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Ontario Disempowers Prostituted Persons: Assessing Evidence, Arguments, & Substantive Equality in Bedford v. Canada

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Abstract

To date, living "on the avails of prostitution of another person" has been illegal in entire Canada. That law was challenged in the Court of Appeal for Ontario in 2012, whom essentially found that it prevented prostituted persons to benefit from third parties such as brothel management, escort agencies, bodyguards, or drivers—all whom where perceived as able to enhance the safety and well-being of prostituted persons. Hence, the provision was rewritten by the court, stating that it "applies only to those" who live on the avails "'in circumstances of exploitation.'" This paper assesses evidence and arguments relied on by courts in Ontario, finding that evidence did not support their decision. In practice the rewrite makes prostituted people, a group which is already subject to intersectional and multiple disadvantages, even more vulnerable to exploitation and abuse. Accordingly, the rewrite is found to violate previous Supreme Court case law as well as it contravenes the Charter's section 15's substantive equality guarantee, which compels a different decision. By upholding the existing criminalization of purchasers and third parties where they apply, and invalidating the criminalization of prostituted people—persons whom should rather be entitled to social support if the wish to leave prostitution, and rights to damages from purchasers and pimps for having violated their equality and dignity—Canada would, consistent with the Charter, promote equality and facilitate for prostituted persons to leave prostitution, which the overwhelming majority say they want. A similar law is already working in Sweden, and has reduced prostitution many times compared to neighboring countries.

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* Any translations are the author's, if not stated otherwise.

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Introduction

To date, living "on the avails of prostitution of another person"[1] has been illegal in Canada. Simply put, pimps and traffickers, or other third parties, are legally prohibited from making a living off the backs of prostituted people. This law was challenged most recently in the Court of Appeal for Ontario, which essentially found that the provision prevented those who are prostituted to benefit from third parties such as brothel management, escort agencies, bodyguards, or drivers—all whom where thought of as being able to enhance the safety and well-being of prostituted persons. Hence, the Court of Appeal rewrote the avails provision in *Bedford v. Canada* (2012) to state that "the prohibition on living on the avails of prostitution applies only to those who do so 'in circumstances of exploitation.'"[2] This paper assesses the evidence and arguments relied on by the courts. It finds that the evidence did not support their decision and that the rewrite, in violation of established case law and the Charter's equality guarantees, makes prostituted people more vulnerable to exploitation. Subsequently, the paper suggests a different decision that would promote equality, and facilitate for prostituted persons to leave prostitution, if they so wish.

Part I surveys the research and evidence on prostitution, showing that prostitution itself is typically a form of gross exploitation of inequality, where people with less power are sold for

[1] *Criminal Code*, R.S.C. 1985, c. C-46, s. 212(1)(j) (holding that every one who "lives wholly or in part on the avails of prostitution of another person, is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years.").

[2] *Bedford v. Canada (A.G.)*, 2012 ONCA 186, 109 O.R. (3d) 1 ¶ 327.

money to people with more power under circumstances that are coercive. It finds that no substantial evidence suggests that third parties who are involved in prostitution are not generally there for financial gains, thus will not take advantage of the inequality and vulnerability of those who are prostituted to increase their share.

Part II addresses how particularly the court of first instance, the Ontario Superior Court, misrepresented several social science studies and also failed to observe crucial flaws therein, which made it possible for them to uncritically cite these studies in support of the assumption that there are benign actors in the sex industry that would facilitate the safety and well-being of prostituted persons if the law was rewritten, which the research did not support. Following the judgment in the first instance, the Court of Appeal relied on the inadequate review of evidence from below, deciding not to make an assessment de novo. Hence, this part concludes that the Court of Appeal erroneously found the living on the avails provision overbroad and "out of all proportion"[3] in relation to its admittedly legitimate objective "to prevent pimps from exploiting prostitutes and from profiting from the prostitution of others."[4]

In Part III, the paper emphasizes how the empirical evidence suggests that the new legal distinction of "circumstances of exploitation" will only benefit those few prostituted people who are least in need of support, if at all, while disempowering the majority by making them more vulnerable to exploitation by pimps and madams, which contravenes their safety and well-being. Moreover, this part highlights that the assumptions underlying the distinction ignore and contravene what was long recognized in case law; namely, that in real life the legal system will not be able to efficiently apply a distinction between exploitative and non-exploitative prostitution. Accordingly, the rewrite effectively provides more protection to pimps, who may now intimidate witnesses (i.e., prostituted people) in order that they do not reveal exploitation or other harmful conditions—a position manifestly in discord with prior holdings of the Supreme Court of Canada.[5]

Part IV contends that because the courts now have made the majority of prostituted persons, who are all vulnerable to exploitation, even more exposed to it, the *Bedford* decision amplifies the vulnerability of a group that already suffers multiple disadvantages in society. The move under *Bedford* is contrary to the imperatives of promoting equality under the *Charter* recognized by the Supreme Court since long. A law with the objective to ameliorate the conditions of the disadvantaged, which prostituted persons typically are, is impregnated under section 15(2) from constitutional challenge even if the law creates legal distinctions based on the disadvantaged groups, and even if it does not apply similarly to other groups. Section 15 thus compels Canadian courts to reformulate the prostitution laws so they *promote equality*. Such an approach, it is argued, necessitates a criminalization of purchasers and pimps, and a decriminalization of prostituted people whom would rather be entitled to social support for exiting prostitution (if they want to), and a concomitant right to damages from purchasers and pimps for having violated their equality and dignity.

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[3] *Ibid.*, ¶ 254.

[4] *Ibid.*, ¶ 239.

[5] *R. v. Downey*, [1992] 2 S.C.R. 10 at 35-39, CarswellAlta 56 [*Downey* cited to S.C.R.] (holding that, in light of the harms generally caused by pimps, and without evidence to the contrary, whenever someone extracted a share of the earnings from another person's prostitution, a presumption could substitute for direct proof of a parasitical relationship that the person was living on the avails of prostitution).

I. Inequality, Exploitation, Harm, & Trauma in Prostitution

Coercive Circumstances as Preconditions to Entry

The evidence on prostitution below shows that it is often characterized by extreme inequalities, which is one reason why it may be said to be intrinsically exploitative. This fact is evident already when looking at why people usually enter prostitution: Compelling evidence from a broad range of countries show how the majority of prostituted persons were sexually abused as children.[6] Those who were abused as children habitually report that sexual abuse affected their entry into prostitution.[7] Moreover, many have been runaways,[8] and many have entered prostitution during their adolescence.[9] Child abuse and neglect affect spirits and life chances negatively; consequently, without education, job training, and resources to survive, they are easy prey for being sexually exploited by pimps and johns.[10] Furthermore,

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[6] *See, e.g.*, Melissa Farley et al., "Prostitution and Trafficking in Nine Countries: An Update on Violence and Posttraumatic Stress Disorder," in Melissa Farley ed., *Prostitution, Trafficking, and Traumatic Stress* (New York: Haworth, 2003) 33 at 43, online: Prostitution Research & Education <http://www.prostitutionresearch.com/pdf/Prostitutionin9Countries.pdf>. Farley and her co-authors found that 59%, or 448 responding prostituted persons, affirmed that she or he "[a]s a child, was hit or beaten by caregiver until injured or bruised." *Ibid.* An additional 63%, or 508 respondents, affirmed they were "sexually abused as a child." *Ibid. See also* Mimi H. Silbert & Ayala M. Pines, "Entrance into Prostitution" (1982) 13 Youth & Soc'y 471 at 479 (finding 60% of 200 prostituted subjects reported childhood sexual abuse from ages three to sixteen). In-depth studies of survivors show higher frequencies of abuse. *See, e.g.*, Evelina Giobbe, "Confronting the Liberal Lies About Prostitution" in Alison M. Jaggar ed., *Living With Contradictions* (Boulder, CO: Westview Press, 1994) 120 at 123 (referring to organization WISPER's survivor interviews in Minneapolis, where 90% reported assault and 74% sexual abuse between three to fourteen years of age); Susan Kay Hunter, "Prostitution Is Cruelty and Abuse to Women and Children" (1993) 1 Mich. J. Gender & L. 91 at 98–99 (finding 85% of 123 prostitution survivors reported child incest, 90% physical abuse, and 98% emotional abuse). Likewise, the Mary Magdalene Project in Reseda, California, reported in 1985 that 80% of the prostituted women it worked with were sexually abused during childhood, and Genesis House in Chicago reported the same for 94%. Giobbe, *supra*, at 126 n.10 (citing The First National Workshop for Those Working with Female Prostitutes, Wayzata, Minnesota, Oct. 16–18, 1985); *see also* Ines Vanwesenbeeck, *Prostitutes' Well-being and Risk* (Amsterdam, Neth.: VU Uitgeverij Univ. Press, 1994) at 21–24 (summarizing studies on abuse and prostitution); Chris Bagley & Loretta Young, "Juvenile Prostitution and Child Sexual Abuse: A Controlled Study" (1987) 6 Canadian J. Community Mental Health 5 (finding 73% of the study's prostituted persons were subjected to child sexual abuse); Jennifer James & Jane Meyerding, "Early Sexual Experience as a Factor in Prostitution" (1977) 7 Archives Sexual Behavior 31 at 35–37.

[7] *See, e.g.*, Mimi H. Silbert & Ayala M. Pines, "Sexual Child Abuse as an Antecedent to Prostitution" (1981) 5 Child Abuse & Neglect 407 at 410 (finding among 200 San Francisco prostituted juvenile and adult women that 70% of those sexually abused as children explicitly reported that sexual abuse affected their entry into prostitution, while a greater number strongly indicated so in open-ended responses); Ronald L. Simons & Les B. Whitbeck, "Sexual Abuse as Precursor to Prostitution and Victimization Among Adolescent and Adult Homeless Women" (1991) 12 J. Fam. Issues 361 at 361 (finding, in a sample of forty adolescent runaways and ninety-five adult homeless women in Des Moines, Iowa, that "early sexual abuse increases the probability of involvement in prostitution irrespective of . . . [other] factors").

[8] *See, e.g.*, Farley et al., "Nine Countries," *supra* note 6, at 43 (reporting 75% of 761 prostituted persons in nine countries had been homeless, either currently or in the past); Silbert & Pines, "Entrance into Prostitution," *supra* note 6, at 485 (reporting over half of 200 juvenile and adult, current and former, prostituted women in San Francisco were runaways when entering prostitution; over two-thirds of the current prostituted women were runaways, and 96% of prostituted juveniles were runaways).

[9] For instance, 47% of 751 prostituted persons in nine countries reported entering prostitution under age eighteen, Farley et al., "Nine Countries," *supra* note 6, at 40, and among a sample of 200 adult and juvenile, current and former prostituted women in San Francisco, 62% reported starting before age 16, and "a number" reported starting "under 9, 10, 11, and 12." Silbert & Pines, "Child Abuse as Antecedent," *supra* note 7, at 410.

[10] Not surprisingly, Silbert & Pines's sample of 200 juvenile and adult prostituted women reportedly had an "almost total lack of positive social supports, and . . . an extremely negative self-concept and a depressed emotional state" when entering prostitution. Silbert & Pines, "Entrance Into Prostitution," *supra* note 6, at 486.

social discrimination in the form of sexism and racism is linked to prostitution (e.g., First Nations women are highly overrepresented in Canadian prostitution).[11]

Some commentators have attempted to suggest that abusive and destitute preconditions is a less common cause for entering prostitution among those who are prostituted indoors—e.g., prostitution in brothels, escort agencies, strip, and pornography settings, as distinguished from "street" prostitution.[12] However, poor and unreliable data have been invoked by scholars who are suggesting such distinctions, which should caution the reader.[13] Moreover, studies show that probably the majority are prostituted *both* indoors and outdoors.[14] Together

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The "primary picture" was thus one of vulnerable runaway juveniles being "solicited for prostitution" and exploited by pimps "because they have no other means of support due to their young age, lack of education, and lack of the necessary street sense to survive alone." *Ibid.*, at 488-89.

[11] *See, e.g.*, Melissa Farley, Jacqueline Lynne & Ann J. Cotton, "Prostitution in Vancouver: Violence and the Colonization of First Nations Women" (2005) 42 Transcultural Psychiatry 242 at 242 (finding 52% of 100 prostituted women of First Nations descent, 1.7–7% of Vancouver's population); Special Committee on Pornography and Prostitution in Canada, *Report of the Special Committee on Pornography and Prostitution* (Ottawa: Minister of Supply and Services Canada, 1985) at 347 (1985) ("On the prairies . . . most of the prostitutes are young native women"); *see also* Aboriginal Women's Action Network, AWAN, "Address to the People's Tribunal on Commercial Sexual Exploitation (Mar. 18–20, 2011), *para.* 6, http://www.facebook.com/notes/aboriginal-womens-action-network/aboriginalwomens-action-network-address-to-the-peoples-tribunal-on-commercials/10150161363946691 (last visited May 22, 2012) (stating that Aboriginal women's overrepresentation in prostitution in Vancouver "is not simply a coincidence"); *cf.* Vednita Nelson, "Prostitution: Where Racism and Sexism Intersect" (1993) 1 Mich. J. Gender & L. 81 at 83 (1993) ("Racism makes Black women and girls especially vulnerable to sexual exploitation and keeps them trapped in the sex industry.").

[12] Accordingly, in an article by a proponent of this view one may read that "[c]hildhood abuse (neglect, violence, incest) is part of the biography of some prostitutes, though it is more common among street workers." Ronald Weitzer, "Sociology of Sex Work" (2009) 35 Annual Review of Sociology 213 at 219.

[13] The first of the two studies that Weitzer's claims, *supra* note 12, were based upon is from Australia, and did not survey any women in street prostitution—only "call girls," with women in brothels as a "control group." *See* Roberta Perkins and Frances Lovejoy, *Call Girls: Private Sex Workers in Australia* (Crawley: Univ. W. Aust. Press, 2007) at 10. Furthermore, only 95 responded to the survey out of 244 women who responded to telephone calls, and half of the total calls were left unanswered. *Ibid*., at 7 & 161. That is an unusually high drop-out rate, but it receives no attrition analysis. Moreover, virtually no information at all regarding drop-out rates or other sampling problems is provided regarding the brothel "control group." *Ibid*., at 10 & 161. Altogether there appears thus to be a serious sampling bias at work, making results incomparable to studies including street prostitution. Weitzer then also cites a Bristol sample of 71 prostituted women in massage parlors compared to an equal number on the streets. N. Jeal and C. Salisbury, "Health Needs and Service Use of Parlour-Based Prostitutes Compared with Street-Based Prostitutes: A Cross-Sectional Survey" (2007) 114 BJOG: An International Journal of Obstetrics & Gynaecology 875. Many other survey studies usually employ persons as interviewers who either are, or have been prostituted. Otherwise, it has been found very difficult to establish the trust that enables prostituted persons to reveal sensitive information without risking disbelief or prejudice, such as being stigmatized for not leaving prostitution. *See, e.g.*, Jody Raphael & Deborah L. Shapiro, "Reply to Weitzer" (2005) 11 Violence Against Women 965 at 967; Silbert & Pines, "Child Abuse as Antecedent," *supra* note 7, at 408; *cf.* Statens Offentliga Utredningar [SOU] 1995:15 Könshandeln: Betänkande av 1993 års Prostitutionsutredning [government report series] at 144 (Swed.) (acknowledging the need for "long time and close contact with prostituted women in order to acquire knowledge of their real situation"). The Bristol authors did not use this method. However, they raised concerns that "[t]he small sample size for each group may mean that important differences have not reached significance." *Ibid*., at 879. Just as with the study cited from Australia, such information was not passed on to Weitzer's readers.

[14] In the words of an experienced researcher team in 1990, who had studied 1022 prostituted women in Colorado Springs, "the same woman may work [sic] in different settings, simultaneously or sequentially. Rigid stratification of prostitutes into 'high-class' or lower categories is not meaningful, either socially or ecologically." John J. Potterat et al., "Estimating the Prevalence and Career Longevity of Prostitute Women" (1990) 27:2 Journal of Sex Research 233 at 234. Not surprisingly, several more recent studies suggest that roughly a majority of prostituted persons drift between indoor and outdoor venues. Melissa Farley, *Prostitution and Trafficking in Nevada: Making the Connections*, Melissa Farley ed. (San Francisco: Prostitution Research

with additional evidence (more below), such findings make it unlikely that preconditions correlate with venue apart from in a few cases. For instance, study of 854 people whom were prostituted in nine countries, Canada included, found that regardless of whether the respondents were solicited indoors or on the streets, in developing or industrialized countries, in legal or criminal prostitution, two-thirds of them nonetheless met clinical criteria for post-traumatic stress disorder (PTSD) equal to or higher than the levels of symptoms found in treatment-seeking Vietnam veterans, battered women seeking shelter, or refugees fleeing from state-organized torture.[15] The similar levels of PTSD across different venues hence corroborate that it is unlikely that a population primarily prostituted indoors would typically come from less desperate or unequal preconditions; if less desperate, they would presumably have more alternatives to prostitution, thus be in a better position to ascertain their interests, and avoid harmful situations that cause PTSD. Generally, this does not either seem to be the case, which becomes even more evident in light of the fact that 89% among the 854 prostituted persons wanted to escape prostitution, but felt they could not.[16]

Harmful Consequences from Prostitution

The exploitation that follows in prostitution often appears to entail a ruined psychic and social development for the prostituted persons,[17] which is also why it is exceptionally difficult for prostituted people to escape and be reintegrated into society on equal terms. Without other acceptable means for income, severe economic hardships also force people to stay in prostitution (this seems to be common across such socioeconomically diverse nations as Canada, South Africa, and the United States).[18] Thus, prostituted persons frequently get

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and Education, 2007) at 29 (*n* = 45); Jody Raphael & Debora L. Shapiro, "Violence in Indoor and Outdoor Prostitution Venues" (2004) 10 Violence Against Women 126 at 131 (*n* = 222); Melissa Farley, "'Bad for the Body, Bad for the Heart': Prostitution Harm Women Even if Legalized or Decriminalized" (2004) 10 Violence Against Women 1087 at 1099; (citing New Zealand study, *n* = 46); Lisa A. Kramer, "Emotional experiences of performing prostitution," in *Prostitution and Traumatic Stress*, *supra* note 6, at 191 (*n* = 119); Ulla-Carin Hedin & Sven-Axel Månsson, *Vägen ut! Om kvinnors uppbrott ur prostitutionen [The way out! On Women's Break-Up from Prostitution]* (Stockholm: Carlsson Bokförlag.Hedin & Månsson, 1998) at 28 (*n* = 23).

[15] Farley et al., "Nine Countries," *supra* note 6, at 44-48. For information on sampling procedures, *see ibid.* at 37–39.

[16] Farley et al., "Nine Countries," *supra* note 6, at 51, 56.

[17] *See, e.g.,* Judith Lewis Herman, "Introduction: Hidden in Plain Sight; Clinical Observations on Prostitution," in *Prostitution and Traumatic Stress*, *supra* note 6, at 11.

[18] Special Committee on Pornography and Prostitution in Canada, *supra* note 11, at 376-77 (finding that "[o]verwhelmingly, prostitutes cite economic causes as the reason they are on the streets. . . . Whatever the individual motivation, prostitution is a means of making a living."); Chandré Gould, *Selling Sex in Cape Town: Sex Work and Human Trafficking in a South African City*, in collaboration with Nicole Fick (Pretoria: Institute for Security Studies, 2008) at 115, online: ISS (Africa) <http://www.iss.co.za/pgcontent.php?UID=3797> (finding, through a survey, "that the majority of sex workers . . . enter the industry as a result of 'financial need'," and defining financial need as "those who said they entered the industry to meet pressing financial obligations or to meet basic needs—they went into sex work for survival."); Silbert & Pines, "Entrance Into Prostitution," *supra* note 6, at 486 (finding among 200 adult and juvenile prostituted women in San Francisco that the "predominant reason given for" initial involvement was money and "basic financial survival," and that the overwhelming majority "felt they had no other options"); *cf.* Attorney General's Commission on Pornography, *Final Report*, 2 vols. (Washington, DC: U.S. Dept. of Justice, 1986) at 888, online: Community Defense Counsel <http://www.communitydefense.org/lawlibrary/agreport.html> (finding it was "generally true of commercial pornography's use of performers: (1) that they are normally young, previously abused, and *financially strapped*") (emphasis added); *see also ibid.,* at 859 n.983 (noting that personal backgrounds among pornography performers were similar with those in other forms of prostitution, who had been studied by other researchers).

stuck in coercive and harmful circumstances of prostitution which they cannot leave. Such facts may also explain why, when physical violence was reported differently in some venues, the PTSD symptoms were nonetheless in the same range across all.[19] Simply put, prostitution in itself is usually intrinsically harmful. In contrast to the doubts expressed by the Ontario court of first instance which suggested that PTSD "could be caused by events unrelated to prostitution,"[20] such as sexual abuse prior to entering, a Korean study in 2009 found that prostitution was strongly related to PTSD even when controlling for childhood abuse.[21]

Numerous bureaucratic or other barriers contribute to keep persons in prostitution. For instance, in Nevada where prostitution is legal in some counties, women shelters do not admit women with children, pets, HIV, communicable diseases, or criminal records, women who have not been drug-free for a specified time, or women recently released from prison.[22] Similarly in Sweden in the early 1990s, a government inquiry reported that although prostituted women with mental disorders were frequently encountered by outreach workers, it was "very difficult to get these women taken care of. This holds especially if the women are drug abusers. Neither the psychiatric care, nor drug addiction programs, seems then to want to take responsibility for them."[23] Even a 45 year old woman, who claimed she was in a better position than other prostituted people by being able to choose her customers carefully, told the government inquiry that most of all she wanted to end prostitution but could not.[24] She explained further: "I cannot enter schools, courses, or work-places. I have no papers and I cannot account for what I have done during all these years."[25]

Decriminalizing Third Parties, and its Effects on Safety & Well-Being

Regarding evidence of the effects of legalizing third parties in prostitution, in the state of Victoria, Australia, prostituted women for instance reported that legalization led to increasing competition and demands that women perform unsafe or high-risk practices and accept unwanted purchasers.[26] In New Zealand, a government committee in 2008 reported that the "majority" of prostituted persons as well as brothel operators felt that the Prostitution Reform Act of 2003, which legalized some forms of prostitution, could do little about violence against women in prostitution.[27] In 2008 Amsterdam's Mayor told the *New York Times* that

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[19] *See* Farley, "'Bad for the Body,'" *supra* note 14, at 1100 (commenting findings were violence differed, but not the PTSD symptoms).

[20] *Bedford v. Canada (A.G.)*, 2010 ONSC 4264, [2010] O.J. No. 4057 ¶ 353, 327 D.L.R. (4th) 52.

[21] Hyunjung Choi et al., "Posttraumatic Stress Disorder (PTSD) and Disorders of Extreme Stress (DESNOS) Symptoms Following Prostitution and Childhood Abuse" (2009) 15 Violence Against Women 933 at 942.

[22] Jody Williams, "Barriers to Services for Women Escaping Nevada Prostitution and Trafficking," *in Prostitution in Nevada*, *supra* note 14, at 159. In effect, these and other similarly exclusionary policies create insurmountable barriers to escape for many prostituted women. *See ibid.*, at 159-72.

[23] SOU 1995:15 Könshandeln, *supra* note 13, at 109 (Swed.).

[24] *Ibid.*, at 75.

[25] *Ibid.*

[26] Mary Sullivan, *What Happens When Prostitution Becomes Work? An Update on Legalisation of Prostitution in Australia* (N. Amherst, MA: Coalition Against Trafficking in Women International, 2005) at 7, online: CATW International <http://action.web.ca/home/catw/attach/Sullivan_proof_01.pdf>.

[27] *Report of the Prostitution Law Review Committee on the Operation of the Prostitution Reform Act 2003* (Wellington, NZ: Ministry of Justice, 2008) at 14, 57, online: Ministry of Justice <http://www.justice.govt.nz/policy/commercial-property-and-regulatory/prostitution/prostitution-law-review-committee/publications/plrc-report/documents/report.pdf>.

legalization did not result in more transparency or protection to women, but rather the opposite: "'We realize that this hasn't worked, that trafficking in women continues,' he said. 'Women are now moved around more, making police work more difficult.'"[28] Similarly, a German federal government report in 2007 found that the reforms which legalized certain forms of indoor prostitution in general have "not been able to make actual, measurable improvements to prostitutes' social protection," nor to their "working conditions."[29]

Contrary to what was accepted by the Court of Appeal, the effects of decriminalizing certain forms of prostitution have not been documented to make the situation better in prostitution. In Nevada, numerous testimonies tell about unsafe sex demanded by purchasers as well as pimps, and during 3 years of research interviews there Melissa Farley received a number of accounts in which women were fired from legal brothels upon receiving a positive HIV test while the pimps who ran the brothels, and their assistants, appeared uninterested in the women's lives or their health.[30] Farley's accounts are corroborated by other survivors who have testified that legal brothels "strictly" forbade them to use condoms, unless requested by the purchaser, as "it took maximum pleasure away from the paying customer."[31] Similarly, others have testified that brutal beatings and rape occurred regularly in Nevada, and were covered up by management as long as the perpetrating purchaser paid the "house."[32] Moreover, 57% of Farley's sample of 45 women in legal brothels in Nevada told interviewers, despite fears of being secretly recorded and punished, that they gave part of or all their earnings to someone other than the legal brothel's pimp, and half of all women in the sample believed that at a minimum, 50% of women in those brothels were controlled by external pimps.[33]

According to the above, public inquiries and research from Nevada, Germany, New Zealand, the Netherlands, and Australia, where prostitution is legal at certain places, corroborate that decriminalization typically do not improve or control health, safety, or the purchasers and pimps' demand for unsafe and dangerous sex. This is to be expected since prostitution is intrinsically unequal and exploitative, and the purchasers' money drives the business—not the needs of prostituted persons. Making third parties legal in prostitution simply provide them with more legitimacy.

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[28] Marlise Simons, "Amsterdam Tries Upscale Fix for Red-Light District Crime" *New York Times* (February 24, 2008) at A10.

[29] *Report by the German Federal Government on the Impact of the Act Regulating the Legal Situation of Prostitutes* (Berlin: Federal Ministry for Family Affairs, Senior Citizens, Women and Youth, 2007) at 79, online: Bundesministerium für Familie, Senioren, Frauen und Jugend <http://www.bmfsfj.de/BMFSFJ/Service/Publikationen/publikationsliste,did=100352.html>.

[30] Farley, *Prostitution in Nevada*, *supra* note 14, at 18, 21, 39-45.

[31] Jayme Ryan, "Legalized Prostitution: For Whose Benefit?" (July 1989) *Sojourner: The Women's Forum* 22 at 23.

[32] Anastasia Volkonsky, "Legalizing the 'Profession' Would Sanction the Abuse" *Insight on the News* (27 February, 1995), online: Find Articles <http://findarticles.com/p/articles/mi_m1571/is_n9_v11/ai_16709484/?tag=content;col1>; *cf.* Ryan, *supra* note 31, at 22 (stating that there "were many different occasions where a woman was brutally beaten or raped by a john, but as long as he paid the house, it was kept quiet"); Farley, *Prostitution in Nevada*, *supra* note 14, at 29-30 (interviewing former brothel manager whom stated that "only a small percentage of brothel violence is reported" and that prostituted women diminish assaults because they have become "accustomed" to violence).

[33] Farley, *Prostitution in Nevada*, *supra* note 14, at 31-32.

II. The Courts Misrepresented Evidence in their Files

The Court of Appeal for Ontario never made their own review of social science evidence, choosing instead to rely on the court of first instance's findings. There, in Ontario Superior Court of Justice, only five submitted studies were cited in full. These five studies were said to be the most relevant ones in shedding light on whether violence towards prostituted persons could be reduced.[34] We will look into each five of them below, as well as discuss some of the expert opinions cited by the two *Bedford* courts.

"Maid-System" in London, U.K., Does Not Improve Safety or Well-Being

One of the articles cited by the courts concerned the role of "maids" in legal prostitution, and was built on a study of women who were prostituted legally indoors in flats located in central London, United Kingdom.[35] (The Superior Court erroneously summarized this study as if it had compared street prostitution with prostitution indoors,[36] in spite of the fact that already the journal abstract informs the reader that the study only looks at prostitution in flats.[37]) Among many interesting findings overlooked by the Superior Court in its brief summary, the authors had noted that although the "ideal function" of maids centres on their protection and company to prostituted women (the "maids" were *supposed* to do various legitimate managerial tasks), "observational evidence suggests that *in reality* there is much variation from this ideal working pattern and in prostitute-maid relationships, which affect prostitute women's safety. It also remains the case that, during the commercial sexual encounter itself, a woman in a flat is still on her own."[38]

The authors further provided examples of violent situations that had had to be mitigated directly by the prostituted women, concluding that the "role" which the maid could "play in containing actual situation of violence" was "minimal."[39] By contrast, when the courts summarized the study they only emphasized how maids could make the prostitution safer (more below), despite that this was not the general conclusion one derives by reading the study—especially not when considering the article's potentially most important and lengthy analysis of the added layer of exploitation occurring in the system of legal prostitution they documented—a finding that has serious implications for prostituted people's general well-being and safe sex practices, consistent with the studies from legal brothels discussed above:

> Unlike women working on the streets, these women have a lot of outgoing expenses. Chief among these is the *daily* rent they have to pay to their landlord: this varies from £120 to £250. The landlord also charges varying daily amounts to cover bills, such as electricity and telephone, on top of the basic rent. In addition, the women pay the maid a daily wage—£30 to £60. . . .

[34] *Bedford v. Canada (A.G.), supra* note 20, ¶ 325 (Super. Ct.).

[35] *Ibid.*, ¶ 325 (d) (citing Dawn Whittaker & Graham Hart, "Research note: Managing Risks: the Social Organisation of Indoor Sex Work" (1996) 18 Sociology of Health & Illness 399).

[36] *See ibid.* ("This U.K. study looks at . . . prostitutes working out of 'flats' *and* to prostitutes working on the street." (emphasis added)).

[37] Whittaker & Hart, *supra* note 35, at 399 ("we report on the flat-working women's employment of protective strategies, such as co-working with 'maids'"); *cf. ibid*, at 406 ("Not described here is our concurrent work with street-working women"). The authors did account for statements by some women in the flats saying they, or people they knew, had experienced more violence on streets, *ibid.*, at 406, but there was no control group from the streets.

[38] *Ibid.*, at 407-08 (emphasis added).

[39] *Ibid.*, at 408-09.

> [S]ome flats advertise in phone boxes. In this case a "card boy" is paid a daily rate of up to £60 to place cards regularly in local phone boxes. There is also the cost of printing the cards. . . . Women aim to see a certain number of clients a day—usually 20. . . . "You've got to get through, like, ten punters before you've made your rent and maid. And after that you might not do any more, so you don't make any money, anyway (depth interview)." . . . . Survey data to date shows the average number of clients seen by these women in a week is 76. Many women see between 20 and 30 men a day—with a few women seeing up to 50.
>
> . . . .
>
> Every woman to whom Dawn Whittaker has spoken reports always using condoms for all penetrative sex, including oral sex. It should be noted, however, that they *all* said they were frequently asked by clients for unprotected sex, and this was usually with an offer of more money. Everyone had stories of women who would "do it without," stories which are used to distance themselves from such activity.[40]

Indeed, testimonies from legal brothels around the world suggest that the "stories" of unsafe sex of "others" are closer to the truth for most persons than these authors might have realized (see above). Considering that some of the women in London saw up to 50 men a day, in part to "meet the rent," there would be strong incentives for them to reduce that number by accepting more unsafe sex. Had these aspects also been mentioned in the summary, would the courts have been able to persuasively invoke the study to argue that third parties enhance the well-being or safety of prostituted women?

In addition, further findings from the London study made the authors conclude that there was usually a hierarchy that prevented prostituted women from exercising autonomous decisions over their situation. First, it was noted how the maids had an "ambiguous position within the structural organization of sex work in the flats."[41] Some flats were apparently "managed by the same 'consortium,'" with groups of maids appearing as being in control over "the running of groups of flats."[42] The authors found that such maids seemed to make decisions regarding what purchasers the women could not refuse, "thus taking away from the woman a key element in what in other circumstances is the most vital aspect of the work."[43] These conditions were said to make "it harder for her to assert herself in her interactions with clients, and hence more vulnerable to client violence," as well as becoming more vulnerable for exploitation.[44] Second, the authors found that some landlords exercised a particular kind of control over the work—e.g., moving around women between different flats so they could not control "with whom they must work"—which suggested that the landlords had a deliberate strategy to "foster dependence and uncertainty."[45] Several accounts also pointed to more hierarchical layers of middle-men—not just maids and landlords. Landlords were sometimes themselves under pressure from others in "the organisation of the sex industry in this district"[46] to set higher rents, or conform to specified working conditions.

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[40] *Ibid.*, at 404-05 (emphasis added).
[41] *Ibid.*, at 409.
[42] *Ibid.*, at 410.
[43] *Ibid.*, at 410.
[44] *Ibid.*
[45] *Ibid.*, at 411.
[46] *Ibid.*, at 411.

In light of everything said in this informative article on indoor prostitution in London, U.K., the court of first instance's summary is remarkably off-track.[47] It completely ignored the exploitation actually at work and the minimal, if not counterproductive, role of the maid in mitigating the harms of prostitution. As expressed by the authors to the U.K. study themselves, but unfortunately lost by the courts:

> Such features as the pressures to "make the rent," which result in long working hours and large number of clients, the absence of autonomy in those situations where it is the maid who determines which clients shall be seen, might be considered by women working the streets to be intolerable conditions of employment.[48]

The accounts of how women must accept twice as many purchasers (or more) are further important to review in light of that many prostituted persons, survivors, and even purchasers describe prostitution as "paid rape."[49] In a study with prostituted persons in legal brothels in Nevada, one prostituted woman said prostitution was "'like you sign a contract to be *raped*,'" another said "[t]he first words that come to mind are: degraded, dehumanized, used, victim, ashamed, humiliated, embarrassed, insulted, slave, *rape*, violated,'" and a third explained that she "cried all the time" during her first six month in legal prostitution.[50] (For a discussion of the importance of the living on the avails provision in light of legal problems with applying rape laws for these abuses, see further below.[51]) Hence, when the *Bedford* courts argue that violent abuse is less extensive in indoor venues than on the streets because explicit rape might have been less reported there, they disregard and minimize the experience of prostituted people; from the perspective of people in prostitution, a double increase in purchasers—as roughly appeared to be the case in the London flats above—might simply mean twice as much abuse, whether or not it is called "rape" by name.

In sum, the London-study was misrepresented by the courts, whom failed to account for the actual practices "in reality" as the study documented them, among other things entailing that "these women are subject to violence and that the presence of the maid has only a limited protective value."[52] The court of first instance's summary is decidedly misleading when stating, without comment or modification, that the "authors found that working in a flat was safer. Safety was defined in terms of guaranteed payment, sex with condoms, and less

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[47] *Bedford v. Canada (A.G.), supra* note 20, ¶ 325(d) (Ont. Super. Ct.) (". . . The authors found that working in a flat was safer. Safety was defined in terms of guaranteed payment, sex with condoms, and less potential for client violence. The authors concluded that there are two characteristics of 'flat work' that make it safer: (1) it takes place indoors in a lit, contained environment (2) the prostitutes work with an assistant, or 'maid.' The maid makes a provisional assessment of prospective clients through a peephole and can veto undesirable clients (such as those that appear drunk), and sits in an adjacent room during the transaction.")

[48] Whittaker & Hart, *supra* note 35, at 412.

[49] *See, e.g.*, Giobbe, *supra* note 6, at 121 (noting survivors described it "like rape"); Farley, "'Bad for the Body,'" *supra* note 19, at 1100 (noting that "survivors view prostitution as almost entirely consisting of unwanted sex acts or even, in one person's words, paid rape"); Melissa Farley, "Prostitution, Trafficking, and Cultural Amnesia: What We Must Not Know in Order To Keep the Business of Sexual Exploitation Running Smoothly" (2006) 18 Yale Journal of Law & Feminism 109 at 131 (quoting purchaser saying "'If you look at it, it's paid rape'").

[50] Farley, *Prostitution in Nevada*, *supra* note 14, at 34 (emphasis added).

[51] *See infra*, notes 102-111, and accompanying discussion.

[52] Whittaker & Hart, *supra* note 35, at 409.

potential for client violence."[53] The authors' study suggested that in reality, sex with condoms was not practiced in many instances, contrary to what is purported in the court's summary, but fully consistent with other studies from Nevada, New Zealand, and elsewhere (see above). Consequently, the study's policy implications were being misrepresented by the courts as more supportive to a partial decriminalization of third parties than they actually were.

Mediated Findings from Nevada of Limited Value

The court of first instance also summarized a study from Nevada, United States.[54] Just as the courts did not mention facts to the contrary in the London study above, they did not mention the procedure of selecting interviewees in Nevada where authors readily, and in writing, had admitted how such access was mediated "through contacts with certain gatekeepers, including the head of the Nevada Brothel Association and attorneys who had worked with brothels, and through cold calls to brothels."[55] Other researchers are regularly denied entry.[56] Nevertheless, the Ontario courts did not question how the Nevada study could only find one person among 40 interviewed prostituted women who reported violent experiences in the legal brothels.[57] These reports of violence are remarkably low compared with other studies.[58] Nor did the courts ask how come all accounts in this study from Nevada claimed that the women felt protected, while managers and brothel owners saw themselves as protecting women on the streets.[59] Given the nature of the mediated access, these accounts are of limited value.

Four Respondents in Victoria, Australia, is Not a Persuasive Sample

Similarly, the court of first instance cited a study from *Victoria, Australia*,[60] which had interviewed 24 women in prostitution whom "were perceived as potentially vulnerable to risk because they were young, inexperienced, homeless, drug or alcohol dependent, or working in illegal brothels or on the street."[61] It should be noted that among the 24 persons interviewed, only 12 were prostituted indoors, and among them only "some" were found in legal brothels,

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[53] *Bedford v. Canada (A.G.), supra* note 20, ¶ 325(d) (Ont. Super. Ct.)

[54] See *Bedford v. Canada (A.G.), supra* note 20, ¶ 325(e) (Ont. Super. Ct.).

[55] Barbara G. Brents & Kathryn Hausbeck, "Violence and Legalized Brothel Prostitution in Nevada: Examining Safety, Risk, and Prostitution Policy" (2005) 20 J. of Interpersonal Violence 270 at 294 n.1.

[56] *See, e.g.*, Tooru Nemoto et al., "HIV Risk Among Asian Women Working at Massage Parlors in San Francisco" (2003) 15 AIDS Education and Prevention 245 at 247 (denied entry in 13 out of 25 parlors in San Francisco); Farley, *Prostitution in* Nevada, *supra* note 14, at 23 (denied entry in 6 out of 14 Nevada brothels).

[57] *Bedford v. Canada (A.G.), supra* note 20, ¶ 325(e) (Super. Ct.).

[58] See, e.g., Farley, *Prostitution in Nevada*, *supra* note 14, at 31-32, who noted that even though her respondents risked being overheard by their pimps, their "conservative" reports nonetheless suggested that 10 of a sample of 42 persons prostituted in legal brothels in Nevada had been physically assaulted, 6 of 41 had been threatened with a weapon, 12 of 44 had been coerced or pressured into an act of prostitution, and 9 of 45 reported being coerced or pressured to imitate a pornography act; cf. Raphael & Shapiro, "Violence Indoor & Outdoor," *supra* note 14, at 134-35, who among 222 prostituted women surveyed in Chicago, Illinois, found that approximately 21% explicitly had acknowledged being raped/forced sex *over 10 times* in escort services (*n* = 28), when prostituted in their private homes (*n* = 24), and in street prostitution (*n* = 101)—not to mention the much higher percentage of women reporting "ever experiencing violence," *ibid.*, at 133, in prostitution.

[59] Brents & Hausbeck, *supra* note 55, at 271.

[60] *Bedford v. Canada (A.G.), supra* note 20, ¶ 325(c) (Ont. Super. Ct.) (citing Priscilla Pyett & Deborah Warr, "Women at Risk in Sex Work: Strategies for Survival" (1999) 35 *J. of Sociology* 183).

[61] Pyett & Warr, *supra* note 60, at 184.

as opposed to being prostituted in illegal massage parlours or escort agencies.[62] Consequently, the number of respondents interviewed in legal brothels was possibly not even 5, but the study does not specify this further. Moreover, the authors did not disclose information on how access to the interviewees was obtained more than saying that a reference group consisting of "women who had some association with the sex industry, either as current or past sex workers, or as health educators or outreach workers . . . . recruited and interviewed the participants and assisted with the interpretation of findings."[63] Contrasting with studies suggesting otherwise (see above), this study from Australia also claimed that "[m]ost of the women working in legal brothels" reported that they felt "safe," and that their security was "enhanced by supportive management" and policies claimed to promote their protection.[64] These accounts from "most women" in legal brothels, likely only made by 3 people in their total sample, are perhaps unsurprisingly quite consistent with those from Nevada where respondents were solicited with mediated access from brothel owners and their attorneys. But in all earnest, this study provides little support for modifying the living on the avails provision.

Large Samples from New Zealand & U.K. Suggested No Positive Effect from Third Parties

Two more studies, from New Zealand and the United Kingdom respectively**,** were explicitly cited by the court of first instance.[65] However, none of them made any claims about a supportive management in legal brothels as the studies above, nor did they claim that bodyguards or drivers would reduce violence.[66] Although the study from New Zealand noted a lower frequency of violence in indoor venues compared to the streets—a finding sometimes seen in other studies, although not unequivocally so[67]—its authors did not attempt to explain those findings with reference to whether some management did, or did not, intervene. Contrasting with the two studies from Nevada and Australia above, whose selection and sampling of interviewees leaves many questions unanswered, this study accounted for 303 survey respondents whom, after careful research, were estimated to represent "just over 80%" of prostituted women in Christchurch.[68] Respondents were recruited through press advertising and flyers, or trough outreach or telephone contact.[69] The other study from the United Kingdom was built on a questionnaire administrated to 240 prostituted women from 3 cities (125 indoors, 115 outdoors). It also noted a higher incidence of reported violence in indoor venues, but there were no data on what percentage or numbers of its indoor women

[62] *Ibid.*, at 185.
[63] *Ibid.*, at 184.
[64] *Ibid.*, at 187.
[65] *Bedford v. Canada (A.G.), supra* note 20, ¶ 325(a) & (b) (Ont. Super. Ct.)
[66] Libby Plumridge & Gillian Abel, "A 'Segmented' Sex Industry in New Zealand: Sexual and Personal Safety of Female Sex Workers" (2001) 25 Australian and New Zealand J. of Pub. Health 78; Stephanie Church et al., "Violence by Clients Towards Female Prostitutes in Different Work Settings: Questionnaire Survey" (2001) 322 British Medical J. 524.
[67] See, e.g., Jody Raphael & Debora L. Shapiro, "Violence in Indoor and Outdoor Prostitution Venues" (2004) Violence Against Women 126 at 134-35, whom in a sample of 222 prostituted women in Chicago found similar percentages (≈ 21%) reporting over 10 incidents of rape in escort, street, and residential prostitution (i.e., prostitution in the woman's home).
[68] Plumridge & Abel, *supra* note 66, at 78-79.
[69] *Ibid.*, at 79.

who had third parties involved in their prostitution.[70] Naturally, nowhere did this study suggest that violent incidents were less frequent due to "maids," drivers, or bodyguards. In sum, none of the two additional studies above from New Zealand and the U.K. support the courts conclusions that third parties, such as "maids" or bodyguards and drivers, may be to the benefit of prostituted persons' safety or well-being.

Hypothetical & Naive Opinions by Expert Witnesses Offered no Evidence

Apart from the five studies discussed above, both courts also referred to hypothetical claims made by some experts and witnesses in the first instance that had suggested that if only certain prostitution provisions were repealed, body guards, drivers—even pimps and madams—would be available to assist vulnerable persons with measures intending to increase safety and well-being. For instance, with regards to the bawdy house provision, researcher John Lowman was quoted approvingly by the Court of Appeal as providing an "informative" comparison between Canada and Great Britain; Lowman referred to the British system of prostitution with legal "maids" and legal landlords which is discussed above in detail, arguing that there was "a *possibility* that others would organize that infrastructure for those desperate and marginalized women on the Downtown Eastside who cannot pay for it."[71] However, if someone is marginalized and desperate, relying on the "possibility" that someone else might step in to assist them, without abusing the position of vulnerability of that person, appears dangerously naive. People who enter prostitution are generally not in a good position to ascertain their interests or perspectives against those who would take advantage of them to increase their profits—a finding which the evidence from the legal brothel industry above corroborates. Indeed, the full study on the British legal system with "maids," which was actually cited in the courts,[72] also supports this conclusion quite contrary to the court of first instance's misleading summary (see above).

Not surprisingly, the accounts of expert opinions did not mention any other studies or evidence in support of the hypothetical assumption that third parties would be so benign, as opposed to imposing an additional layer of exploitation onto prostituted peoples' lives that would be detrimental to their well-being and safety. In this vein, Dr. Augustine Brannigan too made hypothetical claims that were restated by the court of first instance without supporting evidence, assuming prostituted persons would "work" with a "security guard," if not for the "living on the avails provision."[73] Dr. Maticka-Tyndale and her co-authors' were also said to have noted that "strategies to reduce these risks, such as hiring a driver or bodyguard or meeting and communicating with a client in a public place beforehand, run afoul of the law."[74] However, it is one thing to note that a supposed practice theoretically "runs afoul of the law." It is quite another thing to qualify this theoretical statement with evidence that rebuts the empirical and reasonable apprehension of harm documented in numerous studies above, which suggests that third parties typically make prostituted persons more exploited without necessarily improving their well-being and safety otherwise.

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[70] Church et al., *supra* note 66, at 524-25.

[71] *Bedford v. Canada (A.G.), supra* note 3, ¶ 211 (Ont. C.A.) (emphasis added).

[72] *Bedford v. Canada (A.G.), supra* note 20, ¶ 325 (d) (Ont. Super. Ct.) (citing Whittaker & Hart, *supra* note 72).

[73] See *Bedford v. Canada (A.G.), supra* note 20, ¶ 333 (Ont. Super. Ct.).

[74] *Ibid.,* ¶ 338.

According to the above, the studies cited by the court of first instance were incorrectly summarized, and did not support the Court of Appeal's findings for striking down parts of the "living on the avails" provision. Nowhere were there presented reliable evidence that third parties contribute to any reduction of abuse, as opposed to contributing to the increase of harmful exploitation and unsafe sex. Thus, research was misrepresented in the courts to buttress hypothetical claims that legalizing third parties increase safety and well-being, when much research unmistakably shows that it does not.

III. Bedford, in Discord with Evidence, Violates Established Law

Presumption of Third Parties' Parasitical Living is Demonstrably Justified

Before the decision in *Bedford v. Canada* (2012), Ontario had developed a coherent legal doctrine under the "living on the avails" provision. The case law recognized that the provision prohibited people to live parasitically off prostituted people and their earnings, and defined parasitism as those whose occupation "would not exist if his customers were not prostitutes."[75] A pimp was accordingly defined as a "person who lives parasitically off a prostitute's earnings."[76] Except in cases of domestic relationships, where a further finding of exploitation was needed to prove "living on the avails" in the province of Ontario,[77] living on the avails was presumed whenever a third party extracted a share from the earnings of a prostituted person; therefore, the Crown did not have to prove more exhaustively the element of parasitism beyond establishing this economic relationship.[78] Although the defendant could refute this presumption by presenting evidence to the contrary, the Supreme Court of Canada held in *R. v. Downey* (1992) that the initial presumption could permissibly be substituted for direct proof of a parasitical relationship. Facing a constitutional challenge to this doctrine then, the Court saved it as a reasonable limitation of the right otherwise to be presumed innocent until proven guilty beyond reasonable doubt; it was held that the presumption was demonstrably justified under section 1 of the *Charter* in light of the unquestionable "importance of successfully prosecuting pimps,"[79] and the concomitant need to avoid forcing prostituted persons to testify against pimps, which was recognized as dangerous and difficult for them.[80]

Since the "living on the avails" provision is a criminal law, the requirement to prove "exploitation" that is now added by the Court of Appeal for Ontario entails an entirely new

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[75] *Shaw v. Director of Public Prosecutions*, [1962] A.C. 220, 270, [1961] 2 All E.R. 446 (H.L.) (WL); *cf. R. v. Downey*, *supra* note 5, at 32, Cory J. (citing *Shaw* as controlling).

[76] *R. v. Downey*, *supra* note 5, at 32.

[77] *R. v. Grilo* (1991), 2 O.R. (3d) 514, 521-22 (C.A.) (Lexis) (holding that "[i]n the case of a person living with a prostitute, one must turn to indicia which will serve to distinguish between legitimate living arrangements between roommates or spouses, and living on the avails of prostitution. . . . Living on the avails is directed at the idle parasite who reaps the benefits of prostitution without any legal or moral claim to support from the person who happens to be a prostitute.")

[78] *R. v. Barrow* (2001), 54 O.R. (3d) 417 ¶ 29, [2001] CarswellOnt 2010 (C.A.) (Lexis) [*Barrow* cited to O.R.] (holding, in a case against an escort agency, that the "element of parasitism" was found in the fact that the agency manager was "in the business of rendering services to the escorts because they" were prostituted persons).

[79] *R. v. Downey*, *supra* note 5, at 39, Cory J. (L'Heureux-dubé, Sopinka and Gonthier JJ., concurring) (stating that "there cannot be any question of the importance of successfully prosecuting pimps").

[80] *Ibid.*, at 36-39.

burden of proof beyond reasonable doubt. However, as shown above, the evidence on file in the courts did not support the assumption that third parties promote more safety and well-being for prostituted persons. In *Downey*, the Supreme Court recognized the exploitative realities of social inequality between pimps and prostituted persons when they stressed that the presumption of parasitism was necessary to successfully prosecute the former. As explained back in 1992, without that presumption prostituted persons would need to testify in order to gather evidence of parasitic living, which they rarely would do for fears of retribution and other reasons.[81] In part because of these difficulties, the presumption of guilt was held to be a rational legal response to the pressing and substantial objective of fighting sexual exploitation in Canada, proportional to its objectives, and as such demonstrably justified under section 1 of the *Charter*.[82]

In light of the fact that the Court of Appeal for Ontario did not rely on any reliable evidence that third parties improve safety or well-being in prostitution (see above), their decision in *Bedford* is manifestly in discord with the Supreme Court's prior reasons in *Downey*. By invalidating the presumption of parasitism and demanding proof of exploitation in each and every case, the Court of Appeal for Ontario ignores the documented inequality of the majority of prostituted persons vis-à-vis their pimps and the resulting exploitative conditions that *Downey* for practical purposes had accounted for. *Downey* is more consistent than *Bedford* is with recent evidence from psychological research showing how pimps use a range of manipulative techniques to entrap people in prostitution,[83] which prostituted persons according to the evidence above will have severe difficulties to leave later on even when they want to. Brutal techniques might be common to ensnare young people, such as creating a traumatic process of "bonding" by exposing the prostituted person to periods of traumatic violence, social isolation, and degradation, combined with strategic periods of rewards; however, subtler methods are also used to exploit older or more mature persons, whom can be vulnerable due to reasons such as poverty or the need to support dependents, in combination with stacked cards in life due to race and sex discrimination.[84] Consequently, without probable evidence to the contrary, it is a reasonable apprehension of harm to legally presume that third parties in prostitution are malicious parasites in the exploitative sense. There is thus no reason to overturn *Downey*.

Bedford Provides More Cover-Up to Abusive & Exploitative Pimps

The new requirement to prove exploitation every time because, as erroneously submitted by the *Bedford* court, the legal presumption upheld in *Downey* was overbroad, is misguided, dangerous, and wrong. It assumes that the presumption upheld by *Downey* targeted third parties who could "dramatically improve prostitute's safety"[85]—a position strongly in discord even with the particular evidence on file with the courts (see above), which suggested that the

[81] *Ibid.*

[82] *Ibid.*, at 35-39.

[83] See, e.g., Harvey Schwartz, Jody Williams & Melissa Farley, "Pimp Subjugation of Women by Mind Control," in Farley ed., *Prostitution in Nevada*, *supra* note 14, at 49–84, for an illuminating account of pimping based on three different cases, where men pimped women into prostitution with different amounts and forms of coercion along a continuum—overt force on one end, exploitation of persons' inequality and lack of equal alternatives due to racism, sexism, or social class on the other end.

[84] *Ibid.*

[85] *Bedford v. Canada (A.G.)*, *supra* note 3, ¶ 251 (Ont. C.A.).

involvement of third parties does not improve prostituted peoples' safety and well-being. It does not make the Court of Appeal for Ontario's argument more persuasive when they imply regret over their decision in *R. v. Barrow* (2001), exemplifying it as an overbroad application.[86] In *Barrow* it was found that a madam's escort agency took a third of the earnings from her prostituted women,[87] thus the women had to have sex with more men in order to compensate for this loss. As shown above, more purchasers typically entail a risk for more exploitative abuse and incentives for unsafe sex. Although four women who had been prostituted for the defendant testified that she was quite benign and helpful at times,[88] evidence above suggests that their experiences should not be taken as representative for the majority of people in prostitution.

Moreover, researchers have validated since long that prostituted persons rarely trust public authorities with information about their lives, such as social service agencies, in part because they are often distrusted and stigmatized for it.[89] This distrust presumably holds for judicial testimonies as well, and in that sense *Barrow* is no exception. Simply put, there often exists no rational incentive for a prostituted person to testify in Canada, especially as they could expose themselves for much more serious troubles if their pimp was not effectively convicted. Such considerations support the Supreme Court's previous well-grounded opinion in *Downey* that requiring courts to rely on such testimony would not be in the best interest of prostituted people. Moreover, there is little reason to question the Supreme Court's analysis that the reversed onus is not a too large an obstacle to disprove in the event that the accused would de facto not be liable to the exploitative behavior that the law intends to fight:

> Prostitutes are a particularly vulnerable segment of society. The cruel abuse they suffer inflicted by their parasitic pimps has been well documented. The impugned section is aimed not only at remedying a social problem but also at providing some measure of protection for the prostitute by eliminating the necessity of testifying. It would be unfortunate if the Charter were used to deprive a vulnerable segment of society of a measure of protection. . . . All that is required of the accused is to point to evidence capable of raising a reasonable doubt. That can often be achieved as a result of cross-examination of Crown witnesses. The section does not necessarily force the accused to testify.[90]

In light of the Supreme Court's considerations that third parties with genuine intentions of supporting prostituted people may easily present evidence to this end, given that it exists, the *Bedford* litigants and their supporting interveners' attempt to dismantle the presumption of living on the avails appear more as an attempt to promote the interests and perspectives of pimps and brothel owners. Such a partisanship effectively endorse Ontario as a haven for traffickers and brothel owners, whom likely are prepared not only to cater to domestic demand, but also to furnish demand from just across Windsor.

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[86] *Ibid.*, ¶¶ 243, 251, 270 (citing *R. v. Barrow* (2001), *supra* note 78.)

[87] *R. v. Barrow* (2001), *supra* note 78, ¶ 6.

[88] *Ibid.*, ¶¶ 7-11.

[89] Raphael & Shapiro, "Reply to Weitzer," *supra* note 13, at 967; *cf.* SOU 1995:15 Könshandeln, *supra* note 13, at 144 (Swed.) (acknowledging the need for "long time and close contact with prostituted women in order to acquire knowledge of their real situation"); Silbert & Pines, "Child Abuse as Antecedent," *supra* note 7, at 408 (noting the "lack of trust" among prostituted persons "for professionals and officials of the 'straight' world," hence using survivors as interviewers in order to gain the trust of respondents).

[90] *R. v. Downey*, *supra* note 5, at 39.

IV. Bedford Contravenes Equality under the Charter

Substantive Inequality & Intersectionality (Multiple Disadvantages)

Canada has hereto had an international reputation for supporting a progressive sense of social equality, well entrenched in the 1982 *Charter of Rights and Freedoms*, and particularly under section 15. In order to situate and define the role of the provision against living on the avails of prostitution in the context of Canada's general ambition to promote social equality, a short summary of the doctrine under section 15 shall first be made. The Supreme Court has viewed section 15 since its inception as "the broadest of all guarantees," applicable to and supporting "all other rights guaranteed by the Charter."[91] Section 15 has two subsections, where 15(1) holds that "[e]very 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, colour, religion, sex, age or mental or physical disability," and 15(2) holds that "[s]ubsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."[92] Recently in *R. v. Kapp* (2008),[93] the Supreme Court clarified further the objectives of section 15, including the relations between its subsections:

> Under s. 15(1), the focus is on *preventing* governments from making distinctions based on the enumerated or analogous grounds that: have the effect of perpetuating group disadvantage and prejudice; or impose disadvantage on the basis of stereotyping. Under s. 15(2), the focus is on *enabling* governments to pro-actively combat existing discrimination through affirmative measures.[94]

Decisions prior to *Kapp* have held that the meaning of discriminatory distinctions under section 15 is not restricted to facial discrimination (de jure), covering also disparate impact under facially neutral laws (de facto discrimination). Moreover, when interpreting the law the focus has tended to be on the substantive equality in a social, political, cultural, or economic sense. This stance is echoed in the words of the seminal decision in *Andrews v. Law Society of British Columbia* (1989), where it was recognized that "every difference in treatment between individuals under the law will not necessarily result in inequality and, as well, that identical treatment may frequently produce serious inequality."[95] The Canadian approach is thus often explicitly termed "substantive equality," as distinguished from "formal equality," as substantive equality necessitates a more searching inquiry regarding the context and effects of legal application in social, cultural, political, and economic terms.[96]

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[91] *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 at 185, CarswellBC 16, McIntyre J., dissenting on other ground [*Andrews* cited to S.C.R.].

[92] *Canadian Charter of Rights and Freedoms*, ss. 15(1) & 15(2), Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, ch. 11 [hereinafter: *Canadian Charter*].

[93] *R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483, CarswellBC 1312.

[94] *R. v. Kapp*, *supra* note 93, ¶ 25.

[95] *Andrews*, *supra* note 91, at 164, McIntyre J.

[96] *See, e.g.*, Catharine A. MacKinnon, "Toward a New Theory of Equality," in *Women's Lives, Men's Laws* (Cambridge, MA: Harvard Univ. Press, 2005) 44 (analyzing the Canadian *Andrews* decision); Catharine A.

Accordingly, the Court early on developed a proactive and substantive equality approach under 15 that aimed to prevent "discrimination against groups suffering social, political and legal disadvantage in our society," and those groups were usually said to be identified by indicia "such as stereotyping, historical disadvantage or vulnerability to political and social prejudice."[97] Prostituted persons seem to generally belong to the subset of Canada's population that merits protection under section 15. They have historically been vulnerable to multiple disadvantages, as shown above, such as poverty, childhood abuse and neglect, sexism, and racial discrimination, for example, being of First Nations decent. In other words, their disadvantages are directly related to several of the protected grounds enumerated "in particular" in section 15.[98] Many are also subjected to (in the early words of the Court above) "stereotyping" and "political and social prejudice," such as victim-blaming, harassment, and stigma (see above).

Prostitution could similarly be described as an *intersectional*[99] problem of inequality with multiple disadvantages, here prior child abuse and neglect, poverty, racial discrimination, homelessness, and sexism. Intersectionality seems yet to be an analytical concept primarily used by scholars, while the older related concept of "substantive equality" is now used and embraced by Canadian courts.[100] Nonetheless, intersectionality is useful because it highlights important legal problems for groups that "are marginalized in the interface between antidiscrimination law and race and gender hierarchies,"[101] or between other structures of inequality. Problems related to intersectionality may impede the extent to whether certain disadvantaged groups can actually enjoin substantive equality. For instance, although gender-based violence such as rape and domestic abuse are sometimes simplified as singular problems related to sex inequality for legal purposes,[102] socially they might be more complex

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MacKinnon, "Substantive Equality: A Perspective" (2011) 96 Minn. L. Rev. 1 (discussing substantive equality in the U.S. legal context).

[97] *R. v. Turpin et al.*, [1989] 1 S.C.R. 1296 at 1333, CarswellOnt 76; *cf. Andrews*, *supra* note 91, at 154, Wilson J.

[98] *See Canadian Charter*, s. 15(1), *supra* note 92 (enumerations in accompanying text).

[99] For the origins of the seminal political and legal theory of intersectional discrimination and how to challenge it, *see* Kimberle Crenshaw, "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics" (1989) U. of Chicago Legal Forum 139.

[100] *See, e.g., Withler v. Canada (A.G.)*, 2011 SCC 12, [2011] 1 S.C.R. 396; *Peavine Métis Settlement v. Alberta*, 2011 SCC 37, [2011] 2 S.C.R. 670; *R. v. Knapp*, *supra* note 93.

[101] Crenshaw, "Demarginalizing the Intersection," *supra* note 99, at 151.

[102] Gender-based violence, including rape and domestic abuse, in the private as well as public spheres are now regarded as human rights violations and forms of sex discrimination that states are obliged to provide adequate protections and remedies for. *See, e.g.,* Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, pmbl. 9, arts. 3(4), 4(2), July 11, 2003 (entry into force Nov. 26, 2005), online: African Union <http://www.au.int/en/sites/default/files/Protocol%20on%20the%20Rights%20of%20Women.pdf > (repetitiously mentioning gender-based- alternatively violence against women as practices incompatible with provisions guaranteeing human rights and the elimination of all forms of discrimination); Organization of American States, Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (Convention of Belém do Pará), June 9, 1994, arts. 6 & (a), 33 I.L.M. 1534, 1536 (entry into force Mar.5, 1995) ("The right of every woman to be free from *violence* includes… [t]he right of women to be free from all forms of discrimination…" Wordings suggest discrimination and violence interrelated); Fourth World Conference on Women, Sept. 4-15, 1995, *Beijing Declaration and Platform for Action*, ¶ 118, U.N. Doc. A/CONF.177/20/Rev.1. ("Violence against women… have led to domination over and discrimination against women by men."); 1993 U.N. Declaration on VAW, pmbl. *para* 6 (recognizing that implementation of the

and involve, e.g., racial or class factors. Racism and/or poverty then often amplify discriminatory attitudes or aggravate economic obstacles which make some women more vulnerable than others to gender-based violence. In this sense, such violence may be seen as an intersectional problem where gender interacts with other social categories.[103]

Scholars are increasingly trying to address the problems for law and politics to address multiple disadvantages,[104] which are very much apparent in prostitution. Prostituted peoples' multiple disadvantages constitute such coercive circumstances that usually make them having to accept, for lack of other options, to be exploited sexually in ways that many non-prostituted persons would simply define as "rape."[105] However, no prostituted persons can use a rape law in such circumstances when that law is premised on a singular concept of power and social disadvantage, as opposed to an intersectional concept according to the above. This problem is apparent when the law requires evidence of ostensive use of violence or threats in order to establish non-consent—a typical approach taken under many rape laws.[106] For instance, the Swedish Criminal Code's rape provision is premised upon a showing of express force or threats to such ends, with an exception only for persons being in a "helpless state."[107] If prostituted persons may, say, negotiate the price, arguably they are not "helpless." Nonetheless, evidence reviewed above overwhelmingly show they are exploited under circumstances that are coercive, whether or not they negotiate prices. The avails provision is thus necessary because other potentially useful laws have evidentiary burdens that make them ineffective. This is not only the case with most rape laws, but so far also with most trafficking laws.

For instance, the international legally binding definition of trafficking includes "the abuse of power or of a position of vulnerability . . . for the purpose of exploitation" by any third party.[108] In the legislative history, this position has been further defined as "any situation in which the person involved has no *real and acceptable alternative* but to submit to the abuse involved."[109] In light of the empirical evidence from prostitution surmised above, this

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Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) would contribute to the elimination of violence against women and "that violence against women is one of the crucial social mechanisms by which women are forced into a subordinate position compared with men"); *See also* Comm. on the Elimination of Discrimination Against Women, 8th Sess., *General Recommendation No. 12*, U.N. Doc A/44/38 (Mar. 6, 1989) (considering that art. 2, 5, 11, 12 and 16 of the CEDAW Convention "require the States parties to act to protect women against violence of any kind occurring within the family, at the workplace or in any other area of social life.").

[103] For an explitic application of the analytical concept of intersectionality to gender-based violence, *see* Kimberle Crenshaw, "Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color" (1991) 43 Stanford L. Review 1241 at 1241-99.

[104] For the seminal account that still holds sway in terms of its clear cut analytical approach to address such problems of intersectionality, *see generally* Crenshaw, "Demarginalizing the Intersection," *supra* note 100; Crenshaw, "Mapping the Margins," *supra* note 103.

[105] *See supra* notes 49-50, and accompanying text.

[106] *See generally* Catharine A. MacKinnon, *Sex Equality*, 2nd ed., Univ. Casebook Ser. (New York: Foundation Press, 2007) at 779ff (discussing, inter alia, different degrees of requirements for a showing of violence, threats of violence, and similar forced conditions under various state rape laws in the United States).

[107] Brottsbalken [BrB] [Criminal Code] 6:1, *paras*. 1-2 (Swed.).

[108] Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, art. 3(a), *opened for signature* Dec. 12, 2000, 2237 U.N.T.S. 319 (entered into force Dec. 25, 2003) ("Palermo Protocol").

[109] Rep. of the Ad Hoc Comm. on the Elaboration of a Convention Against Transnational Organized Crime on the Work of Its First to Eleventh Sessions, Addendum, Interpretative Notes for the Official Records (*Travaux*

definition should include most prostitution where third parties are involved, even in purportedly legal prostitution—a position already taken by the United Nation's Trafficking Rapporteur, and supported by other legal authorities.[110] Nonetheless, the international trafficking law does not seem to be applied accordingly in practice, which most likely is due in part to uninformed judicial notions of the empirical evidence on preconditions to and coercion in prostitution,[111] but in part also to the trafficking law's higher evidentiary burden when being compared to a presumption of parasitical living, such as under the Canadian avails provision (with the exception for Ontario). The avails provision therefore is demonstrably justified as a more effective response to the exigencies of human sex trafficking than other available legal remedies.

In sum, the "living on the avails" provision addresses certain multiple disadvantages and coercive circumstances that no other law in Canada addresses. For instance, it enables a more efficient prosecution of pimps whom would otherwise use their socially superior power to suppress the testimonies of prostituted people, thus prevent the public to intervene. Hence, to some extent pimps may be likened to abusive partners whom previously, without any effective laws against domestic violence, were protected by a public/private dichotomy that prevented the state to (in the words of singer/songwriter Tracy Chapman) "intervene in domestic affairs."

A Prostitution Law that Promotes Equality is *Consistent* with the Charter

Canadian laws that *promote* social equality are generally consistent with the Charter while those that *amplify* inequality presumably are not, even in face of such conflicting democratic imperatives as freedom of expression.[112] The Supreme Court stated in *Andrews*,

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Préparatoires) of the Negotiation of the United Nations Convention Against Transnational Organized Crime and the Protocols Thereto, ¶ 63, U.N. Doc. A/55/383/Add.1 (Nov. 3, 2000) (emphasis added).

[110] Special Rapporteur on the Human Rights Aspects of the Victims of Trafficking in Persons, Especially Women and Children, *Integration of the Human Rights of Women and a Gender Perspective*, ¶ 42, Comm'n on Human Rights, U.N. Doc. E/CN.4/2006/62 (Feb. 20, 2006) (by Sigma Huda) (reporting that "prostitution as actually practised in the world usually does satisfy the elements of trafficking"); For further evidence and comparative arguments, *see generally* Catharine A. MacKinnon, "Trafficking, Prostitution, and Inequality" (2011) 46 Harv. C.R.-C.L. L. Rev. 271 esp. at 299-300; Max Waltman, "Prohibiting Sex Purchasing and Ending Trafficking: The Swedish Prostitution Law" (2011) 33 Mich. J. Int'l Law 133.

[111] In Sweden, for instance, the national government agency for crime victims reported that many cases which exhibited "very large similarities to, or are completely identical with, those that could give rise to liability for human trafficking," nonetheless had been judged under lesser offences in the criminal code, such as procuring, with "the consequence that the victim, rather than as an injured party, is considered as a witness and therefore is not given the opportunity to assist the prosecution, or claim reimbursement in the scope of the criminal proceeding, or to receive an injured party's legal counsel." Fanny Holm, Brottsoffermyndigheten, "Utbetalning av brottsskadeersättning till offer för människohandel" [Payments of Criminal Damage Reimbursements to Victims of Human Trafficking] (Umeå: Brottsoffermyndigheten, 2010) at 14-15, online: Brottsoffermyndigheten<http://www.brottsoffermyndigheten.se/Filer/Böcker/Utbetalning%20av%20brottsskadeersättning%20till%20offer%20för%20människohandel.pdf>

[112] *See, e.g., R. v. Keegstra*, [1990] 3 S.C.R. 697 at 756, CarswellAlta 192 (Lexis) [*Keegstra* cited to S.C.R.] (finding that a law which prohibited willful promotion of hatred against identifiable groups that were distinguished by colour, race, religion or ethnic origin was saved by s. 1 against challenge under s. 2(b) (freedom of expression), in part because the law was consistent with "the Charter commitment to equality, . . . insofar as it seeks to ensure the equality of all individuals in Canadian society."); *cf. R. v. Butler*, [1992] 1 S.C.R. 452 at 509, CarswellMan 100 (finding that a law against degrading or dehumanizing pornography promotes equality since it "seeks to enhance respect for all members of society, and non-violence and equality in their relations with each other," and is therefore saved by s. 1 against challenges under s. 2(b) in part because "the restriction on freedom of expression does not outweigh the importance of the legislative objective"); *Little*

that the "promotion of equality entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration."[113] Obviously, a person whom de facto is sexually exploited in prostitution, under circumstances that are coercive, is not treated with equal respect, consideration, and dignity. The living on the avails provision therefore finds support in the Charter's equality guarantees, just as the Court of Appeal for Ontario themselves even identified the legislative objective of the living on the avails provisions as aiming "to protect vulnerable persons from being coerced, pressured or emotionally manipulated into prostitution," and "to prevent pimps from exploiting prostitutes and from profiting from the prostitution of others."[114] While the court may disagree with the Attorney General's further argument that "this offence reflects a Parliamentary objective to *eradicate* prostitution,"[115] Parliament need not express a desire to "eradicate" a practice in order for it nonetheless to fall under the ambit of the Charter's equality provision.

To the extent that third parties amplifies and prevents strategies to alleviate the severe discrimination and inequality that prostituted persons face in our societies, and the "living on the avails" provision is effective in prosecuting them, that law promotes the substantive equality of prostituted persons in society which, as shown above, is a group that merits protection under section 15. By contrast, the new requirement under *Bedford* to prove exploitation beyond reasonable doubt provides more protection to third parties who exploit prostituted persons, and less protection for the vast majority of prostituted persons whose equality, dignity, and humanity are violated by being exploited in prostitution. Hence, *Bedford* does not promote social equality, but favours the group which has the upper hand in an unequal social practice. Since the Supreme Court has taken the position that "the effects of entrenching a guarantee of equality in the Charter are not confined to those instances where it can be invoked by an individual against the state,"[116] favouring pimps this way arguably contravenes the Charter's equality guarantees, as favouring racists would have done by invalidating a demonstrably justified law against hate-propaganda—a law saved by the Supreme Court precisely because it promoted social equality.[117] When *Bedford* raised the evidentiary burden under the living on the avails provision, they simultaneously disempowered the majority of prostituted people by taking away the protection against their exploiters which the legal presumption of parasitism previously provided. By this decision they contributed to that most prostituted people (whom are a protected group under section 15) become even more unequal in society.

Sisters v. Canada, 2000 SCC 69, [2000] 2 S.C.R. 1120 ¶ 60 (reaffirming that the equality rationale under *Butler, supra,* also applies to same-sex materials, in part because "non-violent degradation of an ostensibly willing sex slave is no less dehumanizing if the victim happens to be of the same sex, and no less (and no more) harmful in its reassurance to the viewer that the victim finds such conduct both normal and pleasurable.")

[113] *Andrews, supra* note 91, at 171.

[114] *Bedford v. Canada (A.G.), supra* note 3, ¶¶ 238-39 (Ont. C.A.).

[115] *Ibid.*, ¶ 237 (emphasis added).

[116] *R. v. Keegstra*, *supra* note 112, at 755.

[117] *Ibid.*, at 755-56 (saving law against hate-propaganda under s. 1 with reference to s. 15, in part on the rationale that harms caused by such messages "run directly counter to the values central to a free and democratic society, and in restricting the promotion of hatred Parliament is therefore seeking to bolster the notion of mutual respect necessary in a nation which venerates the equality of all persons" at 756).

If one assumed, au contraire, that benign third parties are occasionally found in prostitution, as the *Bedford* court assumed about the escort agency madam in *Barrow*,[118] the *Bedford* decision nevertheless limits the protection to *only* those prostituted persons whom might be less vulnerable and more able to ascertain their interest and perspectives vis-à-vis third parties. The overwhelming research suggests that the majority of prostituted persons are not in such a position to exercise autonomy and influence over others (see above). In other words, *Bedford* benefits those whom are least unequal compared to the general population, while those whom are most unequal receives less protection. Consequently, the outcome of the *Bedford* decision has a negative impact on a population that is supposed to merit particular protection under section 15, which contravenes the Charter's equality imperative. By contrast, upholding the "living on the avails" provision and its presumption of parasitism *promotes* social equality.

Similar Treatment, When Amplifying Inequality, *Contravenes* the Charter

In a recent but yet unresolved Charter case in British Columbia, an attempt was made by the plaintiffs ("B.C. Plaintiffs") to argue, contrary to the analysis made in this paper, that the living on the avails provision contravenes section 15 because it prevents third parties to operate with prostituted people. Along those lines, the provision was alleged to "offend s. 15 of the *Charter* because sex workers are disproportionally members of disadvantaged classes,"[119] and alleged to prevent prostituted people "'to form business relationships with others for the purpose of advancing their economic well-being,'"[120] as well as preventing the application of labour or insurance regulations.[121] This logic leads to a conclusion where the B.C. Plaintiffs attempts to propose that prostitution laws in general (not only the living on the avails provision) impermissibly "'draw a formal distinction or, in the alternative, have a severe and disproportionate impact on sex workers, as compared to those persons in other occupations, by making prostitution more dangerous" than it would have been without the laws.[122]

The B.C. Plaintiffs, however, make the same erroneous conclusions on the evidence of prostitution that were made in *Bedford* (see above). Without considering other laws than the living on the avails provision—laws not subjects of this paper—the evidence above nevertheless clearly showed that prohibiting third parties from living off prostituted people's backs, whether indoors or outdoors, does not make prostitution more dangerous. Here, the mistaken empirical assumptions by the B.C. Plaintiffs are erroneously taken to imply that legal action against pimps and other third parties affects prostituted people's equality rights to their detriment, rather than in the affirmative. If not for the plaintiffs' manifest ignorance of the harms that third parties in prostitution contribute to (see above), this argument might resemble a superficial logic. In reality, the plaintiffs rely on a fictional empirical foundation

[118] *Bedford v. Canada (A.G.), supra* note 3, ¶¶ 236, 251, 270 (C.A.) (purporting to imply that *Barrow* was an overbroad application of the avails provision).

[119] *Downtown Eastside Sex Workers United Against Violence Society v. Canada (A.G.),* 2010 BCCA 439, [2010] CarswellBC 2729 ¶ 8, Saunders J., 324 D.L.R. (4th) 1.

[120] *Downtown Eastside Sex Workers United Against Violence Society v. Canada (A.G),* 2008 BCSC 1726, [2008] 2008 CarswellBC 2709 ¶ 26, 305 D.L.R. (4th) 713 (quoting from plaintiffs' brief).

[121] *Downtown Eastside Sex Workers, supra* note 119, ¶¶ 8-9, Saunders J. (B.C.C.A.).

[122] *Downtown Eastside Sex Workers, supra* note 120, ¶ 26 (B.C. Supr. Ct) (quoting from plaintiffs' brief).

when alleging that the living on the avails provision facially discriminates against prostituted people, or discriminate them by a disparate impact.

Admittedly, "sex workers" (a term the B.C. Plaintiffs choose) are a disproportionally disadvantaged class in Canada whom should merit particular attention under section 15, just as argued previously. There is no disagreement here, although the term "prostituted persons" is preferred because it indicates that those who are in prostitution are substantially placed there and kept there by acts of others, as evidence above suggested—a reality which the term "sex workers" does not indicate.[123] However, agreeing that prostituted persons should be empowered by section 15 does not imply a parallel agreement to empower the exploitative parasites who amplify their misery. That would be counterproductive and turn the Charter and its equality guarantee on their heads. Here, the B.C. Plaintiffs erroneously equates the function of third parties in prostitution with that of legitimate third parties in non-prostitution settings, in spite of that third parties in prostitution are often malevolent and parasitic (see above) to an extent which the others arguably are typically not. Simply put, their section 15 analysis assumes that prostitution and prostituted people can be "similarly situated" to workers, businesses, and the service sector in general. By this move, they implicitly appear to apply a test which was manifestly rejected by the Supreme Court already in *Andrews*:

> [M]ere equality of application to similarly situated groups or individuals does not afford a realistic test for a violation of equality rights. For, as has been said, a bad law will not be saved merely because it operates equally upon those to whom it has application. Nor will a law necessarily be bad because it makes distinctions.[124]

The B.C. Plaintiffs' section 15 analysis literally suggests that the avails provision impermissibly makes "distinctions." Alternatively, they suggest that the provision has a disparate impact on prostituted persons because living on the avails does not operate equally upon more or less the entire Canadian population of third party business entrepreneurs, whom the B.C. Plaintiffs appears to implicitly assume is the relevant similarly situated comparator. Following this logic, either no third party should be criminalized, or all third parties should be criminalized—such as plumbing, acting, or cab driving agencies—because the latter might potentially be exploitative and parasitic. By such a line of reasoning social security plans, and collective bargaining fees, should also be subjected to the similarly situated test given the B.C. Plaintiffs' subconscious assumption that economic relationships, and agreements with those who profit from prostitution, may legally be presumed to be as equal and legitimate as third party contracts with plumbers or cab drivers are. However, the problem underlying this logic is how it ignores *substantive inequality*, fallaciously assuming that the need for legal protections against exploitation among prostituted persons are "similar" compared to the need among non-prostituted people. Evidence above suggests that this need is unequally distributed in the population.

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[123] While "prostituted person" is roughly synonymously with "person in prostitution," the formers convey more clearly the reality, discussed above, that most people who are found in prostitution are either pimped, trafficked, or coerced by social forces that include poverty, racism, and sex inequality. Other common terms apart from "sex workers," such as "prostitutes," do not either convey these meanings. Thanks to Catharine A. MacKinnon, for clarifying these definitions.

[124] *Andrews, supra* note 91, at 167, J. McIntyre.

The fact that the B.C. Plaintiffs initially acknowledged that prostituted persons belong to disadvantaged groups whom merit particular attention under section 15 should have compelled them to make a different analysis altogether. Substantive inequality, including multiple disadvantages that operate intersectionally, as they tend to do in prostitution (see above), are produced through the interplay between exploitative social forces and legal frameworks that either reinforce exploitation, or leave it unaddressed. Just as was stated in *Andrews* above, legal distinctions or disparate impacts do not by themselves produce inequality, nor do they by themselves make laws inconsistent with Canada's legal ambition to promote equality. Whether or not they do so depends on the empirical conditions actually at work in prostitution—conditions which both the B.C. Plaintiffs and the *Bedford* courts have failed to adequately apprehend (see above). Not surprisingly, legal scholars who influenced the early Charter decisions on sex equality in Canada,[125] and whom have since published extensively on substantive antidiscrimination law, reach a different conclusion regarding prostitution laws:

> The absence of effective laws and law enforcement against those who, in substance, exploit people in prostitution is substantive sex discrimination, as is the typical law enforcement pattern of criminalizing prostituted people. A substantive sex equality approach, accordingly, would decriminalize people sold in prostitution and strongly criminalize those who buy and sell them. Almost all those who would be prosecuted under such a scheme, as with rape laws, would predictably be men, either as sellers or buyers of others, a substantively male dominant behavior. Anyone bought or sold for sex would not be prosecuted, due to being substantively in a female/subordinate position, regardless of their sex.[126]

To promote equality under this approach, laws such as the living on the avails provision are needed precisely because they disparately criminalize only those who exploit or buy prostituted persons. Although my paper primarily discusses prostitution laws targeting third parties, the above quote also applies to laws against those purchasing people in prostitution (johns, tricks, punters, clients, etc.)—laws that are extensively discussed in two previous publications of mine dealing with the Swedish law, including its rationales, impact, and future potential.[127] That law, which builds upon a substantive equality approach to

[125] For instance, law professor Catharine A. MacKinnon has been recognized to have helped prepare legal briefs for interveners such as the Women's Legal Education & Action Fund (LEAF) in important early Charter cases. *See, e.g.*, Jeff Sallot, "Legal Victory Bittersweet GOOD; BAD NEWS: The Supreme Court's Pornography Ruling Is Hailed As a Stunning Advance. But a Program That Helped Make It Possible Has Been Cut" *Globe and Mail* (Februrary 29, 1992).

[126] MacKinnon, "Substantive Equality," *supra* note 96, at 15 (footnote and citations omitted).

[127] *See* Max Waltman, "Sweden's Prohibition of Purchase of Sex: The Law's Reasons, Impact, and Potential" (2011) 34 Women's Studies International Forum 449; *see also* Waltman, "Ending Trafficking," *supra* note 108. These two articles account for the history from 1999, when Sweden prohibited purchase of sex while decriminalizing prostituted persons on a similar rationale as advocated here. The Parliament recognized that purchasing sex is a practice of sex inequality (regardless of whether the purchased person is a woman or a man), and that purchasers and pimps typically have the upper hand, thus exploit and harm prostituted people. The law was part of an omnibus bill against violence against women, recognizing prostitution as related to such violence. The occurrence of prostitution in Sweden has been significantly reduced compared to neighboring countries since the law's enactment. Prior claims that alleged a more dangerous situation for those still in prostitution after 1999 have been shown to be unfounded. Hence, in 2011 the Swedish Parliament further clarified the law so that survivors more easily can claim damages against johns for violating their equality and dignity. This clarification is to be distinguished from social support from various public programs which, although they existed previously in Sweden, were amenable to the whims of political majorities or other

prostitution, is now basically adopted in Norway and Iceland as well,[128] and to some extent in the United Kingdom and South Korea.[129] A Canadian court could consider to create such laws effectively by upholding the laws which target purchasers and third parties, and invalidate the laws that target prostituted people whom should rather be given the opportunity to be regarded legally as victims, at least if they so choose (more below). Section 15 already support such an interpretation (more below), particularly as the reasons in *R.v. Kapp* (2008) strengthened the previous position in *Andrews* (1989) from the standpoint that "[a]n insistence on *substantive equality* has remained central to the Court's approach to equality claims."[130]

Accordingly, *R. v. Kapp* held that section 15(2) protects the government from being challenged when any law, program, or activity evidently have the object of ameliorating conditions of disadvantaged individuals or groups, even if this aim entails treating them differently.[131] The living on the avails provision has been shown above to improve the conditions of prostituted people, of whom most are vulnerable and merit protection under section 15(1), in part by enabling more effective prosecution against pimps without prostituted persons being exposed to more dangers by a requirement to testify against their exploiters (see above). Similarly, a substantive prostitution law that criminalizes purchasers and decriminalizes prostituted people, and a program empowering the latter with entitlements to support for exiting prostitution and a concomitant legal right to damages from purchasers for their violation of the prostituted persons' equality and dignity—should they choose to use them—would also have as its object to ameliorate the conditions of disadvantaged individuals or groups, even if it meant "different" legal treatment of different groups.[132] Considering findings such as the one that 89 percent of 854 prostituted persons in nine countries wanted to leave prostitution but felt that they could not,[133] it can be presumed that most prostituted persons would seize this opportunity for damages and social support if it was practically in their reach, and if substantial enough to sustain their exit from prostitution.

The objections from the B.C. Plaintiffs that prostituted persons may be denied a beneficial business relationship with third parties because of the living on the avails provision

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administrative decisions as there existed no legal right to entitlements. The clarifications on the civil rights in 2011 similarly support public social welfare assistance to prostituted persons as crime victims—a legal recognition that was previously only made for trafficking victims, or victims of other crimes—not for prostitution per se.

[128] Almindelig borgerlig Straffelov (Straffeloven) [Criminal Code] Ch. 19, § 202a (Norway), online: <http://www.lovdata.no/cgi-wift/ldles?doc=/all/nl-19020522-010.html>; Comm. on the Elimination of All Forms of Discrimination Against Women, *Response to the Recommendations Contained in the Concluding Observations of the Committee Following the Examination of the Fifth and Sixth Periodic Reports of the State Party on 8 July 2008* (Iceland), U.N. Doc. CEDAW/C/ICE/CO/6/Add.1 (May 27, 2011);

[129] *Policing and Crime Act 2009* (U.K.), 2009, c. 26, s.14, online: <http://www.legislation.gov.uk/ukpga/2009/26>; Statutes of S. Korea, Act No. 7196: Act on the Punishment of Procuring Prostitution and Associated Acts (Mar. 22, 2004); Statutes of S. Korea, Act No. 7212: Act on the Prevention of Prostitution and Protection of Victims Thereof (Mar. 22, 2004).

[130] *R. v. Kapp, supra* note 93, ¶ 15 (emphasis added).

[131] *Ibid.*, ¶¶ 32-38.

[132] This is now basically the law in Sweden, *supra* note 127, although there exist some remaining procedural problems which should be alleviated so prostituted person can make more effective use of the option to claim damages from purchasers under the law. *See* Waltman, "Sweden's Prohibition," *supra* note 127, at 463-68.

[133] Farley et al., "Nine Countries," *supra* note 6, at 51, 56.

is neither consistent with the actual law, nor legally consistent under a section 15 analysis. *First*, they ignore how already in *Downey* it was acknowledged that if evidence was available to the court that indicated a genuinely mutual business relationship, a defendant could easily disprove the charge under the avails provision (see above). Because research and evidence invariably show that the overwhelming majority of prostituted persons would be more disempowered if third parties instead receive a presumption of legitimacy, as under *Bedford* (see above), there seem to be little reason to reverse the presumption when there already exist a viable option for a defendant to disprove an allegation of living on the avails. Moreover, it is only a minority of prostituted persons, possibly a fraction, whom might actually benefit by legally treating similar the third parties in prostitution as third parties are treated in other business areas; these are the prostituted people whom are least unequal compared to the general population—not the majority of prostituted persons, whom should merit the most protection under section 15.

Second, the effects of a similar treatment according to the B.C. Plaintiffs' logic has since long been criticized by discrimination scholars as being a form of legal "neutrality" that is blind to substantive inequality; it is well acknowledged that this approach reinforces inequality by making equality laws useless, except for those who are least in need for substantive equality.[134] Hence, the more substantively unequal and vulnerable to exploitation a person is, the less she or he is recognized as unequal under such a law. Arguably at least since *Andrews*, in Canada this would be legal equality turned on its head. Moreover, "neutrality" along those lines would make it even more difficulties to ameliorate intersectional multiple disadvantages in prostitution, which requires an even more substantive approach (see above). Accordingly, the "similar treatment" advocated by the B.C. Plaintiffs has been particularly criticized as it has often been derived from the perspectives of privileged groups, like men whom did not typically need protection against gender-based violence, or privileged women whom did not need legal protections against sexual exploitation in prostitution.[135]

The mere fact that the neutrality-argument above is now said to be voiced by some women in prostitution does not make it more correct than if it was voiced by male judges. Its perspective is still wrong because it does not accurately apprehend that of the majority, and even less the perspectives of the most vulnerable sections of prostituted people. Moreover, the section 15 test formulated in *R. v. Kapp* for a law, program, or activity that has an ameliorative or remedial purpose, and targets a disadvantaged group, did not require that

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[134] *See* Catharine A. MacKinnon, *Toward a Feminist Theory of the State* (Cambridge, MA: Harvard Univ. Press, 1989) at 233-34 ("Those who most need equal treatment will be the *least* similar, socially, to those whose situation sets the standard against which their entitlement to equal treatment is measured. The deepest problems of sex inequality do not find women 'similarly situated' to men."). *Cf. ibid.*, at 225 ("The women that gender neutrality benefits . . . . are mostly women who have achieved a biography that somewhat approximates the male norm . . . . the least of sex discrimination's victims. When they are denied a man's chance, it looks the most like sex bias.").

[135] *Cf.* Catharine A. MacKinnon, "On Torture," in *Are Women Human? And Other International Dialogues* (Cambridge, MA: Belknap Press of Harvard Univ. Press, 2006) at 26 ("Because there are relatively few similarly raped, battered, or prostituted men around to compare with (or they are comparatively invisible and gendered female), such abuses to women are not subjected to equality law at all. Where the lack of similarity of women's condition to men is extreme because of sex inequality, the result is that the law of sex equality does not properly apply.").

everyone in this group experience the same type of discrimination, or even that they are disadvantaged at all: "Not all members of the group need to be disadvantaged, as long as the group as a whole has experienced discrimination."[136] The evidence above suggests that the few prostituted persons whom might hypothetically be able to ascertain their interests and perspectives when bargaining with third parties are likely to have other alternatives to prostitution to fall back on, or otherwise having a special status. In other words, they are most likely already socially equal to their third parties. Whether this hypothetical group is a tiny fraction of the total population of prostituted persons or not, since *R. v. Kapp* the Charter nonetheless clearly suggests that those whom are more unequal in society should be the beneficiaries of legal protection when balancing between competing interests. Hence, the interest of hypothetical or real persons in prostitution whom approximately are in an equal position to third parties, so that they can effectively bargaining without being vulnerable to exploitation (contrary to the majority of prostituted persons), should not be taken to invalidate the "living on the avails" provision when that law "*has as its object* the *amelioration* of conditions of *disadvantaged* individuals or groups."[137]

Had the Court of Appeal in *Bedford* considered a section 15 analysis in light of *R. v. Kapp*, their conclusion that the law's objective is "to protect vulnerable persons from being coerced, pressured or emotionally manipulated into prostitution," and "to prevent pimps from exploiting prostitutes and from profiting from the prostitution of others,"[138] unmistakably supports upholding the law against a challenge of discrimination under section 15. *Kapp* defined *disadvantaged* as connoting "vulnerability, prejudice, and negative social characterization," and stated that "conditions" of "specific and identifiable groups" was the focus of section 15—not "broad societal legislation."[139] Exploitation in prostitution is a "condition" that is indeed "negative," and amplified by social, economic, political, and cultural "vulnerability." Exploitation in prostitution seems also to have more serious measurable harmful consequences, e.g., very high symptoms of PTSD (see above), than the types of exploitation that might otherwise be the subject of "broad societal legislation," such as labor market regulations. Accordingly, a law which has the objective to protect against exploitation in prostitution, as the presumption of living on the avails provision does, also has the objective to ameliorate the "conditions of disadvantaged individuals or group" under section 15(2). There is hence no need for this law to benefit all persons in prostitution, such as those who are not vulnerable to exploitation.

However, laws which do not ameliorate the conditions of the disadvantaged would be laws that criminalize prostituted persons themselves, rather than those penalizing their profiteers and purchasers. In *R. v. Kapp*, the Supreme Court noted that courts have sometimes misunderstood the term "ameliorate," exemplifying with a case that eventually was reversed where young people under 16 had been restricted from "operating an amusement device" without custodian consent; this law had been saved in the first instance on the alleged ground that it had the purpose of "ameliorating" conditions of the disadvantaged protected under

[136] *R. v. Kapp, supra* note 93, ¶ 55.
[137] *Ibid.*, ¶ 42.
[138] *Bedford v. Canada (A.G.), supra* note 3, ¶¶ 238-39 (Ont. C.A.).
[139] *R. v. Kapp, supra* note 93, ¶ 55.

section 15(2) because of their age.[140] With such "precedents" in mind, the Supreme Court suggested "that laws designed to restrict or punish behaviour would not qualify for s. 15(2) protection."[141] In the case of prostitution, that is exactly what the laws which criminalize prostituted persons do, in contrast to laws that criminalize the purchasers or the pimps; hence, laws that penalize prostituted persons for being prostituted would not enjoy protection under section 15. This logic is perfectly in line with a substantive equality approach to prostitution laws, as outlined above with reference to the Swedish law against purchase of sex that has now been adopted elsewhere as well.

Conclusion

The overwhelming evidence suggests that third parties do not improve the well-being and safety of prostituted people. This is to be expected as prostitution is intrinsically unequal; as such, prostitution provides high incentives and easy targets for exploitation. By contrast, the *Bedford* appeal was decided on the basis of a hypothetical and naive assumption that providing legality to more third parties in prostitution would improve the safety and well-being of prostituted persons. This assumption was not supported by the courts' own evidence. They misrepresented research studies they had received on file, or did not notice serious flaws therein. Moreover, expert opinions that were cited did not contain substantive evidence which could validate the courts' unusual assumptions about third parties. Nonetheless, the Court of Appeal for Ontario decided against previous established Supreme Court case law that had saved a legal presumption that third parties in prostitution are reprehensible parasites "living on the avails" of prostitution, in order to make prosecution of them less difficult and less dangerous to prostituted people.

Just as the Supreme Court recognized when upholding the "living on the avails" provision in 1992, there are many pimps whom will continue to intimidate and threaten, even with murder, in order to prevent prostituted persons to testify and provide courts with evidence of further exploitation.[142] In taking a stance of incredulity towards such well documented realities, the *Bedford* court made the majority of prostituted persons even more exposed to exploitation *and* violence, while providing increased legal protection to pimps through the higher thresholds now required when applying the avails provision. The consequences of their decision amplify the vulnerability and social, political and legal disadvantage of a group that already suffers multiple disadvantages in society. This impact of their ruling is strongly in discord with the imperatives to promote equality under the *Charter* that were clearly recognized by the Supreme Court already in the 1980s. A law with the objective to ameliorate the conditions of the disadvantaged, which prostituted persons typically are, is impregnated from constitutional challenge under section 15(2) even if it creates legal distinctions based on the disadvantaged groups, and even if it does not apply similarly to other groups. Section 15 thus compels Canadian courts to reframe the prostitution laws so they promote equality. Such an approach suggests a criminalization of purchasers and pimps, and a decriminalization of

[140] *Ibid.*, ¶ 53 (citing *R. v. Music Explosion Ltd.* (1989), 62 Man. R. (2d) 189, [1989] CarswellMan 308 (Man. Q.B.), *rev'd* (1990), 68 Man. R. (2d) 203, [1990] CarswellMan 295 (Man. C.A.)).

[141] *R. v. Kapp, supra* note 93, ¶ 54.

[142] See, e.g., *R. v. Downey, supra* note 5, at 33-35 (quoting and citing government reports and research studies).

prostituted people whom would rather be entitled to social support for exiting prostitution (if or when they want to), and a concomitant right to damages from purchasers and pimps for having violated their equality and dignity. This law, which now exists in Sweden,[143] provides real means to make choices in their lives, which the majority of prostituted persons also say they want to.

[143] *See supra* note 127.