemented on this topic.

I have chosen to discuss this case for its similarity to the dilemma of prostitution in Canada, regarding the prioritizing of rights. The legislation in Canada currently restricts the autonomy of sex workers at the cost of victimization to prostitutes alike how the American Supreme Court, in MacKinnon's perspective, prioritized the right to freedom of speech over the protection of women. I commend MacKinnon for attempting to implement this law civilly, as it avoids state control and state discretion. More importantly for me, it would allow women to participate in pornography if they so choose, while simultaneously providing a legal avenue for women who have been harmed in

the production of pornography; However, in Canada it persists as a means of control and regulation over sexuality.

One of many of Catharine MacKinnon's reasons for rejecting Liberalism is her opposition to the sameness/difference model that she claims is reflected in Liberalism. This entails that equality requires similarity, but sex requires difference. Under Liberal ideology women are entitled to rights because they're the same as men, and therefore deserving of the same protections. The courts adopted Aristotle's axiom, which meant that equality entailed treating like things alike, and unlike things unlike. MacKinnon (1991) points out how the American constitution's requirement of "similarly suited" (p.1286) also reflects this axiom. She argues that this is damaging in that, it evaluates women's eligibility for equal treatment on the basis that she is the same as the white heterosexual man, rather than on the basis of her humanity. "Why should anyone have to be like white men to get what they have, given that white men do not have to be like anyone except each other to have it?" (MacKinnon, 1991, p.1287). In addition, laws which provide special protections for women are not solving the core issues of gender in law and rather than creating laws specific to the protection of the oppressed female. An example of a law which provides special protection is *Bill C-36* because it positions women as victims in need of protections. In MacKinnon's evaluation of sameness/difference, prostitutes should not require special protections against rape and abuse in prostitution because the right for a female to not be raped should be enacted and enforced as a human right.

Laws providing *special protections* were brought forth during the women's movement, which called to the end of legal classification on the basis of sex, but MacKinnon persists that the content of equality in the laws has not been contested. In MacKinnon's view rather than using white men as a measure of women's 'fit-ness' for equality, laws should be genderless and objective.

There are other fundamental differences between the abolitionist perspective and the legalization model, which are worth mentioning. MacKinnon's (2005) belief is that women's security in society is already insecure, and only made more insecure by the institution in which women are "bought and sold" (p.151). The abolitionist view asserts that women in prostitution are bought and sold (similarly to slaves) while my own position perceives the interaction as buying and selling of sexual services, therefore denying self-alienation. MacKinnon disagrees with Nussbaum's evaluation of prostitution in relation to other legitimized labour. MacKinnon (2005) equates prostitution with slavery by saying "picking cotton, is not just picking cotton. That slavery is a lot of work does not make it just a job" (p.160). Additionally, MacKinnon equates prostitution with a loss of liberty, while I view prostitution as loss of liberty for some, and liberating for others, depending on their conditions and lived experiences. MacKinnon argues that decriminalization of selling sex will stop the state from reinforcing women's subordination, but that the status of women will remain the same. Most of the points made by abolitionists, can be remedied over time by legalization of prostitution and the implementation of labour rights. These contrasting arguments demonstrate the fundamental differences between the abolitionist and those in favour of

legalization.

In conclusion, it is obvious that the sex trade exists within the framework of patriarchy, but I would argue that women's lived experiences in most fields are a reflection of patriarchy. The best way to liberate women against male domination, is to give women legal control over their own bodies. MacKinnon's approach to pornography mirrors the same dilemma I discuss with regards to prostitution, but has failed to put the power in the hands of the victims, and in-turn has further empowered the state. Laws which provide special protections to women are simply addressing women in their oppression, rather than dismantling the patriarchy which oppresses her.

Conclusion:

Contradictions in *Bill C-36*

It is vital to recognize that when *Bill C-36* refers to prostitution, they are addressing women who feel as though they are victims, as well as the women who autonomously choose sex work. The experiences of these women vary greatly based on their control over the interaction, the amount of money they receive and the conditions in which they work. One instance of victimization was brought forth in Renee Allison Webber's sentencing hearing, in which her victim presented a victim impact statement outlining the trauma and manipulation she was exposed to, when sex trafficked by Webber at the age of 16 (Bruce, 2018). Webber was found guilty on five counts relating to trafficking, advertising and receiving material benefits (Bruce, 2018). Women who feel victimized by the sex trade are entitled to legal protections, so that they can report their abuse and

ultimately never become involved with the sex trade against their will. In the case of Webber's victim, *Bill C-36* was successfully used as a remedy for the victimization of a teenage girl, who experienced trauma related to her coerced engagement in the sex trade. It is important to note that although justice was brought forth for the victim, the victim should never have been victimized in the first place. This is one example of how *Bill C-36* failed to protect women, especially children, from entering the sex trade and experiencing abuse.

Alternately, Bedford, Lebovitch and Scott represent the experiences of women in sex work who participate consensually, but are seeking legal protections in order to conduct their work safely. These women challenged the laws against the constitution, in an effort to create safer working conditions for themselves, and their colleagues. Despite their efforts the government responded with *Bill C-36*, which is in complete violation of Bedford's aims, and criminalizes almost every aspect of sex work. The buying of sex was not prohibited on the basis that the law would protect women from victimization by third parties.

While claiming to protect women and children from the harms of prostitution, *Bill C-36* has simultaneously harmed sex workers by restricting their autonomy and not recognizing them as participating in legitimate labour. This restriction on women's bodily choice, perpetuates the same subordination on sex workers that it claims to combat for prostitutes, which I have identified as an intrinsic contradiction present in *Bill C-36*. Protecting the liberty of women involves actually listening to the lived experiences of women and adhering to their rights. By restricting the autonomy of the sex worker, the legislation has further subordinated women, by determining that they are incapable of making their own

bodily choices or being involved in the legal proceedings which govern them directly. This is evident because Bedford, Lebovitch and Scott's rights for protection while engaging in legal sex work, were completely disregarded by the government. The legislation goes further to aim to abolish prostitution and encourage women to leave prostitution. Regardless if someone is a victim of the sex trade or a sex worker, leaving the sex trade is not realistic or feasible for most women, particularly Indigenous women and those with limited economic opportunities.

The motivation for this research was to determine how *Bill C-36* restricts female autonomy through the criminalization of buying sex and how this furthers the subordination of women. In conclusion, this research has found that *Bill C-36* restricts autonomy of female sex workers by not explicitly identifying their experiences of the sex trade, and conflating sex trafficking and sex work as synonymous. The bill has attempted to deny the autonomy of women in sex work, (particularly Terri Jean Bedford, Valerie Scott and Amy Lebovitch) by claiming that women in sex work are victims. The devastating irony of the emergence of *Bill C-36*, is that when women attempted to influence the laws which govern them, the government believed that they had a better understanding of the position of prostitutes, than prostitutes themselves. Despite the bill's evaluation of exploitation as a basis for prohibition, this research finds that the exploitation in sex work is notably similar to the exploitation found in all other forms of legitimized labour, thus undermining the government's basis. Although prostitution is accused of normalizing the subordination of women, women's

position as subordinate to the superior male is present in all female roles, and many traditional institutions. The bill actually furthers the subordination of women by claiming power over their bodily choices and sexual autonomy. Lastly, *Bill C-36* claims to have introduced the Nordic model out of a need to protect the rights of women, however fails to acknowledge that prioritizing the rights of some women, at the cost of other women is counterproductive and harmful to women's liberation.

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