

2014-01-22

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**An Ostensible Exercise in Modernity: Law, Religious Intervention and Social Science in the  
Case of *Bedford v. Canada***

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**January 2013**

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## Acknowledgements

First and foremost, I would like to express profound thanks to my supervisor, Dr. Antony Puddephatt, for his continual support, encouragement and guidance throughout this project. His constant availability and willingness to discuss points of analytic confusion and push me to do my absolute best have undoubtedly strengthened my thesis as well as my scholarly abilities. In addition to providing support and guidance through direction to helpful bodies of literature and multiple rounds of editing, he went above and beyond, providing endless moral support as I worked my way through bouts of frustration and doubted my abilities. He is an amazing supervisor and an even better friend. Secondly, I would like to thank my internal reviewer, Dr. Lori Chambers for her insightful comments and her assistance with enhancing my understanding of Canadian rights cases. Her ideas and insights were invaluable resources and greatly contributed to my final product. I would also like to thank members of the Departments of Sociology and Women's Studies at Lakehead University who were not committee members but provided endless support and guidance none-the-less, such as Dr. Sharon Dale Stone, Dr. Laurie Forbes and Dr. Pamela Wakewich. I would like to express gratitude to those who participated in interviews for this study. Your time, patience and willingness to answer my queries were very much appreciated. Finally, I would like to offer special thanks to my external reviewer, Dr. Elizabeth Comack for her comments on the final draft of my thesis.

I would also like to acknowledge the financial support I have received for this project. I would like to thank the Social Sciences and Humanities Research Council (SSRC) for the Joseph-Armand Bombardier Scholarship for the 2010-2011 academic year, the Ontario Graduate Scholarship Program for the OGS Scholarship during the 2011-2012 academic year and the

Departments of Sociology and Women's Studies for Graduate Funding Packages over the course of my Master's degree.

Additionally, I would like to thank the many friends, fellow graduate students and family members who have provided support, encouragement, laughter and editing throughout this project. I would especially like to thank Heather Cameron, Max Bernosky, Kathleen Bailey, Caroline Cox, Holly Morgan, Taslim Alani and Katrin Roots. You were always there for late night brain storming sessions, editing, coffee breaks and walks so I could either rant or forget about my research to restore my sanity, and a good laugh when I needed it. I need to thank my dear friends Ashley Partridge, Karla Smith and Melissa Bahan. You were always there for late night chats, constantly encouraged me to pursue my passions and believed in me even when I doubted myself. I would like to thank my partner, Al, who likely knows just about as much as I do about my topic after listening to me talk about it non-stop over the last few years. Thank you from the bottom of my heart for your love, patience, support, understanding and editorial skills. Lastly, I would like to thank my family, especially my sister, Megan, and my mother, Heather. Without your encouragement I could have never accomplished what I have. Your endless love and support mean more to me than you will ever know. Finally, I would like to express my deepest gratitude to my late aunt, Nell. Without her inspiration and selfless dedication to helping me pursue my dreams, I would never have made it to where I am.

### Abstract

Drawing on Adele Clarke's (2005) method of situational analysis as well insights from the social construction of social problems approach (Spector and Kitsuse 1977; Best 2008), symbolic interactionism (Prus 1999) and feminist approaches to power and situated knowledge (Collins 1990; Smart 1992; Haraway 1999; Comack 2006), this study examines how law, religion and science interact to construct an image of the Canadian sex trade in the case of *Bedford v. Canada*. Historically, prostitution has been debated in academic accounts, public forums and the Canadian courts. This debate resurfaced in Canadian courts in 2010, deploying a host of perceptions from religious groups, academics and the general public. Attending to sites of silence as well as latent power relations in the current debate, I examine the interactions between law, religion and science in the *Bedford* case. Emphasizing how novel precedent developments in the Canadian context as well as historical discourses are shaping actors' constructions of the dangers associated with prostitution in Canada, I explore concepts such as "legal moralism", "the risk of harm", "expertise" and "advocacy" and how legal definitions of these concepts shape the terrain on which rights cases are negotiated in Canadian courts. Moreover, the present case study examines how legal fictions presenting the law as neutral and objective construct false binaries between lay and expert knowledge, masking the value-laden nature of Canadian rights cases.

## Introduction

Canadian prostitution law is a highly contested issue. In 2010, this debate was brought before Canadian courts in the third major legal challenge to prostitution laws in Canadian history. In addition to offering an opportunity to analyze contemporary constructions of the sex trade in an arena where multiple perspectives on the issue are dialoguing with one another, *Bedford v. Canada* permits examination of how three major institutions—law, religion and science—interact in rights cases. In this thesis, I analyze the original case of *Bedford v. Canada* using the social construction of social problems approach (Best 2008; Spector and Kitsuse 1977) as well as feminist approaches to power and situated knowledge (Mackinnon 1997; Haraway 1999; Comack 2006), and Adele Clarke's (2005) method of situational analysis in an effort to understand the role of public opinion, religious intervention and expert witnesses in shaping how the Canadian sex trade is constructed in this case. Most centrally, I will argue that contrary to conventional assumptions that law, religion and science represent conflicting epistemologies, in the present case these institutions collude to construct a situation in which legal fictions presenting the law and politics as separate mask the moral and political nature of the current debate while constructing a false binary between lay and expert knowledge. As a result of this collusion, sex workers, who are arguably the most qualified individuals to explain the nature of the sex trade in this case (and whose rights are being negotiated through this legal challenge) are silenced while religious interveners are granted an erroneous status as representatives of the Canadian moral fabric in the *Bedford* case. Religious intervention for the purpose of representing the moral values of the Canadian public in rights cases is redundant because the moral values of Canadian society are central to *Charter* challenges. Ironically, through privileging the accounts of law and science in the current debate, *Bedford v. Canada* constructs a more morally charged



representation of the situation than would be the case if the accounts of sex workers were granted the same status as those of other actors.

### ***Background to the Current Case Study***

Although prostitution is not illegal in Canada, virtually all activities surrounding prostitution are criminalized by various sections of the *Criminal Code of Canada*. Prior to the 1980s street prostitution was controlled under the vagrancy and solicitation provisions of the *Criminal Code*. The 1978 decision in *Hutt v. The Queen* (1978 CanLII 190 (SCC), [1978] 2 WWR 247), in which the Supreme Court of Canada ruled that solicitation had to be pressing and persistent in order for police to charge a street worker, was a catalyst to Canada's replacement of its solicitation laws (s. 195) with what is known as the communication law (s. 213 (1)(c)) in 1985. The *Prostitution Reference* (Reference re: ss. 193 and 195.1(1)(c) of the Criminal Code (Man.), [1990] 1 S. C. R. 1123) was the first major constitutional challenge to Canada's prostitution laws. Although the Supreme Court ruled that the communication law was an infringement on freedom of expression (*Charter* s. 2(b)), it also held that this infringement was justifiable under s. 1 of the *Charter of Rights and Freedoms*. Moreover, the Court held that s. 213(1)(c) violated s. 2(b) of *The Charter* but this infringement on freedom of expression was "demonstrably justified in a free and democratic society" (*Charter* s. 1). The debate over the constitutionality of Canada's prostitution laws has currently resurfaced and is the focus of two constitutional challenges.

Two cases assessing the constitutionality of prostitution related provisions in the *Criminal Code of Canada* came before Canadian courts between 2007 and 2010: *Downtown Eastside Sex Workers United Against Violence Society v. Attorney General (Canada)* 2008

BCSC 1726 and *Bedford v. Canada* 2010 ONSC 4264. The original determination in *Bedford v. Canada* will be the focus of this analysis. Issues associated with sex workers' safety were central to this debate. The *Bedford* case was brought before the court by three women, Terri-Jean Bedford, Amy Lebovitch and Valerie Scott (henceforth referred to as the applicants), who were current and former sex workers. The Attorney General of Canada (henceforth referred to as the AG Canada) responded to their challenge in defence of Parliament and the laws it had put forward. Moreover, the case of *Bedford v. Canada* was ultimately between the applicants and the AG Canada. However, the Attorney General of Ontario (henceforth referred to as the AG Ontario) and a group comprised of the Christian Legal Fellowship, REAL Women of Canada and the Catholic Civil Rights League (henceforth referred to as the CLF et al.) were permitted to intervene in this case. The applicants in *Bedford v. Canada* (2010) challenged the constitutionality of provisions in the *Criminal Code* prohibiting operating or being an inmate of a common bawdy house (s. 210), living on the avails of prostitution (s. 212(1)(j)) and communicating in a public place for the purpose of engaging in prostitution (s. 213(1)(c)). Evidence in this case consisted of facts or submissions to the court on behalf of all interest parties, some of whom relied on written and oral testimony from sex workers, police officers, journalists, concerned citizens and expert witnesses to build their cases.

The *Bedford* case came about in the wake of heightened attention to the safety issues associated with working in the sex trade in Canada. This is especially due to the discovery of several Canadian serial killers preying on street-level sex workers (e.g. Robert Picton and Thomas Svekla) and an emergent moral panic over sex trafficking. This makes understanding contemporary discourses surrounding prostitution particularly important. Prostitution has historically been constructed on conventionally moralistic terms, producing discourses of the

prostitute as immoral, the prostitute as a vector of disease, and the prostitute as a public nuisance. However, recent developments in the Canadian context have led to an increasing focus on the dangers associated with working on-street in Canada, producing discourses of victimization. The current legal debate provides an opportunity for ascertaining the ways in which public attention to the dangers associated with prostitution in Canada are reshaping the ways in which the Canadian sex trade is being discursively constructed. Understanding contemporary discursive constructions of sex work and its practitioners in Canada offers a means to understand the moral and social context within which Canadian sex workers operate. This approach also enables the examination of how the institutions of law, religion and science intersect to collaboratively construct the situation facing Canadian sex workers in the *Bedford* case. What does this case tell us about the role of law in contemporary social arrangements? How do legal accounts constructing the role of law in rights cases influence the role of religious intervention? What is the role of religious interveners in this case and what are the grounds for their interest in *Bedford v. Canada*? What is the role of expert witnesses in this case and, given the state of sociological research on the sex trade, is it warranted? Are the expert witnesses offering anything that sex workers could not tell the courts themselves? Should the so-called experts be granted a more privileged position in this debate than those whom these laws directly affect? How effective is the current legal system at handling issues of this sort and is there an alternative means of reconciling this debate that would be more effective?

### ***Theoretical Framework***

In order to explore these questions, I have conducted documentary analysis of the legal facts and judicial determination for *Bedford v. Canada* as well as focused interviews with some of the

actors involved in this case. This approach was guided by Adele Clarke's (2005) method of situational analysis which permits "thick analyses" in which the situation itself is the central unit of analysis (xxii-xxiii). As noted by Clarke, this approach replaces the concept of "action-centered 'basic social process'" undergirding traditional grounded theory with a focus on "situation centered 'social worlds/arenas/negotiations'" as advocated by Anselm Strauss (xxii). Moreover, as a theory/methods package, situational analysis aims to "simultaneously address voice and discourse, texts and the consequential materialities and symbolisms of the nonhuman, the dynamics of historical change, and, last but far from least, power in both its more solid and fluid forms" (xxiii). This approach is particularly useful in the present case where myriad elements interacted with one another to produce a determination with the power to alter the Canadian sex trade and Canada's approach to the sale of sex. As will be discussed further in chapter 2, in addition to permitting comprehensive examinations of situations in which multiple actors and elements are interacting with one another, this approach complements feminist calls for researchers' reflexivity at all stages of the research process. Combining discursive analysis of legal text with focused interviews allowed me to probe into the role of various actors and institutions in constructing the situation facing Canadian sex workers in the legal arena. Moreover, beginning with documentary analysis of facta and the judicial determination facilitated identification of key areas of agreement and controversy among interest parties in this case and focused interviews aimed to clarify points of confusion in my original analysis. Where applicable, I have also conducted documentary analysis of historical materials in order to attend to the role of discourse in shaping the situation of inquiry. My analysis of *Bedford v. Canada* has been informed by insights from the social construction of social problems approach (Spector and Kitsuse 1977; Best 2008), symbolic interactionism (Prus 1999) and feminist approaches to power

and situated knowledge (see, for example, Collins 1990; Smart 1992; Mackinnon 1997; Comack 2006). The current analysis focuses on the ways in which the situation facing Canadian sex workers is being discursively constructed while attending to power relations affecting who is permitted to influence the definition of reality being forwarded in this case.

Rather than conceptualizing social problems as objective conditions, the constructionist approach holds that social problems consist of actors' claims-making activities (Best 2008; Spector and Kitsuse 1977). Spector and Kitsuse (1977) define social problems as "the activities of individuals or groups making assertions of grievances and claims with respect to some putative conditions" (75). Similarly, Joel Best (2008) defines social problems as "efforts to arouse concern about conditions within society" (10). For constructionists, putative conditions are not inherently problematic (Best 2008; Spector and Kitsuse 1977). Rather, conditions are symbolically defined as problematic and analyses must focus on this definitional process (Best 2008; Spector & Kitsuse 1977). According to Spector and Kitsuse, "the significance of objective conditions...is *the assertions made about them*, not the validity of those assertions as judged from some independent standpoint, as for example, that of a scientist [original emphasis]" (1977: 76). Thus, rather than attempting to negotiate between competing accounts or attempting to determine which definition of reality is most valid or accurate, I have focused on the process by which actors in this case construct the situation currently facing Canadian sex workers as problematic. To be clear, the *Bedford* case was premised on a tacit agreement among interest parties that the context in which Canadian sex workers operate is a social problem. Yet, actors in the *Bedford* case diverged in their constructions of why the Canadian sex trade is problematic and what constituted viable solutions to the issues identified. Attending to this definitional process permits deeper analysis of the roles played by the institutions of law, religion and science

in shaping the terrain on which Canadian rights law is constructed. Inspired by symbolic interactionism, constructionists analyze the “natural histories” or “careers” of social problems (Best 2008; Spector & Kitsuse 1977).

Understanding social problems claims requires appreciating that claims are dynamic, processual phenomena. As noted by constructionist scholars, framing involves rhetorical work (see, for example, Snow et al. 1986; Prus 1999; Best 2008). Claims-makers seeking to persuade audiences must devise strategies in order to have their claims accepted in the face of opposition and competition, in an evolving “social problems marketplace” (Best 2008). Rights cases entail debates over whether or not laws prohibiting conduct infringe on the fundamental rights and freedoms guaranteed to Canadian citizens under the *Charter of Rights and Freedoms*. Thus, rights cases are an integral part of the “social problems marketplace” because they are arenas in which criminality and rights are symbolically defined. For constructionist scholars, audience segmentation makes it necessary for claims-makers to tailor their arguments differently depending on the target audience (Best 2008: 40-41). As noted by Best (2008), this is particularly true in cases such as the abortion debate, where individuals take “intractable, opposing positions” (41). Moreover, audiences are comprised of myriad groups who “have, if not different values, at least different interpretations of which values are most important and how they ought to be realized” (186). In *Bedford v. Canada*, claims had to be tailored to the legal arena--actors had to frame their arguments using a language that the law comprehends. Due to the adversarial nature of Canadian legal proceedings, interested parties must present oppositional accounts in attempts to persuade the judge and/or jury and these accounts must be couched in legal discourse. Thus, in addition to investigating the definitional process by which actors rhetorically construct their arguments, analyzing claims-making in legal debates requires

attending to how actors employ legal discourse to frame their arguments. In the *Bedford* case, interested parties presented Justice Susan Himel with competing accounts of how the impugned *Criminal Code* provisions affected the situation within which Canadian sex workers operated in attempts to persuade her to rule in favour of their position on the issue. Specifically, while the applicants presented arguments aimed at persuading Himel to strike down the impugned provisions on grounds that they violated the rights to freedom of expression (s. 2(b)) and to “life, liberty and security of the person” (s. 7) as guaranteed by the *Charter*, the AG Canada coaxed her to rule that the impugned provisions did not infringe on the *Charter* rights cited by the applicants (*Bedford v. Canada* 2010). In order to accomplish this, interested parties forwarded claims regarding the nature and purpose of the impugned provisions, the Canadian sex trade and the relationship between violence and prostitution in Canada, the role of conventional morality in legal debates, and the effects of the impugned provisions on the *Charter* rights in question. These claims were tailored to convince the judge that their definition of reality was more valid than that presented by the opposition.

Robert Prus’ (1999) interactionist approach to power provides a basis for understanding influence work as an enacted process. Arguing that researchers should conceptualize power as a definitional process, Prus (1999) provides a starting point for analyzing claims-making as influence work. This approach is particularly relevant when analyzing legal debates because the nature of legal proceedings is to persuade the judge to accept one’s definition of reality over other accounts. Moreover, actors in the court room vie for the power to define the situation. In the present case, actors are vying for the power to define Canada’s legal regime concerning prostitution. Noting that “*all influence work connotes activity in the making* [original emphasis]” (168), Prus outlines an interactionist approach to studying relationships between targets and

tacticians. For Prus, “power implies *an intent and a capacity on the part of a person or collectivity to influence, control, dominate, persuade, manipulate, or otherwise affect the behaviors, experiences, or situations of some target* [original emphasis]” (152). According to Prus, researchers must approach studies of power with an appreciation for its processual nature: “by viewing power in emergent or dynamic terms (and attending to its definitional base), all instances in which notions of power are invoked become amenable to a natural history or career analysis” (154). Claims-making involves participants’ actively constructing social problems, by assuming the roles of targets and tacticians.

Prus (1999) argues that analyzing influence work requires attending to how individuals enact their roles as either targets or tacticians. Moreover, while individuals assume roles as either targets or tacticians in exchanges, “it is essential to recognize people’s abilities to assume an *interchangeability of standpoints*, to acknowledge that participants in a setting may assume roles as *both targets and tacticians* in particular interchanges, on either a sequential or simultaneous basis [original emphasis]” (153). Similarly, Best (2008) asserts that “it is important to recognize that the audiences for claims are not passive. People who hear claims react, and claimsmakers must take those reactions into account, by adjusting, revising, and fine-tuning their claims to make them more effective, more persuasive” (44). This is particularly true in the present case where the judge was expected to consider all arguments and draw her own conclusions based on the evidence before her. Analyzing influence work requires exploring the ways by which tacticians plan and prepare frameworks to meet their objectives, attend to target circumstances by incorporating targets’ values and interests into their arguments, and engage in image work in order to shape targets’ perceptions of reality (Prus 1999: 173-4).



While Prus' point is well taken, attending to claims-making activities in legal debates requires an appreciation that not all accounts are granted the same status in legal proceedings. Moreover, analyzing actors' claims-making activities in *Bedford v. Canada* requires attending to power relations and the historical construction of relations of power via discourse. Thus, I have also drawn on feminist approaches to the social construction of gender and sexuality to guide my analysis of the *Bedford* case. Complementing analyses of claims-making activities in *Bedford v. Canada* with feminist approaches to power relations permits a more comprehensive understanding of the role of power, and thus of major institutions such as law, religion and science, in this case.

Insights from feminist scholarship on power and situated knowledge provide a starting point for attending to power relations in the present study. For postmodern feminists, attending to power relations requires moving away from strictly Marxian analyses toward an understanding that power is generated and maintained through discourse. As Elizabeth Comack (2006) explains, shifting to non-economic analyses of power enables researchers to move from conceptions of "the state as key centre of power in society" toward an understanding of "how forms of knowledge (discourses) claim to speak the truth and thus exercise power in a society that values this notion of truth" (61). Similarly, Carol Smart (1989) argues that legal discourse is a form of power: "law operates as a claim to power in that it embodies a claim to a superior and unified field of knowledge which concedes little to other competing discourses" (Ibid). For Smart, law derives its power to "impose its definition of events on everyday life" through claims to represent a singular, unified body of knowledge/rules (4). From this perspective, analyzing power relations in legal debates requires attending to how law, as a discourse, produces difference among the legal subjects it constructs.

According to Smart (1992), understanding discursive constructions of legal subjects requires analyzing law as a gendering strategy or a “technology of gender”. Noting that analyses of “law as sexist” and “law as male” are problematic because “any argument that starts with ceding priority to the binary division of male/female or masculine/feminine walks into the trap of demoting other forms of differentiation, particularly differences between these binary opposites” (33), Smart argues that researchers must conceptualize the “law as gendered”. As noted by Smart, “law does not serve the interests of *men* as a universal category any more than it serves the interests of *women* as a category [original emphasis]” (32-3). Moreover, conceptualizing the law as gendered “allows us to think of it [law] in terms of processes which will work in a variety of ways and in which there is no relentless assumption that whatever it does exploits women and serves men” (33). This approach allows researchers to analyze law “as a process of producing fixed gender identities rather than simply as the application of law to previously gendered subjects” (34). At this point the analytic question becomes “how does gender work in law and how does law work to produce gender?” (35).

Analyzing law as a technology of gender permits understandings of what would otherwise appear to be contradictory and inconsistent in constructions of the legal category “Woman”. As noted by Smart, legal discourse symbiotically constructs different *types* of women and “Woman” in contradistinction to “Man”. Analyzing law as a gendering strategy permits examinations of this “double strategy” by which the modern “Woman” is discursively constructed:

Woman has always been *both* kind and killing, active and aggressive, virtuous and evil, cherishable and abominable, not *either* virtuous or evil. Woman therefore represents a dualism, as well as being one side of a prior binary distinction. Thus in legal discourse the prostitute is constructed as the bad woman, but at the same time she epitomizes Woman in contradistinction to Man because she is what any woman could be and

because she represents a deviousness and a licentiousness arising from her (supposedly naturally given) bodily form, while man remains innocuous. (36)

Moreover, this approach reveals how “Woman” occupies multiple positions simultaneously in legal discourse, thus permitting researchers to attend the experiences of women of colour, for whom racism and classism may be experienced as more urgent than sexism (Kelly 1997: 346). For these women, oppression based on race, class and gender may be experienced as a complex totality which cannot be separated (Ibid).

As noted by bell hooks (1997), race and class operate in conjunction with sexism to “determine the extent to which an individual will be discriminated against, exploited, or oppressed” (23). Moreover, not all women occupy a common social location, nor do all men hold the same amount of power relative to other men (Collins 1990; hooks 1997). As Patricia Hill Collins (1990) explains, “white women are penalized by their gender but privileged by their race” (4). Further, gendered oppression may not be experienced in the same way by all women:

Women in lower class and poor groups, particularly those who are non-white...know that many males in their social groups are exploited and oppressed....While they are aware that sexism enables men in their respective groups to have privileges denied to them, they are more likely to see exaggerated expressions of male chauvinism among their peers as stemming from the male’s sense of himself as powerless and ineffectual in relation to ruling male groups, rather than an expression of an overall privileged social status. (hooks 1997: 23)

In Canada, state control of Aboriginal women’s sexuality has been facilitated by the *Indian Act* (Ouellette 2002; Monture 2006). As noted by Grace Ouellette (2002), “the oppression of Native women must be seen within a broader context, not simply on sex specific terms. The whole process of colonization must be taken into consideration, with the *Indian Act* recognized as Canada’s main legal instrument of colonialism” (39). Moreover, analyses of male dominance over Aboriginal women’s sexuality must incorporate the effects that colonialism has had on the lives of First Nations women. This is particularly true given that in many traditional First Nations

societies, men and women held equal status (Ouellette 2002). Rather than being solely based on constructions of male power and dominance, race, class and gender intersect to produce the oppression experienced by Aboriginal women. Describing her experience as a Mohawk woman, Patricia Monture (2006) explains that she experiences racial and gendered oppression simultaneously: “much of my identity was shaped on the recognition that I was oppressed. I was oppressed as an Indian. I was oppressed as a woman. I was oppressed as an Indian woman. I do not experience these categories of ‘Indian’ and ‘woman’ as singular and unrelated” (79). Echoing Ouellette (2002), Monture (2006) argues that any attempt to understand the oppression of Aboriginal women must take colonialism as its point of departure: “colonialism is the theory of power, while oppression is the result of the lived experience of colonialism” (80). Analyzing discursive constructions of the Canadian sex trade while attending to power relations requires an approach that simultaneously addresses racism, classism and sexism.

Collins’ (1990) “matrix of domination” provides a useful starting point for analyzing discursive construction of the sex trade in the *Bedford* case while simultaneously attending to divergent forms of oppression. For Collins, different forms of oppression intersect in a matrix of domination in which, “depending on the context, an individual may be an oppressor, a member of an oppressed group, or simultaneously oppressor and oppressed” (4). Similarly, Donna Haraway (1999) argues that “there is no way to ‘be’ simultaneously in all, or wholly in any, of the privileged (subjugated) positions structured by gender, race, nation and class” (179). For Haraway, there are no “innocent” positions and “vision is always a question of the power to see” (Ibid). Thus, researchers must subject all perspectives to “critical reexamination, decoding, deconstruction, and interpretation” (178). This approach complements Prus’ (1999) assertion that researchers must appreciate actors’ abilities to assume interchangeable standpoints in exchanges

(153) and permits a more comprehensive examination of how relations of power influence actors' abilities to forward their definition of reality in the *Bedford* case.

In order to conduct the current case study, I have examined the facta submitted by interested parties and the subsequent legal determination in the original hearing of *Bedford v. Canada*. In cases such as constitutional challenges, lawyers for interested parties submit legal facta or statements of fact to the court detailing their client(s)'s position(s) on the issue(s) in question. A factum is essentially a formal presentation of the argument one is forwarding for consideration by the courts; these documents provide a compilation of witness testimony, including testimony obtained via cross-examination, academic evidence and legal precedent that submitting parties are using to construct their argument(s). Upon consideration of all of the evidence submitted, judges provide a determination explaining their decision on the issue(s) in question as well as their reasoning for making said decision(s). Thus, I have examined the facta submitted on behalf of the applicants, the AG Canada and the interveners in this case—the AG Ontario and the CLF and colleagues—as well as Justice Himel's determination. My analysis of discursive constructions in legal facta and Himel's determination is complemented by interviews with two of the religious interveners and three expert witnesses involved in this case. Some of the parties involved in this case were unable to provide interviews for legal reasons because this case is ongoing. In addition to facilitating a more informed understanding of interest parties' positions in the current debate, complementing my analysis of secondary data with focused interviews offers a more detailed understanding of the relationship between law, religion and science in *Bedford v. Canada*.

Rather than treating claims as static entities, the present research explores the ways that claims-makers frame their arguments in *Bedford v. Canada* as they attempt to influence Justice

Himel's perception of the constitutionality of the impugned provisions and, by extension, of the Canadian sex trade. Guided by insights from the social construction of social problems approach (Spector and Kitsuse 1977; Best 2008), symbolic interactionism (Prus 1999) and feminist approaches to power and situated knowledge (Collins 1990; Mackinnon 1997; Comack 2006; Haraway 1999), the current analysis examines how the institutions of law, religion and science intersect to collaboratively construct the situation facing Canadian sex workers in *Bedford v. Canada*. Through exploring how public attention to the dangers associated with prostitution in Canada is reshaping social constructions of the Canadian sex trade as well as the roles of law, religion and science in the current debate, this case study investigates how the situation currently facing Canadian sex workers is being discursively constructed in the *Bedford* case.

### ***Literature Review***

#### ***Research on the Sex Trade***

Sociologists in Canada and abroad have examined the sex trade from a variety of angles. For example, research has been conducted on policing prostitution (Edmonton Police Commission Task Force on Prostitution 1999; LeBeuf 2006), the relationship between prostitution, violence and victimization (Brannigan 1994; Farley et al. 1998; Cler-Cunningham & Christensen 2001; Kurtz et al. 2004; Raphael & Shapiro 2004; Surratt et al. 2004; Brents & Hausbeck 2005; Farley, Lynne & Cotton 2005; Salfati, James & Ferguson 2008), men who purchase sex (Monto 2004; Lowman & Atchison 2006; Klein, Kennedy & Gorzalka 2009), HIV risk among sex workers (Shannon et al. 2008), sex workers' views of their situations and the ways that they manage occupational hazards (Dala 2000; Sanders 2004a, 2004b; McKeganey 2006), health and safety issues associated with working in the sex trade (STAR 2005; Jackson, Bennett & Sowinski 2007;

Jackson et al. 2009; Shaver, Lewis & Maticka-Tyndale 2011), the ways in which indoor sex workers promote latex as a tool for safer sex (Moore 1997), the ways that internet technologies (Bernstein 2007) and tourism (Brents and Hausbeck 2007) have restructured the sex trade, and women's negotiation of their bodies (Coy 2009) and identities (Sanders 2005) in commercial sexual transactions.

The majority of research on the sex trade concentrates on female, on-street sex workers (Lowman 2001; Vanwesenbeeck 2001; Benoit and Shaver 2006; Weitzer 2009*b*) in contexts where prostitution is criminalized (Vanwesenbeeck 2001; Weitzer 2009*b*). As noted by Ronald Weitzer (2009*b*), the lopsidedness of this literature produces a distorted picture of the sex trade (230). This is particularly problematic in light of the fact that street prostitution is the least common type of sex work (Lowman 2001; Vanwesenbeeck 2001; Benoit and Shaver 2006; Weitzer 2009*b*). Further, although some recent studies include male, transgendered and transsexual sex workers (for example, Weinberg, Shaver & Williams 1999; ENMP 2002; STAR 2005; Koken, Bimbi & Parsons 2010; Shaver, Lewis & Maticka-Tyndale 2011), “almost all of the literature is divided into separate studies by gender, with virtually no systematic comparative examinations of males and females at the same level of work,” making any findings regarding differences in experiences of sex work between males and females tentative (Weitzer 2009*b*: 222). And too little is known about transgendered and transsexual sex workers to draw even tentative conclusions (Ibid). Research on the Canadian sex trade is characterized by a tendency for researchers to focus on street-level prostitution, generalize findings to all forms of sex work, and view street prostitution as a monolithic entity (Lowman 1998: 5). Analyzing the extent to which constructions of the sex trade and its practitioners in *Bedford v. Canada* reproduce this tendency will shed light on the situation currently facing Canadian sex workers. Researchers’

tendency to focus exclusively on street prostitution, hence focusing on the most dangerous form of sex work, has resulted in a view that prostitution and violence are inextricably linked (Lowman 2001: 4; Vanwesenbeeck 2001: 279; Weitzer 2009b: 218).

Although recent Canadian scholarship suggests that trends are shifting, indoor forms of sex work have been mostly excluded from researchers' foci because Canadian research on the sex trade has been largely fuelled by public concern over the nuisance aspects of sex work (Lowman 1998, 2001). Moreover, public perceptions of the sex trade in Canada have guided research funding initiatives, producing a distorted image of the sex trade in Canadian research. According to John Lowman (2001), Canadian research on prostitution was basically non-existent prior to the 1970s (1). In response to media portrayals that street-prostitution was expanding due to police crack-downs on indoor venues in Toronto (Brock 1998) and Vancouver (Lowman 1998, 2000, 2001) toward the end of the 1970s, however, the government commissioned research on prostitution, providing an impetus for social scientific inquiry into the Canadian sex trade (Lowman 2001). Lowman (2001) notes that "after 1984 what had been a trickle of studies turned into a flood" (1). However, the methodology employed by researchers examining the Canadian sex trade was guided by socio-political contexts and resulting funding initiatives:

In the early 1980s, concern about the nuisance aspects of the street prostitution trade provided the main stimulus for prostitution research funding. When the federal government initiated research, public nuisance concerns shaped research questions. While many researchers were interested in including men and women working in off-street venues, most of the surveys of the 1980s and early 1990s involved street prostitutes. In the 1990s, the bulk of survey research was devoted to youth prostitution, most of which occurs on street. The image created by these studies is of an inseparable link between prostitution and victimization. (4)

More recently, research agendas have been guided by an increasing tendency to conflate prostitution and trafficking (Weitzer 2007; Hubbard, Matthews & Scoular 2008: 139; Farrell & Fahy 2009: 621; Weitzer 2009a: 88; Scoular 2010: 16; Weitzer 2010: 70). Moreover, according



to Weitzer (2007), as a result of the American government's acceptance of activists' claims that prostitution and trafficking are inseparable (72), organizations applying for U.S funding for research on trafficking must take an abolitionist position on prostitution:

Today, to be eligible for United States funding, any foreign NGO working on the trafficking front must declare its opposition to prostitution and especially legal prostitution. This requirement was added to the 2003 TVPRA [Trafficking Victims Prevention Reauthorization Act], and it applies to *any* funds or activities of the organization, including funds that come across from sources other than the government [original emphasis]. (74)

In Canada, the case of serial killer Robert Picton has also altered the focus of research on the sex trade: “the issues of health and well-being, stigma, social exclusion and marginalization have become even more salient in light of the charging of Robert Picton for the multiple murders of Vancouver’s Downtown Eastside ‘missing women’” (Benoit & Shaver 2006: 245). Cecilia Benoit and Frances Shaver (2006) explain that while the majority of scholarship in Canada and abroad has focused on “the moral, criminal and legal aspects of the industry, or on the proximate risks associated with those involved...[more recently] research has shifted toward an understanding of the heterogeneity of those involved in the sex industry, the broader social determinants of their health and well-being, and the impact of stigma and social exclusion on their life chances” (244). Analyzing *Bedford v. Canada* provides a means for assessing the extent to which contemporary constructions of the Canadian sex trade attend to these factors. To what extent are female, on-street sex workers the focus of the current debate? And to what extent does the debate in *Bedford v. Canada* center on various forms of sex work conducted by male, female, transsexual and transgendered workers? Further, given that the increasing moral panic over sex trafficking and the case of Robert Picton are catalysts to a shift in discursive constructions of sex workers, to what extent are these factors incorporated into discursive constructions of safety issues associated with sex work in this case? Specifically, are the actors involved in the *Bedford*

case focusing on the dangers associated with trafficking and serial killers or are they incorporating a broad range of safety concerns?

*Research on the Sex Trade in Canada*

Frances Shaver, Jacqueline Lewis and Eleanor Maticka-Tyndale (2011) examine Canadian sex workers' concerns with regard to physical, social and mental dimensions of health as outlined by the World Health Organization's definition of health. Drawing on "over 450 face-to-face interviews with adult (i.e.,  $\geq 18$  years of age) women, men, and transsexual/transgender (TS/TG) workers who represent a broad range of occupations (street-based prostitution, exotic dancing, escort, and massage)" as well as interviews with "some 40 key informants" such as police, community service organizations and "owners/managers of establishments where PWSI work" (49-50), Shaver et al. examine "three domains related to worker health and safety: risks to occupational health and safety (OHS), negative perceptions of and behaviors toward workers, and limited access to essential services" (49). Further, Shaver et al. attempt to "identify the risks posed to workers in each of these three domains and how they are exacerbated by the *Criminal Code* provisions" being challenged in the *Bedford* case (49). According to Shaver et al., health and safety concerns with regard to occupational health and safety, perceptions of and behaviours toward workers, and access to essential services vary depending on type of sex work and the gender/sexual orientation of the worker.

Shaver et al. (2011) provide a good starting point for assessing the extent to which sex workers' concerns are being addressed in *Bedford v. Canada*. Although the applicants in this case are sex workers and testimony from current and former sex workers is provided by the applicants and the AG Ontario, combining their accounts with those of sex workers who are not

present in current discussions offers a useful starting point for determining the extent to which current discursive constructions of the sex trade are reflective of the broad range of experiences characterizing sex work in Canada. Specifically, the applicants and experiential witnesses in *Bedford v. Canada* are all female sex workers, thus, Shaver et al.'s findings provide a starting point for assessing the extent to which safety concerns being discussed in these debates apply to Canadian male and transgendered sex workers. However, it is important to note that Shaver et al.'s findings are drawn from studies conducted in "Montreal, Ottawa, Toronto, and numerous smaller cities in southwestern Ontario" (49), and, therefore these findings are only representative of one region in Canada; it is possible that sex workers in other regions have different experiences of sex work and/or different concerns regarding occupational health and safety. Nonetheless, complementing these findings with findings from other Canadian locales as well as analysis of current discursive constructions of the Canadian sex trade promises to offer novel insights into how policies can address these concerns in the event Canadian courts rule in favour of decriminalization.

In 2003, the federal Standing Committee on Justice and Human Rights established the Subcommittee on Solicitation Law Reform (SSLR). The committee's mandate was "to review the solicitation laws in order to improve the safety of sex-trade workers and communities overall, and to recommend changes that will reduce the exploitation of and violence against sex-trade workers" (SSLR 2006: 2). Although the committee was disbanded during the 2005 dissolution of Parliament, a new committee was formed to complete the task in 2006 (Ibid). Conducting 300 interviews across Canada, on a host of prostitution related issues, with a broad range of actors such as policy experts, academics, male, female, transsexual and transgendered sex workers, service providers and private citizens, the SSLR notes that "two broad and conflicting

perspectives concerning the very basic nature of prostitution” characterize these testimonies (71). Gwendolynne Taylor (2010) notes a similar trend in her analysis of submissions by women’s organizations, academics and legal advocates to the SSLR. Moreover, both the SSLR (2006) and Taylor (2010) observe that discussions about prostitution reform in Canada are framed by either discourses of prostitution as a form of violence against women or sex work discourses (the view that prostitution is a legitimate form of employment). Not surprisingly, researchers have noted a similar trend in academic work on the sex trade.

Ronald Weitzer (2009*b*) identifies three theoretical frameworks or paradigms through which prostitution is constructed in academic works: the oppression paradigm, the emancipation paradigm, and the polymorphous paradigm. Similarly, Jane Scoular (2004) identifies three dominant constructions in feminist accounts: discourses of victimization, sex work discourses and postmodern accounts. Scoular’s three categories are compatible with those outlined by Weitzer. According to Weitzer (2009*b*), “the oppression paradigm and the emancipation paradigm are diametrically opposed models based on entirely different assumptions, whereas the polymorphous paradigm integrates aspects of the others and is more empirically driven than the other two” (214). Complementing this assertion, Scoular (2004) argues that postmodern accounts incorporate elements of discourses of victimization and sex work discourses but present a more balanced, multifaceted account than either of the other two constructions: “postmodern work, in contrast to previous approaches, considers prostitution as neither a subversive sexual practice nor an inherently oppressive one” (348). The discursive categories outlined by Weitzer (2009*b*) and Scoular (2004) provide a point of departure for assessing contemporary constructions of sex work and its practitioners in the *Bedford* case.

*Canadian Prostitution and the Law*

Although Canadian scholars have provided historical accounts of the development of prostitution law in Canada (see, for example, Lowman 1998; Robertson 2003), analyses of the social construction of sex work in Canadian law (Brock 1998), assessments of the relative effectiveness of the communicating law in Canada's major cities (Larsen 1996), analyses of legal discourses in rape cases involving sex workers (Sullivan 2007) and analyses of Canadian debates surrounding legal reforms (Larsen 1999; Taylor 2010), there is yet to be a constructionist analysis of cases involving constitutional challenges to Canadian prostitution laws.

While scholarly attention has recently been directed toward the *Bedford* case, sociologists have yet to analyze discursive constructions of the sex trade in this case. Further, scholars have yet to attend to the relationship between law, religion and science in this type of constitutional challenge. Current analyses have produced detailed accounts of the historical progression of the current challenges to Canada's prostitution laws (Louie 2012), examinations of Crown expert witness testimony in *Bedford v. Canada* (Lowman 2012) and analyses of prohibitionist claims in the *Bedford* case (Lowman and Louie 2012). Yet, sociological inquiry has yet to compare the ways in which both sides of this debate are constructing the situation while attending to the roles of law, religion and social science in this process. Moreover, all examinations of the arguments forwarded in this case focus on the prohibitionist stance, neglecting to incorporate analyses of how proponents of legal reform are constructing their claims and whether these accounts accept official definitions of the roles of law, religious intervention and expertise uncritically.

Echoing the applicants' argument in *Bedford v. Canada* that minimizing harm to sex workers while respecting their liberty rights requires a shift from strictly moral perspectives to a harm reductionist approach, Christine Louie (2012) provides a detailed analysis of the events

leading up to *Bedford v. Canada* and *Downtown Eastside Sex Workers United Against Violence Society v. Attorney General (Canada)*. While the *Bedford* case was brought before the court by three individuals, the case of *Downtown Eastside Sex Workers United Against Violence Society v. Attorney General (Canada)* was brought before the court by a sex workers' group, Downtown Eastside Sex Workers United Against Violence Society (SWUAV), and a former sex worker, Sheryl Kiselbach. Albeit on slightly different grounds, both cases challenged the constitutionality of the same prostitution related provisions in the *Criminal Code*: operating or being an inmate of a common bawdy-house (s. 210), living on the avails of prostitution (s. 212(1)(j)) and communicating in a public place for the purpose of engaging in prostitution (s. 213(1)(c)). Yet, SWUAV and Kiselbach went further than the applicants in *Bedford v. Canada*, also challenging the *Criminal Code* prohibitions of transporting another person to a common bawdy-house (s. 211), and procurement (s. 212(1)(a), (b), (c), (d), (e), (f), and (h)). Employing a grounded theory approach, Louie analyzes the origin of these *Charter* challenges as well as the role of legal aid and legal advocacy, social science experts and international prostitution law reform in other Commonwealth countries through documentary analysis and interviews. Specifically, Louie examines published court documents and supplements this analysis with interviews with one applicant from each of these cases, Terri-Jean Bedford and Sheryl Kiselbach, and their advocates, Alan Young and Katrina Pacey, respectively. Louie provides a convincing argument that, contrary to popular renditions of Marxian theory, the law is serving its purpose through a Marxist framework in these cases. Specifically, noting that "both followers and opponents of Marxism fail to understand the subtlety of [Marx and Engels'] materialist conception of history" (9) and that, according to Marx, "the economy is the *ultimate* determining element in history but not the *only* one [original emphasis]"(9-10), Louie argues that, for Marx, "laws reflect the

movement and interaction of industry and the money market, and are influenced by political struggles with classes and by religion and philosophy” (10). From this perspective, the law is fulfilling its purpose of mitigating between political and economic struggles, ensuring that marginalized groups have the opportunity to gain emancipation via legal reform. While Louie’s account provides a good starting point for understanding the current legal debate, her approach does not question legal constructions nor does it focus on sites of silence and intrinsic power imbalances in these debates. Attending to the interactions between law, religion and science as they collectively construct the situation currently facing Canadian sex workers draws attention to the inefficacy of the Canadian legal system when moral issues requiring democratically informed resolutions come before the courts.

Offering a point of departure for analyzing constructions forwarded by the Attorneys General of Ontario and Canada as well as the role of religious intervention in the present case, John Lowman and Christine Louie (2012) compare the results of public opinion surveys to arguments forwarded by prohibitionist groups in *Bedford v. Canada*. Lowman and Louie find that public opinion survey results do not support the government and other prohibitionist groups’ contention that the majority of Canadians agree with prohibiting prostitution. Specifically, comparing the arguments forwarded by the Attorneys General of Canada and Ontario and those of the Christian Legal Fellowship, REAL Women of Canada and the Catholic Civil Rights League to the results from seven public opinion surveys from 1984 to 2011, Lowman and Louie find that the claims forwarded by the government and other prohibitionist groups in *Bedford v. Canada* regarding Canadian beliefs on whether or not adult prostitution should be prohibited are false. As noted by Lowman and Louie, “should *Bedford v. Canada* be upheld, claims about public opinion will likely come to play an important part in the ensuing debate about how to

revise prostitution laws. Indeed, claims about public opinion on prostitution already did play a part in this case” (4).

Similarly, John Lowman’s (2012) exploration of testimony provided by Crown expert witnesses in *Bedford v. Canada* provides a good starting point for analyzing the role of expert witnesses in this case. Considering the core claims forwarded by Melissa Farley, Janice Raymond, Mary Sullivan and Richard Poulin, Lowman concludes that, rather than evidence-based argument, these scholars presented the courts with victim-paradigm hyperbole. While Lowman’s analysis provides a good point of departure for considering the arguments forwarded by prohibitionist scholars in *Bedford v. Canada*, comparative analysis incorporating the claims forwarded by scholars for the other side of the debate is necessary to gain a full understanding of the ways in which the sex trade and its practitioners are being constructed in this case.

### ***Organization of Thesis***

This thesis is organized into three main sections: the role of collective values, the role of religious intervention and the role of expert witnesses in this case.

Chapter two details my research design and methodology, with emphasis on the importance of incorporating feminist research methods when conducting research of this sort. In this chapter, I discuss Adele Clarke’s (2005) situational analysis and how I used it to analyze the *Bedford* case. Throughout this discussion I draw attention to how, as a theory/methods package, situational analysis addresses many methodological concerns raised by feminist researchers.

In chapter three, I consider the role of collective values in Canadian law as a backdrop to examining the relationship between science and religion in *Bedford v. Canada*. I begin with an overview of classical and contemporary theories of the law-society relationship. Following this



account, I discuss the Canadian context and the *Charter of Rights and Freedoms*, drawing attention to the importance of value consensus in official definitions of the nature and purpose of Canadian law. Having established the nature and purpose of the *Charter* as well as its power to shape Canadian jurisprudence, I examine the role of collective values in the *Bedford* case by analyzing actors' constructions of the impugned *Criminal Code* provisions and the role of law in this case.

Chapter four provides an analysis of the role of religious intervention in the current case. In this chapter, I analyze both legal constructions of the role of religion and the claims forwarded by the religious interveners in *Bedford v. Canada* through documentary analysis and interviews. Beginning with a discussion of the role of conventional morality in shaping the Canadian legal tradition, I explore the nature and purpose of religious intervention in the *Bedford* case through analyzing the CLF and colleagues' constructions of their role in this debate and what they claim to bring to the *Bedford* case that would not be present in their absence. Following this account, I explore actors' constructions of the role of legal moralism in *Bedford v. Canada* in an attempt highlight the intrinsically moral nature of the current debate.

In chapter five, I consider the role of expert witnesses in this case. Through highlighting issues with legal definitions of expertise and suggesting feasible alternatives to binary distinctions between lay and expert knowledge, I explore legal constructions of expertise and how these understandings shape the current debate. Analyzing how legal accounts construct the role of expert witnesses in court proceedings highlights the extent to which law and science co-construct legal fictions concealing the moral nature of the debate in *Bedford v. Canada*.

In chapter 6, I explore actors' constructions of the "risk of harm" associated with sex trade involvement in Canada, highlighting the privileged status of expert witnesses in

constructing these accounts. Analyzing actors' constructions of the situation in the *Bedford* case while attending to sites of silence in the data draws attention to the precarious status granted to expert witnesses in this case as well as the collusion of law, religion and science in *Bedford v. Canada* and the need for a more nuanced approach to evidence in legal debates of this nature.

### Research Design and Methodology

Drawing on Adele Clarke's (2005) method of situational analysis, this research is based on documentary analysis of the facts and judicial determination in the case of *Bedford v. Canada* as well as focused interviews with some of the parties involved in this case. Legal facts are summaries of the arguments being forwarded by interest parties in legal proceedings. It is important to note, however, that legal facts are constructed using specific guidelines regarding what information is to be included and how that information is to be presented. Thus, the form and content of the arguments being forwarded by interest parties in this case were tailored to meet specific requirements imposed by the court. I have also incorporated analyses of historical materials which are particularly relevant to this case, namely precedent judicial determinations, because, as noted by Clarke, representations of the present are always informed by historical information (262). This is particularly true of legal constructions of the present in which legal precedent trumps all other forms of knowledge. In addition to permitting comprehensive analyses of discursive construction via its emphasis on attending to a range of elements which could potentially influence the situation of inquiry, situational analysis addresses many feminist methodological concerns central to the goals of my study. Specifically, situational analysis permits a focus on women's experiences, allows analysts to conduct research *for* women rather than research *on* women, and locates the researcher in the same critical plane as the overt subject matter (Harding 1987).

Situational analysis involves constructing maps and using them as the conceptual infrastructure of the research project (Clarke 2005). Moreover, Clarke's (2005) maps are cartographic tools, aimed at helping researchers to gain comprehensive understandings of the situations they are analyzing. According to Clarke, employing situational maps, social

worlds/arenas maps and positional maps over the course of generating, analyzing and interpreting data, permits analyses that “simultaneously address voice and discourse texts and the consequential materialities and symbolisms of the non-human, the dynamics of historical change, and...power in its more solid and fluid forms” (xxiii). As noted by Lise Allen (2010), although situational maps are not a novel contribution to qualitative research, “Clarke’s introduction of them with her postmodern approach to grounded theory is unique” (1616). Situational analysis builds on Chicago School ecological and social worlds/arenas/discourse approaches, making them the “root images or metaphors” for her mapping (Clarke 2005: 39). Clarke (2005) notes that although grounded theorists “have recently produced more constructivist framings [of grounded theory], problematic positivist recalcitrancies remain” (xxii). Situational analysis aims to eradicate the positivist roots of traditional grounded theory by combining symbolic interactionist grounded theory with postmodernism.

In contrast to traditional grounded theorists’ notions of the researcher as a *tabula rasa* (Clarke 2005; Charmaz 2009), situational analysis emphasizes the importance of reflexivity at all stages of the research process. This approach complements feminist calls for researchers’ reflexivity. As noted by Harding (1987), in feminist analyses, by “locating the researcher in the same critical plane as the overt subject matter (8),...the researcher appears to us not as an invisible, anonymous voice of authority, but as a real, historical individual with concrete, specific desires and interests” (9). Similarly, Clarke (2005) emphasizes the importance of transparency and reflexivity throughout the research process: “we need to address head-on the inconsistencies, irregularities, and downright messiness of the empirical world— not scrub it clean and dress it up for the special occasion of a presentation or a publication” (15). Echoing Clarke’s (2005) assertions, Kathy Charmaz (2009) argues that the notion of the researcher as a

*tabula rasa* in the traditional grounded theory approach is problematic: “the notion of the researcher as a *tabula rasa*...sounded absurd to me in 1969 and still does. Rather than denying our pasts and removing ourselves from theoretical conversations of the present, we need to scrutinize how our experiences and disciplinary ideas have influenced us and what we find in the empirical world” (50). In sharp contrast to the traditional grounded theory approach, with situational analysis “the analyst uses their knowledge to help design the data collection and does not wait quietly for magically appearing data to speak! That is, the analyst needs to anticipate what data should be gathered in the initial design, as well as use theoretical sampling appropriately downstream” (Clarke 2005: 192). Contrary to traditional assumptions, making this subjective component of data collection known produces less distorted explanations of social reality. This practice increases objectivity while decreasing objectivism or the “stance that attempts to make the researcher’s cultural beliefs and practices invisible while simultaneously skewering the research objects beliefs and practices to the display board” (Harding 1987: 9).

According to Harding (1987), in contrast to traditional approaches, which focus on what men consider important and merely “add women” to analyses (4), feminist research treats women’s experiences as empirical and theoretical resources (7). Conceptualizing the law and science as mechanisms for constructing sex workers’ identities is expected to ground my analyses in the lived experiences of those who are affected by these discourses. For Harding, the goal of feminist inquiry “is to provide for women explanations of social phenomena that they want and need, rather than providing for welfare departments, manufacturers, advertisers, psychiatrists, the medical establishment, or the judicial system answers to questions they have” (8). Whereas conventional readings of judicial determinations accept the legitimacy of legal discourse, analyzing law as a discursive tool enables more feminist understandings of the current

situation facing Canadian sex workers. Comack (2006) notes that “in the last three decades feminism has challenged us to reconsider the traditional approaches to understanding both the law-society relation and the claims of law itself in its Official Version” (42). Analyzing *Bedford v. Canada* as discourse offers a means of following this tradition by complicating the issue and drawing attention to the constructive nature of arguments for and against prohibiting sex work in Canada.

Situational analysis is particularly useful for analyzing contemporary discursive constructions of sex work and its practitioners in a Canadian context and the roles of religion and science in the current debate because it permits a detailed, multifaceted and reflexive approach to analyzing discourse. An approach that permits investigation of difference as well as examinations of silenced voices is warranted in this case because of the nature of court proceedings. Moreover, court proceedings do not include evidence and/or affidavits from all parties wishing to make submissions. Judges and lawyers make decisions about whose evidence and/or affidavits are presented for consideration by the courts and whose evidence and/or affidavits are not. For example, while Maggie’s: The Toronto Sex Workers’ Action Project was granted joint intervention with Prostitutes of Ottawa-Gatineau Work Educate and Resist (POWER) in the appeal of *Bedford v. Canada*, their perspectives were absent from the initial hearing of this case. And while some sex workers were called to testify in the initial hearings, their evidence was treated as “experiential”, granting it less weight than evidence presented by expert witnesses, all of whom were social science researchers. Identifying which other individuals and groups have been silenced and/or omitted over the course of these proceedings allows deeper analysis of current discursive constructions of the Canadian sex trade. As noted by Clarke (2005), “in seeking to be ethically accountable researchers...we need to attempt to

articulate what we see as the *sites of silence* in our data [original emphasis]” (85). This complements feminists’ emphasis on the importance of attending to silence in research (see, for example, Anderson & Jack 1991).

I began by examining the facta submitted to the Superior Court of Ontario and then analyzed Justice Himel’s determination in the *Bedford* case. This enabled a more comprehensive understanding of the ways in which the court constructed the roles of law, religion and science as well as the Canadian sex trade in this particular case. Facta were submitted on behalf of Terri Jean Bedford, Amy Lebovich and Valerie Scott (the applicants), the Attorney General of Canada, the Attorney General of Ontario and the Christian Legal Fellowship, REAL Women of Canada and the Catholic Civil Rights League. These documents amount to a total of 524 pages. All facta were retrieved via interested parties’ web sites and I retrieved the judicial determination for this case via CanLII. Submissions to the Court of Appeal for Ontario by parties who were excluded in the original hearing were also analyzed with attention to the ways in which the sex trade and other implicated actors/actants were constructed in these accounts as well as central areas of agreement and disagreement between the parties immediately involved in this arena.

I began my analysis by constructing situational maps of the facta submitted in order to identify the actors/actants directly involved. Situational maps allow researchers to get an in-depth appreciation for the elements involved in the situation of inquiry, attending to both contributions to and silences in discourse (Clarke 2005: 86). Through this exercise, I identified actors/actants such as the following: female sex workers; lawyers; government representatives; members of religious groups; concerned citizens; social scientists; the judge; precedent legal determinations; legal procedures; studies on the sex trade; discursive constructions of clients; discursive constructions of sex work; discursive constructions of indoor/outdoor venues;

discursive constructions of the impugned provisions; and discursive constructions of sex workers. Notably absent were actors such as male, transvestite and transgendered sex workers. Following this step, I constructed social worlds/arenas maps and positional maps of the facts in order to identify patterns of collective commitment and positions taken in the discourses respectively. As noted by Clarke (2005), social worlds/arenas maps enable meso-level analysis by drawing attention to the fluidity of actions among structures and agencies (110) and positional maps allow analysts to identify positions taken and positions that are absent in the data in order to gain a more comprehensive understanding of the discourses at work in a given situation (198). My social worlds/arenas maps identified social worlds such as social science worlds, legal practice worlds, sexual service worlds, organized crime worlds, and bureaucratic worlds (i.e. governmental and religious). Positional mapping helped me identify positions taken in the data such as the following: Canadian sex workers operate in a dangerous context at present, the law makes sex work in Canada dangerous, the law makes sex work in Canada safer than it would be without the impugned provisions, morality is the basis for Canada's criminal law, and clients are dangerous. This process also helped me identify positions that were not taken in the data, such as Canadian sex workers currently operate in a safe context. Moreover, analyzing the facts submitted to the court with the guidance of Clarke's maps helped me identify areas of (dis)agreement as well as constructions that appeared to be characterizing this debate.

Reading through soft copies and making margin notes as well as voice notes facilitated a preliminary understanding of whom/what was involved in the situation of inquiry. Over the course of this preliminary reading, I attended to whom/what the actors involved in the situation were constructing as well as the rhetoric used to achieve this, with increased focus on the ways in which the sex trade and its practitioners were being constructed both overtly and via actors'



constructions of other elements involved in the situation. I also attended to major areas of agreement and disagreement among the actors involved in order to provide a more detailed analysis of differing constructions should they arise. Following this step, all sources were manually coded in order to organize themes into conceptual trees and provide a more detailed examination of the relations among various actors' constructions of the elements involved in the situation. Themes such as constructing the role of public opinion, constructing the role of religious intervention, constructing the sex trade and its practitioners, constructing the relative safety of prostitution venues, and constructing the role of the expert witness emerged as a result of this exercise.

After reading and coding the facts in this case, I read and coded the legal determination rendered by Justice Himel. In similar fashion to the way I analyzed the facts submitted to the courts, I began by reading the soft copy of this determination and making margin notes and voice notes in order to establish a preliminary understanding of whom/what was involved in this arena. Having identified patterns of collective commitment and major areas of agreement/disagreement in the facts submitted to the court, my analysis of the legal determination stemming from these facts centered on identifying changes in the way the current situation was being constructed by the judge assessing this case. Are the central areas of agreement/disagreement characterizing the facts submitted to the court also characterizing the situation as constructed within Himel's determination? If not, on what areas is Justice Himel focusing in her determination and what areas are omitted? Which constructions of the elements involved in the situation is Himel reproducing and which constructions of the elements involved in the situation are being ignored in her determination? Are there any novel elements, rhetorical constructions and/or themes emerging in her determination for this case?

Following my analysis of the documentation for this case, I conducted focused interviews in order to clarify points of confusion in my analysis. Although I invited lawyers for the applicants (Terri-Jean Bedford, Amy Lebovich and Valerie Scott) and the respondent (the Attorney General of Canada) as well as all interveners (the Attorney General of Ontario, the Christian Legal Fellowship, REAL Women of Canada and the Catholic Civil Rights League), 12 of the expert witnesses, and excluded parties, such as Maggie's and the United Church of Canada, to participate in interviews, only three expert witnesses for the applicants and two of the religious intervener groups participated. It is noteworthy that many of these parties may have been legally prohibited from participating in interviews at the point in time when I contacted them. The statement of informed consent for these interviews stressed that participants should not participate if it violated the terms of a retainer or some other legal agreement in any way.

Interviews were designed specifically for the interested party I was speaking with. Thus, questions were designed to attend to the experiences and views of the individual or group being consulted. For example, questions for expert witnesses focused on how s/he was retained by the interest party for whom s/he made submission, his/her subjective experience of being an expert witness in this case and what this experience taught him/her about the legal system and its use of expertise. Questions for religious interveners focused on the reason(s) for their intervention, what impact they felt it had on the case, and their thoughts about Justice Himel's ruling. With the exception of one interview, all interviews were conducted via telephone, lasted approximately 90 minutes and were tape recorded in order to ensure accuracy in transcription. One of the expert witnesses did not have time to participate in a tape recorded, telephone interview so his responses to my queries were provided via e-mail. Regardless of how responses to interview questions were obtained, all interviews were manually coded and organized into conceptual

trees. All participants were provided with the option of signing a waiver of anonymity/confidentiality in case s/he desired to have his/her proper name attached to any comments s/he made during the interview. All participating parties signed this waiver. Thus, presentation of this data will be accompanied by the name of the individual or group from whom it was acquired. This research has been approved by the Research Ethics Board at my home institution, Lakehead University.

Through conducting multiple readings and continuously weaving back and forth between sites of construction, novel themes emerged throughout the course of my analysis. This, in turn spurred on novel research questions and new approaches to data collection. Initially, this project was guided by the following questions: How are sex work and notions of safety being constructed in the current debate? To what extent do constructions of sex work and sex workers differ between accounts provided by the actors involved in this case? If there is a difference, to what extent does this difference appear to be linked to differing constructions of the applicants and other sex workers providing evidence for consideration by the court? Given that the Canadian sex trade is composed of multiple forms of indoor sex work as well as street-level sex work and its practitioners are male, female, transsexual and transgendered, to what extent do constructions of the sex trade and its practitioners in this case attend to the diversity of practitioners and experiences characterizing the Canadian sex trade? Given that discussions on prostitution have historically centered on moralism, to what extent are these debates focused on safety issues associated with working in the sex trade?

Over the course of my analysis, I became attuned to a host of new research questions worth exploring. What do constructions of the role of law in this case tell us about the role of law in contemporary social arrangements? How do legal accounts constructing the role of law in

rights cases influence the role of religious intervention? What is the role of the religious interveners in this case and what are the grounds for their interest in *Bedford v. Canada*? What is the role of expert witnesses in this case and, given the state of sociological research on the sex trade, is it warranted? Are the expert witnesses offering anything that sex workers could not tell the courts themselves? Should the so-called experts be granted a more privileged position in this debate than those whom these laws directly affect? How effective is the current legal system at handling issues of this sort and is there an alternative means of reconciling this debate that would be more effective?

I made use of situational analysis in order to provide a comprehensive account of the interactions between law, religion and science in contemporary discursive constructions of the Canadian sex trade in the *Bedford* case. In line with feminist research principles, situational analysis allowed me to attend to silence and power as well as the full range of voices and discursive positions participating in this case. Further, Clarke's (2005) emphasis on reflexivity complements feminist calls to challenge traditional notions of value-neutrality. As noted by Verta Taylor (1998), the reflexive "element of feminist research stems from the belief that all methodologies are, to a degree, shaped by the interests and position of the researchers who deploy them" (368). Thus, any discussion about methods and data collection must be accompanied by a discussion about interests and positions in order to ensure transparency at every stage of the research process.

I decided to analyze this case for my thesis research because safety issues associated with sex work have been a focal point of my academic pursuits and personal activism for many years. Having lived in Vancouver, British Columbia at the time of Robert Picton's arrest for the serial murder of 26 women from Vancouver's Downtown Eastside, attending part of his trial in New

Westminster, British Columbia, and working along-side families of murdered and missing Aboriginal women and former sex workers from across the country in Thunder Bay, Ontario for a number of years, I wanted to know how interest parties in the current debate were presenting the issue. While I have been fortunate enough to have never lost a loved one in the way that these individuals have, their stories, pain and anguish have had profound effects on my view of this situation. Yet, it is important to note that my social location as a middle-class, educated, white woman blurs my ability to truly identify with the situations they are describing. Moreover, by virtue of my social location I have never shared the experiences and subsequent concerns of Aboriginal women working in the sex trade and it is likely that I never will. While my awareness of this difference in perspective has helped me stay attuned to sites of silence in the data I have analyzed and informed many of the research questions that originally guided this endeavour, it has also led me to struggle with the issue of voice throughout the course of this research.

Throughout the research process I questioned whether or not my inability to identify with the situations and concerns of Aboriginal women working in the sex trade hindered my ability to critically analyze the Bedford case. This led me to question if I was merely reproducing the hierarchy that my research aims to challenge. Was I being hypocritical? Was raising my privileged voice to criticize over-reliance on other privileged voices (re)silencing those whose voices should be central to this debate? Did I have any place in this conversation at all? At times, I also worried that I was overcompensating for my inability to identify with their situations and, thus, not being critical enough of their positions. As noted by Haraway (1999), if one aims to be objective, the positionings of the subjugated cannot be “exempt from critical reexamination [sic], decoding, deconstruction, and interpretation...the standpoints of the subjugated are not ‘innocent’ positions” (178).

Similarly, I encountered a struggle with voice when analyzing the data yielded from interviews with the expert witnesses in this case. At times, I felt as though I was not probing sufficiently during interviews and, as a student, my subordinate status in the academic hierarchy made it difficult to critically analyze the perspectives of my superiors. However, I hope that my awareness of this issue has strengthened my ability to analyze the current situation from a feminist perspective and remain attuned to issues of voice and power imbalances in this case.

### **The Role of Collective Values in Law**

Law is...decidedly social. Human beings create laws and do so within the context of their times and societies (Grana & Ollenburger 1999: 2).

The present case study offers a unique opportunity to analyze the relationship between collective values and contemporary Canadian law. In addition to offering a means of exploring the concept of 'rights' in Canadian society, *Bedford v. Canada* poses a challenge to conventional wisdom regarding the role of religion and science in the legal arena. As will become clear in subsequent chapters, whereas scholarly legal analyses generally identify a conflict between the interests of science and religion in the court room (see, for example, Beaman 2008; Jasanoff 1999), religion and science *both conflict and collude* in the present case. Understanding the, seemingly paradoxical, relationship between religion and science in *Bedford v. Canada* requires an appreciation of theories of law and society. Moreover, this collusion is the result of a divergence between the law's purported method and its practical application. Thus, in this chapter I begin by outlining the socio-legal theories of Karl Marx, Emile Durkheim, Talcott Parsons, Max Weber and George Herbert Mead as well as insights from feminist and critical legal scholars. Drawing on these insights permits a more comprehensive understanding of the subject matter of chapters 4 and 5: the role of religious intervention and the role of expert witnesses in the present case. It also provides a backdrop for understanding the Canadian legal context and the role of the *Canadian Charter of Rights and Freedoms*. What does the *Charter* tell us about the purpose and function of law in Canadian society? How do legal actors construct the law's role in rights cases? How do these constructions influence our understanding(s) of the role of law in rights cases? Finally, having established an understanding of theories of law and society and their relevance in the Canadian legal context, I provide a brief overview of the current case study in order to

provide a starting point for understanding the role of religious intervention and the role of expert witnesses in this case.

### ***Conceptualizing Law***

For Karl Marx, law is a tool for maintaining the dominance of the ruling class. As noted by Steven Vago and Adie Nelson (2008), Marx's theory of law derives from his theory of economic determinism (35). Like other social institutions, law is a superstructure arising from the infrastructure or the existing system of material production in society (Comack 2006; Vago & Nelson 2008). Once established, the relation between the infrastructure and superstructure is dialectical: "the superstructure arises out of the economic base but, once created, acts back to reproduce it" (Comack 2006: 35). Under capitalism, the bourgeoisie (ruling class) own and control the means of production and the proletariat (working class) must make a living by working for wages (Marx 1847: 123). Vago and Nelson (2008) outline three principal assumptions in Marx's theory of law: "(1) law is a product of evolving economic forces; (2) law is a tool used by the ruling class to maintain its power over the lower classes; and (3) in the communist society of the future, since law is an instrument of social control, it will 'wither away' and finally disappear" (35). Indeed, from this perspective, "the executive of the modern state is but a committee for managing the common affairs of the whole bourgeoisie" (Marx & Engles 1848: 98). In Marx's view, the conflict emerging from capitalist arrangements will eventually lead to a revolution, resulting in the emergence of a communist state in which "everyone's needs will be fulfilled and universal harmony will prevail," eliminating the need for law and coercion (Vago & Nelson 2008: 35). This view has inspired critical theories positing that law is inherently political and that its function is to maintain and reproduce systemic inequalities



(Comack 2006: 41-2). Whereas Marxist feminists are critical of the role of law in modern society, socialist feminists have revised and reformulated traditional Marxism “to incorporate the interconnections between capital (class) and patriarchy (gender)” (48). As noted by Comack, this permits them to account for “the specific nature of women’s oppression in a patriarchal capitalist society” (49). Socialist feminists’ attention to the role of gender in the production of social inequality leads to analyses of how men control women and their sexuality via law (Ibid).

Similarly, in *The Division of Labour in Society*, Emile Durkheim (1893) argues that law arises out the structure and complexity of particular societal arrangements. Durkheim views law as a measure of the type of social solidarity characterizing a given society (161). According to Durkheim, “life in general within society cannot enlarge in scope without legal activity simultaneously increasing in proportion” (159). Moreover, in line with Marx’s notion of dialectical materialism, for Durkheim, law both reflects and reproduces social arrangements (161). Although Durkheim agrees with Marx’s assertions that society is characterized by competition, he views this struggle as necessary: “it is neither necessary nor even possible for social life to be without struggle” (Ibid). Thus, it is crucial to maintain social cohesion and moral regulation and law is the means by which this is achieved.

Durkheim identifies two types of social solidarity, mechanical and organic, which he argues correspond to two types of law, repressive and restitutive. In small, homogeneous societies, mechanical solidarity prevails, ensuring unity via “close and interpersonal ties and similarity of habits, ideas, and attitudes” (Vago & Nelson 2008: 37). These societies are highly segmented and “the individual does not belong to himself [sic]; he [sic] is literally a thing at the disposal of society” (Durkheim 1893: 170). Conversely, societies marked by a high division of labour emphasize individuality and personal rights (Vago & Nelson 2008: 37). These societies

are characterized by organic solidarity--mutual interdependence replaces similarity as the basis for forging social bonds (Durkheim 1893: 171). According to Durkheim (1893), repressive or penal law imposes injury or disadvantage upon the wrongdoer while restitutive law aims to restore the previous state of affairs (162). In the case of mechanical solidarity, law reflects the premium placed on maintaining similarity:

[I]ts effect is to maintain the social cohesion that arises from these similarities. It is that force which the penal law guards against being weakened in any way. At the same time it does this by insisting upon a minimum number of similarities from each one of us, without which the individual would be a threat to the unity of the body social, and by enforcing respect for the symbol which expresses and epitomises these resemblances, whilst simultaneously guaranteeing them. (Durkheim 1893: 165)

Ensuring mechanical solidarity requires criminalizing acts that threaten collectively shared values and beliefs: “we should not say that the act offends the common consciousness because it is criminal, but that it is criminal because it offends that common consciousness” (Ibid). Moreover, in these societies, the law is necessarily repressive or penal, signalling to the collective that deviance will not be tolerated (Grana & Ollenburger 1999: 38-9; Vago & Nelson 2008: 37). Rather than being aimed at rehabilitating offenders, criminal sanctions are intended to maintain the “collective consciousness”. As Durkheim (1893) explains, punishment “does not serve, or serves only very incidentally, to correct the guilty person or to scare off any possible imitators....Its real function is to maintain inviolate the cohesion of society by sustaining the common consciousness” (166). This explains the existence of laws that penalize acts which are not harmful to society (165). Noting that law is a product of historical development, Durkheim asserts that some laws merely reflect collective emotions or customs based on purely moral rules (Ibid). Failure to maintain these collective emotions threatens the collective consciousness on which social cohesion is based:

Every act that disturbs [collective emotions] is not dangerous in itself, or at least is not so perilous as the condemnation it earns. However, the reprobation such acts incur is not without reason. For, whatever the origin of these sentiments, once they constitute a part of the collective type, and particularly if they are essential elements in it, everything that serves to undermine them at the same time undermines social cohesion and is prejudicial to society. (Durkheim 1893: 165)

Conversely, in modern societies the law is restitutive and emphasizes compensation to the victim (Ibid). For Durkheim (1893), restitutive law consists of civil, commercial and constitutional law (162) and, rather than being expiatory, aims to restore the ‘status quo ante’ (167). Moreover, as noted by Vago and Nelson (2008), in modern societies, “crimes are considered acts that offend others and not the collective conscience of the community” (37).

Durkheim’s conception of law has informed the structural functionalist approach to crime, which holds that the state is a neutral force operating on behalf of society to maintain social control or to ensure “individual conformity to the normative system” (Comack 2006: 27). As noted by Comack (2006), from this perspective there is no need to question law *per se* because, in line with capitalist democratic principles, laws are institutional reflections of the majority’s norms and values (27). Similarly, although the extent to which this perspective can be characterized as feminist is debatable, conservative feminists accept women’s unequal status in society as natural and functional, arguing that women “required the protection and guidance of men” (Comack 2006: 43). A discussion of the structural functionalist approach to law is warranted because it is particularly relevant in the present case.

Building on Durkheim’s theory of legal development, Talcott Parsons (1962) emphasizes law’s structural functions in contemporary social arrangements. For Parsons, law is a generalized mechanism of social control, operating diffusely in almost all sectors of society (57). Indeed, rather than having a specified functional content, law regulates virtually all forms of social relationships (Ibid). This stems from his view that as society evolves specific subsystems or sets

of interdependent phenomena develop in order to maintain equilibrium and ensure society's proper functioning. As noted by Craig Calhoun et al. (2007), Parsons' theory "rests on an organic analogy that likens a social system to a physical body, in which each subsystem is necessary to maintain the proper functioning of the entire organism" (401). Moreover, for Parsons (1951), just as biological organisms must maintain homeostasis, equilibrium is necessary for the proper functioning of society. This is achieved via social institutions, such as the family, school, law and religion, which operate as mechanisms of socialization and social control. From this view, law is a social institution, functioning with others, to maintain social order (Grana & Ollenburger 1999: 36).

For Parsons (1962), law is particularly necessary in societies where myriad interests must be balanced against each other (72). Moreover, the law mainly serves as a mechanism for mitigating conflict and ensuring stable patterns of social interaction (58). Refuting utilitarian and deterministic theories of social action, Parsons (1961) argues that individuals are constantly balancing normative and self-interested goals: "as personalities, each individual may be considered as a system with its own values, goals, etc., facing [other individuals] as part of an 'environment' that provides certain opportunities for goal-attainment as well as certain limitations and sources of frustration" (428). This stems from Parsons' (1951) observation that "no actor can subsist without gratifications, while at the same time no action system can be organized or integrated without the renunciation of *some* gratifications which are available in the given situation [original emphasis]" (415). According to Parsons, balancing these normative and self-interested pressures necessitates some notion of value consensus (Calhoun et al. 2007: 403) and law is a mechanism for achieving this. Specifically, law reinforces values, norms and rules, often through the application of sanctions (Grana & Ollenburger 1999: 36).

According to Parsons (1962), law is a mechanism of social control operating between mechanisms of control focusing “primarily on the motivation of the individual” (71), such as mass media and therapy, and those focusing “on the solution of fundamental problems of value orientation involving basic decisions for the system as a whole,” such as politics and religion (72). However, the prominence and integrity of the legal system depend on specific social arrangements, without which law cannot function as an effective means of social control. For Parsons, law represents a particular type of social equilibrium:

Law flourishes particularly in a society in which the most fundamental questions of social values are not currently at issue or under agitation. If there is sufficiently acute value conflict, law is likely to go by the board. Similarly it flourishes in a society in which the enforcement problem is not too seriously acute. This is particularly true where there are strong informal forces reinforcing conformity with at least the main lines of the legally institutionalized tradition. (71)

As noted by Grana and Ollenburger (1999), if there is a great deal of agitation over the basic values in society, this social disequilibrium will create conflict in the legal system (38). Thus, normative consistency is one of the most important criteria for law’s effectiveness (57).

Parsons (1962) argues that the legal system’s ability to regulate interaction rests on four concerns: legitimation, interpretation, sanctions and jurisdiction. Legitimation refers to the basis for law’s claims to authority. Questions of legitimation always lead “in some form or other either to religious questions or to those that are functionally equivalent to religion. Law from this point of view constitutes a focal center of the relations between religion and politics as well as other aspects of society” (62). Moreover, conflict will occur if the legal system’s normative structure is incongruent with that of society (Grana & Ollenburger 1999: 36).

Interpretation centers on the meaning of rules put in place via law. Noting that legal rules may not cover the full range of situations in which individuals find themselves or may be contradictory because they “must be formulated in general terms” (59), Parsons (1962) asserts

that the interpretive function is likely the most principal of the legal system (62). Interpretation involves both judges and legal practitioners. While the judiciary is responsible for maintaining consistency in the rule-focused aspect of the law, or “the integrity of the system of rules itself,” legal practitioners are responsible for maintaining the client-focused aspect of law, or the “relation of the rules to the individuals and groups and collectivities on whom they impinge” (62). Although “‘judicial independence’ from political pressures, professionalization of the judicial role, and institutionalization of the decision making process” are necessary for ensuring the integrity of the legal system, they are insufficient for ensuring that conflict does not arise (63). Moreover, legal practitioners must strike a delicate balance between the authority of legal precedents and changing environmental conditions:

The legal profession...has to maintain difficult balances in a tradition that is in itself exceedingly complex, that is applied to very complex and changing conditions, subject to severe pressures from interest groups, authoritatively based only on very general and partly ambiguous documents, and subject to change within considerable limits by the more or less arbitrary and unpredictable “will of the people.” (65)

Indeed, for Parsons (1961), like other organisms, the social system is influenced by changes in the external environment, to which it must adapt in order to serve its function of maintaining social equilibrium. Lawyers are responsible for striking this balance because they stand between public authorities and private individuals (33) due to the “conspicuous dual character” of their role: lawyers are both officers of the court and private advisers to their clients (63). Moreover, “the sociologist must regard the activities of the legal profession as one of the very important mechanisms by which a relative balance of stability is maintained in a dynamic and rather precariously balanced society” (70).

For Parsons, sanctions are the third area of concern. Sanctions can be negative or positive, representing a continuum that ranges from acts of inducement to acts of blatant

coercion (59). Force represents the ultimate negative sanction and is also the locus of law's relation to politics: "the basis of the relation of law to political organization lies primarily in the use of physical force or its threat as a means of coercion; that is, a means of assertion of the bindingness of the norm" (60). In more highly developed societies, the state has a monopoly on the use of force because while it serves a preventative function, "the use of force is [also] perhaps the most serious potential source of disruption of order in social relationships" (Ibid). Thus, administering physical sanctions requires at least an adequate connection between the legal system and the state (Ibid).

The final consideration for the effective functioning of law is jurisdiction. The issue of jurisdiction refers to questions regarding how sanctions are applied. For Parsons (1962) the problem of jurisdiction has two aspects: Questions about which authority has jurisdiction to impose the norms and questions regarding which acts, persons, roles and collectivities should be subject to these norms (59).

In contrast to the aforementioned approaches, Max Weber (1914) argues that the legal order evolves in tandem with capitalist arrangements. For Weber, "the existence of a capitalistic enterprise presupposes that a very specific kind of social action exists to protect the possessor of goods *per se*, and especially the power of individuals to dispose, in principle freely, over the means of production: a certain kind of legal order [original emphasis]" (250). While for Marx and Durkheim, law emerges out of particular social arrangements, Weber posits that social arrangements and law are mutually reinforcing: "the structure of every legal order directly influences the distribution of power, economic or otherwise, within its respective community. This is true of all legal orders and not only that of the state" (247). For Weber (1914), power refers to the ability to exercise one's own will in spite of resistance (247). Weber identifies three

primary features distinguishing law from custom. For Weber, law employs threats and actions to pressure individuals into conformity, “the use of these threats and actions always involves force or coercion” and these threats and actions are always implemented by individuals in an official position to uphold the law (Grana & Ollenburger 1999: 40-41).

In Weber’s view, judicial decision making processes are defined by whether rationality and formality are present or absent (Grana & Ollenburger 1999: 41). Rational procedures “involve the use of scientific methods to obtain specific objectives” whereas irrational procedures “rely on ethical or mystical considerations such as magic or faith in the supernatural” (Vago & Nelson 2008: 35). As noted by Vago and Nelson (2008), “Weber argues that modern law is rational, whereas traditional and primitive laws were irrational, or at least, less rational” (36). Formal law refers to abandoning notions of fairness in favour of decision making based on established rules (Grana & Ollenburger 1999: 41; Vago & Nelson 2008: 35). Conversely, substantive law involves rendering decisions based on assessments of the circumstances of individual cases and prevailing notions of justice (Grana & Ollenburger 1999: 41; Vago & Nelson 2008: 35). Based on these distinctions, Weber offers four ideal types of legal systems: substantive irrational, substantive rational, formal irrational and formal rational. As Grana and Ollenburger (1999) explain:

A substantive irrational system is based on case-by-case decision making, often dependent on the insight of a charismatic judge....The legitimacy of the judgement arises from the charismatic gifts of the individual judges. Substantive rational systems decide cases by applying rules from some extralegal source such as religion or a particular ideology...for example, the Puritan use of biblical commandments. In the formal irrational system, specialized legal procedures are used, although the decisions are not derived from general rules but are determined by supernatural forces, for example the use of oracles....In formal rational systems, cases are decided by applying logically consistent, abstract rules that are independent of moral, religious, and other normative criteria. All cases of the same nature should be treated equally. (41)



According to Weber, this latter ideal type of legal system predominates in capitalist societies: “In Weber’s terms, the form of legal thought that predominated in capitalist societies was one that came closest to his ideal type of ‘formal rational law,’ whereby law-making was based on principles that are autonomous, general, and universal, decisions do not differ from case to case, and there is no reference to moral, social, or other factors” (Comack 2006: 30). This has informed liberal pluralist views that the state is an impartial umpire charged with the role of adjudicating social conflict as different groups compete to forward their own interests or to exercise power in society (Comack 2006: 30). From this perspective, rather than being inherent to a set of activities, crime is a status conferred upon actions by those in positions to make and enforce the rules (31). Liberal feminist legal frameworks take a Weberian approach to the law-society relationship. Refuting conservative feminist notions that women’s inequality is rooted in biology, liberal feminists hold that it is a cultural production (43). From this perspective, women are an interest group attempting to gain power in spite of men’s resistance and, as Comack explains, “if women can put enough pressure on the state, those in charge will in turn make appropriate changes or reforms to provide women with equal opportunities relative to men” (44). Moreover, for all Weberian inspired approaches to law, rationality is a fundamental feature of modern Western legal systems (Grana & Ollenburger 1999; Stryker 2007; Vago & Nelson 2008).

The law’s claims to objectivity and impartiality are derived from the doctrines of the *separation of powers* and *stare decisis* governing the modern legal system. Suggesting that the legal system is autonomous, internally consistent and “divorced from the more political processes of the state”, the doctrine of the *separation of powers* holds that the legislature and judiciary are separate (Comack 2006: 21). Aside from assessing the constitutionality of legislation when challenges arise, the judiciary is to remain completely separated from the

political realm, and the state is not supposed to interfere with matters of the court. The state is able to represent its own interest in legal proceedings but must be subject to the same rules and scrutiny as any citizen when it does so. Sometimes referred to as the ‘rule of precedent’, the doctrine of *stare decisis*—“to stand by decided matters”—is supposed to ensure the predictability, consistency and certainty of law (Ibid). Yet, as Alison Diduck and William Wilson (1997) assert, rather than ensuring a separation between law and politics, these doctrines may obscure our understanding of political action:

[W]hile the traditional approach claims the advantage for the liberal legal system of allowing judges to appear to avoid politics, it may, in fact, afford a restricted and arguably unjust vision of what it is to act ‘politically’. One could argue, for example, that construing statutes in a way which reflects existing social relations or a conception of social relations which existed many years ago is intensely political since it militates against possibly beneficial social change. It, along with the rules of *stare decisis* (to stand by things decided) and precedent, instantiates the politics of a possibly unjust status quo rather than facilitating the possible. (507)

Moreover, the traditional approach holds remnants of Weber’s (1947) notion of traditional authority. As Mary Jane Mossman (1993) points out, the structure of legal inquiry contains the opportunity for choice and, thus, “some possibility of positive outcomes,” but its definition of boundaries and concept of relevance often subvert this process (548). Moreover, the legal method defines its own boundaries and relevance. This process respectfully involves judicial “choice as to which precedents are relevant and which approach to statutory interpretation is preferred [as well as] choice as to whether the ideas of the mainstream or those of the margins are appropriate” (Ibid). As noted by Mossman (1993), legal boundary-defining exercises “confer ‘neutrality’ on the law and on its decision-makers,” relieving them “of accountability for unjust or just decisions” and decisions regarding relevance have the power to silence some voices while privileging others, thus preserving the status quo (547). But the myth of neutrality also has more insidious effects:

More sinister than this boundary-defining exercise is the potential for judicial attitudes to be expressed (either explicitly or implicitly) where there is no “objective” evidence to support them. Because of the myth of neutrality which surrounds the process, such attitudes may acquire legitimacy in a way that strengthens and reinforces ideas in "politics" and "morals" which were supposedly outside the law's boundary. (Ibid)

Similarly, Lori Beaman (2008) argues that adhering to positivist myths obscures our understanding of legal discourse. For Beaman, “positivist tales and myths [presenting the law as objective and impartial] obscure the fluidity of legal discourse and occlude the sedimentation of power relations and resistances” (43). Moreover, rather than disqualifying all accounts of social reality, law employs its own logic to privilege some accounts while discounting and excluding others (Smart 1989: 4; Beaman 2008: 8). This observation has prompted some scholars to question official representations of law in the modern era.

Expanding on what Ngaire Nafine (1990) refers to as the “Official Version of Law”, Elizabeth Comack (2006) provides an informative discussion of “the image [law] portrays in terms of its nature, role, and functioning in society” (20). As noted by Comack, and informed by the notion of legal positivism, Canadian law is supposed to be completely impartial and dispassionate: “in both its form and its method, law asserts its claim to be impartial, neutral, and objective” (21). This is symbolized by the blindfolded maiden holding the scales of justice (20), and enacted via the adversarial system and doctrines such as the *separation of powers* and *stare decisis*. As Comack explains, in line with Weber’s view of law in modern societies, “much like other sciences, legal positivism asserts that the focus of the legal players is on facts and not values, such that that legal method involves the application of the appropriate rule or test to those facts of the case that are deemed to be legally relevant. The result is a neutral, value-free, and objective science of law” (21). Accordingly, legal positivists hold that the moral and the legal constitute separate realms (Vago & Nelson 2008: 32). As mentioned, Weber posits that modern

society is governed by formal-rational law, divorced from moral, social, and other factors. For Weber (1962), “‘equality before the law’ and the demand for legal guarantees against arbitrariness demand formal and rational ‘objectivity’ of administration, as opposed to the personally free discretion flowing from the ‘grace’ of the old patrimonial domination” (220). However, as noted by Comack, “to the extent that law’s view of itself is not valueless but rather derives from particular philosophical ideas about human nature and conceptualizations about society, its claims to impartiality, neutrality and objectivity become suspect” (24). Although Comack’s point is well taken, it is important to avoid a myopic representation of law. While law can be an oppressive system, it can also be a vehicle through which resistance and empowerment are made possible.

While law is often constructed as an uncontested producer of truth, legal discourse also provides sites of resistance. As such, scholars such as Lori Beaman (2008) and Jane Scoular (2010) hold that contemporary relationships between law and society must be analyzed using Foucault’s theory of governmentality. Noting that analyses presenting law as a unified phenomenon, or an internally coherent system, fail to account for how law adapts to shifts in power relations (25-6), Scoular (2010) explains the utility of this approach:

Insights derived from Foucault’s theory of governmentality, which advances an understanding of power beyond the focus on its location in a specific site to an awareness of its changing techniques and rationalities of control, is vital in understanding the shifts in modern legal power which mirror the more diffuse forms of power in modernity. Viewing law through the lens of governmentality allows us to appreciate that law has adapted from a juridicial repressive model towards more productive forms.... (26)

Rather than focusing on a specific site of interaction, Foucault’s governmentality approach locates power in a nexus of shifting social relations. Paralleling Durkheim, from this perspective, rather than providing a model for power relations in society, modern law is a pivotal medium through which power relations operate (28). Moreover, “as law adapts to the wider social and

political culture of neo-liberalism, typified by a decentered economy and forms of governance that operate at a distance, it too increasingly reflects its ‘economized model’ of power, operating through, not simply over, lives” (Ibid). Similarly, Beaman (2008) explains that the amorphous state of law is central to understanding its power. According to Beaman, competing claims within legal discourse open up sites where multiple forms of resistance become possible (8). This opportunity for resistance is, in part, facilitated by the way in which law produces “truth”—legal truth is always embedded in a series of case records, offering “a unique window into discursive intersections,” and thus a chance to challenge and resist the version of truth it produces (31). Further, while law continues to criminalize specific actions, operating as an oppressive system, it also functions as a liberating and empowering system because “modern law operates as much through freedom, rights and norms as it does through censure” (Scoular 2010: 29).

### ***The Canadian Context and the Charter of Rights and Freedoms***

The Weberian “ideal type” of law is especially precarious in the Canadian context where the *Charter of Rights and Freedoms* is capable of overruling legal precedent. Beaman (2008) notes that although, like all symbols, its meaning and interpretation are fluid, “the Charter [sic] is an important symbol of the way in which Canada, as a liberal democracy, encapsulates the public expression of values and norms” (62). While Canadian courts emphasize the need to adhere to precedent, the *Charter* poses a challenge to the principles of *stare decisis* and the *separation of powers*. Brought into effect as part one of the *Constitution Act, 1982*, the *Charter* “guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society” (s. 1). Moreover, the *Constitution Act* trumps legal precedent because “the Constitution of Canada is the supreme law of Canada, and

any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect” (*Constitution Act 1982*: s. 52(1)). In order to ensure that *Charter* values are upheld, Canadian courts must occasionally revisit previous decisions in order to assess their legitimacy in light of social change.

In line with Parsons’ (1962) observation that the legitimacy of law rests on maintaining congruence between societal norms and those imposed via law, the Supreme Court of Canada has acknowledged the need to revisit previous decisions where there is evidence that they are not in accord with societal values (*Bedford v. Canada* 2010: 23). Specifically, the Supreme Court has outlined five factors that would permit a judge to overrule a previous decision:

[W]here a previous decision does not reflect the values of the *Canadian Charter of Rights and Freedoms*; where a previous decision is inconsistent with or “attenuated” by a later decision of the Court; where the social, political or economic assumptions underlying a previous decision are no longer valid in contemporary society; where the previous state of the law was uncertain or where a previous decision caused uncertainty; and, in criminal cases, where the result of overruling is to establish a rule favourable to the accused. (*David Polowin Real Estate Ltd. v. Dominion of Canada General Insurance Co.* 2006 as cited in *Bedford v. Canada* 2010: 23)

As noted by Himel, while the Supreme Court clearly has the authority to revisit its precedent decisions, lower courts are only able to do so in limited circumstances (*Bedford v. Canada* 2010: 22). For the Supreme Court, “overruling a previous decision based on one or more of these five factors promotes the interests of justice and the court’s own sense of justice by bringing judge-made law into line with constitutional, legislative, or social changes, by removing conflicts and uncertainties in the law, or by protecting individual liberty” (*David Polowin Real Estate Ltd. v. Dominion of Canada General Insurance Co.* 2006 as cited in *Bedford v. Canada* 2010: 23). But how are *Charter* challenges to be assessed?

Proposing an alternate theory of law as a scientific endeavor, George Hebert Mead contends that communicative rationality is the foundation of a scientific approach to analyzing

“the social and moral order” (Carriera da Silva 2008: 191). As noted by Filipe Carreira Da Silva, rather than being limited to the social nature of the self, “Mead’s intellectual edifice is sustained upon the pillars of science, of social psychology, and of politics” (4). For Mead, science is a problem-solving activity, taking logical precedence over the pillars of social psychology and politics (5). Mead’s rational method for moral problem solving “is focused not so much on the definition of a determined final end that is supposed to motivate moral action, as on the definition of the procedures of a democratic and experimental moral method” (188). As such, similarly to Weber, he argues for a scientific approach to the resolution of social problems:

Mead’s writings on morals and politics should be given the status of applied research insofar as a science of politics and morals is one of his chief aims. The resolution of practical moral and political problems is to be achieved through the application of the method of intelligence. Intelligent social reform and moral reconstruction are, then, the promises of Mead’s scientific approach to the “social or moral order.” (5)

For Mead, those attempting to resolve moral problems must assume a role akin to that of a scientist: “the resolution of moral problems is inspired by the example of the research scientist in that both the critical moral agent and the scientist have to take into consideration all relevant facts” (188). This involves adopting the rational perspective of the “generalized other” and the rational community represented by the universe of discourse. The universe of discourse provides moral agents with “an imaginary context of action in which their conduct can be based on the principles of impartiality, publicity, and reasoned discussion” (193). As noted by Da Silva, “social cooperation through the exchange of rational arguments by a cognitively competent and informed public opinion is...the keynote of Mead’s proposed scientific method for the solution of [social] problems” (Ibid). Moreover, for Mead, “since moral problems involve conflicts between opposing ends, the crux of the question is to be able to have in mind the wider perspective. Only in this way can all points of view be fully appreciated” (Ibid). Thus, in contrast

to Weber's approach, holding that the law must function as an objective, impartial umpire, divorced from the realms of politics and morals, Mead argues that moral, legal and political problems can only be resolved through the same process of deliberative democracy.

Mead's theory of communicative rationality is inspired by the pragmatist's radical democratic claim that "without concrete material equality of conditions, the abstract theory of political rights is no more than an abstraction that benefits some at the expense of the many" (173). According to the pragmatists, institutional social control involves conflict and neglects to incorporate the full range of interests which are necessary foundations of proper social control (174). Thus, intelligent social control requires the realization that the most effective form of governance is that which is achieved through public opinion (Ibid). For Mead, moral growth and social evolution necessitate a reconstruction of problematic situations:

The moral agent does not carry inside him the solution for the problem, so to speak. Since the moral "problem is the community's," the moral agent needs first to create a new situation that includes all attitudes he can possibly imagine, as if he were before "an audience of imaginary persons," and then he needs to confront this new situation with a reconstructed self. This new, reconstructed self is the sign of moral and social evolution. When all members of a moral community are able to put themselves completely in the place of each other, clear and unimpeded thinking occurs, and with it, authentic "democratic consciousness" emerges. (189)

Intelligent solutions to social problems require consideration of all possible perspectives and positions. Moreover, in contrast to Weber's approach, Mead emphasizes "the logical priority of concrete social democratic practices over abstract legal provisions" (195). While on the surface the *Charter* appears to represent the rational perspective of the generalized other forming the crux of Mead's deliberative democratic model, its potentially progressive effects are countered by seemingly Weberian methods employed by Canadian courts to assess *Charter* challenges. Canadian courts assessing *Charter* challenges employ discourses of value neutrality, masking the moral assumptions inherent in any evaluation of *Charter* values.



In an attempt to provide an “objective” measure, the “risk of harm” test has been adopted by Canadian courts in order to assess cases involving constitutional challenges. As Beaman (2008) explains: “Rights cases have become increasingly reliant on the risk of harm assessment as determining the boundaries of rights, often with an either implicit or explicit understanding of the analysis of risk of harm as an objective test” (84). In spite of being informed by social values, *Charter* challenges frequently involve the application of a so-called objective assessment by judges. Legal assessments of harm focus on measurable and calculable factors:

The quest for a formulaic approach to the solving of problems presented to law is a residual effect of legal positivism, itself a residue of the Enlightenment preoccupation with rationality, with scientific and universal truths as the defining motifs of human behaviour. Rationality, a weighing of measurable harms, and positivism, the meter for measure, combine to form the basis on which harm and risk of harm are assessed. (89)

This approach echoes Weber’s notion of formal rational law in which logically consistent, abstract rules are applied to cases in order to treat all like cases alike. Yet, rather than being neutral or objective, harm frameworks employ moral assumptions regarding what is good, right or desirable (86). Moreover, Weberian inspired discourses of neutrality and objectivity mask the social values that Durkheim or Parsons might emphasize, which underpin legal decisions regarding risks of harm.

Analyzing judicial constructions of obscenity law in Canada, Mariana Valverde (1999) notes that the risk of harm test acts as “a veritable joker card,” serving different purposes depending on the context in which it is employed (184). Rather than imposing a single logic on rights cases, “risk of harm” assessments simultaneously deploy a variety of principles, values and discourses (Ibid). In this sense, all interest parties can feel as though their concerns are being addressed by the courts because of the ambiguity of “risk of harm” assessments (Ibid). Yet, while in some instances this opens the door for progressive reform, in other cases “risk of harm”

assessments work as a means for imposing moral authoritarianism “insofar as the authorities retain both the right to define what is harmful and the right to prioritize those risks” (187). For this reason, in spite of decisions such as *R. v. Morgentaler*, in which the court ruled that Canada’s abortion laws were unconstitutional, and *R. v. Egan*, in which the Supreme Court read sexual orientation into the equality rights section of the *Charter* (s. 15), Valverde cautions against assuming that the regulation of sexuality via Canadian law can be “adequately understood by reference to a single dynamic of growing rationalization or liberalization” (182). As noted by Valverde, “the same supreme court [sic] decision that ‘read’ sexual orientation into the equality rights provision of the Charter, for example, also featured four judges uniting to write a strongly moralistic decision denying gay couples equal rights to spousal benefits” (182).

Building on Valverde’s (1999) notion that the “risk of harm” test acts as a joker card in legal arenas, Beaman (2008) contends that common sense functions as a judicial trump card to resolve cases in which uncertainty is prevalent. Beaman argues that judges must turn to common sense in order to render decisions when positivist frameworks fail to provide answers and uncertainty prevails: “In law then, the pursuit of risk assessment has an intriguing twin: common sense, or ‘what everybody knows.’ This presumed consensus fills in the gaps when positivism can’t provide an answer” (90). Indeed, legal constructions of risk and actual harm employ science as well as common sense for support. As noted by Beaman, risk “relies on measurement and experts” while common sense “draws on an implied and assumed consensus among citizens” (90). Notions of social consensus have informed the leading decisions regarding “risk of harm” assessments in Canadian courts. For example, assessing “risk of harm” in *R. v. Labaye*:

The decision of the Supreme Court of Canada...very much establishes an understanding of the regulation of public sex based on moral and ethical convictions. However, it is grounded in the fundamental social, legal, and political (liberal) values—such as autonomy and tolerance—rather than in sexual morality....Chief Justice McLachlin relies

upon, in order to protect, the fundamental ethical and social considerations enshrined in the constitution and she does so in a manner which continues to recognize the importance of community and collective interests without subjugating minority desires to majoritarian sexual morality. (Craig 2009: 359)

As noted by Beaman (2008), rather than being presented as epistemologies, legal accounts construct both science and common sense in ways that transform them into objective, neutral means of accessing “truth”:

An examination of case law in almost any area of jurisprudence would reveal judicial reliance on what we all know. These confidential assertions gloss over the unknowability of the subject of legal analysis and belie the moral assumptions that are usually imported under the guise of common sense. The precariousness of this science of law is revealed by the tenuous nature of scientific results and also shaped by the very notion of common sense. The latter masks the disrupted terrain of what we all know and denies the multiple definitions of shared knowledge. At a more profound level, it also obfuscates the complexity of subjectivity(ies) and the varieties of spaces in which those are lived and negotiated. Shared knowledge, or common sense, if and when it exists, is partial, contextual, contested, and shifting. (90-91)

In this sense, common sense becomes a legal “trump card” because it is irrefutable in legal discourse: “‘Everybody knows that’ is a difficult position to counter. If the ‘risk of harm’ is a joker card that can be played by anyone, surely common sense is the trump card used by courts to fill in the space between those things that are uncertain” (95). Indeed, as will be demonstrated, the arguments forwarded by interest parties in *Bedford v. Canada* center on common sense and Parsonian notions of value consensus. Thus, they cannot be reduced to pure legal rationality.

### ***The Role of Collective Values in Bedford v. Canada***

In October of 2009, Justice Susan Himel of the Superior Court of Ontario heard a challenge to three prostitution related provisions in the *Criminal Code of Canada*. In *Bedford v. Canada* (2010), three sex workers (Terri Jean Bedford, Amy Lebovich and Valerie Scott) challenged the constitutionality of the provisions criminalizing living on the avails of prostitution (s. 212 (1)(j)),

owning, operating or being an inmate of a common bawdy-house (s. 210), and communicating in public for the purpose of engaging in prostitution (s. 213(1)(c)) of the *Criminal Code* on grounds that they infringed their rights to freedom of expression (s. 2(b)) and security of the person (s.7), guaranteed by the *Canadian Charter of Rights and Freedoms*. Specifically, the applicants argued that ss. 210, 212(1)(j) and 213(1)(c) of the *Criminal Code* violated their right to freedom of expression (*Canadian Charter of Rights and Freedoms* s. 2(b)) and that s. 213(1)(c) of the *Criminal Code* violated their right to security of the person (*Canadian Charter of Rights and Freedoms* s. 7).

The applicants' argument centres on sex workers' ability to take necessary safety precautions while plying their trade. As noted by Himel "the applicants' case is based on the proposition that the impugned provisions prevent prostitutes from conducting their lawful business in a safe environment" (*Bedford v. Canada* 2010: 8). Invoking Parsonian notions that law's efficacy depends upon normative consistency (Grana & Ollenburger 1999: 57), the applicants hold that the impugned provisions violate their liberty rights because, while prostitution is not illegal in Canada, each of the offences outlined by the impugned provisions creates the possibility of imprisonment (*Bedford v. Canada* 2010: 8). Further, the applicants contend that the impugned provisions violate their right to security of the person because "the operation and intersection of the impugned provisions materially contribute to the violence faced by prostitutes" (Ibid). Moreover, according to the applicants, these provisions criminalize safety enhancing practices, thus endangering sex workers:

[T]he intersection and operation of ss. 210, 212(1)(j) and 213(1)(c) materially contribute to the violence which street sex workers face on a daily basis. Under s. 210, it is illegal to conduct business in an indoor location on a habitual basis, and the evidence tendered on this Application demonstrates that violence is significantly reduced or eliminated in most indoor settings. Under s. 212(1)(j) it is illegal to hire managers, drivers, and security personnel and the evidence tendered on this Application demonstrates that these types of

services can reduce or eliminate the incidence of violence. Finally, it is illegal under s. 213(1)(c) to “communicate” for the purposes of prostitution and the evidence tendered on this Application demonstrates that the prohibition on “communication” has compelled sex workers to make hasty decisions without properly screening customers when working on the streets. (Applicants’ Memorandum of Fact and Law: 2-3)

From this perspective removing the impugned provisions from the *Criminal Code* will allow sex workers to practice “their lawful business in a safe environment” (2).

The applicants also allege that the Supreme Court determination regarding the constitutionality of the communicating provision in the *Prostitution Reference* must be reconsidered in light of new evidence and a material change in circumstances (*Bedford v. Canada* 2010: 8-9). As Himel explains, in the *Prostitution Reference* “the entire court found that s. 195.1(1)(c) [now 213(1)(c)], the communicating offence, represented a *prima facie* infringement of s. 2(b) of the *Charter*” (19). However, the majority also found that a limitation of sex workers’ s. 7 rights was warranted in this case (*Prostitution Reference* 1990). Specifically, the majority determined that an infringement on sex workers’ freedom of expression “can be reasonably justified in a free and democratic society” (*Canadian Charter of Rights and Freedoms* s. 1). For the applicants, this decision must be reconsidered because “the context in which this case is being heard has changed dramatically” (*Bedford v. Canada* 2010: 21). According to the applicants, “in part, as a result of the serial murders of prostitutes in Vancouver’s Downtown Eastside, as well as the work of advocacy groups and academics, new light has been shed on the violence faced by prostitutes in Canada” (Applicants’ Memorandum of Fact and Law: 21). Moreover, according to the applicants the normative structure of the legal system no longer reflects that of society. Further, the applicants hold that the communicating provision’s infringement on freedom of expression is unreasonable “in light of numerous government reports attesting to the inefficacy of the law” (9).

Indeed, Himel's decision to hear the present case rests upon the structural functionalist idea that normative consistency is a fundamental concern for law. Noting that "the *Prostitution Reference* is *prima facie* binding on this court" (19), Himel asserts that the court's decision in that case should be revisited in light of changing circumstances: "In my view, the s. 1 analysis conducted in the *Prostitution Reference* ought to be revisited given the breadth of evidence that has been gathered over the course of the intervening twenty years. Furthermore, it may be that social, political, and economic assumptions underlying the *Prostitution Reference* are no longer valid today" (*Bedford v. Canada* 2010: 23). Moreover, the decision to uphold the *Criminal Code* provisions criminalizing communicating in public for the purpose of engaging in prostitution (s. 213 (1)(c)) and owning, operating or being an inmate of a common bawdy-house (s. 210) in the *Prostitution Reference* must be revisited in light of new research and changing conditions in society. Noting the Attorney General of Canada's submission that "a lower court may only disregard a higher court's decision in cases that are 'beyond compelling'" (22), Himel decides that there is sufficient evidence to justify her reconsideration of the decision in the *Prostitution Reference*. Specifically, Himel accepts the applicants' contention that *Bedford v. Canada* involves legal arguments that were not considered in the *Prostitution Reference* (20) and that there is a difference between the *Bedford* case, which was an "application with the benefit of a full factual record," and the reference that was heard by the court in 1990 (21). Himel also accepts their argument that the context in which violence against sex workers is understood has evolved since the *Prostitution Reference* was heard (21).

The applicants' contentions are opposed by the AG Canada and two interveners: the AG Ontario and the CLF and colleagues. Like the applicants, the Attorneys General of Canada and

Ontario and the CLF et al. invoke Parsonian notions of value consensus to support their arguments.

For the AG Canada, “prostitution entails a high level of risk for individuals who engage in it and significant harms to society at large” and these risks and harms “are inherent to the nature of the activity itself” (*Bedford v. Canada* 2010: 9). Thus, Parliament has “decided to criminalize the most harmful and public emanations of prostitution” (Ibid). According to the AG Canada, Canada’s prostitution laws aim to protect both prostitutes and the public:

The prostitution-related provisions of the *Criminal Code* work together as an interconnected whole to prevent the harms associated with prostitution; to denounce and deter the most harmful and public emanations of prostitution; to protect those engaged in prostitution; and to reduce the societal harm that results from vulnerable youth being lured into prostitution and neighbourhoods being exposed to the violence, drugs and other harms which often accompany prostitution. (Factum of the Respondent, the Attorney General of Canada: 84)

Moreover, removing any of the impugned provisions will place society at risk because these provisions work in conjunction with each other to protect its vulnerable members:

Paragraph 212(1)(j) is intended to address the significant risks and harms to vulnerable women and to society at large caused by pimps living on the avails of prostitution. Section 210 works in conjunction with the procuring offences in s. 212 to control the “*institutionalization and commercialization of prostitution*” and the harm which is experienced by vulnerable persons involved in prostitution outside of public view. Paragraph 213(1)(c) is aimed at preventing the harms that arise from the public communication of the sale of sex, including community harm, influence on vulnerable youth, and harm to the prostitutes themselves. These offences, along with other prostitution-related offences in the *Criminal Code*, reflect Parliament’s view that prostitution is inherently harmful and should be discouraged wherever it is practiced. (Factum of the Respondent, the Attorney General of Canada: 95)

Further, according to the AG Canada, prostitution is associated with physical violence, drug addiction, drug trafficking, organized crime and human trafficking (*Bedford v. Canada* 2010: 9).

Citing law enforcement officials, the AG Canada argues that a host of harms would stem from decriminalizing prostitution:

The number of women being required to prostitute themselves would drastically increase; Canada would become a sex tourism destination, attracting pimps and johns; prostitution may become viewed as a “*career choice*” and families in poverty may force their children to prostitute themselves to provide food and shelter; competition would increase, resulting in decreased price and potential increases in violence; conflict and confrontations between prostitutes and community members would increase; it would “*send the message that women are sexual commodities and that prostitution is harmless and safe or it would not be legal*”; criminal offences which are associated with prostitution activity would increase, including increased use of drugs; and dangerous psychopaths and sexual predators would still find victims [original emphasis]. (Factum of the Respondent, the Attorney General of Canada: 86)

As noted by Himel, most of the AG Ontario’s argument mirrors that of the AG Canada (*Bedford v. Canada* 2010: 9).

For the AG Ontario, “the physical and psychological harms experienced by prostitutes stem from the inherent inequality that characterizes the prostitute-customer relationship, and not from the *Criminal Code*” (*Bedford v. Canada* 2010: 9). The AG Ontario emphasizes the need to interpret the legislative objectives of the impugned provisions with an understanding that they were intended to preserve societal values and human dignity (Ibid). As such, while the AG Ontario concurs with the AG Canada regarding the objectives of the impugned provisions, he adds that “the prevention of harm and exploitation to prostitutes, and protection of their dignity as human beings” are also objectives of these laws (Factum of the Intervener, the Attorney General of Ontario: 199). For the AG Ontario, decriminalization “would normalize the exploitative conditions these prostitutes would likely continue to experience. [And] the state’s legitimate interest in curtailing the exposure of the public and children to prostitution would be impaired” (Factum of the Intervener, the Attorney General of Ontario: 108).

While the CLF and colleagues agree with the Attorneys General of Canada and Ontario “that the impugned provisions are not unconstitutional from the standpoint of actual harm caused to prostitutes and to society” (*Bedford v. Canada* 2010: 10), they add a moralistic component to



their argument. As Himel explains, for the CLF et al. “the impugned provisions are a reflection of society’s views, soundly rooted in interfaith morality, which is that prostitution is an act that offends the conscience of ordinary Canadian citizens” (Ibid). The CLF et al. contend that publicly visible prostitution endangers society at large and the purpose of the impugned provisions is to control public prostitution:

The communication provisions are designed to take prostitution off of the streets. It may still exist, but nobody should be obliged to be confronted or exposed to it. The bawdy house provisions similarly ensure that there is no permanent establishment where prostitution can take place: there can be no legitimate “place of prostitution” that can be frequented with regularity. The living on the avails provisions ensure that persons who seek to profit from prostitution as a form of business (who routinely abuse the prostitutes themselves) will go to jail. In short, this country has determined that prostitution can take place (perhaps because it cannot be stopped entirely), but Canada will not confer legitimacy on the practice by allowing it to take place in public. (Factum of the Christian Legal Fellowship, REAL Women of Canada and the Catholic Civil Rights League: 2-3; henceforth cited as Factum of the CLF et al.)

According to the CLF and colleagues, striking down the impugned provisions “will send a signal to the vulnerable in society, particularly the youth, that as a last resort they can make a living by selling their bodies” (3).

Upon considering the arguments forwarded by the interest parties, Himel ruled in favour of the applicants, striking down the impugned provisions. Moreover, noting that “the court has not been called upon to decide whether there is a constitutional right to sell sex or to decide which policy model is better” because “that is the role of Parliament” (10), Himel ruled that the impugned provisions are unconstitutional. Specifically, Himel found that:

Three provisions of the *Criminal Code* that seek to address facets of prostitution (living on the avails of prostitution, keeping a common-bawdy house and communicating in a public place for the purpose of engaging in prostitution) are not in accord with the principles of fundamental justice and must be struck down. These laws, individually and together, force prostitutes to choose between their liberty interests and their right to security of the person as protected under the *Charter of Rights and Freedom*. (*Bedford v. Canada* 2010: 5)

For Himel, these laws violate section 7 of the *Charter* and, in contrast to the Supreme Court's decision in the *Prostitution Reference*, they are "not saved by s. 1 as a reasonable limit justified in a free and democratic society" (6). After considering the evidence tendered by interest parties in this case, Himel explained that "the evidence... suggests that ss. 210 and 212(1)(j) are rarely enforced and that s. 213(1)(c) is largely ineffective" (130). In her opinion, as it stands, the communicating provision "contributes to the danger faced by prostitutes" and this danger "greatly outweighs any harm which may be faced by other members of the public" (Ibid). As such, Himel ruled that the impugned provisions are of no force and effect.

### ***Conclusion***

While the law presents a Weberian inspired image of itself, closer analysis of the legal discourse in this case reveals an adherence to more structural functionalist notions of its function and purpose. This feature is likely to be particularly prevalent in the Canadian context where the *Charter*, a supposed reflection of society's most fundamental values, is able to trump all other forms of law. The extent to which notions of value consensus influence contemporary Canadian legal arrangements is evidenced by all interest parties' reliance on the notion of fundamental norms and values in their arguments to the court in the current case. In line with Durkheim and Parson's theories, it appears that Canadian law is intimately connected to the social and political order. This image of law representing, and thus shaping society in accord with, publicly held values and opinions suggests that, to an extent, Canadian jurisprudence is being guided by a Meadian deliberative democratic model. Yet, curiously, in spite of possessing a framework for a truly deliberative democratic approach, *Charter* challenges are guided by the positivist paradigm, which masks the value consensus on which legal determinations rest. Common sense becomes a

“judicial trump card” as judges rely on assumed and implied public opinion to render their decisions (Beaman 2008). As noted by Valverde (1999), this process enables judges to engage in moral authoritarianism. While scholars such as Louie (2012) argue that legal reform requires a shift away from moral perspectives, to present the current case in terms of “harm reduction” would conceal the value consensus on which this case, and all *Charter* challenges, rest. Canadian law is based upon moral perspectives. Thus, a shift in moral perspectives is the only means by which legal reform can be achieved. In the next chapter I discuss the role of religious intervention and conventional morality in *Bedford v. Canada*. As will be demonstrated, in addition to the problems associated with using a so-called objective “risk of harm” assessment in rights cases, legal adherence to a Weberian-inspired image of itself also obfuscates notions of morality in legal discourse.

### **The Role of Religious Intervention**

The preamble to the *Canadian Charter of Rights and Freedoms* itself refers to the “supremacy of God”, and that is in no way an accident (Factum of the CLF et al.: 4).

This statement by the CLF and colleagues nicely captures one of the main reasons for religious intervention in the current debate: Canadian law was founded on Christian values. Although Canada is purportedly a secular society, the separation of church and state that is supposed to be emblematic of our liberal democracy becomes blurred by the presence of Christian values in our legal codes and religious intervention in legal matters. Beginning with a discussion of the role of conventional morality in shaping the Canadian legal tradition, this chapter explores the role of religious intervention in the current case. Who are these groups? Why have they been granted intervener status? And what do they purport to bring into the debate that would not be present in their absence?

#### ***Conventional Morality and the Canadian Legal Tradition***

The centrality of Christian values in Canadian law is exemplified by what were originally considered offences against morality. From 1892 until 1953, the *Criminal Code of Canada* regulated “offences against morality” under the title “Offences Against Religion, Morals and Public Convenience” (*Criminal Code* 1892-1953). Acts such as buggery, incest, seduction, procurement and defilement were criminalized as offences against morality (Ibid) until 1954 when, with the exception of procurement, they were redefined as “sexual offences” under the title “Sexual Offences, Public Morals and Disorderly Conduct” (*Criminal Code* 1954). At this time, procurement was moved to “Part V: Disorderly Houses, Gaming and Betting” (Ibid). A brief discussion of two of such offences against morality--sex with women who were considered

“mentally deficient” and the “seduction of unmarried women”-- demonstrates the extent to which preserving chastity overtly pervaded Canadian criminal law until the 1980s and reveals how the law has historically served as a tool for preserving traditional views of male and female sexuality.

Early laws prohibiting sexual relations with women considered to be “feeble-minded” provide an exemplar of how the law has historically served as a mechanism for regulating female sexuality. As Joan Sangster (2001) explains, particularly during the interwar period, eugenicists considered feeble-mindedness to be a cause of promiscuity: “In the interwar period especially, feeble-mindedness was seen as a cause of both promiscuity and prostitution, a view promoted by Helen MacMurchy and C.K. Clarke, leading Canadian doctors with eugenicist sympathies” (88). Acts legislating the sexual sterilization of “mental deficient” (see, for example, the Alberta “Sexual Sterilization Act” 1928) throughout Canada during the early 20<sup>th</sup> century demonstrate the ferocity with which the state aimed to deal with this perceived social ill. Originally section 189 and changed to section 219 in 1906, from 1892 until 1953 the *Criminal Code* prohibited any sort of sexual relation with women who were considered “mentally deficient”:

Every one is guilty of an indictable offence and liable to four years' imprisonment who unlawfully and carnally knows, or attempts to have unlawful carnal knowledge of, any female idiot or imbecile, insane or deaf and dumb woman or girl, under circumstances which do not amount to rape but where the offender knew or had good reason to believe, at the time of the offence, that the woman or girl was an idiot, or imbecile, or insane or deaf and dumb.

While from 1892 until 1953 sex with “feeble-minded” women was considered an offence against morality, this offence was redefined as a sexual offence in 1954. This change was accompanied by an amendment permitting sexual relations with a “feeble-minded” woman to whom a man was married:

Every male person who, under circumstances that do not amount to rape, has sexual intercourse with a female person

(a) who is not his wife, and

(b) who is and who he knows or has good reason to believe is feeble-minded, insane, or is an idiot or imbecile,

is guilty of an indictable offence and is liable to imprisonment for five years. (s. 140)

Although it was moved to section 148 in 1970, this section of the *Criminal Code* remained in place until it was repealed in 1982. In addition to preventing sex with “feeble-minded” women in order to discourage promiscuity and prostitution and to prevent these women from reproducing, preserving the chastity of “good women” has historically been an imperative of the laws governing morality.

Seducing women of “previously chaste character” who were under the age of 21 (at which point, they would have been considered spinsters if they were unmarried) was considered an offence against morality until the 1950s and was criminalized in a variety of contexts up until the 1980s. For example, from 1892 until 1954, when it was redefined as a sexual offence, the *Criminal Code* outlawed “seduction under promise of marriage”. Specifically, section 182 of the *Criminal Code* stated that “Every one, above the age of twenty-one years, is guilty of an indictable offence and liable to two years’ imprisonment, who [sic], under promise of marriage, seduces and has illicit connection with any unmarried female of previously chaste character under twenty-one years of age”. This offence of “seduction under promise of marriage” appeared as a sexual offence under section 144 of the *Criminal Code* from 1954 until 1969 and section 152 from 1970 until it was repealed in 1987 (*Criminal Code*, 1954-1987).

Writing on the separation of religion and politics in modern Western society, Alessandro Ferrara (2009) identifies three different narratives of secularism: political secularism, social secularism, and “the phenomenological transformation of the experience of believing”. For the

purpose of this discussion, I will focus on political and social secularism. Political secularism is the most common understanding of the secular state:

In the classical version of the separation between the state and the churches religious faiths are protected in their freedom to articulate revealed knowledge and paths to salvation, to administer the interpretation of what is holy, to regulate rituals, to infuse transcendence in daily life, to celebrate the bond shared by the faithful, as long as they never invoke support from the state's coercive power, *never pretend to turn sin into crime* [my emphasis] and always allow their believers to change their mind and turn to another religion or no religion. (78)

In this context, churches are free to influence social life so long as they refrain from using the state or any other means to impose their values on citizens. In contrast, social secularism, which Ferrara asserts is the logical ensuant to political secularism (79), refers to a separation between the church and social phenomena. In essence, political secularism refers to diminishing importance of religion in all facets of social life, including law, politics, education, rites of passage and social networks (78-9). Moreover, in politically secular societies, religious communities cease to influence “public life in general and become functionally specialized sub-groups, communities of like-minded believers” (78). For the purpose of this discussion, it is noteworthy that in both senses of secularism there is a separation between religious influence and law. However, as noted by Ferrara, this is a failed ideology because “there is no doubt that religion has forcefully returned to the political scene” (79).

Indeed, globalization and increasing immigration have led some scholars to reconceptualize the relationship between religion and politics, arguing that modern Western society is more accurately characterized as post-secular (see, for example, Habermas, Blair & Debray 2008; Ferrara 2009). Post-secular societies are characterized by a change of consciousness in which the experience of believing is understood as one existential option among many (Habermas et al. 2008: 21; Ferrara 2009: 80). Moreover, “in these societies,

religion maintains a public influence and relevance, while the secularistic certainty that religion will disappear worldwide in the course of modernization is losing ground” (Habermas et al. 2008: 21). Jürgen Habermas, Tony Blair and Régis Debray (2008) attribute this shift in consciousness to presentations of global conflicts “as hinging on religious strife,” increasing participation by churches and religious organizations as “communities of interpretation” in the public domain—especially regarding “value conflicts requiring political regulation” such as abortion and euthanasia--and the immigration of “guest-workers” and refugees from highly traditional countries (20).

Yet, as noted by Ferrara (2009), rather than being viewed as rival theories, in post-secular societies, theism and atheism are merely perceived “as different ways of being in the world” (80). Although it can be argued that, as the foregoing discussion of the evolution of offences against morality demonstrates, there has never been a complete separation of religion and politics, Ferrara’s assertion that increasing globalization and immigration have altered the function of law in supposed liberal democracies is well taken. However, if increasing religious influence in the political realm is due to globalization and immigration, we should expect that non-Christian denominations would be playing a central role. Moreover, if globalization and immigration are leading to increasing religious influence in the political realm, we should expect non-Christian denominations to be a strong voice in *Bedford v Canada*. This is not the case, however--only Christian groups acted as interveners in this case.

### ***Religious Intervention in Bedford v. Canada***

While other interest groups, such as Maggie’s, “an organization run for and by local sex workers” in Toronto in order to help sex workers “live and work with safety and dignity” by



controlling their “own lives and destinies” (<http://maggiestoronto.ca/about>) were denied intervenor status in this case, the CLF and colleagues were permitted to intervene as friends of the court. According to REAL Women of Canada, this intervenership was granted in spite of dissent from other parties:

Originally we were denied intervenership. There was much opposition to our intervening. So, we had to appeal the decision not to accept us as interveners. And the judge who heard that appeal [Justice Himel] stated that there was a moral component to this issue and we had something to offer the overall understanding of the situation...it was determined by the judge that there was a moral component to the issue and they welcomed our input. So, as a consequence we were accepted as interveners because we had something different to present. Quite often they'll turn people down if someone's already presenting that view point. (Interview excerpt, REAL Women of Canada)

Justice Himel explains that they were granted leave to intervene because “they have a real, substantial, and identifiable interest in the subject matter of the application and an important perspective different from the [other] parties” (*Bedford v. Canada* 2010: 10). Indeed, according to the CLF et al., “missing from the entire debate between parties is the most important and obvious point of all: the laws are a reflection of society's views, soundly rooted in interfaith morality, which is that prostitution is an act that that offends the conscience of ordinary citizens” (Factum of the CLF et al.: 1). From their perspective, this is the sole basis for prohibiting prostitution related activities:

*Let's face it, it's not a violent activity as a rule...you know, now-a-days quite a few people think it's consenting adults but the reason it was outlawed in the first place is because of a social consensus that it's not a right thing to be doing.* (Interview excerpt, Catholic Civil Rights League)

Yet, the Attorneys General of Ontario and Canada chose not to emphasize this point because it was controversial:

I guess [the government] excluded it from their position because it's a rather sensitive point in our culture...prostitution not being a Canadian value, not being something positive that's accepted by the general population. (Interview excerpt, REAL Women of Canada)

Prior to discussing the CLF et al.'s arguments, it is useful to understand the nature and purpose of these groups.

While the Christian Legal Fellowship (CLF) and the Catholic Civil Rights League (CCRL) are expressly religious organizations, REAL Women of Canada claims to be an interfaith, non-partisan, alternative women's movement. According to their website, the CLF views legal practice as a divine calling and aims to integrate Christian faith and law:

Christian Legal Fellowship (CLF) is a national not-for-profit, charitable organization founded in 1978 out of the conviction that the vocation of law is a calling from God. With God's calling comes the responsibility and stewardship of integrating Christian faith and law. As Christian lawyers, law students, legal professionals and interested friends, we recognize the privilege and responsibility of joining together as a national voice to affirm our Christian convictions.

According to the CLF's website, they intervene "primarily in issues threatening sanctity of life, religious freedom, the traditional family, and such other issues that serve to challenge our beliefs as contained in the Bible and reflected in our Statement of Faith." Similarly, the CCRL "is a national lay Catholic organization committed to combating anti-Catholic defamation, working with the media to secure a fair hearing for Catholic positions on issues of public debate, and lobbying government and intervening in court challenges in support of law and policy compatible with a Catholic understanding of human nature and the common good." Advocating for the "gift of all human life" and respect for "the intrinsic dignity of every human person", the CCRL holds that "the highest norm of human life is the Divine law - eternal, objective and universal. This law has been revealed in its fullness in the Gospel of Jesus Christ." Unlike the CLF and CCRL, REAL Women of Canada does not claim to represent a divinity. According to REAL Women of Canada's website, they are an alternative women's movement dedicated to preserving the traditional family:

Until the formation of REAL Women of Canada, there was no voice to represent the views of those many thousands of women who take a different point of view from that of the established feminist groups. We're filling a need that has long existed....REAL (Realistic, Equal, Active for Life) Women of Canada, a non-partisan, inter denominational organization, believes the social and economic problems of women should be resolved by taking into consideration the effects on family life and society as a whole. REAL Women believes the family is the most important unit in society, as we have yet to develop a better model to care for the young, protect the weak and attend the elderly....REAL Women speaks for women who support traditional family values. Society may change, but society's need for strong, stable families remains.

Clearly, whether explicitly or not, the CLF and colleagues all support Christian values and their views are informed by biblical teachings. As will be discussed, maintaining traditional, religious values concerning sexuality is central to the CLF et al.'s argument that the current legal regime must remain intact. Interestingly, in spite of the obvious Christian values informing these organizations and their arguments in the current debate, the CLF et al. hold that their position reflects the values of the Canadian public and it would be anti-democratic to alter laws reflecting the majority view.

The CLF et al. preface their argument on the notion of democratic inclusion of all faiths. Moreover, for the CLF et al. religious views must be included in the current debate because “the overwhelming majority of Canadians identify themselves as being religious” (Factum of the CLF et al.: 4). According to the CLF and colleagues, “Canada is a moral country, [t]hat morality is derived, in part, from religious views” (4) and “generally people view the sale of sex as immoral, dehumanizing and inherently wrong” (9). Evidence for their claims is founded in the fact that religion continues to play a central role in the social and political realms of Canadian society:

Religion is an important aspect of modern Canadian society: 92 percent of Canadians have either had religious groups perform at least one rite, such as a wedding, baptism or funeral, in the past, or expect to turn to a religious group for such a rite in the future. As of 1998, more than 80 percent of Canadians asserted a belief in god. Religion has also shown to have influenced the political decisions of Canadians: research has consistently shown voting preferences to be invariably associated with religious affiliation, and that

this association is at least as strong as, if not stronger than, those between voting and other variables, such as social class or ethnicity. (7-8)

Interestingly, while their arguments are prefaced on Christian views and aim to uphold laws infused with Christian dogma, the CLF and colleagues claim to represent the views of Canada's four major religions. Noting that "early legislation focused on instilling the moral views of an almost exclusively Christian society into law" (6) and that "while largely Christian, Canada is no longer exclusively so" (8), the CLF et al. explain why prostitution is considered immoral for all four of Canada's major religions:

All four of Canada's major religions consider prostitution to be immoral. Christianity teaches that *expressions of human sexuality should reflect a concern for faithfulness in relationships, and that the proper place for such expression is marriage*. As such, prostitution is considered immoral and dishonourable to both participants and to God. Judaism has consistently viewed prostitution as contemptible to morality. Both Hinduism and Islam recognize *the need to protect marriage and the family*; prostitution and other *extramarital sexual behaviours are condemned as immoral and illicit* [my emphasis]. (8-9)

It is noteworthy that in the advent of the sexual revolution and the 2005 invocation of the *Civil Marriage Act*, which legalized same sex unions in Canada, arguments for preserving the traditional family form continue to have a place in legal debates. While they assert that "Canadian laws must evolve as society evolves" (1), the CLF and colleagues place a premium on condemning extra-marital sexual relations. However, as noted by Ferrara (2009), "if the only currency used in the public arena of politics is...the reasonable 'secular' reasons shareable by believers and non-believers alike, then due to the religious nature of their most profound beliefs, citizens who are believers are required to go an extra hermeneutic mile...in order to formulate reasons that can be legitimately used in the political arena" (81-2). As such, the CLF et al. frame their argument using discourses of human rights and democratic principles. For the CLF and colleagues, striking down the impugned provisions, and thus legitimizing public prostitution, not

only “offends the consciousness of ordinary Canadian citizens”, but also threatens Canada’s democratic system: “The Laws [sic] prohibit conduct that attacks the dignity of the victims of prostitution and defines acts that are inappropriate in public. The state has a duty and legitimate interest in enforcing these prohibitions to protect values that are integral to a free and democratic society” (Factum of the CLF et al.: 17).

Given the emphasis on democratic inclusion in the CLF et al.’s account, it is useful to consider interest parties’ positions on the role of conventional morality in the current case. While Canadian law is informed by the Christian values it was designed to reflect, the legal system and judicial decision making processes are supposed to be guided by objectivity and impartiality. Thus, the role of legal moralism in the current debate must be taken into consideration. Is enforcing Christian values still a valid legal objective? If not, what is the current function of law? As recommended by Jane Scoular (2010), rather than focusing on its purported method, it is helpful to look at how the law works in practice when issues associated with female sexuality are in question—what exactly does law do in this context?

### ***The Role of Legal Moralism***

All interest parties in the debate attempt to negotiate the role of legal moralism. The *Oxford English Dictionary* defines moralism as follows: “Natural system of morality, religion reduced to moral practice.” As the present discussion demonstrates, analyzing interest parties’ positions on this issue provides a starting point for assessing what law is doing in the present context. Judicial definitions of legal moralism and attempts by the judiciary to distinguish it from paternalism are ambiguous, leading to significant controversy over the role of conventional morality in Canadian law. Beginning with a discussion of the Supreme Court’s attempts to define legal moralism and

to distinguish it from paternalism provides a backdrop for understanding interest parties' interpretations of what constitutes legally moralistic legislation and its role in Canadian law. Further, analyzing interest parties' positions on the issue reveals their conception of the function of law in Canadian society.

In contrast to law's official version, legal moralism refers to the belief that certain behaviours should be prohibited under the laws because they are morally wrong and degrading (Dworkin 2005). Writing for the majority in *R. v. Butler*, Supreme Court Justice Sopinka J. offers a similar definition of legal moralism:

To impose a certain standard of public and sexual morality, solely because it reflects the conventions of a given community, is inimical to the exercise and enjoyment of individual freedoms, which form the basis of our social contract. D. Dyzenhaus, "Obscenity and the Charter: Autonomy and Equality" (1991), 1 C.R. (4th) 367, at p. 370, refers to this as "legal moralism", of a majority deciding what values should inform individual lives and then coercively imposing those values on minorities. The prevention of "dirt for dirt's sake" is not a legitimate objective which would justify the violation of one of the most fundamental freedoms enshrined in the *Charter*. (*R. v. Butler* [1992] 1 S. C. R. 452: 48)

As noted by Gerald Dworkin (2005), it is not always easy to distinguish between legal moralism and paternalism, the latter being the notion that certain behaviours that are considered immoral and degrading must be prohibited in order to protect those who engage in them. However, it appears that in *Butler* the Supreme Court rejects Durkheim's mechanistic laws. Reinforcing notions of the *separation of powers*, this refutation of legal moralism as a legitimate legal objective suggests that while the political realm is democratic, the legal realm is not. In his article, "Legal Moralism Reconsidered", Carl Cranor (1979) notes that legally moralistic arguments generally take three different forms: that the immorality of the act is a sufficient condition for criminalization, that the immorality of the act is a necessary, but insufficient, condition for criminalization, and that the act must be criminalized because "*the or a function of*

the criminal law is to enforce community morality [original emphasis]" (147). Echoing Cranor's assertion, Lars O'Ericsson (1980) identifies two common charges against prostitution from conventional morality:

The prostitute, according to the moralist, is a sinful creature who ought to be banned from civilized society. Whoredom is "the great social evil" representing a flagrant defiance of common decency. The harlot is a threat to the family, and she corrupts the young. To engage in prostitution signifies a total loss of character. To choose "the life" is to choose a style of living unworthy of any decent human being. And so on. There is also a less crude form of moralism, which mixes moral disapproval with a more "compassionate" and "concerned" attitude. The fate of the whore is "a fate worse than death." The hustler is a poor creature who has to debase herself in order to gratify the lusts of immoral men. Prostitution is degrading for all parties involved, but especially for women (337).

Whereas the first charge against prostitution outlined by O'Ericsson is clearly in line with definitions of legal moralism, the second charge he identifies illuminates the difficulty associated with distinguishing between legal moralism and paternalism noted by Dworkin. Indeed, the Supreme Court of Canada has attempted to clarify the distinction between these two modes of governance. According to the majority in *R. v. Malmo-Levine; R v. Caine*:

The protection of vulnerable groups from self-inflicted harms does not, as Caine argues, amount to no more than "legal moralism". Morality has traditionally been identified as a legitimate concern of the criminal law (*Labatt Breweries, supra*, at p. 933) although today this does not include mere "conventional standards of propriety" but must be understood as referring to societal values beyond the simply prurient or prudish: *Butler, supra*, at p. 498; *R. v. Murdock* (2003), 11 C.R. (6th) 43 (Ont. C.A.), at para. 32. ([2003] 3 S. C. R. 571, 2003 SCC 74, at ¶ 77).

According to the Supreme Court, "prudishness" is a determining factor in deciding the role of morality as a valid legislative objective. Moral arguments based on prudish notions are insufficient and considered tantamount to legal moralism while moral arguments extending beyond prudish notions are worthy of consideration—these arguments are paternalistic. Of course, it is not clear what subject matter would be considered "prudish" or "beyond prudish". One would guess that in the face of weak criterion to operationalize this, it would be the subject

of much contested negotiation. Specifically, while mere prudishness is not a sufficient argument for upholding a law, the legislation is entitled to assume a paternalistic role in order to protect vulnerable citizens on grounds of morality extending beyond “conventional standards of propriety”. This is striking in light of the above mentioned determination that coercively imposing the values of a majority upon the individual lives of a minority undermines our social contract (*R. v. Butler* 1992: 48).

Additionally, it appears that the alleged harm must affect unwilling participants for state intervention to be permitted. Moreover, according to the majority in *R. v. Malmo-Levine; R. v. Caine*, in cases where the alleged harm is inflicted upon both participants and wider society, the state has a legitimate concern and may prohibit the allegedly harmful conduct: “In our view, the control of a ‘psychoactive drug’ that ‘causes alteration of mental function’ clearly raises issues of public health and safety, both for the user as well as for those in the broader society affected by his or her conduct. The use of marihuana is therefore a proper subject matter for the exercise of the criminal law power” (2003, at ¶ 77 & 78). This explanation contradicts the above mentioned determination that under certain conditions the state has a right to prohibit conduct for the purpose of protecting vulnerable groups from self-inflicted harm. Moreover, this definition casts law in line with Durkheim’s notion of restitutive law, which he argues is characteristic of modern societies. Given the debatable nature of what distinguishes legal moralism from paternalism, it is not surprising that this is highly contested in the current case.

For the applicants, the impugned provisions and their objectives must be recast in terms of harm-based considerations (Applicants’ Memorandum of Fact and Law: 243). Moreover, “the sex trade offences must be justified on the basis of social harm and not on the basis of a moral objection to the trade itself” (Ibid). Asserting that “it is no longer considered constitutionally



valid to justify criminal law on the basis of ‘legal moralism’” (243), the applicants argue that moral assessments of prostitution should not be considered in the present case:

It is respectfully submitted that the impugned provisions cannot be grounded or justified upon the basis of an evaluation of the moral worth of the act of selling sexual services. Although the Supreme Court of Canada has concluded that Parliament can validly take action to protect and preserve “core values”, in the modern era it no longer has authority to enact laws based solely on the values of a moral majority. (208)

In line with Weber’s (1914) assertions, the applicants hold that religious values have no place in modern law—while it is valid to legislate on the basis of rational values, legislating on the basis of irrational or religious values is not. Moreover, as Sopinka J. explains in *Butler*, “core values” are those that extend beyond “the [moral] conventions of a given community” (1992: 48). Of course, this begs the question, what if “core values” are based on “conventional notions of society”, thus reflecting the moral conventions of a given community? In addition to citing Sopinka J.’s aforementioned assertion in *Butler*, the applicants offer an example to clarify how the courts must consider prostitution related provisions in the modern era:

The rejection of legal moralism can be seen most clearly in the dramatic re-fashioning of the elements of the offence of “keep common bawdy house for the purpose of indecency” by the Supreme Court of Canada in 2005. With respect to the question of whether a “sex club” for “swingers” can be characterized as a bawdy house, the Court replaced the traditional “community standards” test for determining indecency with a harm-based test grounded in secular values. (Applicants Memorandum of Fact and Law: 209)

Accordingly, the applicants rely on *R. v. Labaye* to demonstrate how the courts should establish whether or not conduct results in social harm. In *Labaye*, the majority of the Supreme Court defines social harm as conduct that is incompatible with society’s proper functioning and offers guidance for establishing which conduct falls into this category:

Incompatibility with the proper functioning of society is more than a test of tolerance. The question is not what individuals or the community think about the conduct, but whether permitting it engages a harm that threatens the basic functioning of our society. This ensures in part that the harm be related to a formally recognized value, at step one. But beyond this it must be clear beyond a reasonable doubt that the conduct, not only by

its nature but also in degree, rises to the level of threatening the proper functioning of our society. (*R. v. Labaye*, [2005] 3 S.C.R. 728, 2005 SCC 80: 28).

Echoing Durkheim's (1893) definition of penal or repressive law, the majority in *Labaye* holds that conduct threatening the collective consciousness must be criminalized. Moreover, an act must be injurious to the entire collective for it to be considered criminal (Comack 2006: 27). As noted by Comack (2006), Durkheim holds that all crimes consist of "acts universally disapproved of by members of society" (as cited: 27), inspiring structural functionalist assumptions that the primary function of the state is to ensure individual conformity to the normative system (27). Additionally, the Supreme Court of Canada identifies the conditions under which sexual activity can be considered "incompatible with the proper functioning of society": in cases of harm based on threats to autonomy and liberty "arising from unwanted confrontation by a particular kind of sexual conduct," the crown must establish a real risk to persons other than willing participants; in cases of harm based on predisposing others to anti-social conduct, concrete evidence that anti-social behaviour stems from the linkage between the sexual conduct at issue and negative attitudes and between those attitudes and anti-social conduct must be provided; and in cases based on physical or psychological harm to participants, the crown must establish that injury has occurred or that there is a real risk that it will occur (*R. v. Labaye* 2005: 29). Caution must be taken to avoid mistaking disgust with psychological harm (Ibid). As mentioned, "risk of harm" acts as a joker card in legal arenas (Valverde 1999: 184) and common sense operates as a judicial trump card in cases where positivistic measures fail to provide resolutions (Beaman 2008: 90). For the applicants, this demonstrates that the arguments forwarded by other interest parties amount to legal moralism and should not be considered valid.

Conversely, the CLF and colleagues argue that morality continues to be the basis of criminal law. Asserting that "the Applicants' argument that legal moralism has been rejected by

the courts is simply wrong” (20), the CLF et al. hold that “morality is recognized as a legitimate public purpose of criminal law” and that “the notions of moral corruption and harm to society are inextricably linked” (Factum of the CLF et al.: 18). Moreover, acts that conflict with public morals are harmful to society’s proper functioning and criminalizing these activities is a valid legislative objective:

Parliament enforces this social morality by enacting statutory norms in legislation, such as the *Criminal Code*. Morality is conveyed by means of provisions that demand that each individual case be assessed in light of its specific context and circumstances to gauge Canadians’ tolerance for the acts in question. Harm is thus linked to a concept of social morality. There is also harm where what is acceptable to the community in terms of the public morals is compromised. The purpose of the Laws is not to legislate on the basis of a “particular”, fleeting or prudish conception of morality, but rather on the basis of *fundamental* conceptions, which are integral to promoting and protecting our values in Canadian society. (19)

In Weberian terms, this implies that the Canadian legal system is a substantive rational system, in which cases are assessed in light of their individual circumstances as well as prevailing notions of justice and the decision making process is informed by rules “from some extralegal source such as religion or a particular ideology” (Grana & Ollenburger 1999: 41). Similarly, this definition falls in line with what Durkheim (1893) conceptualizes as law based on collective emotion or tradition, which he argues is most characteristic of less developed societies (165). For the CLF and colleagues, some moral values are so firmly entrenched in our society that they justify a legally moralistic approach.

The CLF and colleagues refute the applicants’ interpretation of *Labaye*, explaining that “while the Supreme Court in *Labaye* adopted a harm-based analysis, it also made clear that social values *do* have a role to play in the analysis [original emphasis]” (Factum of the CLF et al.: 20). Moreover, for the CLF and colleagues, tolerance does factor into evaluations of compatibility with society’s proper functioning: “To ground a finding that acts are indecent, the

harm must be shown to be related to a *fundamental value* reflected in our society's Constitution or similar fundamental laws, which constitutes society's formal recognition that harm of the sort envisaged may be incompatible with its proper functioning [original emphasis]" (Ibid). It is noteworthy that while both the applicants and the CLF et al. take a Durkheimian or structural functionalist approach to law, they use this approach to justify oppositional stances. Whereas for the applicants this demonstrates the invalidity of legally moralistic legislation, for the CLF and colleagues this justifies a legally moralistic approach. According to the CLF et al., social abhorrence of prostitution is a fundamental value and the Supreme Court of Canada has acknowledged this fact:

In their factum, the Applicants take pains to argue that mere moral assertions cannot sustain a law. They are right, in part. Mere prudish sensibilities cannot be invoked to justify a law that threatens the life, liberty, or security of the person of Canadians. Mere "moral views" with respect to the place of women in the 1950s, or ethnic minorities before that, obviously have evolved today, and Canadian law must evolve as society evolves. But there are certain core values—values that are so entrenched in society—that can, should, and must be valid objectives underlying the laws. There is such a thing as "right" and "wrong" and the criminal law properly reflects and enforces those views. The Supreme Court of Canada has been clear that *there is no requirement that the criminal law only punish those acts that directly "harm" other persons*. The Supreme Court has stated that *it is legitimate, and entirely constitutional, to punish those acts that society views as being immoral, or inherently wrong, where that moral view is rooted in legitimate and fundamental concepts* that are otherwise compatible with *Charter* values. That is the case here [my emphasis]. (Factum of the CLF et al.: 1-2)

In contrast to notions that modern law must be rational and objective, this definition of what constitutes legitimate criminalization is highly subjective. Once again, this suggests that Canadian law is grounded in what Durkheim refers to as laws reflecting collective emotions or custom. As aforementioned, for Durkheim, rather than penalizing conduct that is harmful to society, these laws solely prohibit conduct that undermines social cohesion and are characteristic of highly segmented social arrangements.

Interestingly, for the CLF and colleagues, the fundamentality of the values underlying Canada's prostitution related *Criminal Code* provisions is akin to the fundamental nature of the values reflected in laws against rape and murder. As the CLF et al. explain:

The social prohibition on murder and rape are fundamental values that do not change over time, and are thus codified in the criminal law as *fundamental* concepts of morality. In the same way, the disapproval of soliciting prostitution, keeping a common bawdy house or pimping because of the social and physical harms these acts cause society are fundamental conceptions, and thus underlie the objectives of the Laws. (19)

However, far from reflecting fundamental values, our current rape laws reflect years of feminist struggle to remove dogmatic beliefs from legislation. For example, prior to 1983 a husband could not be charged with raping his wife and proof of vaginal penetration was a requirement in rape cases (Busby 2006: 265). Further, as noted by Karen Busby (2006), "until 1985, sexual offences against children focused on whether the complainant was 'of previously chaste character' and applied, in most cases, only to females" (265). Additionally, it is irrational to argue that prohibitions against rape and murder are based solely on societal values because these acts pose obvious harms to unwilling participants.

The AG Ontario concurs with the applicants' assertion that legal moralism has no place in criminal law but, in line with the CLF et al., argues that enforcing moral values is a valid legislative objective. Moreover, according to the AG Ontario, while "as noted by the Applicants in *R. v. Butler*, the Supreme Court of Canada did conclude that moral legalism had no place in criminal law" (87), "in *R. v. Malmo-Levine*; *R. v. Caine* the Supreme Court of Canada reiterated that reliance on moral values does not necessarily descend into legal moralism" (Factum of the Intervener, the Attorney General of Ontario: 88). Asserting that "the jurisprudence of the Supreme Court of Canada...makes it clear that respect for human dignity is one of our society's core values and it is permissible for Parliament to legislate to protect that value" (91), the AG

Ontario argues that “prevention of harm and exploitation of prostitutes, and protection of their dignity as human beings, continue to be valid constitutional objectives of the bawdy house provisions, and, indeed, the other impugned provisions” (90). Citing the Supreme Court of Canada in *R. v. Mara* and *Labaye*, the AG Ontario posits that prostitution infringes on the fundamental value of human dignity and thus must be prohibited by law:

In *Mara* the Supreme Court of Canada has recognized that it is an appropriate use of the criminal law to address conduct which publicly portrays individuals in a servile and humiliating, undignified manner, as sexual objects. This type of portrayal is incompatible with the recognition of the dignity of each human being. The Subsequent case of *R. v. Labaye* builds on the principles set out in *Butler* and *Mara*. The Court clarifies that three types of social harm are legitimately addressed by the criminal law and captured under the indecency provisions: (1) harm to those whose autonomy and liberty may be restricted by being confronted with inappropriate conduct; (2) harm to society by predisposing others to antisocial conduct; and (3) harm to individuals participating in the conduct. These same harms arise out of the public display of prostitution. (89)

Moreover, for the AG Ontario, public displays of prostitution cause harm to both participants and to wider society by undermining human dignity, which is a fundamental value. Like the applicants and the CLF et al., for the AG Ontario, as Durkheim would argue, Canadian law is central in upholding collectively shared values and punishing those who threaten these values.

In contrast to other interest parties, the AG Canada does not entertain a discussion of morality in his factum. Assuming a paternalistic position, the AG Canada explains that, rather than being an issue of legal moralism or the validity of legislating moral values, “the issue is whether there is a ‘*reasoned apprehension of harm*’ beyond the *de minimis* range [original emphasis]” (Factum of the Respondent, the Attorney General of Canada: 108). Noting that “the harms targeted by the challenged offences constitute a legitimate state interest in criminalizing the most harmful public emanations of prostitution” (108), the AG Canada asserts that “the state interest in protecting against harms is legitimate where the harm is beyond the *de minimis* range or is not insignificant or trivial” (110). In contrast to other interest parties’ assertions that

preventing harm to the wider public may be a valid legislative objective, for the AG Canada, this harm need not affect anyone other than participants: “The Supreme Court in *Malmo-Levine*...held that the principles of fundamental justice do not include the so-called “*harm*” principle, namely, that the law should only prohibit conduct that harms persons other than the accused. Rather, the criminal law may be used to protect legitimate state interests other than the avoidance of harm to others [original emphasis]” (110). Elaborating on this point, the AG Canada asserts that prohibiting conduct offending the public conscience is a valid legislative objective:

In addition to the avoidance of harm to others, the criminal law may also legitimately address conduct that “*affects the public*”, or that constitutes “*a wrong against the public welfare*”, or is “*injurious to the public*”, or that “*affects the community*”. The law may also legitimately criminalize conduct “*that causes harm only to the accused*”. The Applicants may consider this “*paternalistic*”, but the Supreme Court has confirmed that this objection “*does not go to the validity of prohibiting the underlying conduct*” [original emphasis]. (110-111)

Moreover, for the AG Canada protecting the public and participants from the harms stemming from public displays of prostitution is a valid legislative objective. While not purportedly enforcing moral standards, clearly the AG Canada supports the notion that the impugned provisions are informed by moral values, as evidenced by his defence of the laws even if they are considered merely paternalistic.

### ***Conclusion***

Fuelled by the ambiguity in Supreme Court definitions of legal moralism and attempts to distinguish it from paternalism, interest parties’ positions on what constitutes valid legislative objectives provide an interesting starting point for understanding their positions in the current debate. Moreover, in their attempts to negotiate the role of legal moralism in the current case

interest parties implicitly offer their perspectives on the state of the Canadian legal system. Although their reliance on precedent cases and rules of procedure suggest that all interest parties view the Canadian legal system as formal and rational, they part ways when discussing the purpose of the impugned provisions. Whereas the applicants' interpretation of the purpose of the impugned provisions is in line with Weberian notions of formal rational legal systems the CLF et al. and the Attorneys General of Ontario and Canada believe that the law's purpose is to maintain social cohesion and uphold moral values.

Indeed, in contrast to Louie's (2012) argument that reducing harm to sex workers while respecting their liberty right requires a shift away from strictly moral perspectives to more objective measures such as harm reduction, the current case centres on collective values and notions of social cohesion. Moreover, upholding liberty rights in the Canadian context means upholding core *Charter* values, which are a reflection of the moral values held by Canadian citizens. Canadian law was founded on Christian values, creating a space for religious intervention in cases of a purportedly secular nature. Yet, analyzing the role of legal moralism in the Canadian context reveals that morality in the contemporary Canadian legal arena takes on a much broader meaning. Moreover, in the contemporary Canadian context, legal moralism refers to the "core values" of the majority of the Canadian public. In this sense, morality refers to the collectively held values enshrined in the *Canadian Charter of Rights and Freedoms*, without which the current challenge to Canada's prostitution laws would not be possible. As mentioned, the courts have a *prima facie* obligation to uphold the collective values enshrined in the *Charter*. The *Canadian Charter of Rights and Freedoms* is capable of overriding any laws and legal precedent which are not consistent with its provisions, as evidenced by the necessity of invoking the *Charter* in order to challenge established legal codes and the need for courts to revisit legal



precedent in order to assess whether or not it is still a reflection of our collective values. Clearly, moral values are central features of law and legal reform in the Canadian context. The applicants contend that the impugned provisions must be recast in terms of harm-based considerations and Louie concurs. But casting *Charter* challenges in terms of risk of harm disguises the value-laden nature of judicial determinations in cases involving social values (Valverde 1999; Beaman 2008). While Louie's contention that Canada's prostitution laws are in need of reform is well taken, this reform must be achieved by demonstrating changes in the values of the Canadian public in order for it to be in line with the foundation of the Canadian legal structure. It is important to note that arguing that the moral values of the Canadian public ought to be the driving force behind legal reform is not a call for a strictly Christian sense of morality to guide discussions of this sort. In line with Mead's vision, this should be a deliberatively democratic approach, ensuring that all relevant voices are given equal standing in debates in which our collective values are in question (Carriera da Silva 2008). Given findings that the majority of Canadians feel that Canada's prostitution laws are unconstitutional (Lowman and Louie 2012), adhering to the cornerstones of the Canadian legal tradition promises to bring about the changes sought by the applicants.

### **The Role of Expert Witnesses**

If the “experts” are experts, why do they disagree? (Hoffman 1996: 81)

In the last few decades, the law has become increasingly reliant upon science to resolve the disputes that come before the courts. This point has been noted by judges and academics alike. As Justice Doherty J. A. explains: “the increased reliance on expert opinion evidence by both the Crown and defence in criminal matters is evident upon a cursory review of the reported cases....Expert evidence is particularly prevalent where inferences must be drawn from a wide variety of human behaviour” (*R. v. Abbey* 2009: 32). Similarly, Sheila Jasanoff (1999) argues that the institutions of law and science have become so thoroughly enmeshed that “the law is now an inescapable feature of the conditioning environment that produces socially embedded...science” (762). This increasing reliance has led to a wealth of scholarly work on the relationship between law and science; academics from a host of persuasions have explored the interactions between these two institutions from a variety of angles. Perhaps because it is the most common locus of interaction between science and law, the majority of scholarly work on the relationship between these institutions focuses on interactions between law and natural science in criminal cases and tort litigation (see, for example, Schuck 1993; Goodstein 2000; Jasanoff 2002; Winiecki 2008; Haack 2009; Kristzer 2009; and Sanders 2009). Further, the bulk of these analyses focus on the interactions between law and science in American courts.

Many of the insights stemming from analyses of natural science and law in criminal cases and tort litigation offer legal practitioners and scientists a basis for establishing a better understanding of how the other works. Yet, as noted by Jasanoff (1999), most literature on the interactions between law and science remains polarized—for the most part, lawyers have analyzed the legal side of this relationship while scientists have analyzed the scientific side

(767). While these endeavours have produced useful starting points for understanding the nature of the relationship between law and science, by neglecting to probe into the other's "claims concerning the authority of their respective epistemic and normative practices" each institution reinforces the others' status (768). This has been the central focus of Science and Technology Studies (STS) analyses. STS scholars have focused on what Jasanoff refers to as the co-production framework; these constructivist accounts emphasize the cooperative effort between law and science to construct and reinforce dominant social understandings of expertise, evidence and, more generally, how society functions (772). As a result, "science studies...continues to function as an agnostic field, in which analytic prowess and disciplinary insight by no means suffice to ensure that STS insights and findings will circulate to audiences outside the field" (780). As noted by Jasanoff, accounts of interactions between law and science that simultaneously attempt to destabilize the authority of legal rule-making and the authority of scientific fact-making will benefit both science studies and the law (774). Further, analyses of interactions between social science and law, which are sparse at present, have potential to offer novel insight to the current conversation.

Analyzing interactions between social science and law is necessary because social scientists are increasingly being called upon to assist the courts, particularly in cases involving *Charter* challenges. While social science experts, especially sociologists, seldom interacted with the legal system until the 1990s and even then sociology maintained "a rather low status in the legally defined pecking order of knowledges" (Valverde 1996: 204-5), courts are increasingly relying on evidence from social scientists regarding a range of subject matters. As noted by Mariana Valverde (1996), whereas prior to the late 1980s courts tended to turn to psychologists when social scientific evidence was necessary to assist the court in resolving conflicts, the

Supreme Court of Canada's recognition of "systemic" discrimination in the 1989 *Andrews* case "opened the door for sociological expertise" (204). The extent to which legal reliance on social science experts has increased in the wake of these changes is demonstrated by a key term search of provincial and federal cases and tribunals for "social science experts" on the Canadian Legal Information Institute's website ([www.canlii.org](http://www.canlii.org)). Whereas this search yields only 67 results for the decade from 1980-1990, 521 results appear for the decade from 1990-2000 and a search of the last decade yields over 1800 results. Given this increase, understanding how the law constructs social science in cases where social science expert witnesses come before the courts is a useful line of inquiry. And exploring how legal actors in the *Bedford* case construct the role of expert witnesses is a starting point for assessing interest parties' constructions of the situation currently facing Canadian sex workers.

Academics were granted status positions, as experts, in the court room, giving their evidence more weight than the evidence presented by sex workers in *Bedford v. Canada*. While the applicants were permitted to share their experiences and perceptions of the sex trade with the court and both sides of the debate submitted affidavits from other sex workers or "experiential witnesses", these accounts were not the focus of the proceedings. Moreover, the accounts of "experiential witnesses" were intended to provide "corroborative voices" and to challenge the accounts of "experiential witnesses" proffered by the other side while the accounts of "the experts" were intended to assist the court in rendering a decision on the issue (*Bedford v. Canada* 2010). Should this have been the case? Is privileging the accounts of social science researchers over those of sex workers warranted in a case concerning the constitutional rights of individuals who sell sex? As noted by Valverde (1996), "in order to achieve legal existence [social] movements need first of all to reduce themselves either to individuals fighting individual cases or

to groups seeking intervenor [sic] status. Then, these necessarily unrepresentative representatives of movements have to find themselves a legal voice by securing sympathetic lawyers and sympathetic ‘expert’ witnesses” (213). In addition to obfuscating the real nature of these legal proceedings, this process obscures our understanding of the role of expert witnesses in these cases. This is particularly true in the *Bedford* case where sociologists who are part of competing social movements regarding sex work were called in to provide the sex workers with a legal voice. As will be discussed in chapter 6, in line with the accounts presented by sex workers in this case, the expert witnesses presented diametrically opposed positions on the issue. The positions taken by expert witnesses in the Bedford case are partly due to the adversarial nature of legal proceedings and partly the result of the current state of sociological research on the sex trade (Weitzer 2009b). In this sense, the evidence presented by expert witnesses does not differ from that which is offered by “experiential witnesses” in *Bedford v. Canada*. Prior to analyzing the arguments forwarded by interest parties in this case, it is necessary to understand legal constructions of the role of expert witnesses in court. Thus, in this chapter I analyze how the law constructs expertise and the role of expert witnesses. Exploring legal constructions of expertise and the role of expert witnesses while drawing on insights from STS illuminates the performative nature of expertise and how law’s incessant recourse to constructed binaries works to subvert the social movements for whom academic claims are being made in rights cases.

### ***Expert versus Lay Knowledge***

Legal accounts offer a concrete definition of expertise, privileging it over other ways of knowing. According to legal accounts, expertise is the acquisition of “special or peculiar knowledge through study” (*R. v. Mohan* [1994] 2 S. C. R. 9: 21), which enables individuals to

provide opinions that “a person of ordinary experience and intelligence would not be able to form...based on the same set of circumstances” (O’Melia 1991: 7). Thus, while the current and former sex workers who offered testimony in this case are considered lay witnesses and were only permitted to provide “fact evidence” for the judge’s consideration, the academic witnesses in this case were permitted to provide opinions to assist the judge with her decision making process (*Bedford v. Canada* 2010). As Steven O’Melia (1991) explains:

Unlike ordinary ‘lay’ witnesses, the expert witness is called not to testify with respect to the factual background of an action but rather to provide an opinion with respect to those facts which will help the judge, jury or tribunal reach its conclusion. The ability of an expert witness to provide evidence in connection with a factual situation with which they had no connection is thus a major exception to the hearsay rule, which generally provides that indirect evidence may not be led to support the truth of the matter asserted. Expert evidence is by definition an opinion only, based on facts which have been provided by a first-hand examination by the expert, by listening to the testimony of lay witnesses who are familiar with the facts of the case, or by responding to a hypothetical fact situation.  
(1)

Expert witnesses are granted status over other witnesses because they are expected to provide insights that others cannot. Moreover, legal definitions of expertise distinguish expert knowledge from common sense: “expert evidence is necessary only where the judge or jury would not be able to form an adequate opinion based solely upon their own knowledge. Expert evidence is inadmissible in cases where only a common-sense or otherwise non-expert opinion is necessary” (O’Melia 1991: 2). Thus, in line with Beaman’s (2008) contention that common sense is a judicial trump card to resolve apparently intractable cases (90), common sense is invoked as an objective measure in determinations of the admissibility of expert evidence. Moreover, sociological expertise is called upon to help judges establish “common sense” understandings where positivistic measures cannot provide answers. Indeed, as noted by Valverde (1996), sociology is only brought into court proceedings in cases where there is no consensus on the issue(s):

If one analyzes in some detail the specific ways in which sociological expertise plays out in legal arenas, it becomes clear that the law's increasing recourse to sociology is due not to that discipline's inherent virtues but rather to the fact that there is no longer a consensus either among the public at large or within law about a series of social issues impinging directly on the law's work. (206)

This was certainly the case in *Bedford v. Canada*. As noted by Himel, "the only consensus that exists is that there is no consensus on the issue" (*Bedford v. Canada* 2010: 5). Thus, Himel relied on the evidence proffered by expert witnesses to establish a common sense understanding of the situation in order to render her decision.

Yet, deeper analysis of how expert witnesses come before the courts and the role that law constructs for the expert witnesses suggests that the structure of Canadian legal proceedings prevents experts from fulfilling the duty that law has carved out for them. Specifically, just as legal adherence to positivist myths obfuscates our understanding of political action (Diduck and Wilson 1998: 507), it obscures our understanding of what expert witnesses contribute to rights cases. Rather than providing objective evidence to assist the judge in his/her decision making process, social science is a means by which the claims of social movements gain legal standing. Expert witnesses act as vessels through which these claims are transformed into the language of law, mutating lived experiences into legal categories and solidifying binary distinctions between the knowledge they possess and that of the individuals they are representing. As Valverde (1996) asserts, "while the position of the sociologist within law can be studied and found to be subordinate, the position of social movements within law is even more subordinate, despite the fact that without the movements' political effectivity there would be no experts on social inequality in the first place" (212).

Challenging binary distinctions between lay and expert knowledge, research from STS draws attention to the performative nature of expertise and the need for a more inclusive

approach to participation in decision making processes. As noted by Robert Evans and Harry Collins (1999):

[O]ne of the most important outcomes of STS work has been to highlight the expertise and knowledge that exists outside of the mainstream scientific community. As a result, we now know that expertise is often partial, that experts frequently emphasize some aspects of a problem but overlook others, and that, even if we could find the right experts, they may not have answers. (609)

For Evans and Collins, while experts might be best suited to decide certain matters of fact, value judgements about how the knowledge of experts is to be used are better left to lay citizens (623).

According to STS accounts, expertise is enacted and maintained through boundary work (610).

Moreover, communities of individuals must agree upon what counts as competent performances of expertise because expertise is shared, transmitted and validated by the community (Ibid). As noted by Evans and Collins, “knowledge is acquired by socialization, so expertise is acquired through a prolonged period of interaction within the relevant community and is revealed through the quality of those interactions” (620). From this perspective, expertise must be reconceptualized as “a continuum of knowledge states, ranging from ignorance to complete expertise” (Ibid). Evans and Collins propose an approach to expertise that accounts for how different types of expertise are distributed as individuals move between states in this continuum:

[S]ome sorts of expertise (e.g., speaking and writing a natural language) will be so widely distributed as to be ubiquitous. Others, like milking cows or growing stem cells, will be restricted to such small groups that they are seen as esoteric expertises. Similarly, while some expertise will be about substantive domains, other kinds of expertise might operate at a meta level, providing the criteria and skills needed to make judgements about the expertise held by others. (Ibid)

Specialist expertises range from ubiquitous tacit knowledge (such as knowing standardized facts, popular understandings and primary source knowledge such as the knowledge gleaned from written works on the topic) to specialist tacit knowledge (such as what Evans and Collins refer to as “interactional expertise” and “contributory expertise”) (621). Whereas both interactional and



contributory expertise “rest on tacit knowledge specific to the group in question,” a distinction must be drawn between individuals who are able to speak fluently about a domain of expertise (interactional experts) and those who are able to contribute to it (contributory experts) (Ibid). Moreover, individuals possessing interactional expertise are able to speak fluently about a domain of expertise and thus pass as native members of the community but “contributory expertise signifies that a person has both the conceptual and practical expertise held by the group” (Ibid). Meta-expertises enable individuals to “make judgements about the substantive expertise of others” and consist of “internal” expertise (such as technical connoisseurship, downward discrimination and referred expertise) and “external” expertise (such as ubiquitous and local discriminations) (Ibid). According to Evans and Collins, whereas “internal meta-expertise denotes those judgements that require some kind of socialization within the community” external meta-expertise represents judgements that are possible in the absence of being socialized in the relevant community of experts (621-2). As noted by Evans and Collins, while lay citizens do not possess the esoteric knowledge required to be considered experts in specialist fields and decide matters of fact, their lack of membership in these communities makes them the best candidates to decide what should be done with the knowledge of experts: “lay participation [in deliberative and participatory decision making models] is warranted via the idea of meta-expertise, particularly ubiquitous and local discrimination, which use more generic social knowledge and skills to put political and moral preferences into actions” (623). Analyzing the role of expert witnesses in *Bedford v. Canada* through this lens reveals that sociological expertise holds a rather precarious position of privilege in these proceedings.

### *The Role of the Expert Witness*

Expert witnesses are expected to remain impartial throughout legal proceedings, providing objective evidence for the assistance of the court. Yet, sociology is not allowed to enter the court on its own accord—expert witnesses are only permitted to submit evidence to the court if they have been enlisted by lawyers for the interest parties and/or interveners in the case to do so and those who are chosen as experts are not enlisted to provide what they feel is pertinent information:

Social science evidence, while officially treated with full diplomatic honours as a knowledge from an autonomous realm, cannot appear before the courts on its own steam. Social scientists cannot on their own account get legal standing; they must be first of all be *chosen* as experts. And even after being selected, they are not at liberty to say whatever they think is relevant to the case: they are experts for a particular lawyer, they are briefed by them on what is required and their affidavits are corrected by the lawyers. The desired bits are then turned into legal raw matter and processed through the legal system's existing mechanisms [original emphasis]. (Valverde 1996: 208)

Thus, expert witnesses are compelled to provide evidence for the court by employing discourses and categories that are already familiar to law (Valverde 1996: 209). Moreover, expert witnesses are expected to present evidence in ways that they normally would not. Valverde (1996) explains how she felt compelled to give her evidence a positivistic spin when testifying as an expert witness: “Not wanting to undermine the case for which I was testifying, and having the impression that for lawyers social science basically means positivistic knowledge, I have often given my answers a much more definite epistemological status than I would do in teaching a class” (208). Further, legal discourse relies on binaries and oppositional categories, forcing experts to define situations in these terms even if they do not endorse the concrete divisions that law mandates (210). Moreover, law promotes a sense of opposition between parties even when none exists in reality. Curiously, in spite of the process by which they come before the courts, in contrast to lay witnesses, experts are expected to remain impartial throughout the proceedings.

The potential for expert witness partisanship is a *prima facie* concern for Justice Himel in *Bedford v. Canada* (2010). In contrast to lay witnesses, such as current and former sex workers and police officers, who are restricted to providing “fact evidence”, “qualified expert witnesses are granted a right to give opinions for the assistance of the court” (27). However, in line with the Code of Conduct for Expert Witnesses, Himel notes that this opinion must not be influenced by the party calling the expert witness—expert witnesses are expected to maintain an “attitude of strict independence and impartiality” throughout the proceedings (Ibid). Moreover, “*an expert witness...should never assume the role of an advocate* [my emphasis]” (*National Justice Compania Navieria SA v. Prudential Assurance Co Ltd.* as cited in *Bedford v. Canada* 2010: 27).

Yet, as noted by Gary Edmund (2009), apart from the fact it would be impossible to find an expert who does not have some sort of subjective view, this approach is problematic because experts are often brought before the courts to testify because of their commitments to particular ideologies: “all experts are (and expertise is) more or less aligned, subjective, interested, biased, and dependent....Although experts selected by the different parties may well take on aspects of a case, based *in part* on their contractual relationship, these experts will often be selected because they already adhere to particular assumptions and commitments or employ methodologies considered valuable [original emphasis]” (173). Indeed, this was the case in *Bedford v. Canada*. The applicants’ experts were all selected because of their alignment with the position the applicants were forwarding in court:

I had written an article critiquing Melissa Farley’s work, and other people who take her position, basically, on sex work. And I think that Alan Young and people he worked with were aware of that article and reached out to me....they might have done a Google search on me as well and decided that I was the kind of person that they might be able to use. (Interview excerpt, Weitzer)

Moreover, witness selection is driven by the adversarial nature of legal proceedings. Thus, witnesses are likely to be selected because they hold partisan views on the issue(s) in question.

For Edmund (2009), party selection of expert witnesses is a more significant factor in the production of bias than the adversarial context in which expert witnesses find themselves: “Expert selection may be far more important than any pressures or importunity brought about by adversarial alignment and interactions with parties and their lawyers” (Ibid). While Edmund’s point is well taken, Michael Saks (1990) analysis of potential roles for expert witness’ in court suggests that expert witness partisanship is a complex issue.

Analyzing expert witnesses’ behaviour and interactions with other participants in the legal process as well as the tension between the role that law designates for experts and the part they enact in court, Saks (1990) identifies four possible roles for expert witnesses in court. The “Mere Conduit/Educator” serves his/her discipline at the expense of the cause for which s/he is providing evidence. According to Saks “the Educator makes the field the first priority and is impervious to the claims of the cause on whose behalf it is employed” (296). In contrast to this role, the “Philosopher-Ruler/Advocate” acts at the behest of the cause, believing there is a greater good at stake, and “is more or less indifferent to the contents of the field” (Ibid). While similar to “Philosopher Rulers”, Hired Guns are indifferent to both the cause and the contents of the field. These witnesses are generally motivated by retainers or financial incentives (Ibid). As noted by Saks, the roles of educator, philosopher-ruler and hired gun are associated with the dilemma that experts face in relating the knowledge of their field to the cause at stake (Ibid). While Saks identifies a fourth option, which in its pure form is “an expert witness’s heaven on earth,” he cautions that this role poses a different ethical dilemma (297). For Saks, the fourth cell in the matrix of possible roles for expert witnesses is one in which “the data are so helpful to a cause you believe in that you can be entirely forthcoming about them” (Ibid). However, this cell is a triviality because it presents no choices and, according to Saks, this cell does not realistically

exist (Ibid). Moreover, “no matter how good the data are, they never are good enough for an advocate’s purpose. Pressures may develop to stretch or to over-state, or to make more clear and unambiguous data that are never altogether clear and unambiguous” (Ibid). In an attempt to rectify these potential issues, judges are charged with the role of evidentiary gatekeeper in legal proceedings.

Citing the decision in *National Justice Compania Navieria SA v. Prudential Assurance Co Ltd.*, Himel explains that she has a duty to guard against expert bias and advocacy: “expert evidence should not be influenced by the interests of the party calling him or her. The judge’s role as gatekeeper requires vigilance to ensure that the necessary responsibilities of an expert are adhered to” (27). Moreover, when social science and law interact, the value and admissibility of the evidence social science has to offer is determined according to legal standards: “Sociological facts are transmuted into legal facts, and their subsequent effectivity is wholly determined by legal processes completely outside the control and even the knowledge of the social scientist who entered the facts into evidence” (Valverde 1996: 2008).

First advocated in the American case, *William Daubert, et ux., etc., et al., v. Merrell Dow Pharmaceuticals, Inc.* (509 U. S. 579 (1993)) and later incorporated into Canadian decisions such as *R v. Mohan* (1994), *R. v. J.-L. J.* (2 S. C. R. 600) and *R. v. Abbey* (2009 ONCA 624), the judge’s role of evidentiary gatekeeper has been enshrined in American and Canadian law. As evidentiary gatekeepers, judges are required to ensure that only “reliable” evidence that will “assist the trier of fact” is admitted in legal proceedings. It is important to note the definition of reliability used by judges assessing the admissibility of expert evidence—judges assess the admissibility of expert opinion based on its *evidentiary reliability*. In *Daubert* the court concludes that evidentiary reliability will be based upon whether or not the expert’s theory

proves what it is intended to prove (1993, f.n. 9). Moreover, distinguishing between scientific reliability and scientific validity, the court concludes that in cases involving scientific expert evidence “*evidentiary reliability* will be based on *scientific validity* [original emphasis]” (Ibid). In this sense, the evidence proffered by expert witnesses is processed and evaluated in terms which are foreign to them. Justice Doherty J. A. explains that “This ‘gatekeeper’ component of the admissibility inquiry lies at the heart of the present evidentiary regime governing the admissibility of expert opinion evidence” (*R. v. Abbey* 2009: 34-35). Judges’ role as evidentiary gatekeepers extends beyond the duty to protect lay persons from biased expert opinion in jury cases: “As an impartial adjudicator, an application judge cannot disregard his or her role as gatekeeper simply because there is no jury” (*Bedford v. Canada* 2012: 28). Moreover, as Himel explains, “in *Charter* cases, judges are also the triers of fact” (30). Thus, they are “expected to disabuse themselves of irrelevant and inflammatory evidence” (Ibid). Yet, the process by which this is accomplished permits the judge’s personal views to permeate the proceedings. In order to fulfil her duty to remain vigilant against expert bias and advocacy, Himel employs an “evidence based approach” as explained by David Paciocco to evaluate the proffered expert opinion(s).

In “Taking a ‘Gouge’ out of Bluster and Blarney: and ‘Evidence-Based Approach’ to Expert Testimony” Paciocco (2009) synthesizes the “evidence-based approach” to expert evidence imposed by the court in *Mohan* with the recommendations for how to achieve this in practice made by the *Inquiry into Pediatric Forensic Pathology in Ontario* (the Gouge Report). In *Mohan* (1994) the Supreme Court of Canada sets out the conditions for the admissibility of expert evidence: relevance, necessity to the trier of fact, the absence of any exclusionary rule; and a properly qualified expert (16). As noted by Paciocco (2009), the Gouge Report details how to achieve this legal requirement in practice (136). Paciocco asserts that “expert evidence is a

dangerous thing” (139) and “courts who are fooled by experts who claim to offer more than they really do, or who furnish opinions outside of their field of expertise, or who expect to be believed on their authority alone, or who are biased, or selective, or who puff up the stature of their discipline or their training” cannot be tolerated (156). Thus, in order to help the courts safeguard against these dangers, he synthesizes an “evidence-based approach to evaluating expertise” into four predicates:

- (1) the theory or technique used by the expert must be reliable, and so too must the *use* of that theory or technique by the expert;
- (2) the expert must not be biased (the expert must “keep an open mind to a broad menu of possibilities”);
- (3) the expert must be objective and complete in collecting evidence, must reject information that is not germane to the theory or technique being used, and must be transparent about all the information and influences they have been exposed to; and
- (4) the expert must clearly express not only the opinion, but also the complete reasoning process that led to it, and must be candid about the shortcomings of the theory or technique and the opinion reached, offering fair guidance on the level of confidence that can be placed in the opinion expressed [original emphasis]. (146-7)

While the Gouge Report, and thus Paciocco’s work, center on forensic pathology, it is useful to consider the first two predicates because they have direct bearing on the admissibility of expert opinion in *Bedford v. Canada*.

For Paciocco (2009), the means of assessing the reliability of the expert’s theory or technique and the way s/he employed it depends on whether the expert invokes “science” to validate his/her claims or s/he is presenting more interpretive evidence (148-9). Paciocco explains that in cases where “experts...invoke ‘science’ to validate their opinions” *Daubert*’s scientific standards must be used to scrutinize their evidence. This involves considering “whether the theory or technique has been tested, whether it has been subject to peer review and publication, its known or potential rate of error, and its general acceptance in the relevant field of expertise” (148). However, in cases where the expert’s evidence is of a more interpretive nature

“a more nuanced approach is called for” (149). This approach involves assessing whether or not the expert has appropriate training and experience; the degree to which the empirical evidence s/he relies upon “is accurately recorded;” the extent to which his/her “reasoning process is clearly explained and logical” as well as how justifiable his/her opinion appears to be; whether or not s/he acknowledges the limitations of the science s/he has employed; whether his/her opinion “is located in an area of controversy;” whether or not s/he offered “reasoned rejection of alternative conclusions;” and whether or not “a system of quality assurance and meaningful peer review” exists in his/her discipline (Ibid).

Guarding against expert bias requires ensuring that expert witnesses maintain an open mind to a broad range of possibilities (Paciocco 2009: 150). As is evident in Himel’s statements, guarding against expert bias is a major concern for the courts. Similarly, Paciocco notes that “an adversarial posture is not one that is uncommon for experts to take” (151). Echoing, Saks (1990), Paciocco (2009) explains that expert bias takes on many forms: the expert has some sort of connection to the party calling him/her; “adversarial bias” stemming from witness selection based on the party’s needs rather than the integrity of his/her opinions; “association bias,” which arises from our natural inclination to do something serviceable for those who remunerate us for services; witness predisposition because they are assigned to teams in our legal system; bias stemming from the expert’s professional interest in advancing his/her theory or technique or credibility; “noble cause distortion” or a belief that a particular outcome is “the right one”; and “confirmation bias” (150-51). Indeed, “what makes the bias of expert witnesses so invidious is that it is often unconsciously held” (151). The Gouge Report suggests that experts should be expected to make their reasoning process, including explanations for why they have rejected alternative theories and opinions explicit in their reports and testimony (Paciocco 2009: 151)



However, as noted by Paciocco, “even advocates frame their self-interested arguments by explaining their reasoning, so doing so is no guarantee of impartiality” (151). This process may be further complicated when expert witnesses are sociologists. As noted by Valverde (1996), in cases involving “conflicts between traditional assumptions about the social and the claims put forward by social movements” (204), such as *Charter* challenges, sociological experts are often in some ways surrogates for the social movements making the claims (203). Moreover, the presence of experts often works to silence the movements for whom they are acting, if only as surrogates, in court (212). And, as mentioned, sociological experts are a means by which the claims of social movements are translated into legal terms in court proceedings. Thus, sociological experts act at the behest of these claims regardless of whether or not they are explicitly biased. The Gouge Report also recommends the implementation of a code of ethics for expert witnesses, emphasizing that the expert’s “first duty is to the court” (Paciocco 2009: 152).

Canada has implemented such a code. Pursuant to section 52.2 (c) of Canada’s Federal Court Rules, Canada has a code of conduct for expert witnesses. Sections 1 and 2 of the Code of Conduct for Expert Witnesses emphasize the expert’s duty to the court:

An expert witness named to provide a report for use as evidence, or to testify in a proceeding, has an overriding duty to assist the Court impartially on matters relevant to his or her area of expertise. This duty overrides any duty to a party to the proceeding, including the person retaining the expert witness. An expert is to be independent and objective. An expert is not an advocate for a party.

The need for experts to remain impartial is also emphasized in section 3 (k) of the Code of Conduct for Expert Witnesses: Affidavits or reports submitted by experts to the courts must contain “particulars of any aspect of the expert’s relationship with a party to the proceeding or the subject matter of his or her proposed evidence that might affect his or her duty to the Court.”

According to Paciocco (2009), the Gouge Report “could have gone even further than it

did by providing for the absolute exclusion, in some cases, of biased witnesses” (152). Yet, if the duty of expert witnesses is to the court, you would expect attempts by both sides to draw on the expertise of the witness during proceedings and this is not the case. Rather than drawing on the expertise of expert witnesses under cross examination, lawyers attempt to discredit the witness’ proffered by their opponent(s):

During the cross examination they basically tried to pick apart my affidavit and my CV and asked a lot of questions that, you know, I expected from them, challenging basically the claims that I had made in my affidavit about the lack of scientific integrity on the part of some of the other actors like Melissa Farley and Janice Raymond. The government’s side basically tried to weaken my case, as they would in any kind of court proceedings like this, by trying to find inconsistencies in what I’d written or said in public....it wasn’t just a simple fact finding exercise on their part, they were attempting to weaken the case that the applicants had made. (Interview excerpt, Weitzer)

As Charles Bazerman (2009) points out, cross examination of expert witness testimony centres on *ad hominem* attacks because of the distinct standing that expert witnesses occupy in legal proceedings: “expert witnesses do not necessarily have any direct observations to report but are valued for their opinions, not, like lay witnesses, for their personal trustworthiness, but for their expertise. Their testimony can be impeached only by attacking that expertise or, more precisely, its relevance and use in the case at hand” (104). And the expertise of the witness is determined by legal standards, not those of the discipline for which the expert witness is supposed to be a representative. As Valverde (1996) explains, in her experience as an expert witness, “it was law’s precedent that counted for establishing [her] credentials, not [her] standing within sociology” (211). Further, the evidence that expert witnesses present to the judge while testifying is limited to what lawyers question them about: “Sometimes I would try to add points or I wanted to make points that were a bit off topic that I wanted them to be aware of and I wanted to be recorded in the record. And they would try to stop me and say ‘well that wasn’t the question’” (Weitzer). Moreover, lawyers constrain the evidence available for judges to consider when

making decisions with the assistance of expert witnesses. Judges then make subjective determinations regarding the admissibility of the limited evidence proffered by expert witnesses in order to render a decision.

In order to fulfill her role as evidentiary gatekeeper, Himel weighs the evidence presented by the parties, assigning little or no weight to evidence that is not in accord with the standards for admissibility (*Bedford v. Canada* 2010: 30). Moreover, noting that it would be impractical to engage in an admissibility analysis of each piece of evidence tendered and that neither party objected to the opposition's evidence, Himel sets out five factors, derived from the requirements in *Mohan* and *Abbey*, which she uses to determine the weight to be given to expert evidence in this case:

Unwillingness of the expert to qualify an opinion or update it in the face of new facts provided (often in cross-examination); bold assertions without a properly outlined basis for the claim; refusal to restrict opinions to expertise or the expertise demarked by the judge as required by the court; lack of sufficient independence from the party proffering the expert; and prior history as an advocate on the topic. (30)

Using this supposedly objective measure, Himel decides to grant less weight to the evidence tendered by some of the expert witnesses: Melissa Farley, Janice Raymond, Richard Poulin and John Lowman. As will be discussed in chapter 6, her decision to discount the evidence presented by these witnesses centres on the extent to which they appeared to be acting as advocates for the positions of the interest parties who called them to make submissions. Yet, given the issues with legal constructions of expertise and the role of expert witnesses in legal proceedings outlined in this chapter, it should not be surprising that the evidence tendered by experts was designed to advance the argument being presented by the parties who called them.

### ***Conclusion***

While social science evidence is intended to assist judges and/or juries in their decision making process, the adversarial nature of legal proceedings prevents social science from presenting a view that differs in any significant way from that presented by the interest parties. Party selection of experts combined with the ways in which the evidence these witnesses tender is submitted for the consideration of the court ensures partisanship in spite of legal demands that expert witnesses remain impartial. Sociologists do not enter court proceedings on their own accord and the evidence they tender is constrained by lawyers and the need to employ categories and discourses that law is familiar with. Thus, the role of sociological expert witnesses in rights cases is more accurately described as a means by which the claims of social movements are translated into oppositional legal accounts. In this sense, sociology and law collude to silence those for whom these challenges are being mounted (Valverde 1996). Moreover, “social science, purportedly courted because it can inject useful ‘facts’ into the legal process, is through the legal process reduced to the status of mirror for law’s narcissistic deliberations” (Valverde 1996: 202).

Specifically, the process by which sociological evidence enters court proceedings, particularly rights cases, perpetuates legal fictions constructing law as impartial, neutral and objective. Legal constructions of expertise as an objectively identifiable category and the role of the expert witness as non-partisan mask the extent to which *Charter* challenges rest on moral assumptions. Privileging the accounts of social scientists over those of “experiential witnesses” grants an unwarranted status to knowledge generated at the behest of the social movements for whom these challenges are being mounted. Further, legal constructions of expertise and the role of expert witnesses enable judges to engage in moral authoritarianism under the guise of making assessments based on objective measures. In the next chapter, I explore interested parties’

constructions of the situation currently facing Canadian sex workers and their constructions of “the risk of harm” in the *Bedford* case. Attending to sites of silence and excluded voices in this case reveals that through the process of transmuting lay knowledge into the language of law, social science colludes with law and religion to conceal the moral and political nature of the current debate. Interestingly, this collusion results in a more morally charged representation of the Canadian sex trade than would have been the case if the accounts of sex workers had been granted the same status as the accounts of other actors in this case.

### **Constructing the Canadian Sex Trade**

The topic of prostitution raises issues of morality, sexuality, organized crime, health and public safety, the exploitation of women and children, inequality between men and women, and human rights, among other things (SSLR 2006: 1).

Indeed, challenging Canada's prostitution laws deploys myriad perspectives and issues, all of which have a moral basis. Exploring interested parties' constructions of the situation currently facing Canadian sex workers as a backdrop to analyzing which evidence Himel considers and which evidence she omits in her decision permits analysis of how law, science and religion collaboratively construct the Canadian sex trade in the current case. How do the interested parties in *Bedford v. Canada* construct the situation? To what extent do these parties rely on expert witnesses to construct their accounts? And, what influence does this evidence have on the court? In order to explore these questions, I begin by analyzing the accounts presented to the court by the applicants, the Attorney's General of Canada and Ontario and the CLF and colleagues. Drawing attention to the sites of silence in the evidence presented in their facts highlights the extent to which social science evidence acts at the behest of rival social movements in the *Bedford* case. Following this account, I consider Himel's reasoning for her decision to strike down the impugned provisions, focusing on which evidence was considered in order to render this decision and the broader implications of constructing the Canadian sex trade in this manner.

Ronald Weitzer (2009b) identifies two "diametrically opposed" positions in academic constructions of the sex trade: the empowerment paradigm and the oppression paradigm. The empowerment paradigm "focuses on the ways in which sexual commerce qualifies as work, involves human agency, and may be potentially empowering for workers" (215). Proponents of

the empowerment paradigm “avoid essentialist conclusions based on only one mode of production”, arguing that sex work manifests itself differently depending on the legal regime in place (Ibid). Rather than arguing that sex work *is* empowering, proponents of this view hold that sex work has *potential to be empowering* in contexts where it is legal and regulated (Ibid). However, as noted by Weitzer, proponents of the empowerment paradigm tend to emphasize success stories, neglecting the accounts of sex workers who have had “highly negative experiences” (215). Echoing Weitzer, Scoular explains that feminist accounts employing sex worker discourses hold that prostitution is a legitimate form of work and failure to acknowledge its legitimacy amounts to legal discrimination (346-7). In contrast to the empowerment paradigm, the oppression paradigm holds that “sex work is a quintessential expression of patriarchal gender relations” (Weitzer 2009b: 214). In addition to making essentialist claims about male domination, some proponents of the oppression paradigm “make generalizations about specific aspects of sex work” and employ slavery discourses to characterize prostitution (Ibid). Moreover, some proponents of the oppression paradigm hold that:

[M]ost or all sex workers were physically or sexually abused as children; entered the sex trade as adolescents, around 13-14 years of age; were tricked or forced into the trade by pimps or traffickers; use or are addicted to drugs; experience routine violence from customers; labour under abysmal working conditions; and desperately want to exit the sex trade. (214)

According to Weitzer (2009b), proponents of the oppression paradigm generally employ “dramatic language to highlight the plight of workers” and present worst case scenarios as representative (Ibid). Similarly, Scoular (2004) notes that radical feminist accounts highlight the harms experienced by sex workers, holding that violence, inequality and oppression are fundamental features of prostitution (344). As noted by Scoular, for radical feminists, prostitution is a form of sexual slavery (Ibid). Analyzing interested parties’ constructions of the

situation currently facing Canadian sex workers in *Bedford v. Canada* highlights the extent to which these diametrically opposed positions permeated the debate before the court.

In line with Beaman's (2008) observation that Canadian courts are becoming increasingly reliant on the "risk of harm" test as a so-called objective measure in rights cases, *Bedford v. Canada* centres on defining the harm faced by Canadian prostitutes. As such, interested parties in the *Bedford* case all attempt to define the "risk of harm" associated with sex work in Canada, employing the oppression and emancipation paradigms to construct their arguments. As noted by Valverde (1999), the "risk of harm" test acts as a "veritable joker card" in these cases, deploying a host of values and discourses under the guise of objectivity (184). Moreover, harm frameworks are constructed using moral assumptions (Beaman 2008: 86) but the role of collective morality in shaping these constructions is hidden by discourses of objectivity and neutrality surrounding applications of the "risk of harm" test in legal accounts. The ambiguity of "risk of harm" assessments allows all interested parties to feel as though their concerns are being addressed by the courts (Valverde 1999: 184). However, when positivist frameworks do not provide answers and uncertainty prevails, judges rely upon common sense to fill in the gaps (Beaman 2008: 90). As noted by Beaman (2008), in this sense, "the 'risk of harm' is a joker card that can be played by anyone [and]...common sense is the trump card used by the courts to fill in the space between those things that are uncertain" (95). Indeed, this is the case in *Bedford v. Canada*.

### ***The Applicants' Account***

Offering testimony from various academic experts, police and other community members as well as testimony from experiential witnesses, the applicants present an account suggesting that, although it is a dangerous enterprise at present, the sex trade can be a safe, legitimate vocation



for Canadian women. It is important to note that all of the applicants' experiential witnesses are women involved with groups advocating for sex workers' rights such as the Prostitute Empowerment Education and Resource Society (PEERS), the B.C Coalition of Experiential Women, and the Canadian Guild for Exotic Labour and Sex Professionals of Canada. These groups all aim to confer legitimacy on the sex trade. For example, according to the mission and principles listed on Sex Professionals of Canada (SPOC)'s website: "SPOC operates on the principle that all forms of consensual adult sex work are legitimate and valid. We provide a public voice that promotes the validity of our occupation. We assert that one's decision to be a sex worker is equally and unequivocally as valid of a choice as is the decision to be in any other legal occupation" (<http://spoc.ca/index.html>).

In line with proponents of the emancipation paradigm, the applicants view sex work as legitimate entrepreneurship. Accordingly, the applicants emphasize the business aspects of sex work and the need to ensure that practitioners are able to operate under safe working conditions:

The act of prostitution *per se* has always been a legal activity under the *Criminal Code* but the *Code* prohibits many other activities accompanying or associated with this lawful business. In a nutshell, this case is based on the proposition that sex trade activities prohibited by the *Criminal Code* prevent or prohibit sex trade workers from conducting their lawful business in a safe environment. (Applicants Memorandum of Fact and Law: 2)

From this perspective, sex work is both legitimate and legal employment yet the law prevents practitioners from taking necessary safety precautions. The applicants refute constructions of sex workers as victims. For example, the applicants note that "Professor [Deborah] Brock stresses that the all-encompassing view of the 'prostitute-as-victim' is wrong" (66) and that, according to Brock, "a more realistic view of the sex industry is not of a homogeneous monolith, but as a complex sector where activities, work patterns, income and risk vary widely" (67). Citing Deborah Brock, the applicants argue that sex work can be an edifying and lucrative vocational

choice for many who engage in it: “women often enter the sex trade after determining that it is a better option compared to other opportunities, such as unskilled labour. The process by which women get into sex work is ‘not so different a process from the way in which working-class women find working-class jobs, generally’” (Ibid). As noted by Weitzer (2009*b*), proponents of the emancipation paradigm generally highlight the routine aspects of sex work, aligning it with “kindred types of service work” (215).

For the applicants, indoor sex work is safer than working on-street because those working indoors are able to employ safety measures that are not available to those working in outdoor settings. Moreover, for the applicants, a fundamental distinction must be drawn between indoor and outdoor sex work. Invoking the “legal trump card” of common sense (Beaman 2008: 95), the applicants assert that “the proposition that street prostitution is far more dangerous than indoor prostitution being conducted with the assistance of third parties is primarily a matter of common sense and simple inference” (Applicants’ Memorandum and Fact of Law: 7). While all women working on-street are more vulnerable to violence than indoor sex workers, this threat is increased for Aboriginal women working on-street: “Darlene Maurga Mooney, former sex-trade worker and Aboriginal Youth Case Worker, noted that the violence against street workers is heightened with respect to Aboriginal sex workers” (27) because of “the combined social marginalization, racism and sexism experienced by Aboriginal women” (38). According to the applicants’ account, while there is always the potential for violence indoors, sex workers are able to employ a host of security measures to reduce this threat and deal with violence should it occur. However, operating independently is not an option for many women engaged in sex work. For example, Amy Lebovich “remains aware that ‘the possibility of working indoors is a privilege’ and that ‘this is not a luxury that others enjoy’” (16). And Darlene Mooney “acknowledges that

‘as a sex worker, it is a privilege to be able to work indoors’ due to the high costs that may arise when advertising and renting space” (37). As a result, the relative safety of working indoors currently depends on management:

In cross-examination, Ms. Bedford conceded that dangers can arise in indoor locations as the safety of a given venue depends on how it is being run and the safety measures put in place to protect workers. (Applicants Memorandum of Fact and Law: 14)

After leaving the street, the Applicant [Amy Lebovitch] began working for an escort service. She admits that outcalls “still carry with them the potential for danger” and that she experienced “reduced safety” due to poor management of the particular escort service. (Applicants Memorandum of Fact and Law: 15)

It is noteworthy that for the applicants the potential for violence in indoor settings is a concession rather than an assertion. As noted by Weitzer (2009*b*), proponents of the empowerment paradigm “tend to highlight success stories to demonstrate that sex work can be edifying, lucrative, or esteem-enhancing” (215). From this perspective, the current legal regime is the basis for the harms associated with working in the sex trade.

According to the applicants’ account, the law forces sex workers to operate in the most dangerous venue for sex work. For the applicants, the current legal regime perpetuates violence against street workers by forcing those working indoor venues onto the street where they are subject to increased violence. Citing John Lowman’s research, the applicants assert that “criminal law plays a causal role in violence against prostitutes by creating conditions in which violence can flourish” (Applicants Memorandum of Fact and Law: 75). Moreover, “by preventing sex workers from organizing safe work conditions, [the law] plays a decisive role in creating opportunities for violence against prostitutes to occur” (Ibid). Noting “that the ‘criminal law materially contributes to the violence against prostitutes’ along with other causal factors such as poverty, drug addiction and lack of education” John Lowman deposes that the

“governing legal regime ‘materially contributes’ to the victimization of sex trade workers” in three ways:

- 1) the *Criminal Code* provisions force survival sex workers outside and into vulnerable areas, such as isolated streets and industrial areas;
- 2) street-involved prostitution is more violent than working in off-street venues; and
- 3) in spite of this increased vulnerability, prostitutes do not benefit from the same level of protection and response from police authorities, especially when compared to other citizens. (74-5)

Similarly, Wendy Harris explains that “a great deal of the harm that is perpetrated against women in the sex trade industry is a result of the laws which [promote working on the street]...I have heard numerous stories where women, out of fear of prosecution have moved out of their homes and onto the streets only to be viciously attacked” (as cited in Applicants Memorandum of Fact and Law: 30). And Dr. Leyton argues that “we must cease our practice of forcing [sex workers] out on the streets, where they are subject to the tender mercies of pimps and passing psychopaths” (as cited in Applicants Memorandum of Fact and Law: 29).

Indeed, psychopaths such as serial killers are a serious threat to sex workers and the current legal environment contributes to this danger. Citing Statistics Canada, the applicants assert that the sex trade is an “occupation at risk”: “In recent years Statistics Canada, in its annual Juristat report *Homicide in Canada*, has characterized the ‘sex trade as an occupation at risk’” (Applicants Memorandum of Fact and Law: 20). Further, with regard to official statistics on the rate at which sex workers are murdered, “whatever the precise numbers may be, it is important to note the high prevalence of violence against sex trade workers had been well-documented many years prior to statistics Canada’s decision to characterize the sex trade as an ‘occupation at risk’” (21). Moreover, the applicants note that “Professor Augustine Brannigan submitted a report to the Department of Justice in 1994” (22) and that “it is clear from this report

that risk of violence at the hands of serial killers extends beyond Robert Pickton [sic] and Lower-East side Vancouver, and it is clear that the government was aware of the problem” (23). Indeed, although, “Jody Patterson of PEERS (Prostitution Empowerment, Education and Resource Society) deposed that ‘it is naïve to blame all of the violence on a single serial killer...because violence is systematic in outdoor prostitution” (25) and “Oscar Ramos of the Vancouver Police Department testified that the problem of vulnerability to predators had not subsided since the arrest of Robert Pickton [sic]” (26), a great deal of the applicants’ argument concerning violence in the outdoor sex trade centers on the danger of the serial killer. As noted by the applicants:

Since the late nineteenth-century, starting with the horrors of Jack the Ripper disemboweling street prostitutes with surgical precision, we have seen a repeating array of similar killers targeting street prostitutes: Gary Ridgway (Green River Killer—48 victims, early 1980’s); Peter Sutcliffe (the Yorkshire Ripper—13 victims—late 1970s); Arthur Shawcross (Genesee River Killer—10 victims, late 1980’s) and Joel Rifkin (New York City—9 victims, early 1990’s). (29)

For the applicants, a large proportion of sex worker homicides are at the hands of serial killers: “Dr. Leyton suspects that prostitutes make up close to half of all serial killer victims. However, on cross-examination, he conceded that there is no hard data on this point” (Ibid). This discourse of serial killer as *prima facie* risk of harm to sex workers invokes a highly moralistic image of the Canadian sex trade. Analyzing news media coverage of the missing and murdered women in Vancouver’s Downtown Eastside and the subsequent arrest of serial killer Robert Picton for their murders in the *Vancouver Sun* from 2001-2006, Yasmin Jiwani and Mary Lynn Young (2006) find that these accounts reproduce stereotypical discourses surrounding femininity, monogamy and Aboriginality. Moreover, for Jiwani and Young, these accounts invoke dominant societal constructions of hypersexual, racialized, deviant sexuality, constructing narratives in which “race, class, and sexuality intersect and interlock to sustain hegemonic power” (900). Similarly, writing on the social construction of serial murder, Philip Jenkins (2001) argues that narratives of

“sex killers” or “rippers” tend to advance cultural messages concerning “matters of race, gender and sexual orientation” (2). Moreover, noting that “serial murder accounts for no more than (perhaps) two percent of homicides in any given society” (1), Jenkins argues that cases involving “rippers” garner “a massively disproportionate amount of attention from both media and law enforcement” (1) because these narratives provide cultural and moral messages that tales of other forms of homicide do not (10). By focusing on middle-aged white men preying on street-level prostitutes, “sex killer” narratives employ discourses of white male violence against women and reproduce discourses of hegemonic heterosexuality and proper feminine conduct (17-18).

According to the applicants, sex workers are often victims in homicides because of the nature of on-street sex work and the legal regime in which they operate: “Dr. Leyton believes prostitutes represent society’s invisible, overlooked victims...compared to the average person, street working sex workers represent easy targets for serial predators because of their accessibility; it is much more difficult for a stranger to lure the average person into their car, whereas street workers enter strange vehicles as part of their work and because of the ‘societal failure to provide adequate protections’” (Applicants Memorandum of Fact and Law: 28). This failure to provide adequate protections stems from the legally endorsed social stigma associated with sex work.

For the applicants, the law poses a risk of harm to sex workers because the legally endorsed social stigma associated with this vocation dehumanizes them: “criminalization of sex work...leads to a high degree of stigma, dehumanizing sex workers in the eyes of johns, police and the wider public—turning them from women into ‘disposable people.’ [And] this dehumanization enables violence and predation, while simultaneously reducing public concern and empathy” (60). Dan Gardiner, a journalist who has reported extensively on the dangers of

the sex trade in Canada, explains that the stigma created by the law reduces public concern for the plight of sex workers:

Mr. Gardiner's experiences also show the power of stigma of criminalization on sex workers. By being labelled criminals, sex workers are denied access to employment in other industries, and are often forced to continue to work the streets in a fundamentally unsafe environment. Stigma also denies sex workers concern and compassion from the public notwithstanding the terrible conditions they are often forced to work in. Mr. Gardiner has been particularly struck by the lack of reaction from his readers to his pieces on prostitution, leading him to believe that members of the public simply do not believe that sex workers merit concern when they are murdered. (51)

And Professor John Lowman "deposes that his research has led to the conclusion that the *Criminal Code* provisions actually contribute to legal structures which propagate the belief that a prostitute is responsible for her own victimization, and thus reinforces the line of 'they deserve what they get'" (75). This legally endorsed stigma compounds the dangers posed by serial killers:

According to Dr. Leyton, the targeting of prostitutes by serial killers is compounded by the fact that society routinely overlooks and minimizes their personhood. Of the infamous abduction and murder of street workers in Vancouver's East end in the 1990's, the witness remarks, "nobody [in the police force] wanted to know: it was only the worthless ones disappearing, so nothing need be done, and the killings continued for years". Dr. Leyton similarly recounts police inaction surrounding the murder of dozens of prostitutes in Coquitlam, BC—their remains left on a pig farm. To Dr. Leyton, such ambivalence suggests "some lives are more sacred than others." (29)

Further, when sex workers are the victims of homicide these cases have a much lower clearance rate (the official measure of how many crimes have been solved by police) than other homicides: "there is a 46% clearance rate for resolving cases against sex workers, whereas there is an 80% clearance rate for all other victims" (24). Indeed, the social stigma associated with sex trade involvement leads to police indifference toward the victimization of sex workers. As noted by the applicants, "virtually all witnesses called by the Applicant, both experiential and expert, testified as to the high level of distrust between sex workers and police officers and the

perception or belief that some police officers are indifferent to the violence experienced by sex workers, and in some cases the police are the perpetrators of violence” (24-5). Wendy Babcock “identifies abuse and neglect by police officials toward prostitute as a major problem contributing to the victimization of sex workers” (32), and Linda Shaikh “recounts being forced to perform sexual acts on officers” upon police detention (31). Further, the current laws prevent sex workers from reporting incidents of violence against them. According to Valerie Scott “even when bad dates are reported and sex crimes unit knows who the assailant is, women are still terrified to come forward due to possible repercussions against them and the inability for the government to protect their safety...the law in effect deters sex workers from reporting the violence” (as cited in Applicants Memorandum of Fact and Law: 19-20).

While the applicants claim to challenge constructions of the sex trade as a monolithic entity, their account focuses on gendered legal discrimination, thus legitimizing dominant discourses surrounding heterosexuality and femininity. As noted by Scoular (2004), accounts that challenge “objections to prostitution as degrading women by asserting its role in promoting sexual expression and economic freedom for women” (348) tend to fall into the trap of casting deviant sexuality as normative, thus reproducing heteronormative discourses (347). This approach “ignores the role of law and material structures in producing, as well as constraining, sexual preferences and acts (Ibid). The applicants’ reliance on the dangers posed by “psychopaths” such as serial killers in their construction of the “risk of harm” facing Canadian sex workers exemplifies the extent to which normative discourses surrounding heterosexuality and femininity pervaded their arguments in this case. As mentioned, serial killer narratives tend to advance cultural and moral discourses regarding, race, sexuality and sexual orientation (Jenkins 2001: 2; Jiwani & Young 2006: 900).



### *The AG Canada's Account*

In line with proponents of the oppression paradigm, the Attorney General of Canada presents an account of the sex trade as a monolithic, characteristically dangerous enterprise. Noting that “the Applicants’ argument is based upon the false premise that there is a constitutional right to engage in prostitution, which there is not” (96), the AG Canada explains that “the risks and harms flowing from prostitution are inherent to the nature of the activity itself. The risks and harms exist regardless of the many ways in which prostitution is practiced, whether “*street*” or “*off-street*”, and regardless of the legal regime in place [original emphasis]” (Factum of the Respondent, the Attorney General of Canada: 1). Moreover, for the AG Canada, “the criminal prohibitions relating to prostitution...do not preclude access to some kind of ‘*safe*’ haven for prostitution, as there is no such thing [original emphasis]” (103). As noted by Weitzer (2009b), “the most prominent exponents of [the oppression paradigm] go further...claiming that exploitation, subjugation and violence against women are intrinsic to and ineradicable from sex work, transcending historical time period, national context, and type of sexual commerce” (214). For the AG Canada, prostitution involves an inherent “risk of harm” due to the medical dangers associated with sex trade involvement.

According to the AG Canada, psychological harm, such as post-traumatic stress disorder (PTSD), and cervical cancer are major risks of harm for prostitutes. Citing Melissa Farley, the AG Canada explains that the prevalence PTSD in prostitutes is evidence that the sex trade is inherently dangerous: “Experts have reported that prostitution involves an inherent risk of harm, even if violence is never realized. This is due to the physical and psychological harms that result from prostitution. Studies show that women engaged in prostitution suffer from high rates of both dissociation and post-traumatic stress disorder” (Factum of the Intervener, the Attorney

General of Canada: 19). Further, prostitutes are seldom aware of the psychological damage incurred as a result of their participation in the sex trade until after they exit: “they [former prostitutes] have stated that they only become aware of the damage that has occurred as a result of the repetitive use of their bodies for paid sex once they have left prostitution” (20). Indeed, promiscuity is the cause of many of the harms faced by prostitutes. The AG Canada argues that, in addition to the fact that “the lifestyle of a prostitute often involves little sleep, poor nutrition, drug addiction, frequent unprotected sex and abusive relationships which can lead to many health problems, including injury, infection, HIV and other sexually transmitted diseases” cervical cancer is a major hazard for prostitutes: “prostitutes are also subject to higher rates of cervical cancer, with two risk factors being the younger age at which they engage in sexual activity and the high number of sexual partners” (24). These risks of harm are compounded by the dangers posed by pimps and organized crime syndicates who traffic women and children.

Refuting the applicants’ assertions that the sex trade is comprised of different venues with varying levels of relative safety, the AG Canada explains that the sex trade is a monolithic entity. For the AG Canada, the distinction between indoor and outdoor prostitution is a myth: “One of the myths about prostitution is that there is a sharp divide between street prostitution and off-street prostitution. In reality, prostitution can be practiced in a wide variety of venues, and there is fluidity between them” (12). This fluidity between prostitution venues “has been compounded by the advent of cell phones and the internet” (16), creating an environment where “in some situations, prostitutes will work the streets, while carrying a cell phone to take calls from escort agencies, thus working both street and off-street simultaneously” (15). Interestingly, while the AG Canada holds that the distinction between indoor and outdoor prostitution is a myth, he offers a more detailed typology of prostitution than any other interest party. Based on

evidence submitted by expert witnesses and police, the AG Canada explains that street prostitution constitutes roughly 10-20 percent of all prostitution and occurs on various “strolls”:

[T]he high track , where prostitutes who are generally Caucasian, clean, and not drug addicted offer a higher-priced menu and generally have pimps; the low track, where drug-addicted prostitutes provide services for \$10-\$20 or a piece of crack cocaine; the trannie stroll (for transvestites); the kiddie stroll (for under-age prostitutes); and boystown (for those, generally men, seeking male prostitutes). (13-14)

However, circumstance may lead prostitutes to move from one stroll to another: “a so-called ‘street’ prostitute may move from the high track to the low track as she descends into drug addiction or loses her attractiveness [original emphasis]” (14). There are also myriad types of indoor prostitutes:

[T]hose working for escort agencies on an “*in-call*” basis (services provided on site) or an “*out-call*” basis (service provided in location provided by the john); specialized prostitution practices catering to specific preferences, such as sado-masochism and bondage; women trafficked from other countries into indoor venues, where they can be more easily hidden than on the street; and similarly, under-age prostitutes are sometimes found indoors, where it is harder for the police to find them. (14)

For the AG Canada, this fluidity between venues is largely due to pimps who move their prostitutes between venues in order to maintain control over them and keep them isolated from social supports (Ibid).

According to the AG Canada, the majority of women working in the sex trade have pimps who use abuse and manipulation to force these women to engage in prostitution. For the AG Canada, “up to 50% of prostitutes could have pimps” (22) who employ a host of manipulation strategies to lure young women into a life of prostitution:

Expert, police and experiential evidence indicates that prostitutes become emotionally and financially dependent on their pimp and will gradually give in to their requests to engage in prostitution to show their “*love*” and commitment to the pimp. Pimps often provide drugs, creating a drug addiction which makes the prostitute even more dependent on them and creates the need to make money through prostitution to buy drugs for herself and her ‘*boyfriend*’....In addition to psychological control, physical violence is also used by some pimps as a method to control prostitutes and prevent them from leaving

prostitution or going to work for another pimp. For example, the Hell's Angels in Quebec use gang rape as a technique to break down a woman, strip her of any sense of self-worth, in order to manipulate and control her. (23-4)

However, pimps need not always be human. As the AG Canada explains, sometimes drugs operate as a pimp: “On the low track, prostitutes are usually drug addicted and it is the drug (or the drug dealer) that is the ‘pimp’ or the coercive force which motivates a prostitute to continue to sell sexual services for money or drugs. Crack cocaine is particularly addictive and provides only a short high—creating “*prostitutes for whom crack is the pimp* [original emphasis]” (14).

For the AG Canada, the harms stemming from connections between indoor prostitution, organized crime, drugs and sex trafficking are significant risks of harm faced by Canadian prostitutes. As noted by the AG Canada, “experts and police testified that organized crime is involved in prostitution. It is involved in the procuring of women, as well as the trafficking of women and children for prostitution, often in tandem with other criminal activity such as drug trafficking, automobile theft, and trafficking in illegal weapons” (18). For the AG Canada, “the keeping of common bawdy houses is an integral part of human trafficking syndicates, as this is where victims may be ‘*trained*’ and housed, and then transported elsewhere for the purpose of sexual exploitation [original emphasis]” (25). Moreover, “police report being called to investigate residential brothels where women brought from Asia or under-age girls were working as prostitutes” (25). Constructing the “risk of harm” faced by Canadian prostitutes using sex trafficking discourses adds yet another morally charged component to the debate in *Bedford v. Canada*. As mentioned, scholars have noted an emergent tendency for researchers to conflate prostitution and sex trafficking (Weitzer 2007; Hubbard et al. 2008: 139; Farrell & Fahy 2009: 621; Weitzer 2009a: 88; Scoular 2010: 16; Weitzer 2010: 70). According to Weitzer (2007), this tendency is the product of an institutionalized moral crusade. Moreover, analyzing the

construction of sex trafficking by leading activists and organizations in the United States, Weitzer argues that “the degree to which current claims recapitulate arguments made a century ago regarding ‘white slavery,’ a problem that was largely mythical” is striking (467). Like the issues with the applicants’ constructions of the dangers posed by serial killers, the AG Canada’s construction of the “risk of harm” posed by sex traffickers invokes moral discourses regarding race, class and sexuality. Scholars have noted a tendency for sex trafficking discourses to be couched in the language of border control (see, for example, Schaeffer-Grabel 2010; Ticktin 2008; Sethi 2007). As noted by Anupriya Sethi (2007), Canadian sex trafficking discourses tend to focus on border control, conflating human trafficking and prostitution and omitting the experiences of Aboriginal women who are domestically trafficked for the purpose of sexual exploitation:

Human trafficking has received growing attention in recent years, both in Canada and worldwide, especially, in the wake of increased focus on nation State’s security and tightening of borders. The discourses on sex trafficking of women and girls in Canada continue to highlight international trafficking thus positioning Canada more as a transit and destination country than an origin country. [As a result] domestic trafficking has not received the attention it deserves. Instead of being contextualized in a trafficking framework, sexual exploitation of Aboriginal girls is portrayed and understood as a problem of prostitution or sex work. (57)

As such, domestic trafficking of Aboriginal women and girls is not acknowledged and “Aboriginal peoples are stereotyped as ‘willing’ to take up sex work” (61). For Sethi, this is particularly problematic given that Aboriginal women and girls comprise 60% of the sex trade in some regions in Canada (59). Conducting interviews with 18 individuals from “NGOs, women’s organizations and other community-based groups or individuals dealing with the issue of sexual exploitation in Canada”, some of whom had been victims of domestic sex trafficking themselves, Sethi finds that the experiences of Aboriginal women who are trafficked domestically for the purpose of sexual exploitation differ from those of other sex trafficking victims. Specifically, the

domestic trafficking of Aboriginal women in Canada is often familial-based trafficking (women and girls are trafficked by family members) linked to poverty and the intergenerational effects of colonization and residential schools (59). Moreover, in contrast to the AG Canada's account, drawing connections between organized crime syndicates and sex trafficking, it could be that the "risks of harm" associated with sex trafficking in Canada originate in the homes of victims. Yet, the experiences of victims of domestic sex trafficking and/or Aboriginal women involved in the sex trade are not mentioned in the AG Canada's submission to the court in the *Bedford* case.

### ***The AG Ontario's Account***

The AG Ontario concurs with the AG Canada and proponents of the oppression paradigm, arguing that prostitution is an inherently dangerous enterprise and that the "risks of harm" facing Canadian prostitutes are linked to medicalized risk as well as the dangers posed by sex traffickers and pimps. Yet, as will be discussed, in contrast to the AG Canada's assertion that all forms of prostitution carry the same "risk of harm", for the AG Ontario outdoor prostitution is safer than indoor prostitution. In addition to presenting some of the applicants' testimony under cross-examination, the AG Ontario provides the court with affidavits from current and former prostitutes, police officers, social workers and concerned advocates. The AG Ontario's experiential witnesses have all been involved with Streetlight. Although Streetlight's website does not offer a description of the organization, according to the Prostitution Education & Research website (<http://www.prostitutionresearch.com/services/toronto/>), Streetlight is "a community based, non-profit organization, created to provide alternatives for individuals involved in Sex Trade activities". In addition to being involved with Streetlight, all but one of the AG Ontario's experiential witnesses are either in the process of completing or have completed

the *Assaulted Women's and Children's Counsellor and Advocacy* program at George Brown College. Accordingly, these witnesses argue that “the idea of normalizing prostitution by making it ‘work’ is insulting” to many women who have or continue to sell sex (D.S. as cited in *Factum of the Intervener, Attorney General of Ontario*: 34).

Echoing the AG Canada's assertions, the AG Ontario holds that the sex trade is an inherently a harmful enterprise:

[P]rostitution involves the use of a person's body, most often that of a woman, by another person, most often a man, for his own sexual satisfaction. Prostitution is not a mutually pleasurable exchange of the use of bodies but the unilateral use of one person's body by another in exchange for consideration, usually money....The ability of the prostitute to effect any control in that relationship is related to her own social and economic power *vis-à-vis* the customer. (*Factum of the Intervener, Attorney General of Ontario*: 2)

For the AG Ontario, “the physical and psychological harms experienced by prostitutes stem from the inherent inequality that characterizes the prostitute-customer relationship” (*Ibid*). Yet, the AG Ontario goes even further, citing dangers to the public in his constructions of the “risk of harm” associated with prostitution: “Members of Canadian communities forced to witness prostitution also experience harms” (4).

In line with the AG Canada, the AG Ontario argues that prostitution carries a significant “risk of harm” due to medical dangers associated with sex trade involvement. In addition to noting that two thirds of prostitutes meet diagnostic criteria for PTSD (63), the AG Ontario argues that cervical cancer and hepatitis are significant risk factors for prostitutes: “Prostituted women have an increased risk of cervical cancer and also chronic hepatitis” (72). Like the applicants and the AG Canada, the AG Ontario constructs the Canadian sex trade in gendered terms, reproducing heteronormative discourses.

The AG Ontario holds that all forms of commercialized prostitution are inherently dangerous and must be prohibited. The AG Ontario explains that, as reflected in the laws, non-

commercialized prostitution presents a safer alternative to commercialized venues: “The combined operation of the provisions does not extend to the private practice of prostitution in circumstances where the prostitute is arguably at less risk of exploitation by pimps and managers. One level of exploitation is removed from the practice” (3). Moreover, even if there is a difference between indoor and outdoor prostitution it is a moot point because all commercialized prostitution is extremely dangerous:

Based on what is known to date, there may be different types of risks of harm or different rates of risk of harm arising from “indoor” prostitution as distinct from “street” prostitution; however, in all types of commercialized venues prostitutes face significant danger. Commercial institutional prostitution is associated with harms to those who are prostituted and to those who purchase sex. Members of Canadian communities forced to witness public prostitution also experience harms. (4)

Interestingly, while for the AG Ontario all forms of commercialized prostitution are extremely dangerous, working outdoors is safer than working indoors because indoor prostitution is more clandestine and it is connected to organized crime and sex trafficking. For example, H.C., explains that “working indoors is not safer, and in some ways can even be more dangerous” (47) because “underage girls can be hidden indoors” (45) and “women working indoors are robbed of the safety and witnesses that come from walking the streets” (as cited in Factum of the Intervener, the Attorney General of Ontario: 47). According to H.C., legalizing bawdy houses will lead to an increase in violence against prostitutes: “women working indoors will be even more hidden, police will not be able to go in and check out what is happening, and the chances of ‘getting out’ will decrease” (Ibid). In addition to feeling “a sense of independence on the street” because “on the street she could make more money while providing fewer sexual services”, Natasha Falle “felt it was *safer* ‘since we went mainly to hotels and rarely to someone’s house’ [original emphasis]” (Factum of the Intervener, the Attorney General of Ontario: 27). As noted by the AG Ontario, “numerous affiants gave evidence that street solicitation is sometimes



preferred to bawdy house or brothel work due to safety concerns about brothels” (54). In contrast to the applicants presentation of Terri-Jean Bedford’s experience running an escort agency, which focuses on how she “used a variety of safety measures to protect herself and her employees” (13) but was charged and convicted “with ‘being a keeper’ of a common bawdy house” following “a ‘humiliating’ and violent police raid” (Applicants Memorandum of Fact and Law: 14), the AG Ontario’s account describes links to organized crime and drugs:

When she was 24, she started up her own escort agency in Windsor which employed 19 women. Ms. Bedford fired one woman who was associated with the Outlaws biker gang, and organized crime gang. Ms. Bedford testified that the woman she fired has seen how much money Bedford was making with the escort service, the only one in Windsor at the time. Ms. Bedford was visited by two members of the Outlaws gang who took her for a ride in their car, offering to buy her escort business. “And I said, ‘It’s not for sale,’ and they go, ‘Well, we have ways of getting what we want.’” Ms. Bedford testified that the Outlaws “wanted the money [from prostitution], and if I wasn’t able to co-operate, then they would take me down.” Ms. Bedford attributes her failure to co-operate with the Outlaws for the complaint later made to Windsor police by the woman she had fired. Ms. Bedford’s escort agency was raided by police and shut down and she was charged with procuring, exercising control and keeping a common bawdy house. Terri Bedford was addicted to crack at this time. (Factum of the Intervener, the Attorney General of Ontario: 8-9)

For the AG Ontario, drugs are an integral part of the indoor sex trade. When H.C. began working for an escort agency, she “began to drink heavily and use cocaine, like everyone around her” because “drugs were readily available and ‘it was something to look forward to’” (44-5) and “escort work exposed Ms. Falle to cocaine and other drugs” because “escort drivers sold cocaine and guns to the prostitutes they drove” (28).

Also in line with the AG Canada, the AG Ontario contends that abuse and manipulation at the hands of pimps are features of the sex trade, both indoors and outdoors. According to the AG Ontario, most prostitutes “are extremely susceptible to manipulation and pressure by persons desiring to exploit the labour of the prostitutes, whether this be an abusive and controlling pimp or the ostensibly benign brothel or agency owner, who may even be female” (94). Experiential

witness accounts presented by the AG Ontario emphasize the role of the pimp in the sex trade.

Natasha Falle “met and fell in love with a pimp whom she later married at age 23. She thought things would be better with a pimp for protection, but found ‘he had other girls behind my back.’ When Ms. Falle confronted her pimp-husband about this, he whipped her with a cable cord. She testified, ‘There were many beatings after that’” (27). When T.D. became a prostitute at age 15 it was because of a pimp:

T.D. ran away from the group home [where she was residing] with her roommate and started working as a prostitute at age 15. Within a few days, T.D. met an older American man in an arcade. He took her to his motel room. This man became her pimp for 14 years. T.D.’s pimp also acted as a boyfriend and father figure, but she knew he was a pimp. He lived off her work as a prostitute for 14 years. He had other women working for him at times as prostitutes, but none of them stayed. T.D. was his “main girl.” He had been selling drugs when T.D. met him, but he gave this up when he started living off T.D.’s prostitution. (Factum of the Intervener, the Attorney General of Ontario: 40-41)

T.D.’s pimp was also abusive and controlling. He “did not allow her to use birth control when they had sex, although she used condoms with customers. She had five pregnancies, 2 abortions and a miscarriage. T.D.’s pimp forced her to give up three of their children for adoption when each was born” (41). When T.D. finally managed to leave her pimp because “she became pregnant for a fourth time” and she “could not bear the possibility of losing another child” she went to live with her mother and stayed out of prostitution (Ibid). However, T.D. “moved back to Toronto” when her son was two years old and “her pimp immediately came to visit and got her back into prostitution for a few months. This continued periodically until her son was 5” (42). Pimps also contribute to the sex trafficking characteristic of the sex trade: “T.D. was moved from city to city and in and out of every province in Canada by her pimp in order to control her and isolate her from friends and family. ‘He also moved me because it is good for business to be the fresh, new face on the street.’ T.D. was also taken by her pimp to the United States, where they moved around for 6 ½ years” (41). And, in line with the AG Canada’s assertion that pimps

contribute to the fluidity between venues, Natasha Falle's pimp "wanted her to work indoor locations, 'since that way he could keep track of me more easily'" (27). While, in contrast to the AG Canada's account, the AG Ontario draws attention to domestic sex trafficking, like the AG Canada, he omits the experiences of Aboriginal women whom researchers suspect comprise the majority of domestic trafficking victims in Canada due to increased vulnerability stemming from a host of social inequalities (Sethi 2007; Baldo 2010). Moreover, through silencing the accounts of Aboriginal victims of domestic sex trafficking, like the AG Canada, the AG Ontario reproduces discourses of border control and the "white slave trade".

### ***The CLF and Colleagues' Account***

Like the Attorneys General of Canada and Ontario, the CLF et al. employ the oppression paradigm to construct the situation currently facing Canadian sex workers. According to the CLF and colleagues, "prostitution victimizes anyone who engages in it" and "it perpetuates a fundamentally offensive and abusive gender imbalance" (Factum of the CLF et al.: 2). The CLF and colleagues rely on the submissions of expert and experiential witnesses proffered by the Attorneys General of Canada and Ontario to demonstrate that prostitution is harmful to those who engage in it as well as society at large. Moreover, in line with the AG Ontario, the CLF et al. go even further than the AG Canada, citing dangers to the public in their construction of the risks of harm associated with sex work in Canada. According to the CLF and colleagues, in addition to the harms prostitution poses to the women involved in the sex trade, such as physical and psychological exploitation and Post-Traumatic Stress Disorder (12), "prostitution destigmatizes and may even encourage the rape, sexual assault or sexual harassment of women who partake in prostitution and, indeed, women in general" (11). Further, the existence of

prostitution encourages views that women are slaves: “prostitution offends the dignity of all women in society by creating a culture of sexual commodification wherein women are objectified as mere bodies that may be bought, sold, or traded” (12). As noted by Weitzer (2009b), proponents of the oppression paradigm tend to use slavery discourses when constructing the sex trade (214).

Like the applicants, the Attorneys General of Canada and Ontario and the CLF et al. construct an inherently moralistic and patriarchal image of the Canadian sex trade. For these interested parties, the sex trade is the epitome of male domination. As noted by Scoular (2004), such accounts are “frequently achieved at the expense of a recognition of women’s agency and the complexities and contradictions inherent in analyzing selling sex across space and time, without regard for the structuring roles of culture, class and race” (345). Indeed, racial oppression was largely absent from the debate in this case. While the Attorneys General of Canada and Ontario focus on social inequalities in their constructions of the Canadian sex trade, these issues are attributed to sexism, omitting the racist and colonial policies affecting Aboriginal prostitutes. Researchers focusing on the experiences of Aboriginal women in the Canadian sex trade note that many of these women are involved in the sex trade due to sexual exploitation and that poverty and racism significantly shape their experiences (Sethi 2007; Baldo 2010). Yet, in spite of their reliance on sex trafficking discourses to construct the “risk of harm” facing Canadian prostitutes, these factors are absent from the accounts provided by the Attorneys General of Canada and Ontario and the CLF et al. Given that Aboriginal women are overrepresented in the Canadian sex trade (SSLR 2006: 12; Sethi 2007: 59; Baldo 2010: 11), one would expect their experiences to be at the forefront of the current debate. However, this is not the case in *Bedford v. Canada*. Similarly, especially given interested parties’ focus on street

prostitution, one could reasonably expect that the experiences of male, transvestite and transgendered sex workers would enter the current debate over Canada's prostitution laws. According to the Subcommittee on Solicitation Law Reform (SSLR), male, transgendered and transvestite prostitutes make up approximately 20% of Canada's street-level sex trade (2006: 14). But, like the experiences of Aboriginal women, these accounts are largely absent from the *Bedford* case.

### ***Justice Himel's Account***

Couched in legal fictions presenting the law as a neutral, objective producer of "truth", Himel renders a highly moralistic decision, constructing the Canadian sex trade using gendered, heteronormative discourses. It is noteworthy that Himel's perspective is constrained by the evidence tendered by interested parties in this case. Moreover, Himel is charged with rendering a decision based on the arguments before her and is unable to bring new elements into the debate. However, Himel's recourse to positivist myths regarding law's application conceals the moral basis of the arguments informing her decision as well as the subjective nature of her choice to focus on some aspects of the debate and omit others from her decision making process.

In order to fulfill her role as evidentiary gatekeeper, Himel weighs the evidence presented by the parties, deciding to assign less weight to the evidence presented by expert witnesses whom, in her view, had entered the realm of advocacy. Himel explains that she was struck by the fact that some expert witnesses "had entered the realm of advocacy and had given evidence in a manner that was designed to persuade rather than assist the court" and that "while it is natural for persons immersed in a field of study to begin to take positions as a result of their research over time, where these witnesses act primarily as advocates, their opinions are of lesser value to the

court” (*Bedford v. Canada* 2010: 46). Accordingly, Himel assigns less weight to the evidence tendered by three of the respondents’ expert witnesses, Dr. Melissa Farley, Dr. Janice Raymond and Dr. Richard Poulin, and one of the applicants’ expert witnesses, Dr. John Lowman (92-3). Himel assigns less weight to Farley’s evidence because “although Dr. Farley has conducted a great deal of research on prostitution, her advocacy appears to have permeated her opinions” (92). According to Himel, “Farley’s choice of language is at times inflammatory and detracts from her conclusions” (Ibid). And during cross-examination Farley conceded that some of her opinions, “including ‘that prostitution is a terrible harm to women, that prostitution is abusive in its very nature, and that prostitution amounts to men paying a woman for the right to rape her’” were formed prior to her research on the sex trade (92-3). Similarly, Himel assigns less weight to the evidence proffered by Raymond and Poulin because they had entered the realm of advocacy:

I find that Drs. Raymond and Poulin were more like advocates than experts offering independent opinions to the court. At times, they made bold, sweeping statements that were not reflected in their research. For example, some of Dr. Raymond’s statements on prostitution were based on her research on trafficked women...[And] in his affidavit Dr. Poulin suggested that there have been instances of serial killers targeting prostitutes who worked at indoor locations; however, his sources do not appear to support his assertion. I found it troubling that Dr. Poulin stated during cross-examination that it is not important for scholars to present information that contradicts their own findings (or findings which they support). (93)

Noting that “the applicants’ witnesses are not immune to criticism,” Himel explains her reluctance to assign full weight to Lowman’s evidence because he “made a direct causal link between the *Criminal Code* provisions at issue and violence against prostitutes” in his affidavit (Ibid). Yet, “During cross-examination, Dr. Lowman expressed discontent with portions of his affidavit, citing ‘careless’ language and ‘poorly reasoned argument’ [and] he rightly takes responsibility for the content of his affidavit, which was drafted for him by law students” (Ibid). Himel further explains that while “such inattentiveness on such a crucial issue is indeed

concerning, [d]uring cross examination, Dr. Lowman gave nuanced and qualified opinions, which more accurately reflect his research” (Ibid). Rather than being based on objective measurements, Himel’s assessments of the evidence proffered by these expert witnesses is highly subjective. Further, given party selection of experts and the adversarial nature of the proceedings, it should not be surprising that expert witnesses offered partisan accounts in the *Bedford* case.

Having decided to assign less weight to the evidence presented by Farley, Raymond, Poulin and Lowman, Himel omits factors such as sex trafficking and the dangers posed by serial killers from her decision. According to Himel, while these are important issues, they have no bearing on the case at hand: “the evidence from some of [the international expert witnesses] tended to focus upon issues that are, in my view, incidental to the case at bar, including human trafficking, sex tourism, and child prostitution” (46). And, although Himel notes that Statistics Canada finds that prostitutes “are at a heightened risk of violence and homicide due to their profession” (77), the issue of serial killers does not enter her decision making process. As such, Himel decides that there is a high risk of violence involved in prostitution but this risk can be reduced if sex workers are able to employ safety precautions which are currently prohibited by Canadian law. As noted by Himel, “while both parties agree that prostitutes in Canada face a high risk of violence, they disagree as to whether violence is intrinsic to prostitution or whether there are ways that prostitution can be practiced that may reduce the risk of violence to prostitutes” (79). Moreover, Himel defines the “risk of harm” in the *Bedford* case as the “risk of violence to [female] prostitutes” (79). But, invoking a so-called evidence-based approach to expert witness testimony, Himel determines that the risk of violence against female sex workers does not involve the risk of sex trafficking or the risk posed by “psychopaths” such as serial killers. As noted by Valverde (1999), as a “veritable joker card”, the “risk of harm” test allows

judges to engage in moral authoritarianism through the process of defining what is harmful and prioritizing those risks (187).

Having defined the “risk of harm” facing Canadian sex workers as the risk of violence to female prostitutes, Himel attempts to resolve the dispute amongst interested parties regarding the extent to which legal reform will enhance the safety of female sex workers in Canada. Himel bases this decision exclusively on social science evidence regarding the relative safety of prostitution venues. Moreover, noting that “these studies, as with other prostitution studies before me, must be viewed in context and the discreet findings cannot be generalized”, Himel decides that “upon a consideration of the evidence *as a whole* presented on this issue...there are ways in which risk of violence towards prostitutes can be reduced [original emphasis]” (*Bedford v. Canada* 2010: 86). Siding with the applicants’ argument that “the proposition that street prostitution is far more dangerous than indoor prostitution being conducted with the assistance of third parties is primarily a matter of common sense and simple inference” (Applicants’ Memorandum and Fact of Law: 7), Himel determines that working indoors and working independently reduce the risk of harm faced by Canadian sex workers:

The evidence led on this application demonstrates on a balance of probabilities that the risk of violence towards prostitutes can be reduced, although not necessarily eliminated. The two factors that appear to affect the level of violence against prostitutes are location and venue of work and individual working conditions. With respect to venue, working indoors is generally safer than working on the streets. Working independently from a fixed location (in-call) appears to be the safest way for a prostitute to work in Canada. (*Bedford v. Canada* 2010: 79)

Moreover, while Himel acknowledges that the relative safety of working indoors can vary, depending on management, she generally accepts the applicants’ proposition that being able to legally ply their trade from indoor locations will reduce the risk of harm faced by Canadian sex workers. Thus, Himel rules in favour of striking down the impugned *Criminal Code* provisions.



As noted by Valverde (1999), in some cases the ambiguity of “risk of harm” assessments creates a space for progressive reform in judge made law (187). But the grounds on which Himel decides that the impugned provisions ought to be stricken from the *Criminal Code* call the progressiveness of her determination into question. By defining the “risk of harm” as the risk of violence to female prostitutes, Himel reproduces gendered discourses surrounding sexuality and sexual orientation. A brief discussion of the submission made to the Ontario Court of Appeals by sex workers who were denied intervener status in the original hearing of *Bedford v. Canada* elucidates the extent to which the interested parties in these proceedings construct a more morally charged situation than would have been the case had sex workers been granted the same status as others in these proceedings.

Shifting attention to the multiple forms of oppression which intersect to produce the situation currently facing Canadian sex workers, POWER and Maggie’s present a more balanced account than any of the interested parties in the original *Bedford* case. While they ultimately agree with the applicants, POWER and Maggie’s present a much less morally charged construction of the situation, arguing that “the decision to pursue sex work is a choice about one’s body, one’s sexuality, and specifically who to have sex with and on what terms” (Factum of the Interveners, POWER and Maggie’s, Court of Appeal for Ontario: 2-3). Rather than constructing the sex trade using the emancipation paradigm or the oppression paradigm, POWER and Maggie’s acknowledge that the Canadian sex trade is a complex entity and that sex workers’ experiences vary widely:

[S]ome sex workers are coerced into sex work; that some sex workers choose sex work from among a particularly restricted set of options; that some sex workers believe that violence and abuse is [sic] inherent in sex work; and that some sex workers decide to change jobs when given the opportunity. (5)

Citing Deborah Brock, POWER and Maggie's argue that sex work can restore a sense of autonomy for women as well as gay and transgendered individuals:

Sex work can empower women not only by providing them with financial security, but by allowing for 'the development of alliances between women, bodily integrity and sexual self-determination. As well, some members of the gay and transgendered communities, whose sexuality and gender expression is frequently marginalized, find that sex work provides acceptance of their sexuality and gender expression that is lacking elsewhere. (3)

Contrary to constructions of the risk of violence to female sex workers characterizing the debate in the original hearing of *Bedford v. Canada*, POWER and Maggie's draw attention to the dangers associated with sex work for gay and transgendered sex workers such as violence related to sexism, homophobia and transphobia (10) and lacking access to health and social supports due to "transphobia on the part of service workers" (13). Indeed, this assertion echoes the SSLR's (2006) findings that "men are less likely [than women] to suffer physical violence at the hands of their clients...[but] they are more likely to be victims of violence by members of the public; this is particularly true for transvestites and transgendered individuals, who are doubly marginalized" (14-15). Similarly, Shaver et al. (2011) find that while all sex workers in their studies reported that clients, managers/employers, members of the public and even police at times threatened their persons and their property, transvestite and transgendered sex workers "consistently reported harassment and assault that exceeded that of other PWSI [persons working in the sex industry]" (53). Moreover, in contrast to constructions of the Canadian sex trade in the original hearing of *Bedford v. Canada*, POWER and Maggie's assert that "a relatively large proportion of street-level sex workers are racialized, Aboriginal, and/or transsexual or transgendered" (7-8) and the impugned provisions exacerbate "the various and intersecting disadvantages that sex workers otherwise face" (Factum of the Interveners, POWER and Maggie's, Court of Appeal for Ontario: 8).

By drawing attention to the unique circumstances of male, transvestite, transsexual and Aboriginal sex workers POWER and Maggie's are able to present a more balanced and less morally charged account of the situation than the interested parties in the original hearing of the *Bedford* case. While still assuming a moral perspective, as all interested parties in rights cases do, POWER and Maggie's construct a more nuanced account of the "risk of harm" facing Canadian sex workers, giving voice to a wide range of experiences and avoiding essentialist conclusions regarding the Canadian sex trade. Yet, these factors were not considered in Himel's determination because sex workers' groups were denied intervener status in this case and the accounts of expert witnesses were privileged over those of experiential witnesses. Moreover, while the expert witnesses in this case were permitted to provide opinions to assist Himel in her decision making process, sex workers who offered evidence were restricted to detailing their personal experiences for the court. As a result, the evidence Himel considered centred on the accounts of female sex workers because they were the only "experiential witnesses" proffered by the interested parties and because sociologists have yet to engage in rigorous exploration of the experiences of male, transgendered and transsexual sex workers (Lowman 2001; Vanewesenbeeck 2001; Benoit & Shaver 2006; Weitzer 2009b).

### ***Conclusion***

Paralleling submissions to the SSLR, the debate over prostitution reform in *Bedford v. Canada* is characterized by two broad, conflicting discourses (SSLR 2006; Taylor 2010). In the *Bedford* case, this polarization is fueled by party selection of expert witnesses as well as lawyer constraints over the evidence presented by these witnesses and the need to translate the claims of oppositional social movements into adversarial accounts. Through the process of transmuting lay

knowledge into legal accounts, the voices of those for whom this challenge was mounted are silenced and law, science and religion collaboratively construct a moralistic and patriarchal image of the Canadian sex trade in *Bedford v. Canada*. Exploring how sex workers' groups construct the situation reveals that interested parties in the *Bedford* case construct a more morally charged situation than would have been the case if the accounts of sex workers had been granted the same status as those of other actors in this case. Moreover, using social science research on the sex trade which has been noted to concentrate on female, on-street sex workers (Lowman 2001; Vanweesenbeeck 2001; Benoit & Shaver 2006; Weitzer 2009) actors in the *Bedford* case discursively construct "the risk of harm" as the risk of violence to female prostitutes. The moral nature of this position is masked by legal claims that judicial decisions are based on neutral and objective measures such as evidence-based approaches to expert witness testimony and the "risk of harm" test. As such, Himel is able to make highly subjective decisions and invoke assumed value consensus to render her determination regarding the "risk of harm" faced by Canadian sex workers (defined as non-Aboriginal females at the exclusion of the experiences of Aboriginal, male, transgendered and transsexual sex workers) and the extent to which the impugned provisions contribute to this harm.

## Conclusion

Analyzing the role of religion, law and science in *Bedford v. Canada* reveals how these institutions collude to construct a situation in which legal fictions presenting law and politics as separate conceal the inherently moral nature of the current debate while constructing a false binary between lay and expert knowledge. Analyzing discursive constructions of the Canadian sex trade in the *Bedford* case reveals the extent to which, as a result of this collusion, religious interveners are granted an erroneous status as representatives of the Canadian moral fabric. Privileging the accounts of law and science results in a more morally charged representation of the situation than would have been the case if the accounts of sex workers had been granted the same status as those of other actors in this case.

In the Canadian context, rights cases are premised on collective values. Moreover, as a reflection of the fundamental values held by Canadian citizens, the *Canadian Charter of Rights and Freedoms* introduces a moral component to all legal cases involving civil liberties in Canada. The extent to which notions of value consensus influence contemporary Canadian legal arrangements is evidenced by all interest parties' reliance on the notion of fundamental norms and values in their submissions to the court as well as Judge Himel's recourse to "common sense" in her evaluation of the extent to which the "risk of harm" faced by Canadian prostitutes can be reduced by altering the current legal regime. However, the moral and political nature of these debates is obfuscated by legal fictions presenting the law as a neutral umpire, allowing judges to engage in moral authoritarianism under the guise of making decisions based on objective criteria.

In the case of *Bedford v. Canada*, law, religion and science collude to construct a false distinction between law, morality and politics. As a result of this collusion, religious interveners

are granted an erroneous status as representatives of the Canadian moral fabric in the current debate. Presenting *Charter* challenges in terms of “risk of harm” disguises the value-laden nature of judicial determinations in cases involving social values (Valverde 1999; Beaman 2008). All interested parties in the *Bedford* case rely on assumed value consensus to build their arguments and construct the situation currently facing Canadian sex workers in highly moralistic terms. Yet, these accounts are couched in discourses of objectivity and value-neutrality, concealing the inherently moral and political nature of their positions in the current debate. As noted by Diduck and Wilson (1997), traditional assumptions that law and politics represent separate realms obscure our understanding of political action (507). Rather than introducing a novel element to the debate in the *Bedford* case, the presence of religious interveners places pressure on the court to reinforce legal fictions that the law is somehow separate from the realms of morality and politics. Through this process, religious interveners in the current debate are able to forward strictly Christian values while purporting to represent the majority views of all Canadians. Further research exploring the extent to which a similar situation emerges as a result of religious intervention in other rights cases would greatly inform current understandings of the role of religious intervention in *Charter* challenges.

Similarly, legal recourse to so-called objective measures permits expert witnesses to occupy a precarious position in the current debate. Just as legal adherence to positivist myths blurs our understanding of political action (Diduck and Wilson 1998: 507), it obscures our understanding of the role of expert witnesses in *Charter* challenges. Analyzing legal constructions of expertise and the role of expert witnesses reveals that, when faced with uncertainty over the issues at hand, judges rely on sociologists to assist them in forming common sense understandings in order to resolve disputes before the courts. Moreover, rather than

providing objective evidence to assist the judge in his/her decision making process, social science is a vehicle for transmuting lay knowledge into legal accounts. Party selection of expert witnesses combined with the adversarial nature of Canadian legal proceedings enhance the odds of expert witness partisanship in spite of legal demands that expert witnesses remain impartial throughout the proceedings. Judicial determinations regarding the admissibility of expert witness testimony are replete with legal fictions, disguising judges' subjective opinions with discourses presenting the law as objective and impartial. As noted by Edmund (2009), rather than being analytically reliable concepts, "partisanship" and "adversarial bias" allow judges to selectively privilege (or discount) particular expert witnesses and opinions (172).

In the *Bedford* case, the admission of sociological expertise permitted a highly polarized academic debate to permeate the legal proceedings. Echoing proponents of the emancipation paradigm, the applicants focused on the routine aspects of sex work, highlighting success stories and omitting the experiences of those who have had highly negative experiences (Weitzer 2009b: 215). Conversely, the Attorneys General of Canada and Ontario and the CLF and colleagues' accounts paralleled those forwarded by proponents of the oppression paradigm, constructing prostitution as inherently harmful and degrading and using dramatic language to highlight the plight of those who are "prostituted" (Weitzer 2009b: 214).

Ironically, Himel's privileging of the accounts of expert witnesses in *Bedford v. Canada* resulted in a more morally charged construction of the Canadian sex trade than would have been the case if the accounts of sex workers had been granted the same status as those of other actors in this case. Through a mutual exclusion of the experiences of Aboriginal women as well as those of male, transvestite and transgendered sex workers, interested parties in *Bedford v. Canada* construct a highly moralistic and patriarchal image of the Canadian sex trade. Through

the process of transmuting the claims of social movements into legal discourse, actors in the *Bedford* case define the “risk of harm” facing Canadian prostitutes as the risk of violence to female sex workers. Actors’ constructions of the risk of violence do not include the experiences of Aboriginal women involved in the sex trade. Thus, the effects of racial oppression and colonization on the risk factors faced by Aboriginal women in the sex trade are largely excluded from this debate.

Comparing the accounts of interested parties in the original hearing of the *Bedford* case with the account provided to the Ontario Court of Appeals by POWER and Maggie’s demonstrates that sex workers’ groups who were permitted to intervene during the appeal of *Bedford v. Canada* provided a more balanced and less morally charged construction of the situation than any of the interested parties in the original hearing of this case. While this suggests that a more inclusive definition of the risk of harm may influence the Supreme Court of Canada’s decision regarding the constitutional challenges raised in the *Bedford* case, as interveners, POWER and Maggie’s ability to influence the outcome of the proceedings is limited. Moreover, the courts will likely continue to privilege the accounts of expert witnesses over those of sex workers as this case advances to the Supreme Court level. Future research comparing how the Canadian sex trade is being discursively constructed as this case advances and more voices are permitted to enter the conversation would be a worthwhile endeavour. Further, the case of *Downtown Eastside Sex Workers United Against Violence Society v. Attorney General (Canada)* offers an interesting basis for comparative analysis between a case mounted by individual sex workers and a case mounted by a sex workers’ group. Further research in this area would be an invaluable contribution to current understandings of contemporary discursive constructions of the Canadian sex trade.



Several limitations to the present study suggest that further research in this area is necessary to increase our understanding of how law, religion and science interact in rights cases. Due to time constraints and challenges obtaining transcripts for the proceedings, my analysis was conducted using the facts submitted to the court as well as Himel's determination in *Bedford v. Canada*. A more detailed examination taking into account the affidavits filed by all parties presenting evidence in this case as well as the transcripts from the proceedings would have offered a more informed examination of how the sex trade was discursively constructed in this case. Similarly, while I intended to conduct interviews with lawyers and expert witnesses for the applicants and the respondents as well as all interveners and excluded parties, such as Maggie's and the United Church of Canada, from this case, I was only able to interview three expert witnesses for the applicants and representatives from two of the religious intervener groups. A more detailed examination involving interviews with all of the parties I had initially set out to include in my study would yield a more informed examination of how law, science and religion interacted in the *Bedford* case. Further, my examination lacks comparative analysis with other rights cases, restricting my conclusions to the current case study. Research comparing the role of law, religion and science in the *Bedford* case with other Canadian rights cases would enhance current understandings of how these institutions interact in *Charter* challenges.

While the findings from my study are tentative and partial, they provide an interesting contribution to the conversations on discursive constructions of the sex trade and the relationship between social science and law. While other scholars, such as Louie (2012), argue that shifting to a harm reduction approach is necessary in constitutional challenges of this sort, the present case study demonstrates that applying so-called objective measures such as the "risk of harm" in rights cases masks the collective morality on which such challenges are premised, allowing

actors to engage in moral authoritarianism under the guise of using objective measures to forward their opinions. Contributing to existing literature on the social construction of sex work, the present case study elucidates the extent to which public perceptions of the danger posed by serial killers and the emergent moral panic over sex trafficking are reshaping the way in which the Canadian sex trade is being discursively constructed. As a result, constructions of the Canadian sex trade continue to employ gendered, heteronormative discourses and discount the experiences of male, transvestite and transgendered sex workers. The present research also provides novel insight into the interactions between law and social science in Canadian rights cases. Scholarly legal analyses generally identify a conflict between the interests of science and religion in the court room (see, for example, Beaman 2008; Jasanoff 2008). However, these studies tend to focus on the interactions between law and natural science in American criminal cases and tort litigation (see, for example, Schuck 1993; Goodstein 2000; Jasanoff 2002; Winiecki 2008; Haack 2009; Kristzer 2009; and Sanders 2009). Further research examining the relationship between law, religion and social science in *Charter* challenges has the potential to offer novel insights into theories of secularism as well as STS scholarship on expertise and the law-science relationship. In contrast to conventional assumptions that law, religion and science represent conflicting epistemologies, these institutions collude to construct a situation in which legal fictions presenting the law and politics as separate mask the moral and political nature of the current debate while constructing a false binary between lay and expert knowledge in the *Bedford* case. As a result of this collusion, sex workers are silenced and *Bedford v. Canada* constructs a more morally charged situation than would have been the case if the accounts of sex workers had been granted the same status as other accounts in this case.

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