In Bedford v. Canada, two levels of Ontario courts ruled that a selection of criminal laws prohibiting prostitution-related activities unjustifiably deprive sex workers of their right to liberty and security of the person.*** The courts struck down or modified some of the offending provisions to ensure that sex workers are better able to take precautions against violence. While sex workers consider the Ontario Superior Court of Justice ruling a victory and the Ontario Court of Appeal ruling a partial victory, the government, some women’s rights groups, and other defenders of the provisions argue that courts ventured into a “policy thicket”, which is to suggest that they had stepped outside of their legitimate institutional role. Associated concerns include that the decisions effectively constitutionalize prostitution and will pre-empt or curtail Parliament’s consideration of legislative options.

In this paper, the authors clarify misconceptions about the constitutional foundations and implications of Bedford, and explore how the ruling might affect legal and policy-based interactions among various stakeholders. Approaching constitutional rights as discursive mechanisms, rather than as “trumps”, we argue that Bedford will not hinder the continuation of democratic debate about whether, how, and why aspects of sex work should be regulated. To the contrary, Bedford is more likely to enhance the quality of debates by making them more inclusive of the perspectives of sex workers as well as accommodative of growing empirical research that has hitherto been ignored or misrecognized.

Dans l’affaire Bedford v. Canada, deux tribunaux ontariens ont conclu que des dispositions législatives du droit criminel interdisant les activités liées à la prostitution privaient de façon injustifiée les travailleurs et travailleuses du sexe du droit à la liberté et à la sécurité de leur personne. Ces tribunaux ont déclaré inconstitutionnelles certaines des dispositions contestées ou les ont modifiées dans le but d’assurer que les travailleurs et travailleuses du sexe puissent prendre des mesures pour se protéger contre...
les actes de violence. Si les travailleurs et travailleuses du sexe considèrent cette décision comme une victoire partielle, le gouvernement, certains groupes de défense des droits des femmes et d’autres défenseurs desdites dispositions prétendent, pour leur part, que les tribunaux se sont aventurés en « terrain politique », ce qui suggère qu’ils ont outrepassé leur rôle institutionnel légitime. Il en découle des préoccupations parmi lesquelles ces décisions rendraient effectivement constitutionnelle la prostitution et qu’elles écarteraient ou limiteraient toute considération d’options législatives par le Parlement.

Dans le présent document, les auteurs dissipent les malentendus sur les fondements et répercussions constitutionnels de l’affaire Bedford, et explorent les incidences que pourrait avoir cette affaire sur les interactions aux niveaux juridiques et politiques des différentes parties intéressées. Nous sommes d’avis que, en abordant les droits constitutionnels comme des mécanismes discursifs et non comme des droits primordiaux, la décision Bedford n’empêchera pas la poursuite du débat démocratique sur les questions de savoir si oui ou non, comment et pourquoi les divers aspects du travail du sexe devraient être soumis à une réglementation ou, même, criminalisés. Bien au contraire, l’affaire Bedford est susceptible d’améliorer la qualité des débats en les rendant plus inclusifs des perspectives des travailleurs et travailleuses du sexe de même que plus ouverts à la recherche empirique croissante qui, jusqu’à ce jour, a été mise de côté ou n’a pas été reconnue.

I. INTRODUCTION

In Bedford v Canada,1 the Ontario Superior Court Justice [OSCJ] and the Ontario Court of Appeal [OCA] reviewed three provisions of the Canadian Criminal Code2 for consistency with the Canadian Charter of Rights and Freedoms.3 The impugned provisions prohibited activities relating to prostitution, including: renting, using, or owning an indoor location on a habitual or frequent basis for the purposes of prostitution (s. 210), living on the avails of prostitution of another person (s. 212(j)), and communicating in public for the purposes of prostitution (s. 213). The three complainants -- all current or former sex workers -- argued that the three impugned provisions violate sex workers’ section 7 right to liberty and security of the person and that the law against communicating further violates sex workers’ section 2(b) right to freedom of expression, as protected by the Charter. On September 28, 2010, the OSCJ ruled that the provisions do indeed violate the Charter and are not in accord with the principles of fundamental justice. On March 26, 2012, the OCA similarly held that blanket prohibitions on common bawdy-houses and living on the avails of prostitution are unconstitutional. However, a majority upheld the constitutionality of the communication provision. On October 25, 2012, the Supreme Court granted leave to the Crown’s appeal and the complainant’s cross-appeal.

Public and professional reactions to this case have been varied. Current sex workers and their supporters have tended to view the rulings more or less favourably, insofar as they are now able to take

---

2 RSC 1985, c C-46 [Criminal Code].
more precautions to protect themselves against physical violence. However, even the most optimistic observers think the OCA’s decision fell short by upholding the communication provision. Others think the decisions will increase incidences of violence and exploitation (particularly of women and minors), as well as crime associated with sex work (e.g. drug trafficking, organized crime) and gender inequality. Still others contend that the decision will effectively constitutionalize prostitution, thereby stifling “political” or “policy-oriented” discourses about whether, how, and why sex work should be regulated.4

Somewhere in between these conflicting positions stand those who think the decision will lead to few material changes. Some observe that indoor and street sex work has been pervasive for decades, concluding that Bedford simply reflects an inevitable or at least highly intractable social reality that has not been reduced by criminal law interventions. The argument follows that striking down or modifying the impugned provisions does not create uncertainty, inhibit the regulation of sex work, or expose sex workers to greater exploitation and abuse, since there exist numerous regulatory laws sufficient for contending with the ‘nuisances’ associated with sex work as well as Criminal Code offences of general application (i.e. non-sex-work-specific criminal offences) that prohibit physical violence and exploitation (e.g. assault, sexual assault, extortion, sexual interference, sexual exploitation). In the end, the Bedford decisions may end up having little effect because, as we will see, they rested in large part on the fact that prostitution itself is legal and that laws which penalize and expose sex workers to violence are accordingly irrational; it is conceivably possible – though far from certain or desirable – for Parliament to “rationalize” these provisions by criminalizing prostitution per se.

The purpose of this article is to elucidate the constitutional foundations and implications of Bedford with a view towards clarifying persistent confusion about what was and what was not decided. In particular, we will argue that the decisions do not constitutionalize a right to sex work, nor will they facilitate an increase in incidences of violence or exploitation of sex workers. Although we acknowledge holding particular views about whether, how, and why sex work should be regulated,5 we hasten to add that the OSCJ and OCA Bedford decisions do not endorse a position on the question of whether sex work should be decriminalized. Rather, they rest on the empirical claim that substantive law as well as processes of law-enforcement contribute to increased risk of violence and exploitation, as well as on the principle that any attempt to regulate sex work must consist with the maxim: “do no harm.”6 This is to say that Bedford is concerned with the limited right of sex workers to take precautions against violence, leaving intact a range of laws that can be effectively used to reduce (perceived) negative aspects of sex work and to protect sex workers from violence.

In the second section, we will explore the historical and institutional context of the decisions, including the narratives and conceptual frameworks that have tended to organize our thoughts about the intersections among sex work, law, and violence. We focus in particular on the ways in which legal rights have served as discursive mechanisms for the articulation of competing beliefs, values, and

---

4 The government and interveners on its behalf argued that Himel J of the OSCJ “should have declined to enter into this policy thicket and should have simply acknowledged that the conflicting evidence provided a reasonable basis for the policy choices reflected in the relevant Criminal Code provisions”; see Bedford (2012), supra note 1 at para 139.


6 We borrow this principle from the medical maxim: Primum non nocere (first, do no harm).
interests. In the third section, we will explore the jurisprudential foundations of *Bedford*, paying exclusive attention to s. 7 of the *Charter*. In the fourth section, we review public and professional reactions to the case, relaying contending visions as a possible engine of or a hindrance to more inclusive discourses about the regulation of sex work. In the final section, we will argue that while the case does impose constitutional constraints on the regulation of sex work, these constraints extend only so far as to protect the limited right of sex workers to take precautions against violence; they do not remove important legal protections against violence and exploitation and do not unjustifiably limit other interests.

**II. SEX WORK, LAW, AND VIOLENCE: HISTORICAL AND CONTEMPORARY PERSPECTIVES**

The central issue in *Bedford* was whether and to what extent certain criminal law provisions contribute to physical violence against sex workers. While it raises strong moral and ethical issues, this is at root an empirical question. As such, it cannot be answered by simply describing the content, form, or objectives of relevant law or by invoking moral perspectives on sex work. We must instead explore the various social, political, and economic contexts within which criminal law operates and, of course, whether it reinforces relations of social, economic, and gendered domination. This is a difficult task for at least two reasons.

First, there are a plurality of legal regimes and processes that touch upon sex work. Although prostitution itself is a lawful activity in Canada, all levels of government use law to prohibit, regulate, and otherwise restrict prostitution-related activities. Criminal law is perhaps the most visible form of regulation, which has been used to prohibit many activities commonly associated with prostitution. While the federal government has exclusive authority to promulgate criminal law,7 provinces exert considerable influence over prostitution-related activities through regulatory law and through their constitutional authority over the administration of criminal justice (e.g. prosecutions, the composition and administration of courts, provincial and some municipal police forces). Municipalities also play an important role through zoning and other regulatory bylaws as well as through the policies and practices of local law-enforcement. It is obviously difficult to distinguish the (possibly) distinct causal influence of criminal law from the influences of these other legal regimes.

Second, there is limited empirical research on the historical interactions between law, sex work, and violence in Canada.8 It was not until the mid-1970s that academics and governments began systematically studying this issue,9 and sex workers began writing about their experiences, collectively

---

7 *Constitution Act, 1982*, supra note 3 at s 91(27).
producing workable bodies of knowledge by the late 1980s and early 1990s. Since sex workers have often been largely excluded from official legal and policy discourses however, their perspectives have tended to have little impact on state decision making. Instead, narratives about sex work seem to draw on recurring themes or paradigms concerning what sex work “is” as well as whether, why, and how it should be regulated. It would be useful for heuristic purposes to divide these narratives into pre- and post-Charter eras. This division is admittedly anachronistic, since traditional, pre-Charter perspectives continue to shape discourses, while the values underpinning Charter rights were recognized and used by some pre-Charter. Nonetheless, this division will help us better appreciate the constitutional foundations of Bedford.

A. Pre-Charter Perspectives

Traditional, historical narratives of sex work were largely governed by conceptions of sex work as immoral, and were reflective of religious beliefs and commitments. This narrative was historically coupled with a philosophy of legal-moralism, according to which the state may legitimately use law to prohibit behaviour that conflicts with society’s collective moral judgments, even if such behavior does not result in demonstrable physical or psychological harm to others. Canada’s first Criminal Code, for example, enacted in 1892, classified sex work-related offences as “Offences against Religion, Morals


11 Several authors have similarly observed the use of various conceptualizations or “paradigms” of prostitution; See, Janine Benedet, “Paradigms of Prostitution: Revisiting the Prostitution Reference” in K Brooks, ed, Justice Bertha Wilson: One Woman’s Difference (Vancouver and Toronto: UBC Press, 2009) 131. Benedet’s work includes a thorough discussion of paradigms of prostitution that are similar to the narratives we will shortly discuss, including those relating to immorality, nuisance, (in)equality, and inevitability.

12 Rottenberg, supra note 8; Nilsen, supra note 8.

Earlier criminal law, including that of pre-confederation colonies, was governed by a mixture of English and colonial statutes as well as English common law, all of which were similar in this regard. Legal-moralism manifested itself in criminal law through traditional principles of punishment, including retribution, deterrence and, to a much lesser extent, rehabilitation. In one sense, the objective of criminal law was to protect women’s “virtue” and shield her from the “ravages of vice.” Yet, prostitutes were typically treated as offenders rather than as victims, much as they are today, while customers were not subject to arrest or prosecution. In particular, few appreciated prostitutes’ experiences of poverty, racism, social discrimination, stigma, and inter-personal or familial victimization. Nor did many contemplate that exchanging sexual service for financial reward might be a means of resistance for women disinterested in marriage, dominant conceptions of sexual propriety, or the performance of ascribed social and gender roles.

On the surface, criminal laws notionally protected prostitutes, and other women for that matter, from exploitation and physical abuse at the hands of male spouses, customers, and/or procurers. From 1892 to 1953-54, for example, the Criminal Code contained offences pertaining to living on the avails of prostitution and procuring. However, these same provisions were, and continue to be, used against sex workers’ family members, loved ones, and others as decided by the police and judiciary. As with several other anti-prostitution offences, living on the avails of prostitution was a vagrancy or status offence and so applied only to a “loose, idle or disorderly person or vagrant who ... having no peaceable profession or calling to maintain himself by”, supports himself on the “avails of prostitution.” Whereas procuring prostitution applied to anyone who:

(i) for the purposes of gain, exercises control, direction or influence over the movements of any woman or girl in such a manner as to show that he is aiding, abetting or compelling her prostitution with any person or generally; or (l) being a male person, lives wholly or in part on the earnings of prostitution.

---

14 The Criminal Code 1892, 55-56 Victoria, c 29.
15 Shaw v Director of Public Prosecutions, [1962] AC 220 at 237, [1961] 2 All ER 446, 45 Cr App Rep 113 (HL) 449 All ER.143 Cr App Rep
16 Although currently a fundamental principle of sentencing in Canada (see, Criminal Code s 718(d)), rehabilitation was for a long time contested as a legitimate principle of punishment; see HLA Hart, “The Presidential Address: Prolegomenon to the Principles of Punishment (1959-60)” 60 Proceedings of the Aristotelian Society 1.
17 Canada. The Report of the Special Committee on Pornography and Prostitution (Ottawa: Communications and Public Affairs, Department of Justice Canada, 1985) at 403 [Fraser Committee).
18 McLaren, supra note 8.
20 Criminal Code, supra note 2 at s. 207(i).
21 Ibid at s 2 16.
In theory, laws against assault, sexual assault, extortion, and others provided further protections. However, empirical research conducted since the 1980s demonstrates that law has failed to protect sex workers, and women in general, in these and other regards. For example, we know that most sex workers, and indeed most women, who experience serious victimization do not report the crimes to authorities. Reasons for this include distrust and even abuse at the hands of police, “victim blaming” by criminal justice personnel, feelings of shame or guilt, a sense of hopelessness or “learned helplessness”, and fear of reprisals from the victimizer. For those willing to report crimes, socio-economic and systemic discrimination imposed (and continue to impose) enormous barriers to justice.

Men accused of sexual assault, for instance, could (and arguably still do) use a women’s status as a sex worker to plead mistaken belief in consent; they also used (and still use) prior sexual history and other sexist stereotypes to impugn the credibility of complainants. Sex workers abused by people with whom they regularly interacted—such as third-party managers or spouses—were and still can be intimidated into withdrawing or not filing charges and not testifying in court.

Currently, traditional narratives of sex work as inherently dangerous and immoral make it easier to deny that law contributes to victimization. A typical argument is that those who voluntarily engage in risky and dangerous behaviour are responsible for what happens to them; this was the position taken by the Attorneys General for Canada and Ontario in *Bedford*. Those who adopt this position tend to believe that the best means of reducing violence and exploitation is to eradicate sex work itself; if law contributes to violence in the meantime, this is the cost of achieving a more fundamental goal. However, notwithstanding doubts about the possibility of fully eradicating sex work, law (and law-enforcement) has arguably played a contributory role by aggravating pre-existing risks and preventing sex workers from minimizing those risks. It does so by criminalizing activities that can reduce the risk of violence, such as laws prohibiting indoor sex work and communication, which then require sex workers to move their activities to remote and decidedly more dangerous locations, insofar as they wish to avoid arrest.

---


23 The legal profession and the justice system at large, for example, was exclusive to men; see Constance Backhouse, “Gender and Race in the Construction of ‘Legal Professionalism’: Historical Perspectives”, online: Law Society of Upper Canada <http://www.lsuc.on.ca/me-dia/constance_backhouse_gender_and_race.pdf>.


26 *Bedford* (2010), *supra* note 1 at paras 17, 20.
and prosecution for engaging in prohibited activities that are necessary to conduct their work.\(^{27}\) On the whole, this position of indifference implies that sex work is inherently wrong, immoral, or distasteful, and that the suffering of sex workers therefore need not be taken seriously. At the very least, it implies that the ends pursued by criminal law justify increasing the risk of violence.

B. The Charter Era

Discourses have changed in the past 30 years or so due to various factors, including women’s rights movements,\(^ {28}\) shifts in the geography and forms of prostitution,\(^ {29}\) increased awareness of the links between prostitution, laws, and violence,\(^ {30}\) and the advent of the Charter. Traditional legal-moralistic principles have gradually decreased in visibility (although not necessarily influence), while the concept of “rights” has become predominant. In particular, rights serve as vehicles for the articulation of counter-veiling values and interests in terms of law. While there is a wide range of ways these values and beliefs may be articulated, they tend to be expressed through the following narratives or conceptualizations: sex work-as-nuisance, sex work-as-inequality, sex work-as-labour, and sex work-as-inevitable.\(^ {31}\)

The nuisance narrative constructs sex work as necessarily dangerous, offensive, and a social blight, and recommends the use of criminal and regulatory law to “protect” the enjoyment of private and public property. In particular, it articulates the interests of residents of local communities to healthy, safe, and aesthetically-pleasing environments, free from the “nuisance” of street-based prostitution. By framing this interest in terms of rights to private and public property, the government may be obligated to


\(^{28}\) Carol Vance, ed, Pleasure and Danger: Exploring Female Sexuality (Boston: Routledge, 1984); Varda Burstyn, ed, Women Against Censorship (Toronto: Harper Collins, 1985); Bell, supra note 10.


intervene in the sale of sex for money, even if this requires limiting the counter-veiling rights of sex workers. In the 1990 *Prostitution Reference*,32 for example, the Supreme Court of Canada reviewed the constitutionality of laws prohibiting the keeping of a bawdy-house and communicating in public for the purposes of prostitution. Proceedings were initiated when sex workers argued that these laws infringed their section 2(b) *Charter* right to freedom of expression. The Court found that the prohibition on solicitation did indeed infringe section 2(b) of the *Charter* by restricting expressive activity. However, the majority ruled that this restriction was justified under section 1 because it was proportionately tailored towards eradicating “the various forms of social nuisance arising from the public display of the sale of sex” as well as “the general curtailment of visible solicitation for the purposes of prostitution.”33

In some respects, viewing sex work as a nuisance departs from traditional religious or moralistic language. However, this paradigm presupposes a more fundamental conception of sex work as necessarily ugly, distasteful, or offensive. For this reason, some argue that it tacitly transmits a philosophy of legal-moralism.34 It may also be argued that the underlying value of protecting the interests of property owners (of course, neglecting to consider that sex workers are property owners too) unjustifiably diminishes the rights of sex workers by permitting municipalities to displace commercial sex activities to more secluded and dangerous areas.

Sex work has also increasingly been viewed through the prism of anti-prostitution feminism, which argues that sex work is inherently inegalitarian, violent, and exploitative.35 Insofar as this is the case, Canada’s human rights obligations would require it to eradicate or actively reduce sex work.36 This narrative rests on a strong conception of what sex work “is” as well as what legal responses are needed to protect and promote human dignity, autonomy, and equality. Many of its empirical and normative claims are supported by assertions of correlations between sex work and “sexual abuse, poverty (local and global) and neglect, homelessness, addiction, the glamorization of prostitution in the popular media, and, for Aboriginal women, the legacy of colonialism and the persistence of racism.”37

Those who support the sex work-as-inequality perspective recommend what is sometimes referred to as “end demand” or “asymmetrical criminalization,” whereby criminal law would be used to penalize clients, managers, and procurers, but not sex workers, as they are exclusively victims.38 Controversially, they recommend that a strict approach be taken with all who “purchase and profit from women’s bodies,” which includes those who live on the avails of sex work, even if in ways that are not patently

33 *Ibid* at 1154.
37 Benedet, *supra* note 11 at 136.
violent or exploitative (e.g. third-party managers, drivers, security guards). This position is defended on the assumption that these actors are always men, or women controlled by men, and that a failure to penalize them "effectively enshrines a constitutional right to men’s prostitution of women."  

Another concern is that those who exploit sex workers may pose as clients, security guards, or drivers in order to avoid arrest and prosecution, thereby exposing sex workers to greater risk of violence and exploitation. Missing from this perspective is why existing criminal laws prohibiting disorderly conduct (section 172-179), nuisances (section 180-182), homicide (section 222-228), murder (section 229-240), causing bodily harm (section 244-248), assault (section 264-270), sexual assault (section 271-273), kidnapping (section 279), extortion (section 343-346), and so on, are not sufficient to contend with the problems that are seen to be inherent in sex work. Why, in other words, do we need sex-work specific criminal laws?

Sex workers and advocates in Canada and internationally have countered that sex work should not be regulated through criminal law and instead should be conceptualized as a form of work; resting on a narrative of sex work as labour. Insofar as sex work is a lawful activity, anti-sex work laws unduly restrict sex workers’ right to earn a living, facilitate increased stigma and discrimination, and deny them the protection of labour protections available to others engaged in lawful employment. This latter argument was central to the Prostitution Reference, where the Court was asked to consider whether:

> the impugned provisions infringe the liberty interest of street prostitutes in not allowing them to exercise their chosen profession, and their right to security of the person, in not permitting them to exercise their profession in order to provide the basic necessities of life.

This narrative provides an alternative historical and contemporary perspective on the relationship between sex work and equality. Those who conceive of prostitution as labour often argue not only that the state ought not to eradicate sex work, but that federal, provincial, and municipal governments should facilitate it by drawing on a mixture of employment standards, occupational health and safety, and other forms of regulatory labour law, as developed by sex workers and labour organizers. They have produced diverse sex-positive theorizations of sex and sex work as a means of social, economic, and political resistance, and civil-libertarian conceptualizations that construct anti-prostitution laws as an illegitimate intrusion of state power into private acts between consenting adults. Courts have generally

---

39 Women’s Coalition, supra note 36 at para 57.
40 Ibid at para 52.
42 van der Meulen & Durisin, “Why Decriminalize?”, supra note 5.
43 Prostitution Reference, supra note 32 at 1156
44 Bell, supra note 10; Carol Queen, Real Live Nude Girl: Chronicles of Sex-Positive Culture (San Francisco: Cleis Press, 1997); Carol Leigh, Unrepentant Whore: Collected Works of Scarlet Harlot (San Francisco: Last Gasp Press, 2004).
not been receptive to these sorts of arguments, often treating them as more “policy-based” than “legal” in nature. In the *Prostitution Reference*, for instance, Lamer J. refused to engage with these arguments on their merits because, in his view, the section 7 *Charter* right to liberty is engaged only when state power is exerted through adjudicative or analogous proceedings.45

Finally, there is a narrative of sex work as an inevitable or at least highly intractable social phenomenon. This narrative presents itself as largely neutral with respect to whether sex work ought to be eradicated or actively reduced. What it states is that, as long as sex work exists, law should not further contribute to violence, exploitation, or harm. We call this the maxim of “do no harm”, which states that, given an existing problem, it may be better not to do something, or even to do nothing, than to risk causing more harm than good. It also rests on the supposition that it can be easier to end discrete instances of injustice than to produce justice. Adherents to this principle need not be committed to a particular moral stand on sex work *per se*. Instead, they argue that we must draw sharp distinctions between ideal ends and empirical realities; whatever may be our intentions, if legal interventions demonstrably cause more harm to sex workers than good, we should change our approach.

On the one hand, adherents of the sex work as an inevitable perspective recognize the need to prohibit exploitation, abuse, and violence through criminal law; acknowledging that sex work can be violent or exploitative, although they would note that there are different kinds or degrees of violence (e.g. physical, emotional, psychological). On the other hand, adherents contend that existing antiprostitution laws have failed to end or even reduce the prevalence of sex work and, what is more, they may have actually increased sex workers exposure to specifically physical violence.46 Contrary to the claims of some,47 this narrative does not necessarily endorse the full decriminalization of activities related to sex work. Instead, proponents more often recommend the revision (but not necessarily the extinguishment) of existing criminal laws to better actualize the rights of sex workers to liberty (i.e. to be free from arrest and prosecution) and personal security (i.e. to be free from violence). In particular, sex workers should at the very least be allowed to take precautions to protect themselves, such as: hiring security, drivers, and assistants, operating small-scale bawdy houses, and, communicating in public for the purposes of prostitution.

This view was perhaps first expressed officially in the 1985 report of the Federal Special Committee on Pornography and Prostitution (the Fraser Report/Committee).48 Among the challenges facing the Fraser Committee was the need to engage with “very real disagreement about whether the protection of individual freedom or an emphasis on moral and social values should take precedence.”49 Although it made a series of firm recommendations, the Fraser Committee was clear that the government had to conduct more research, particularly regarding customers and male exploiters of female prostitutes as well as how federal, provincial, and municipal governments might cooperatively regulate sex work.

---

45 *Prostitution Reference*, supra note 32 at 1177.
47 Benedet, supra note 11 at 142
48 The Fraser Committee, supra note 17; it has since been expressed, albeit contentiously, in every major government or government-commissioned report on sex work.
within the confines of the Canadian constitution. 50 Among its core recommendations was that sex work be approached as a complex, multi-jurisdictional web of social and economic activities that has not been and, indeed, cannot be addressed through a command-and-control philosophy characteristic of criminal law. It further recommended that, if sex work cannot be eliminated or appreciably reduced in the foreseeable future, then it should take place “in private, and without the opportunities for exploitation which have traditionally been associated with commercialized prostitution.” 51 This recommendation was not acted upon and, in fact, the government shortly thereafter amended the Criminal Code to include a section on the criminalization of public communication for the purposes of prostitution. 52

III. BEDFORD V. CANADA

All of these narratives are evident in the legal arguments and judicial reasoning employed in Bedford. The case was initially framed around the sex work-as-inevitable narrative and the “do no harm” maxim. The claimants -- Terri Jean Bedford, Amy Lebovich, and Valerie Scott – argued that that sections 210 (bawdy-house), 212(1)(j) (living on the avails), and 213(1)(e) (communication) of the Criminal Code deprive sex workers of liberty and personal security by prohibiting them from taking even the most basic precautions to protect themselves from physical violence. 53 Criminalizing such activities as operating indoors, hiring managers, drivers, or security personnel, and vetting prospective customers in public places forces sex workers to choose between complying with criminal law (thereby exposing themselves to higher risk of violence) or taking health and safety precautions (thereby exposing themselves to arrest and prosecution).

The government and various interveners used other narratives to identify and defend the objectives of the impugned provisions, to counter the empirical claim that the provisions contribute to violence against sex workers, and to outline those Charter values that would justify any limitation of the s. 7 rights of sex workers in case a causal link among sex work, law, and violence was established. In order to succeed in court, then, the claimants had to successfully make three arguments. First, they had to distinguish Bedford from the Prostitution Reference, where the Supreme Court upheld the constitutionality of the impugned provisions against a s. 7 challenge in 1990. Second, because the Charter only applies to public institutions and actors, they had to identify a causal link or some other connection between the impugned provisions and physical violence perpetrated by private parties. Finally, they had to establish that deprivations of liberty and security of the person are not justified in accordance with principles of fundamental justice. This required them to engage with the objectives of the provisions as well as the various Charter and other legal values that the provisions are supposed to help actualize.

50 Federal/Provincial, supra note 27; Federalism is, of course, a serious issue here; see R V Westendorp [1983]1 SCR 43.
51 The Fraser Committee, supra note 17 at 547.
52 Criminal Code, supra note 2, s. 213.
A. Why Hear the Case Again? *Bedford, the Prostitution Reference, and Stare Decisis*

How did the OSCJ and OCA justify considering an issue that had seemingly been settled by the Supreme Court more than twenty years ago in the *Prostitution Reference*? The answer to this question requires a brief overview of how s. 7 works. When claimants invoke s. 7, they have to first demonstrate that they have been deprived of life, liberty, or security of the person. This requires that there be a causal relationship or some other connection between a particular law, policy, or state practice and the deprivation.54 As well, claimants have to demonstrate that the deprivation is not in accordance with “principles of fundamental justice,” which are norms that “have been developed over time as presumptions of the common law…have found expression in the international conventions on human rights” and are embodied in the Canadian Constitution.55 Although any given principle of fundamental justice has a distinctive content, scope, and source, they are functionally united as “essential elements of a system for the administration of justice which is founded upon the belief in the dignity and worth of the human person and the rule of law.”56

As with other Charter (and constitutional) provisions, the content and scope of s. 7 develops in response to changing social values, attitudes, and expectations.57 There are at least two ways this relationship unfolds. First, courts can either facilitate or constrain the ease with which a claimant’s personal interests may be articulated in legal terms. At this stage, focus is directed towards the content and scope of the right to life, liberty, and security. It is important to appreciate the difference between a right and the interest protected by a right. Rights serve as means of articulating variable personal interests or values in public law terms, meaning that the same right can touch on different interests; a decision about the constitutional dimensions of one interest does not foreclose a later decision on a different interest, even if both interests are expressed through the framework of the same Charter right. In the *Prostitution Reference*, for example, s. 7 was used to articulate the interest of sex workers in economic liberty. In *Bedford*, s. 7 was used to articulate sex workers’ interest in physical safety and liberty. The Supreme Court has not pronounced on this latter issue, so the principle of *stare decisis* does not yet apply to *Bedford*.

Legal change also occurs through the identification of new or the modification of existing principles of fundamental justice against which the constitutionality of deprivations to life, liberty, or security of the person are assessed. The emphasis here is no longer on the claimant’s interests, but the ways in which the limitation of their recognized right implicates the integrity of the justice system. As with other constitutional norms, the existence, content, and scope of particular principles of fundamental justice vary as our legal order interacts with surrounding social environments.58 In theory, the emergence of new principles or alterations to existing principles is not attributable to the unilateral pronouncements of a particular court. Legal developments are supposed to occur slowly, as the collective practices of actors

---

56 Ibid at para. 30.
working in a plurality of legal institutions cumulatively create new principles that judges recognize post-facto.

By the time *Bedford* was decided, three principles of fundamental justice had emerged or crystalized that were not applied in the *Prostitution Reference*. In the latter case, the Supreme Court considered whether the impugned provisions were unconstitutionally vague and inconsistent. In *Bedford*, by contrast, the issue was whether the impugned provisions were arbitrary, overly broad, and grossly disproportionate -- principles we will define shortly. Arbitrariness and over-breadth were not judicially recognized as principles of fundamental justice until 1993 and 1994, respectively -- three years after the *Prostitution Reference* was decided. Gross disproportionality was recognized as a principle of fundamental justice in 2003. Since the Supreme Court had yet to consider both the claimants’ interest in personal security and whether the limitation of this right unduly diminishes respect for principles of arbitrariness, overbreadth, and gross disproportionality, the OSCJ and OCA legitimately asserted the authority to consider them in *Bedford*.

### B. Is Parliament Responsible for Violence against Sex Workers?

The claimant’s next challenge was demonstrating that the impugned laws materially contribute to deprivations of liberty and security of the person. Insofar as conviction for these offences carries the possibility of imprisonment, the provisions clearly activate a liberty interest. The issue of personal security, however, required lower courts to decide whether it could hold Parliament responsible for physical violence perpetrated by private parties. If it could, would responsibility arise by virtue of Parliament’s failure to protect sex workers or can we say that the impugned laws somehow motivate or materially contribute to violence?

Fortunately, there is case law on similar issues. The Supreme Court, for instance, has found that legislation that denies or delays the provision of health services contributes to “serious physical or psychological suffering” that can amount to a deprivation of security of the person. In these cases, judges have attributed the deprivation to the distinctive harm that legislative obstacles impose on personal autonomy and control over bodily integrity rather than to the claimant’s medical condition per se. It would seem that legislation must create a harm that would not otherwise exist in order to directly deprive one of personal security. On the one hand, anti-prostitution laws do not seem to exhibit this quality, as they do not prohibit prostitution per se (thereby limiting personal autonomy) nor can they be said to obviously “cause” violence against sex workers, which, like violence against women in general, would in all probability exist even if the impugned laws were extinguished. On the other hand, however, the stigmatization and penalization of sex workers may motivate and even tacitly endorse violence, harassment, and intimidation, to the extent that this helps portray sex workers as second-class citizens and deviants with diminished moral agency. This stigmatization is a product of the collective actions

---

62 *Rodriguez*, supra note 59 at 577-78.
63 Sharry Allinott et al, *Voices for Dignity: Call to End the Harms Caused by Canada’s Sex Trade Laws*. Research report (Vancouver: Pivot Legal Society, 2004); Jacqueline Lewis, Frances M Shaver, & Eleanor Maticka-Tyndale, “Going ’round Again: The Persistence of Prostitution-Related Stigma” in Emily van der Meulen, Elya M Durisin, & Victoria
and inactions of various governmental institutions and agencies, though, so it is open to question whether Parliament could be singled out on these grounds.

On this point, state agencies and institutions may be held responsible for deprivations of security of the person directly caused by third parties if there is a “sufficient causal connection” between the actions of state officials and those of the third party. In Suresh v. Canada, for example, the court ruled that Canada generally could be held responsible for deprivations of security of the person if it deports a refugee to face the substantial risk of torture. It established that section 7 applies “at least where Canada’s participation is a necessary precondition for the deprivation and where the deprivation is an entirely foreseeable consequence of Canada’s participation.”64 In Khadr, this principle was applied when state officials interviewed Omar Khadr and then shared the records of these interviews with U.S. authorities while he was detained in Guantanamo Bay. The court held that s. 7 will be activated if the conduct of state officials “contributes” to the occurrence or continuation of deprivations of security of the person.65

This position finds some support in international law, where international and regional courts have held states responsible for failing to protect the international rights of persons or other states against the actions of private parties that occur within their territory.66 In all of these cases, however, there was some level of subjective knowledge or negligence on the part of the state with respect both to the existence or inevitability of harm and to its international legal obligation to intervene. In the United States Diplomatic and Consular Staff in Tehran,67 for example, the International Court of Justice found that Iran either knew or was negligent about its international responsibilities to “take appropriate steps to protect the premises of the United States Embassy and its diplomatic and consular staff from any attack…and to protect the security of such other persons as might be present on the said premises.”68 Since this jurisprudence deals with the blameworthy attitudes of particular state officials with respect to rather exceptional situations, it is not immediately applicable to legislation or, by extension, Bedford. It may yet be applicable to exceptional cases of governmental negligence, such as the seriously deficient approach local law-enforcement took to the disappearance of at least sixty women in Vancouver’s Downtown Eastside.

Still, several international human rights treaties obligate states to take legislative steps to reduce the occurrence and root causes of violence against women.69 The United Nations and other international legal institutions have identified violence against women as a human rights violation, calling on states to

---

64 Suresh, supra note 54 at paras 35-36.
65 Khadr, supra note 54 at paras 19, 21.
67 Suresh, supra note 54.
68 Ibid at para 68.
take positive measures to reduce its root causes and occurrence.\(^70\) The views of the United Nations and other interpretive communities are not formally binding on Canada, but they can serve as “re relevant and persuasive” sources of insight during the course of Charter review.\(^71\) At the very least, these sources provide principled support for the OSCJ and OCA’s decision to at least consider whether anti-prostitution laws contribute to violence against sex workers.

It is a different question altogether how international law might factor into judges’ reasoning about the constitutionality of the challenged provisions. Part of the problem is that international law does not expressly pronounce on the relationship between prostitution and women’s rights; only coerced and exploitative prostitution (e.g. sexual exploitation, forced migration, child prostitution) is proscribed under international law. Article 6 of the International Convention on the Elimination of all Forms of Discrimination Against Women,\(^72\) for example, requires states parties to “take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.” There is no international treaty provision that requires states to eradicate prostitution per se, unless one takes the contested position that prostitution is inherently involuntary and discriminatory.\(^73\) Although this latter position has little support in documents formally recognized as sources of international law,\(^74\) or even in so-called “soft law,”\(^75\) lawyers representing seven anti-prostitution women’s groups in Bedford submitted that international law mandates the use of criminal law and other measures to eradicate prostitution. In their view, physical violence and victimization is a necessary feature of prostitution and so the impugned laws are necessary to ensure compliance with international treaties on women’s rights.\(^76\) However, as noted above, there currently is no international legal obligation to eradicate prostitution, and indeed, international sex worker advocacy groups have made significant inroads in their attempt to promote a right to self-determination, equality, liberty, and security.\(^77\) This suggests that even soft law is not so clearly oriented towards a prostitution-as-inequality narrative. In addition, it is not clear why existing laws prohibiting various forms of exploitation would not suffice to discharge any such international obligation, even were it to exist.

In any event, the OSCJ was prepared to apply the “sufficient connection” test developed in Suresh and Khadr to the impugned provisions. The question then became an empirical one: do the impugned


\(^{71}\) Reference Re Public Service Employee Relations Act (Alberta), [1987] 1 SCR 313 at 349; Slaight Communications Inc v Davidson, [1989] 1 SCR 1038 at 1056-1057.

\(^{72}\) Article 38 of the Statute of the International Court of Justice, 3 Bevans 1179; 59 Stat 1031; TS 993; 39 AJIL Supp 215 (1945) lists these sources as: international conventions, international custom, the general principles of law recognized by civilized nations, and, subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

\(^{73}\) Barry, supra note 35; Dwarkin, supra note 35; Farley, supra note 35.


\(^{75}\) Kempadoo & Doezema, supra note 41.
provisions materially contribute to violence against sex workers, regardless of what may be their purposes and objectives? At the OSCJ level, Himel J. heard extensive testimony from numerous expert witnesses on this point, many of whom employed and/or conducted research on how sex work is addressed in foreign jurisdictions. All witnesses agreed that sex workers -- particularly those who work on the street -- are at risk of encountering physical violence. However, witnesses were divided on the question of whether and how the likelihood of violence can be effectively reduced.

Ultimately, Himel J. preferred the testimony of the claimant’s witnesses, finding that:

a. Working indoors is generally safer than working on the streets;

b. Working in close proximity to others, including paid security staff, can increase safety;

c. Taking the time to screen clients for intoxication or propensity to violence can increase safety;

d. Having a regular clientele can increase safety;

e. When a prostitute’s client is aware that the sexual acts will occur in a location that is pre-determined, known to others, or monitored in some way, safety can be increased;

f. The use of drivers, receptionists and bodyguards can increase safety; and

g. Indoor safeguards including closed-circuit television monitoring, call buttons, audio room monitoring, [and] financial negotiations done in advance can increase safety.78

Based on these claims, Himel J. proceeded to outline how the impugned provisions materially contribute to deprivations of sex workers’ personal security. To begin, prohibiting sex workers from working indoors prevents them from increasing personal safety by working in a familiar location, in proximity to others, and with security staff and devices (e.g. closed-circuit cameras). While violence is a risk in any female dominated profession,79 Himel J. made the factual determination that street prostitution is comparatively more dangerous than indoor prostitution in this respect, and so the bawdy-house provision contributes to an unnecessarily high risk of physical violence.80

Himel J. also found that the living on the avails provision materially contributes to deprivations of personal security. Prostitution, “including legal out-call work, may be made less dangerous if a

---

78 Bedford (2010), supra note 1 at para 421.


prostitute is allowed to hire an assistant or a bodyguard.”81 In combination, the bawdy-house and living on the avails provisions increase the likelihood of violence because “prostitutes may proceed to unknown locations and be left alone with clients who have the benefit of complete anonymity with no one nearby to hear and interrupt a violent act, and no one but the prostitute able to identify the aggressor.”82 Finally, Himel J. found that the communicating provision can similarly “increase the vulnerability of street prostitutes by forcing them to forego screening customers at an early and crucial stage of the transaction” and displacing them to remote locations.83

The government appealed these factual findings on the grounds that, inter alia, Himel J. failed to explain why she preferred the evidence supporting the claimant’s position to that supporting the position of the government. They also contended that the complex, inconclusive, and value-laden nature of empirical research on prostitution suggests the court was faced with a quintessential “policy” issue best left for Parliament.84 Taking this one step further, the anti-prostitution Intervener Women’s Coalition argued that Himel J.’s ruling “prohibits Parliament from criminalizing demand both on the street and in brothels.”85 The OCA rejected these arguments. While the normative commitments of experts clearly affect the interpretation and presentation of empirical evidence, the OCA found that Himel J. “understood the thrust of the expert evidence and … carefully assessed it,” ultimately coming to a conclusion that was based on a reasonable interpretation of the entire factual record.86 After engaging in its own review of the record, the OCA concluded that the “negative impact of the legislation on prostitutes is obvious.”87 It then affirmed Himel J.’s use of the “sufficient connection” test, noting that the impugned provisions raise the risk of physical violence and that “(a)ny real increase in that kind of risk must impair… security of the person.”88

C. Do the Ends Justify the Means?

Having demonstrated that Parliament has deprived them of the right to liberty and security of the person, the claimants had to show that these deprivations were not in accordance with principles of fundamental justice. They identified three principles against which the deprivations were to be scrutinized: arbitrariness, overbreadth, and gross disproportionality. The principle of arbitrariness states that a statutory measure is unconstitutional if it “bears no relation to, or is inconsistent with, the objective that lies behind the legislation.”89 The greater the seriousness of the deprivation, the greater

81 Bedford (2010), supra note 1 at para 361.
82 Ibid at para 421. For supporting research, see: Mary Childs et al, Beyond Decriminalization: Sex Work, Human Rights and a New Framework for Law Reform (Vancouver: Pivot Legal Society, 2006); Allinott et al, supra note 62.
85 Women’s Coalition, supra note 36 at p. 57..
86 Bedford (2012), supra note 1 at para 135.
87 Ibid at para 135.
88 Ibid at para 111.
89 Rodriguez, supra note 58 at 594-595.
must be the connection between the legislative measure and its objective.\textsuperscript{90} The principle of overbreadth states that deprivations of life, liberty, and security of the person are only justified if the offending measures are necessary to achieve a legitimate objective; otherwise, the deprivation serves no public purpose. Judges here respect the legislatures’ authority to make policy choices, but also recognize that legislation can produce unintended effects that unnecessarily harm certain individuals or groups.\textsuperscript{91}

Finally, the principle of gross disproportionality states that a law will be declared unconstitutional if it infringes \textit{Charter} rights in a manner “so extreme that they are \textit{per se} disproportionate to any legitimate government interest.”\textsuperscript{92} In contrast to overbreadth, even measures that are necessary to achieve a legitimate objective can be declared unconstitutional, if the gravity of the alleged \textit{Charter} infringement is significantly greater than the importance of the state interest pursued.\textsuperscript{93} This will become important as we consider how Parliament might respond to \textit{Bedford} and, in particular, whether the unconstitutionality of the provisions may be remedied simply by criminalizing prostitution itself.

Given the principles of fundamental justice that were at issue, the most important task at this point was determining how the objectives of the impugned laws should be characterized. As we have seen, many anti-prostitution laws are historically rooted in the conceptions of sex work as immoral. However, the \textit{Charter} prevents Parliament from using criminal law to impose standards of public or sexual morality on society,\textsuperscript{94} while general constitutional doctrine prevents courts from substituting contemporary public values, interests, and goals for historical legislative intent as the basis for the objectives of a long-standing law.\textsuperscript{95} \textit{Bedford} therefore required courts to rely on a rather technical analysis of the legislative history of the provisions, their terms and legislative context, and case law, while guarding against the transmission of unconstitutional as well as “shifting” purposes.

The Attorney General for Canada submitted that anti-prostitution laws in general are designed to denounce and deter the most harmful and public emanations of sex work, to protect sex workers,\textsuperscript{96} and to reduce the societal harms that accompany prostitution. Interveners for anti-prostitution women’s groups and the Attorney General for Ontario went even further, submitting that anti-prostitution laws are designed to eradicate prostitution. However, the OSCJ and OCA could not find any evidence that the original drafters of the provisions intended to eradicate prostitution. What is more, a majority of the

\textsuperscript{90} Chaoulli, supra note 60 at para 131.


\textsuperscript{92} Suresh, supra note 53 at para 32.

\textsuperscript{93} \textit{Canada (Attorney General) v PHS Community Services}, 3 SCR 134 at paras 58 and 296; \textit{Cochrane v Ontario (Attorney General)} (2008), 92 OR (3d) 321 at 332 (CA), leave to appeal to SCC refused, [2009] SCCA No 105; \textit{Malmo-Levine, supra} note 59.

\textsuperscript{94} \textit{R v Butler}, [1992] 1 SCR 452.

\textsuperscript{95} For a critical review of this judgment and its impacts, see Scott G Requadt, “Worlds Apart on Words Apart: Re-examining the Doctrine of Shifting Purpose in Statutory Interpretation” (1993) 51 UT Fac L Rev 2; This is called the “shifting purposes” doctrine, which was formally rejected by the Supreme Court in \textit{R v Big M Drug Mart Ltd}, [1985] 1 SCR 295.

\textsuperscript{96} This argument is somewhat inconsistent with their legal position that Parliament is not obligated to maximize security for sex workers. However, the Attorney General for Canada denies that the impugned laws contribute to violence and insists that one of the purposes of the laws is to deter women from engaging in what it holds to be inherently dangerous behaviour; Factum of the Attorney General of Canada, \textit{Bedford v Canada} (2012) OCA, Court File No C52799 and C52814 at para 3.
Supreme Court in the *Prostitution Reference* expressly held that the bawdy-house and solicitation provisions were historically designed to reduce the public nuisances associated with prostitution (e.g. neighbourhood disruption and threats to public health and safety). Consistent with a long line of case law and the history of the provisions, the Supreme Court had also ruled that the objective of the living on the avails provisions is to reduce exploitation. The OSCJ and OCA accordingly distilled the objectives of the provisions to the reduction of nuisances and exploitation.

With these objectives in mind, both courts found that the bawdy-house and communication provisions are non-arbitrary, as their enforcement tends towards the reduction of public nuisances. The OSCJ ruled that the living on the avails provision is arbitrary as it can actually increase incidences of exploitation. The OCA over-turned this aspect of the judgment, meaning that none of the provisions are currently considered unconstitutional on the grounds of arbitrariness. However, both courts ruled that the bawdy-house provision is overbroad because it issues a blanket prohibition on bawdy-houses of all sizes, all levels of sophistication, and in all locations. While the prohibition of large brothels in residential areas is reasonably necessary to reduce nuisances, the “impact on a neighbourhood of a prostitute working independently and discreetly from home, or with another person in order to enhance safety” is negligible, and indeed already commonly exists. In the courts’ view, permitting sex workers to work indoors on a small scale would not interfere with Parliament’s objective of reducing public nuisances, although it would require federal, provincial, and municipal governments to reassess certain regulatory laws (e.g. zoning by-laws).

The living on the avails provision was deemed overly broad because it issues a blanket prohibition on all forms of economic inter-dependence, catching labour and specifically security-based relationships that do not contribute to, but actually reduce the occurrence of, exploitation and violence. This effect is exacerbated by recent case law that relieves police and prosecutors from proving the existence of exploitation where an accused who does not live with a sex worker provides services for her. The OSCJ and the OCA found that the communication provision is not overly broad as it is necessary to curb the social nuisances associated with prostitution (e.g. traffic congestion, high visibility sex work).

Finally, the courts decided that the bawdy-house and living on the avails provisions are grossly disproportionate. In the case of the bawdy-house provision, the courts reiterated that indoor sex work is considerably safer than street work and, in particular, that “there is a very high homicide rate among prostitutes and the overwhelming majority of victims are street prostitutes.” The impact of the provision on the safety and security of sex workers was deemed “extreme” and “grossly disproportionate to its legislative objective.” Similarly, the courts found that the living on the avails of prostitution provision was “out of all proportion to the state objectives,” declaring it unconstitutional. None of the offending provisions were saved under s. 1 of the *Charter*. This is unsurprising given the seriousness of

---

97 *Prostitution Reference*, supra note 32 at 1132.
98 *Bedford* (2010), supra note 1 at para 400; *Bedford* (2012), supra note 1 at para 204.
99 *R v Barrow* (2001), 54 OR (3d) 417.
100 *Bedford* (2012), supra note 1 at para 207.
101 *Ibid* at para 212.
the rights infringements and the principle that s. 1 can only justify breaches of fundamental justice on rare occasions, such as during states of emergency.103

But what of the communication provision? The OSCJ and OCA came to markedly different decisions on this issue. The OSCJ ruled that the communication provision is grossly disproportionate, as it forces sex workers to forgo screening and other safety measures and displaces prostitution to remote locales. The majority of the OCA overruled this aspect of the judgment, finding that Himel J. understated the importance of the objective of the communication provision, while she overstated its negative effects. In the former case, she ignored the seriousness of crimes related to prostitution (e.g. drug trafficking, organized crime), while in the latter case she ignored how judicial declarations that the bawdy-house and living on the avails of prostitution are unconstitutional will improve the safety of sex workers.104 In a powerful dissent, a minority of the OCA would have found the communicating provision to be grossly disproportionate.

On the one hand, all judges agreed that the legislative objective of the provision is to curb nuisances. The majority’s tacit inclusion of the reduction of crime associated with street prostitution as a legislative objective at this stage runs counter to their (and the Supreme Court’s) earlier characterization of the provision as concerned with nuisances per se. On the other hand, the benefits produced by screening would-be clients are demonstrably effective at increasing safety, particularly in the context of street-based work. Declaring the bawdy-house and living on the avails provisions unconstitutional helps, but this is a woefully inadequate solution for those sex workers who are unable to work indoors, or who choose to continue street-based work due to a variety of socio-economic factors, including insufficient resources to establish an independent in-call workspace, increased flexibility of work arrangement on the street, and lack of support networks,105 as discussed in greater detail below. The OCA minority concluded:

The world in which street prostitutes actually operate is the streets, on their own. It is not a world of hotels, homes or condos. It is not a world of receptionists, drivers and bodyguards. The world in which street prostitutes actually operate is a world of dark streets and barren, isolated, silent places. It is a dangerous world, with always the risk of violence and even death.106

IV. PUBLIC AND PROFESSIONAL REACTIONS TO BEDFORD

There has been a wide range of public and professional reactions to Bedford. Many sex workers and their allies are supportive of the OCA’s ruling, insofar as it upheld the lower court’s decision to decriminalize indoor workspaces and allow the hiring of support and administrative personnel. The

103 Motor Vehicle Act, supra note 60 at 518; Malmo-Levine, supra note 59 at 271.
104 Bedford (2012), supra note 1 at para 310.
105 Ibid at paras 345-349.
106 Ibid at paras 370-371.
claimants in particular described the decision as a victory.\textsuperscript{107} For example, Valerie Scott reported being thankful to the court for “declaring sex workers persons,”\textsuperscript{108} saying, “I feel like a citizen”\textsuperscript{109} and “this is wonderful.”\textsuperscript{110} Terri-Jean Bedford stated that the day of the decision was “emancipation day.”\textsuperscript{111} Others, like sex-trade activist Jamie Lee Hamilton expressed similar sentiments, saying, “To allow brothels, that's a safe step forward,”\textsuperscript{112} or as Susan Davis added, “It allows us to fearlessly hire security guys without fearing that that guy would be arrested.”\textsuperscript{113} Many sex workers wrote publicly of their support for the decision, calling it a “breakthrough” for sex workers’ rights,\textsuperscript{114} a “major victory by sex workers and their allies,”\textsuperscript{115} and “a step in the right direction.”\textsuperscript{116}

Not all sex workers were in agreement, however, with some arguing that the decision did not go far enough and others, specifically a very small number of former prostitutes and their supporters, condemned the OCA for going too far. One former sex worker argued that legalizing indoor work locations will prevent police from conducting raids in search of those who are under age, adding, “this won’t keep anyone safe… It’s more than troubling, it’s disgusting.”\textsuperscript{117}

In news reports and press releases, most sex workers maintained that the OCA fell short in its decision to uphold the communication provision.\textsuperscript{118} Some called the ruling a “mixed bag”\textsuperscript{119} or “partial

\begin{thebibliography}{99}
\bibitem{109} \textit{Makin, supra} note 107.
\bibitem{114} Perkel, \textit{supra} note 108.
\bibitem{117} Humphreys, \textit{supra} note 110.
\bibitem{119} POWER, \textit{supra} note 116.
\end{thebibliography}
victory” while others said this aspect of the decision was “very disappointing.” They argued that the provisions against communication continue to negatively affect those who are already the most marginalized, are exposed to the highest levels of violence, and most often face intrusive police scrutiny — street-based sex workers. Ample research was presented to both the OSCJ and OCA on the negative consequences of the communicating law. Sex workers and advocates interviewed by media in the days following the OCA decision identified many such consequences based on their lived experience, including that the communicating law “places the most vulnerable sex workers in exceedingly dangerous circumstances”; how it “force[s] women underground into dark segments of society in harms way”; how it “creates more dangers because [sex workers] have to jump into cars and get away from prying eyes”; and how it “leaves the most vulnerable sex workers unprotected.”

Co-founder of the sex workers’ rights organization POWER [Prostitutes of Ottawa-Gatineau Work, Educate, Resist] and Professor of Criminology at the University of Ottawa, Chris Bruckert, argued that the criminal sanctions against communication increase sex workers’ marginalization as they remain reticent to call police in times of need: “Sex workers are going to continue to take steps to stay away from police and those steps actually make them more vulnerable to violence.” Similarly, Katrina Pacey, litigation director at Vancouver’s Pivot Legal Society, maintained that removing the communicating law is of “utmost importance” as “it is essential that the law no longer target street-based sex workers who face the reality of violence and murder every day.”

Sex workers and advocates were particularly critical of the OCA’s majority pronouncement that the communicating law is reasonable given the negative effects of prostitution on neighbourhoods. Rene Ross, Executive Director of Stepping Stone, an organization in the Maritimes that supports sex workers, wrote in the Huffington Post, “The courts feel that public nuisance is a greater priority than violence in our communities and that the lives of women, men, and transgendered individuals can be pushed into the dark, forgotten areas of our cities to fend for themselves.” Likewise, Lux, a Toronto-based sex worker argued, “I reject the conclusion that street work is so bad for neighborhoods that stopping it is more

---

123 Katrina Pacey, PIVOT Legal Society, quoted in Hainsworth, supra note 112.
125 Jamie Lee Hamilton, sex worker advocate, quoted in Hainsworth, supra note 112.
126 Chanelle Gallant, member of Maggie’s: The Toronto Sex Workers Action Project, quoted in Poisson, supra note 111.
128 Hainsworth, supra note 112.
129 Makin, supra note 107.
130 Ross, supra note 122.
important than protecting women’s lives.”

In response to the OCA suggestion that street-based sex workers can move their work indoors if they wish to escape outdoor criminalization, sex workers countered that it may not be possible for many. For example, sex worker and activist with Maggie’s: Toronto Sex Workers Action Project, Kara Gillies, stated, “many street-based workers don’t have access to an indoor place to work.” Similarly, Sarah M. commented, “While decriminalizing indoor sex work may provide limited incentive to move off the street, it does nothing to assist those who can’t rent a worksite.” Writing for NOW Toronto on the day after the decision was rendered by the OCA, Fleur de Lit wrote of her disappointment “that the most vulnerable of [her] sisters and brothers in the skin trade will be the ones who will benefit the least from these changes. In fact, they will barely benefit at all.” She argued that many outdoor workers will not be able to escape criminalization by moving to indoor locations and that “The onus of criminality has always been on [them]. The biggest danger has always been to them.”

Sex worker rights advocates were highly critical of the continued criminalization of communication saying, “the courts are essentially telling us which communities are valued by our society and which communities are considered disposable, undeserving and unequal.” Or, as the dissenting OCA justices articulated: “putting aside the fiction that all prostitutes can easily leave prostitution by choice or practise their occupation indoors, the communicating provision closes off valuable options that street prostitutes do have to try to protect themselves.” Instead, there was widespread support among sex workers for full decriminalization. Sex worker organizations reported being “dismayed” at the government’s decision to appeal the OCA ruling to legalize bawdy-houses. Instead of continued or heightened criminalization, sex workers suggest “Any form of criminalization pushes the industry underground.”

As Toronto-based community activist and Indigenous sex worker Monica Forrester expressed, “I deserve respect and safety. Right now, I can’t access safety or be respected in my work with these laws in place.” Former Executive Director of the Sex Professional of Canada, Nikki Thomas, argued that politicians must engage with sex worker representatives to determine new policy directions that keep sex workers safe and healthy. Sex workers and advocates argued that sex workers need to be included in discussion about future policy directions, professing: “Sex workers themselves must lead any initiatives to further their safety”; “Inclusion is key. Consensual adult sex industry

131 Maggie’s, “Vulnerable”, supra note 118.
132 Makin, supra note 107.
133 Sarah M., supra note 118.
135 Ibid.
136 FIRST, supra note 115.
137 Bedford (2012), supra note 1 at para 360.
138 Sarah M., supra note 118.
140 Makin, supra note 107.
141 Maggie’s, “Dismayed”, supra note 139.
142 Makin, supra note 107.
workers must be included in decisions that will affect our occupation”,
and “the government ought to heed the advice of sex workers themselves, for who is better positioned to know how an industry should be run than those who work within it?”

In addition to engaging directly with sex workers in legislative reform and development processes, Brenda Cossman, Law Professor at the University of Toronto, advocated for the need to assess foreign regulatory responses to determine potential direction for Canadian policy, saying: “what they should do is strike some expert panels to explore how municipalities in countries with legalized prostitution have responded… There is a broad range of potential regulatory responses, some of which would protect the rights of sex workers and some of which would do as much damage as the current criminal laws.”

Feminists in support of decriminalization and sex workers’ rights further argued for a separation of moralistic discourses from constitutional law, saying: “As feminists, we support a legal framework in which complex social issues are disentangled from patriarchal moral norms” and “we support legal action and legal reform in which the evidence of women’s diverse lives is considered.”

In response to questions about what transformations might result on account of the ruling, and in particular, if communities would now see a dramatic increase in brothels, some noted that there already are bawdy-houses on many residential and urban streets. As such, communities will likely not see dramatic change: “There is a brothel on every block in every city, and there always has been”, “News flash: This is already happening around you” (emphasis in original). Others suggested that bawdy-houses tend to be less noticeable than other types of businesses because, “The clients of sex workers, and sex workers themselves, want it to be discreet.” Likewise, Alan Young, the constitutional lawyer who represented the three complainants in Bedford, reasoned that the decision would not result in dramatic changes, saying, society “would not collapse or even flinch.”

However, anti-prostitution advocates were not persuaded by these assertions. In particular, they saw the OCA ruling as counter to their goal of eradicating prostitution. Megan Walker, Executive Director of the London Abused Women’s Centre, argued, “When women are controlled by their pimps, they have a very difficult time coming forward to police,” adding, “What this does is legitimize sex slavery and gives an incredible amount of control to pimps.” Since prostitution is seen as harmful to women, the move to decriminalize indoor worksites and allow the hiring of security and other personnel is seen as

144  SPOC, supra note 121.
145  FIRST, supra note 115.
146  Makin, supra note 107.
147  Simone de Beauvoir Institute, “Simone de Beauvoir Institute Applauds Court of Appeal for Ontario Decision Related to Prostitution” (March 2012) online: Feminist Alliance in Solidarity for Sex Workers’ Rights <http://www.alliancefeministesolidaire.org/2012/03/simone-de-beauvoir-institute-applauds-court-of-appeal.html>.
148  Makin, supra note 107.
149  Aguirre-Livingston, supra note 143.
151  Perkel, supra note 108. Maggie’s, “Dismayed”, supra note 139.
counter to the *Criminal Code* provisions which, they argue, originally set out to reduce both the visible and hidden aspects of sex work. Ranjan Agarwal, a lawyer representing three Interveners (the Christian Legal Fellowship, Catholic Civil Rights League, and REAL Women of Canada), for example, argued that the intention of the legal sanctions against bawdy-houses, procuring, and communication was to eliminate prostitution, adding that prostitution is “an attack on the fundamental values of modern Canadian society.”

Prime Minister Stephen Harper was similarly quoted as saying, “We view prostitution as bad for society and we view its affects as particularly harmful for our communities and women, and particularly for vulnerable women and we will continue to oppose prostitution in Canada.”

V. WHAT WAS ACTUALLY DECIDED: THE CONSTITUTIONAL FOUNDATIONS AND IMPLICATIONS OF *BEDFORD*

State officials and critics of *Bedford* express concern that the judgment will “constitutionalize” or otherwise legitimize prostitution, and may “pre-empt or curtail Parliament’s consideration of legislative options.” This position rests on a misunderstanding of the bases of the decisions and the scope of its impact on the enforcement of laws that prohibit criminal activities about which many are rightly concerned. To be sure, one of the primary functions of constitutions is to insulate certain values, interests, and power relations from political contestation. This function can inhibit democracy, insofar as full democracy means that no political debate or issue be taken off the table. In our view, *Bedford* will not have this effect, beyond its preclusion of debate about whether sex workers have a limited right to protect themselves from violence. If anything, it may facilitate democratic debate by bringing a broader range of knowledge, experiences, and interests to bear on legal and policy discourses. The case might also encourage the government to conduct (and accept the results of) more concerted empirical research into the intersection of sex work, law, and violence.

We think it is important to recognize that rights are one of the engines of this potentially important change, yet it is important not to exaggerate the nature or material impact of constitutional rights. As we understand them, rights structure discourse about the imposition of legal obligation in three stages. First, claimants encode extrinsic, non-legal values and interests in legal terms that are cognizable to authoritative decision-makers and other participants to legal interaction. This requires some degree of translation, as personal values and interests must “fit” into the body of law that surrounds a given right. At the same time, bodies of law may change as they absorb ambient values, interests, and expectations. In *Bedford*, the implications of this act of translation were seen in the way s. 7 was used to articulate the claimant’s interest in personal safety rather than in economic liberty, as has historically been the case.

---

140  Humphreys, *supra* note 110.
156  Women’s Coalition, *supra* note 36 at para 55.
Using s. 7 in this way boosted the persuasive power of the claimant’s position on the unconstitutionality of the provisions. However, it also required the claimants to sideline their personal view that they have a constitutional right to engage in sex work. The existence of such a right was quite simply never argued in Bedford. Second, rights-claimants must identify prospective duty-bearers i.e. persons whose (in)actions interfere with the well-being of the rights claimant. In the context of the Charter, this requires showing that a public institution or agency is somehow connected to the deprivation of a right. Finally, an authoritative decision-maker must decide whether there are reasons sufficient to justify issuing a remedy or, alternatively, whether counter-veiling values and considerations justify non-intervention. At this point, a court will consider both the range of state interests that animate an impugned law, policy, or practice, and counter-veiling Charter values that may be affected by a decision to (not) intervene.

Ideally, rights discourses facilitate discussion about the objectives of laws, the relative strengths and weaknesses of the measures used to achieve those objectives, and the comparative merits of alternative approaches. The success of this process requires disputants to be candid about the values and beliefs that underpin their positions, to respond in good faith to criticism, and to not prevent the advancement of or deliberately misrepresent alternative standpoints.159

How does this help us understand the foundations and significance of Bedford? Until recently, sex workers have attempted to frame juridical discourses around a narrative of sex work as labour, whereas the government has tended conceptualize sex work as a public nuisance and as necessarily inegalitarian. Each of these narratives invoke legal rights, thereby raising complicated questions about the ends towards which the impugned provisions work and how we should resolve conflicts between (seemingly) incommensurate interests. Underlying these discursive exchanges is the spectre of legal-moralism that arguably continues to influence juridical discourses in implicit ways.

For whatever the reasons may be, juridical discourses have not generated mutual understanding among interested parties. To the contrary, discursive communities have tended to take an all-or-nothing approach. In the Prostitution Reference, for example, the Supreme Court had to choose between recognizing a sweeping constitutional right to engage in prostitution, or, upholding existing laws precisely as they stood at the time; to say the least, the stakes in that dispute were high. At the same time, discourses have been fiercely ideological, with there being little by way of an empirical backdrop to assess the material implications of the laws in question or to lend credence to alternative positions and critical perspectives.

In Bedford, the claimants employed a new strategy by focusing on Parliament’s role in facilitating physical violence. Practically speaking, this shift became possible due to the availability of empirical research on sex work, law, and violence that was produced by public and private actors working in domestic, foreign, and international fora. The claimants also drew insights from critical research on the

(in-) effectiveness of certain anti-prostitution laws at achieving their stated objectives. Current events, such as the extreme violence and murder of sex workers in Vancouver’s Downtown Eastside, contributed to an increased willingness to explore the failings of state institutions and actors as well as the characterization of sex workers as second-class citizens undeserving of the protection of the law. Finally, international and comparative law -- normative resources upon which state institutions increasingly rely -- helped highlight a range of alternative regulatory approaches to the traditional Canadian criminal law regime.

On the whole, *Bedford* drew from and advanced these broader social, policy, and academic discourses. We should reiterate that these discourses concern “big picture” normative issues, such as the goals and wisdom of general law and policy, as well as the separable or “bracketed” issue of how law interrelates with violence; engagement in the latter discourse is consistent with a degree of neutrality with regards to the issues raised in the former. What *Bedford* did not do is pronounce on the former; it did not weigh in on broader philosophical, moral, and policy-based debates about whether the state is authorized to attempt to eradicate or actively reduce prostitution. Indeed, the OCA expressly rejected the claim made by interveners on behalf of the claimants that “a person’s decision to engage in prostitution involves personal life choices that are also protected under the right to liberty.”  

Contrary to the *Prostitution Reference*, the Courts’ attention in *Bedford* was fixed on the discrete issue of physical violence and the right to security of the person. This meant that a judicial finding that the impugned laws are unconstitutional in this sense alone would not have especially powerful spin-off effects in other legal or regulatory fields or, for that matter, the application of many criminal offences to prostitution-related activities, such as medium- and large-scale bawdy-houses, exploitation, and so on.

This is all to say that the limited scope of the claimants’ asserted rights made it difficult for the government and interveners on its behalf to argue that the provision of a constitutional remedy would undercut Parliament’s capacity to pursue legitimate public interests in other legal and policy fields or even in criminal law. It may require changes to law-enforcement practices and policies, but as we saw earlier, these are in dire need of change anyway. In other words, *Bedford* does not inhibit the continuation of discourses about the regulation of sex work, it does not discredit or devalue different conceptions of sex work, and it does not prevent the enforcement of criminal laws that aim to protect the safety and well-being of sex workers. What it does is proclaim that there can be no debate about the principle that sex workers should be able to take basic precautions to protect themselves against violence, especially when it is clear that state law has thus far been woefully inadequate.

Critics of the case will of course assert that the judgment rests on the contestable empirical claim that the impugned laws in fact contribute to violence. With respect, we believe that the ideological pre-commitments of those who take this position hinder acceptance of the preponderance of available evidence and exaggerate the material implications of the case. Expert witnesses for the government failed to adduce sufficient empirical support for their claim that prostitution is inherently violent, regardless of the legal regime in place or how or where prostitution is practiced. This certainly is inconsistent with the perspectives of a sizeable group of current sex workers, as well as international evidence from decriminalized contexts, and may amount to the rather paternalistic attitude that those who want to engage in sex work are misguided.

---

Expert witnesses also failed to engage with the claim that taking such basic precautions as working indoors or with security personnel generally reduces the incidence of physical violence and does not contribute to a higher incidence of sex work (i.e. interfere in simultaneous efforts to reduce sex work). Anti-prostitution witnesses ignored or misrepresented empirical evidence that casts doubt on the successes of “end demand” criminalization strategies taken in foreign jurisdictions. While we accept the need for more research in this area, we note that the sorts of harmful activities which critics suggest will occur should sex work be moved indoors is still subject to the Criminal Code; Bedford will not prevent the enforcement of laws prohibiting violence, extortion, assault, and so on, as discussed previously. We also note that while outdoor work may be easier for police to surveil, this does not lead to enhanced safety. To the contrary, police surveillance and the criminalization of sex work and practices that help protect sex workers from violence is precisely why street sex work is conducted in remote and comparatively more dangerous locations.

It is hard to understand how these points can be so consistently overlooked. It seems as though opposition to indoor sex work and other precautionary practices is rooted in the belief that to allow such practices would amount to tacit endorsement of sex work. We note here a decisive undercurrent of legal-moralism and a contestable ordering of priorities. Even if helping to protect sex workers from violence was tantamount to endorsing sex work, the symbolic power of denunciating sex work does not justify exposing sex workers to physical violence. Bedford stands for the principle that the right of sex workers to protect themselves from violence outweighs the public interest in denunciating sex work. This cannot reasonably be identified with constitutionalizing or otherwise legitimizing sex work per se.

Now, it is open to Parliament to respond to Bedford by identifying the eradication or reduction of sex work as the core objective of the impugned laws. The courts’ finding of unconstitutionality, after all, depended on poor fits between the objectives of the provisions and the means used to achieve these objectives. It would accordingly seem that Parliament might remedy breaches of section 7 principles of arbitrariness and overbreadth simply by reframing the objectives of the laws to produce better fits. For example, if the objective of the bawdy-house and living on the avails provisions included the eradication of prostitution, then these provisions might well be regarded as neither arbitrary nor overly broad. At this point, the terms of debate would shift to whether eradicating prostitution is within Parliament’s constitutional authority or, alternatively, whether individuals have a constitutional right to engage in sex work. Although this latter issue was dealt with in the Prostitution Reference, the Supreme Court may

decide, in light of a fuller evidentiary record and changing values, to change its position, much as it has done with respect to extradition to face the death penalty.\footnote{United States v Burns, [2001] 1 SCR 283; Kindler v Canada (Minister of Justice), [1991] 2 SCR 779; Reference re Ng Extradition, [1991] 2 SCR 858.}

However, we should not forget that the OSCJ and OCA also found the bawdy-house and living on the avails of prostitution provisions to be grossly disproportionate -- a finding that does not depend on the logical or functional fit between the objectives of a law and the measures used to pursue that objective. A highly significant feature of the \textit{Bedford} decisions is that Parliament may be held (indirectly) responsible for inter-personal violence, which has strong foundations in international human rights law - - albeit in different contexts -- and is now firmly part of \textit{Charter} jurisprudence. Insofar as Parliament is a duty-bearer with respect to the right of sex workers to protect themselves against violence, it will not be so simple a matter for it to just alter the objectives of the impugned laws. The real issue in \textit{Bedford} is not merely about ensuring a more rational fit between ends and means; the issue is about reducing the harmful impacts that law has on the lives and bodies of sex workers. It may well be that links between the application of the impugned provisions and physical violence are so serious as to outweigh virtually any legislative objective.

\textbf{VI. CONCLUSION}

Unsurprisingly, public and professional reactions to \textit{Bedford} reflect long-standing disagreements about both the regulation and meaning of sex work and the directions in which law and policy should move. While some have raised concerns that the courts’ findings and the remedies offered effectively “constitutionalize” prostitution or, less dramatically, seriously constrain the government’s capacity to set and pursue policy through criminal law, others have suggested that little will change, as Parliament can comply with the \textit{Charter} simply by reformulating the objectives of the provisions to produce more functional and/or rational fits between ends and means.

In our view, neither of these positions is persuasive. On the one hand, \textit{Bedford} is unlikely to determine new policy directions regarding the overall regulation of sex work or, in particular, whether the state is authorized to work towards the eradication or reduction of prostitution. The cases have foreclosed debate about the right of sex workers to protect themselves against violence by operating indoors on a small scale and hiring bodyguards, drivers, and other security-enhancing personnel; it has not precluded broader regulatory and narrative debates. We would go further, though, and recommend that the Supreme Court uphold the position of the OSCJ and a strong minority of the OCA that the communication provision be declared unconstitutional. This would extend protection to the most disadvantaged, stigmatized, and marginalized sex workers, still without constitutionally precluding the use of effective, non-harmful criminal law provisions to reduce violence.

On the other hand, it is not at all obvious that criminalizing prostitution itself will bring the laws into conformity with the \textit{Charter}. While “\textit{Charter}-proofing” the provisions in this way might bring them into conformity with principles of arbitrariness and overbreadth, the OSCJ and OCA’s decision also rested on the principle of gross disproportionality. What we are dealing with here is less rational or logical felicity and more the ways in which law materially contributes to physical violence. With respect to this principle, the question of whether or not sex work is legal in and of itself may not be decisive. Recall,
sex workers’ interest in taking basic precautions against violence by operating small-scale bawdy houses and hiring security personnel need not seriously impact on the protection of counter-veiling rights and interests. Instead, it tends towards the fuller protection of the rights of sex workers. Reducing the (unintended) harmful effects of a selection of anti-prostitution laws without otherwise interfering in the design and enforcement of other laws suggests that sex workers’ right to take precautions may well outweigh the state’s interest in the eradication or serious reduction of prostitution.