

Assessing Evidence, Arguments, and Inequality in *Bedford v. Canada*

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INTRODUCTION

To date, everyone who “lives wholly or in part on the avails of prostitution of another person” committed a criminal offence in Canada, liable to imprisonment for up to ten years.¹ In other words, pimps, traffickers, and other third parties were generally prohibited from making a living off the backs of prostituted persons.² A similar approach to prostitution is found in most parts of the United States, with a few exceptions.³ Canada has also prohibited keeping a bawdy-house (or “place”) for prostitution, or, among other things, “having charge or control” of any place while “knowingly” permitting parts of it to be used for prostitution.⁴ The penalties ranged from a summary conviction to at most two years imprisonment.⁵

The avails provision facilitated the prosecution of traffickers—pimps and other profiteers of prostitution—who otherwise could abuse the prostituted persons’ fear to testify, or benefit from the difficulties in proving various elements of the more complex trafficking offense.⁶ Generally, unless evidence to the contrary existed, the avails provision only required proof that someone was “habitually in the company” of a prostituted person to make an initial presumption that such persons were living on earnings of the prostitution of others.⁷ Case law prior to *Bedford* established certain exceptions where this presumption could not be applied without further evidence of exploitation.⁸ The provision’s design, with regards to its relatively lax burden of

¹ Canada Criminal Code, R.S.C. 1985, c. C-46, § 212(1)(j).

² The term “prostituted person” conveys the reality, shown below, that persons who are bought for sex are generally placed in prostitution and kept there by the acts of others. As shown below, *see infra* Part I, most people in prostitution appear to be either pimped and/or trafficked, or coerced by social forces that include poverty, racism, and sex inequality. The term “sex workers” implies prostitution is a chosen form of work. The term “prostitute” conveys that being in prostitution is a characteristic inherent to the person rather than inherent in the coercive circumstances of her/his social situation.

³ For instance, under a Nevada statute, NEV. REV. STAT. § 244.345 (2011), counties with populations under 700,000 can enable third parties, through a county licensing board process, to profit from businesses that use “natural persons” (as long as they are not minors) for the purpose of prostitution, though unlicensed prostitution is still regarded as a misdemeanor. According to information published in 2007, third parties in prostitution would be able to operate consistent with this law in ten among Nevada’s seventeen counties. *See* Melissa Farley, *Legal Appendix A, in* PROSTITUTION AND TRAFFICKING IN NEVADA: MAKING THE CONNECTIONS 213, 213 (Melissa Farley ed., 2007).

⁴ Canada Criminal Code, R.S.C. 1985, c. C-46, § 210(1)(2)(c).

⁵ *Id.*

⁶ Already in 1992, the Supreme Court of Canada noted that the avails provision eliminated the need for prostituted persons to testify against pimps, whom the court recognized to be generally dangerous in such situations as they often threatened prostituted persons with reprisals, thus thwarting efforts to gain evidence of exploitation or abuse at the hands of their pimps. *R. v. Downey*, [1992] 2 S.C.R. 10, 36–39 (Can.). The Royal Canadian Mounted Police have also noted in a recent report on human trafficking in Canada that most investigations also involve other prostitution-related charges, including violations of the avails provision, and that trafficking charges are sometimes omitted because charges such as living off the avails of prostitution tend to be easier to prove compared to the requirements under trafficking laws (e.g., there is no need to prove “exploitation” or “fear” in the former). ROYAL CANADIAN MOUNTED POLICE, HUMAN TRAFFICKING IN CANADA 37 (2010).

⁷ Canada Criminal Code, R.S.C. 1985, c. C-46, § 212(3).

⁸ *See infra* Part III C, for details.

proof, contrasts with trafficking laws that include more requirements that need to be proven in order to apply them against exploitation in prostitution.⁹ In this sense the bawdy-house provisions have also facilitated prosecuting traffickers and other profiteers of prostitution who creatively conceal incriminating activities that are difficult to prove under tracking laws.¹⁰ It is often possible for such exploiters to hide financial transactions or behavior (e.g., being visibly and habitually in company of a prostituted person) that would incur liability under the avails provision, or to hide more coercive activities that would otherwise suggest trafficking, for instance by threatening or manipulating key witnesses.¹¹

Canadians find themselves in a situation in which the avails and bawdy-house provisions have been struck down as unconstitutional across the board in *Bedford v. Canada* (2013).¹² An application was brought under Canadian rules of civil procedure by three women who sought a declaration that the laws were unconstitutional.¹³ The women had either been third parties in prostitution and/or said they had been bought for sex.¹⁴ The Province of Ontario's highest court essentially found, as did the Supreme Court of Canada, that the avails provision prevented those who are prostituted from being assisted by brothel management, escort agencies, bodyguards, or drivers, among others, who were seen as people that would generally enhance the safety and well-being of prostituted persons if not for the law.¹⁵ Similar rationales were invoked to strike down the bawdy-house provisions, on the view that systematically organized indoor prostitution (also by third parties) substantially improved safety, support, and reduced harm for prostituted persons.¹⁶ The guarantees in Canada's 1982 Charter of Rights and Freedoms of prostituted persons' "life, liberty[,] and security of the person"¹⁷ were invoked to strike at these two laws.¹⁸

⁹ For further comment on Canadian trafficking statutes, see *infra* notes 322–343, and accompanying text.

¹⁰ See *infra* notes 344–354, and accompanying text discussing application of bawdy-house laws.

¹¹ See *infra* notes 344–354, and accompanying text discussing application of bawdy-house laws; cf. ROYAL CANADIAN MOUNTED POLICE, *supra* note 6, at 38–39 (discussing how “victim cooperation” is typically crucial to obtain necessary evidence of exploitation, coercion, or deception for prosecuting trafficking, and that a fear of reprisal from pimps is common among trafficking survivors, which obstruct cooperation with law enforcement).

¹² *Bedford v. Canada* (Att’y Gen.), 2010 ONSC 4264, (2010) 102 O.R. 3d 321 (Can. Ont. Super. Ct. J.), *aff’d in part in, rev’d in part* 2012 ONCA 186, (2012) 109 O.R. 3d 1 (Can. Ont. C.A.), *aff’d in part, rev’d in part* 2013 SCC 72, 34788 (Can. Sup. Ct.) (Dec. 20, 2012) [hereinafter *Bedford* (Ont. Super. Ct. J.)].

¹³ *Bedford v. Canada* (Att’y Gen.), 2012 ONCA 186, (2012) 109 O.R. 3d 1, para. 13 (Can. Ont. C.A.), *aff’d in part, rev’d in part* 2013 SCC 72, 34788 (Can. Sup. Ct.) (Dec. 20, 2012) [hereinafter *Bedford* (Ont. C.A.)]. The women were age thirty-three, fifty-two, and fifty-three, respectively. *Id.* at paras. 10–12.

¹⁴ See *id.* at paras. 10–12.

¹⁵ See *id.* at paras. 253–55; *Canada* (Att’y Gen.) v. *Bedford*, 2013 SCC 72, [2013] CarswellOnt 17681, paras. 66–67, S.C.J. No. 72 (Can. Sup. Ct.) (Dec. 20, 2013), available at <http://scc-csc.lexum.com/decisia-scc-csc/scc-csc/scc-csc/en/item/13389/index.do> [hereinafter *Bedford* (Can. Sup. Ct.)].

¹⁶ See *Bedford* (Ont. C.A.), *supra* note 13, at paras. 207–12; *Bedford* (Can. Sup. Ct.), *supra* note 15, at paras. 63–64.

¹⁷ Canadian Charter of Rights and Freedoms, §7, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982, c. 11 (U.K.) [hereinafter Canadian Charter of Rights and Freedoms] (“Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.”).

The bawdy-house provisions were thus invalidated.¹⁹ The Court of Appeal for Ontario had rewritten the avails provision so that “the prohibition on living on the avails of prostitution applies only to those who do so ‘in circumstances of exploitation.’”²⁰ In practice, these judicial actions reversed a presumption of guilt into a presumption of innocence on behalf of those who profit from the prostitution of others. The Supreme Court of Canada went further, however, invalidating the avails provision in its entirety.²¹

This Article assesses the evidence and arguments relied on by the courts in *Bedford*. It finds that the evidence did not support their decisions. Moreover, the attempted rewrite of the avails provision by the Court of Appeals, subsequently rejected by the Supreme Court’s invalidation across the board, and the invalidation of the bawdy-house laws, which all courts agreed upon, make prostituted persons more vulnerable to exploitation. This outcome goes against principles expressed in previous case law and contravenes the Canadian Charter of Rights and Freedom’s equality guarantees. The Supreme Court of Canada could have decided to *promote* equality and facilitate the escape from prostitution for prostituted persons who choose to leave, which it did not, by keeping the criminalization of those who profit from their prostitution and those who buy them, while decriminalizing and support those who are prostituted.

Part I surveys the research and evidence on prostitution, showing that prostitution is typically an exploitation of inequality, where people with less power are sold for sexual use to people with more power under circumstances which are coercive. No substantial evidence suggests that third parties who are involved in prostitution would not generally be there for financial gain; rather, the evidence suggests that they take advantage of the inequality and vulnerability of those who are prostituted to maximize their profits. Recent government reports and independent sources from Germany, the Netherlands, Nevada, Australia, and New Zealand are cited in this part, suggesting that legalization, contrary to their expectations, did not improve the situation of prostituted women, but rather made it worse.

Part II addresses how the court of first instance (the Ontario Superior Court) misrepresented several social science studies and/or failed to observe crucial flaws in them. Such studies were uncritically cited to support the argument that benign actors in the sex industry would facilitate the safety and well-being of prostituted persons if only the laws were rewritten or invalidated, or that indoor prostitution was the safest form of prostitution compared to the streets. All these

¹⁸ *Bedford* (Ont. C.A.), *supra* note 13, at paras. 212-77; *Bedford* (Can. Sup. Ct), *supra* note 15, at paras. 65, 67.

¹⁹ *Bedford* (Ont. C.A.), *supra* note 13, at paras. 214-16; *Bedford* (Can. Sup. Ct), *supra* note 15, at para. 164. The statutory definition of a “bawdy-house” for prostitution in Canada Criminal Code, R.S.C. 1985, c. C-46, § 197(1) was not invalidated as applied in more complex offences in the Code with higher penalties that were not under challenge. For instance, *procuring* or *concealing* persons for prostitution in bawdy-houses for the *purpose* of prostitution are still illegal under *Bedford*, see *Bedford* (Ont. C.A.), *supra* note 13, at para. 214, though such charges require additional acts and mental intents apart from keeping, having charge or control of, or knowingly permitting a place or parts of it to be used for prostitution. See R.S.C. 1985, c. C-46, § 212(1)(b), (c), (e), (f) (maximum penalty of ten years imprisonment).

²⁰ *Bedford* (Ont. C.A.), *supra* note 13, at para. 327.

²¹ *Bedford* (Can. Sup. Ct), *supra* note 15, at paras. 143-45, 164.

studies cited lacked a reliable strategy to control for bias in interview responses from people that are currently exploited by third parties. One study even admitted to having gained access to respondents through the Nevada Brothel Association, brothel attorneys, or directly through brothel management, but the court nonetheless refrained from questioning why all prostituted women claimed they felt protected in these brothels.²² Another study on indoor prostitution reported severely exploitative conditions that seemed to create strong incentives for unsafe sex and reported a lack of strategies to prevent violence. This study's findings were misrepresented by the court, which only quoted isolated and unrepresentative passages.²³ The court also misinterpreted data from large survey studies with prostituted persons; the court failed to control for whether other factors—such as young age, inexperience, or use of drugs or alcohol that reduce the ability to prevent abuse—better predicted the variance in abuse than the current place of prostitution.²⁴ The inference drawn by the court, that indoor prostitution reduces violence compared to street prostitution, could thus not be supported by the data. Hence, Part II and Part III conclude that the courts factually and legally erred in finding the avails and bawdy-house provisions constitutionally overbroad.

Part III analyzes in more detail how the bawdy-house provisions, together with the avails and trafficking provisions, constituted a comprehensive legislative scheme that was rationally related to and—but for the two courts' failure to properly assess social science and other evidence—not overbroad in pursuing the compelling objective of combating trafficking of persons and sexual exploitation of minors. Accordingly, the improper invalidation of the bawdy-house laws makes prostituted persons more vulnerable to exploitation and trafficking, as their pimps and profiteers may now more easily avoid liability when the less severe, though in practice much more effective, criminal provisions under the bawdy-house laws are not available anymore. Similarly, this Article emphasizes how the empirical evidence suggests that even the Court of Appeal for Ontario's attempted rewrite of the avails provision (subsequently rejected by the Supreme Court of Canada) to only cover "circumstances of exploitation" would only have benefited, if anyone, those few prostituted persons who are least exploited and least in need of protection against pimps and madams. By contrast, this Article shows how such a revision of the law also disempowers the majority of prostituted persons by making them more vulnerable to exploitation by pimps and madams, threatening their safety and well-being. It is found that the Supreme Court of Canada's wholesale invalidation of the avails provision (as well as the Court of Appeal's attempt to save it with a stronger requirement to prove exploitation) in effect provide more protections to pimps, who may now more easily intimidate witnesses (i.e., prostituted persons)

²² See *infra* Part II.B.

²³ See *infra* Part II.A.

²⁴ See *infra* Part II.D.

and prevent them from revealing conditions that could prove trafficking or other criminal abuse—a consequence that goes against principles expressed in prior case law.²⁵

Part IV asserts that Canadian Courts have now made the majority of prostituted persons, a population already demonstrated to be vulnerable, even more exposed to the risk of being exploited. Their decisions amplify the vulnerability of a group that already suffers multiple disadvantages in society. This move in *Bedford* is contrary to the goal of promoting substantive equality under the Canadian Charter of Rights and Freedom, which has been recognized by the Supreme Court of Canada since 1989.²⁶ A law with the objective of ameliorating the conditions of the disadvantaged, a category that typically includes prostituted persons,²⁷ is constitutionally protected under Section 15 of the Charter.²⁸ This protection permits Canadian courts to uphold laws, such as the avails and bawdy-house laws invalidated in *Bedford*, on the ground that doing so would promote *equality*, which these laws did by preventing exploitation in prostitution. This equality doctrine should prohibit courts from invalidating or reformulating such laws so they promote *inequality*, as the decisions in *Bedford* arguably did by enabling more exploitation. In light of this analysis, Parliament’s criminalization of pimps and other third-party profiteers should have been upheld unchanged. By contrast, striking down any criminalization of prostituted persons themselves would promote substantive equality, since that group is generally prostituted under unequal and exploitative conditions. The evidence analyzed in Part I suggests that the overwhelming majority of prostituted persons suffers from social forces such as prior childhood abuse and neglect; homelessness; extreme poverty; and racial, ethnic, or gender discrimination, which often push them to enter prostitution simply to survive. The severe physical and mental health problems typically caused by prostitution have been documented, as well as the increasing obstacles for most persons who are prostituted for a longer period of time to be reintegrated in society with equal opportunities and prospects as other people have. Thus, prostituted persons should not be punished as criminals, which according to Canadian laws as of 2013 and before *Bedford* they would have been in various instances,²⁹ but should instead be

²⁵ See, e.g., *R. v. Downey*, [1992] 2 S.C.R. 10, 35–39 (Can.). (holding, when considering the harms generally caused by pimps and their threats against those they victimize, that whenever someone received a share of the earnings from the prostitution of another a presumption of living on the avails of prostitution was raised without evidence to the contrary).

²⁶ See *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 (Can.).

²⁷ See *infra* notes 31–45, and accompanying text on the empirical evidence of disadvantage among prostituted persons; see also *infra* notes 373–79, 411–12, and accompanying text on the Canadian legal conceptualization of “disadvantage” as it may be applied to persons in prostitution.

²⁸ See Canadian Charter of Rights and Freedoms, *supra* note 17, § 15(2) (protecting “any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups, including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability” from being challenged as a form of discrimination (e.g., as impermissible preferential treatment) under § 15(1)).

²⁹ See Canada Criminal Code, R.S.C. 1985, c. C-46, § 210(2)(a) (criminalizing anyone who “is an inmate of a common bawdy-house”), § 213(1)(c) (criminalizing anyone who “stops or attempts to stop any person or in any

understood as victimized by other persons and the social circumstances of inequality. Moreover, Canadian legislatures should be able to create any law, program or activity that guarantees prostituted persons support for exiting prostitution if and when they want to. Such legislative action is consistent with Section 15. A law that provided prostituted persons a claim for civil damages from tricks³⁰ and pimps for violating their equality and dignity through exploiting their vulnerable situation to buy sex would also be constitutional.

I. RELEVANT REALITIES OF PROSTITUTION

A. Prostitution Globally

The evidence on prostitution shows that it is often characterized by extreme inequalities, which is one reason it may be said to be intrinsically exploitative. This inference is evident when looking at the typical reasons for entry into prostitution. Extreme poverty is the most frequently cited reason for entering prostitution, in a variety of national economic contexts, from North American welfare states to Scandinavian welfare states to industrializing or rural developing nations.³¹ Social discrimination in the form of sexism and racism, which precludes equal

manner communicates or attempts to communicate with any person for the purpose of engaging in prostitution”), *invalidated by Bedford* (Can. Sup. Ct), *supra* note 15, at para. 164.

³⁰ “Trick” is a word frequently used by prostituted persons themselves for men who buy them. See Melissa Farley, “Renting an Organ for Ten Minutes”: *What Tricks Tell Us About Prostitution, Pornography, and Trafficking*, in *PORNOGRAPHY: DRIVING THE DEMAND IN INTERNATIONAL SEX TRAFFICKING* 144, 147 (David E. Guinn & Julie DiCaro eds., 2007). Other such commonly used words are “johns,” “punters,” “buyers,” or “clients.” *Id.* The term also refers to the many ways the buyers “trick” persons into performing more acts than paid for, or cheating them by, e.g., refusing to pay after having sexually exploited them. *Id.*

³¹ See, e.g., CHANDRÉ GOULD & NICOLÉ FICK, *SELLING SEX IN CAPE TOWN: SEX WORK AND HUMAN TRAFFICKING IN A SOUTH AFRICAN CITY* 115 (2008), *archived at* <http://perma.cc/0ZBn6FYWT93> (finding “that the majority of sex workers [surveyed] . . . enter the industry as a result of ‘financial need,’” and defining financial need as “to meet pressing financial obligations or to meet basic needs—they went into sex work for survival”); CECILIA KJELLGREN, GISELA PRIEBE & CARL GÖRAN SVEDIN, *UTVÄRDERING AV SAMTALSBEHANDLING MED FÖRSÄLJARE AV SEXUELLA TJÄNSTER [EVALUATION OF COUNSELING SESSIONS WITH SELLERS OF SEXUAL SERVICES]* 21 (2012), *archived at* <http://liu.diva-portal.org/smash/get/diva2:506278/FULLTEXT01.pdf> (Swed.) (reporting needing money to support survival was the most common reason stated for entering prostitution among 34 persons who started counseling treatment); SPECIAL COMM. ON PORNOGRAPHY AND PROSTITUTION IN CANADA, *REPORT OF THE SPECIAL COMMITTEE ON PORNOGRAPHY AND PROSTITUTION* 376–78 (1985) (finding that “[o]verwhelmingly, prostitutes cite economic causes as the reason they are on the streets”); Mimi H. Silbert & Ayala M. Pines, *Entrance into Prostitution*, 13 *YOUTH & SOC’Y* 471, 486 (1982) (finding among 200 adult and juvenile prostituted women in San Francisco that the “predominant reason given for” initial involvement was money: “Basic financial survival was mentioned by three-quarters of all subjects, by over 80% of the current prostitutes, and by close to 90% of the juveniles,” and over three-quarters of all subjects “reported having no other options” when entering prostitution); see also Alice Cepeda, *Prevalence and Levels of Severity of Childhood Trauma among Mexican Female Sex Workers*, 20 *J. AGGRESSION, MALTREATMENT & TRAUMA* 669, 671–72 (2011) (citing research from both industrialized and developing regions highlighting poverty-related socioeconomic predictors to prostitution); cf. Melissa Farley et al., *Prostitution and Trafficking in Nine Countries: An Update on Violence and Posttraumatic Stress Disorder*, in *PROSTITUTION, TRAFFICKING, AND TRAUMATIC STRESS* 33, 65 (Melissa Farley ed., 2003) [hereinafter Farley et al., *Nine Countries*], *available at* <http://www.prostitutionresearch.com/pdf/Prostitutionin9Countries.pdf>, who suggests

employment opportunities, is also linked to prostitution; e.g., First Nations (Aboriginal) women whose ancestors came before early European immigrants, are highly overrepresented in prostitution in Vancouver and in some other parts of Canada, as are Black women in the U.S. and foreign nationalities in Sweden.³² Compelling evidence from North America and a broad range of

that the “incident of homelessness (75%)” and the wish to “get out of prostitution (89%)” among their sample of 854 prostituted persons in nine countries reflect a lack of options for escape. Such conditions, and the high numbers stating a need for “job training” (76%), *id.* at 51 tbl. 8, implies that poverty and lack of survival alternatives are critical obstacles. Poverty has also been cited as a reason for entering the pornography industry. *See, e.g.*, U.S. ATT’Y GEN.’S COMM’N ON PORNOGRAPHY, FINAL REPORT 859 (1986), *available at* <http://www.communitydefense.org/lawlibrary/agreport.html>, *archived at* <http://perma.cc/0vSbrogSxk8> (finding that what “chiefly” motivated entry among performers into the pornography industry was “financial need”); *id.* at 888 (finding it was “generally true of commercial pornography’s use of performers: (1) that they are normally young, previously abused, and *financially strapped*”) (emphasis added); *id.* at 859 n.983 (noting that evidence of the personal backgrounds among pornography performers in their investigation, *id.* 856-59, were similar with those in other forms of prostitution who had been studied by researchers Mimi Silbert and Ayala Pines, whom the Commission cited); Laura Lederer, *Then and Now: An Interview with a Former Pornography Model*, in TAKE BACK THE NIGHT: WOMEN ON PORNOGRAPHY 58-59 (Laura Lederer ed., 1st ed., 1980) (former performer mentioning reasons for that persons enter pornography, e.g., having a kid in a hospital, being an illegal alien lacking green cards, or not earning enough at regular low-status jobs).

³² *See, e.g.*, SPECIAL COMM. ON PORNOGRAPHY AND PROSTITUTION IN CANADA, *supra* note 31, at 347 (“On the prairies . . . most of the prostitutes are young native women . . .”); CHERRY KINGSLEY & MELANIE MARK, SACRED LIVES: NATIONAL ABORIGINAL CONSULTATION PROJECT 4, 8 (2010), *available at* http://www.gov.mb.ca/fs/traciustrust/pubs/sacred_lives.pdf (noting that Aboriginal children and youth forms over 90 per cent of “visible sex trade” in some Canadian areas where Aboriginal population is less than 10 per cent); JULIE COOL, PROSTITUTION IN CANADA: AN OVERVIEW 3 & n.5 (2004), *available at* <http://publications.gc.ca/collections/Collection-R/LoPBdP/PRB-e/PRB0443-e.pdf> (citing study that noted an overrepresentation of Aboriginal and minority women in Montréal prostitution); Melissa Farley et al., *Prostitution in Vancouver: Violence and the Colonization of First Nations Women*, 42 TRANSCULTURAL PSYCHIATRY 242, 242 (2005) (finding 52 of 100 prostituted women to be of First Nations descent, despite being only 1.7–7.0% of Vancouver’s population); Andrea Krüsi et al., *Negotiating Safety and Sexual Risk Reduction with Clients in Unsanctioned Safer Indoor Sex Work Environments: A Qualitative Study*, 102 AM. J. PUB. HEALTH 1154, 1155 (2012) (finding 30 of 39 in a sample living in a Vancouver public housing project for prostituted persons that sanctioned indoor prostitution “were of Aboriginal ancestry”); Cecilia Benoita et al., *In search of a Healing Place: Aboriginal women in Vancouver’s Downtown Eastside*, 56 SOC. SCI. & MED. 821, 824 (2003) (citing studies estimating that 70% of prostituted persons in Vancouver Downtown Eastside are Aboriginal women); Leonard Cler-Cunningham & Christine Christenson, *Studying violence to stop it: Canadian research on violence against women in Vancouver’s street level sex trade*, 4 RES. FOR SEX WORK 25, 26 (June, 2001) (finding that 31% in a sample of 184 prostituted women on the “street-level” to be Aboriginal Women); JENNIFER JAMES, ENTRANCE INTO JUVENILE PROSTITUTION: FINAL REPORT 17, 19 (1980) (finding African American girls were 25% of sample of prostituted girls interviewed in Seattle area though their share of the population in the geographic area of the study was only 4.2% (n = 136)). Barbara Goldsmith, *Women on the Edge*, NEW YORKER, Apr. 26, 1993, at 64, 65 (finding among 3000 “streetwalking prostitutes” interviewed in New York City that half were African American and a quarter Hispanic); *cf.* Vednita Nelson, *Prostitution: Where Racism and Sexism Intersect*, 1 MICH. J. GENDER & L. 81, 83 (1993) (“Racism makes Black women and girls especially vulnerable to sexual exploitation and keeps them trapped in the sex industry.”); *see also* Ungdomsstyrelsen (Swedish Nat’l Bd. for Youth Affairs), *Erfarenheter av sexuell exponering och sex mot ersättning*, in SE MIG: UNGA OM SEX OCH INTERNET (Ungdomsstyrelsen ed., 2009) 148, 158 (noting in a nationally representative youth-survey that one of several predictors to prostitution was foreign

other countries also documents that the majority of prostituted women (roughly 60–90%, depending on the study) were sexually abused as children and that a majority were subjected to physical abuse.³³ As a general population comparison, the prevalence of child sexual abuse among females in the United States is reportedly three times lower than among prostituted populations (roughly 20–30%, depending on the study).³⁴ As a further comparison, a Canadian

nationality); BROTTSFÖREBYGGANDE RÅDET [BRÅ] [SWEDISH NAT'L COUNCIL FOR CRIME PREVENTION], THE ORGANISATION OF HUMAN TRAFFICKING: A STUDY OF CRIMINAL INVOLVEMENT IN SEXUAL EXPLOITATION IN SWEDEN, FINLAND AND ESTONIA 8, 36–43 (2008), available at <http://www.bra.se/> (finding that poverty and discrimination are key structural factors for recruitment into trafficking to Sweden, Finland, and Estonia, and that many trafficked women and girls belong to minority groups, such as the Baltic Russian-speaking minority and the Roma people in Eastern Europe).

³³ See, e.g., Farley et al., *Nine Countries*, *supra* note 31, at 43 (finding that 59% of 854 prostituted persons affirmed that she or he “[a]s a child, was hit or beaten by caregiver until injured or bruised,” and 63% affirmed they were “sexually abused as a child.”); Chris Bagley & Loretta Young, *Juvenile Prostitution and Child Sexual Abuse: A Controlled Study*, 6 CAN. J. CMTY. MENTAL HEALTH 5, 12–14 tbl.2 (1987) (finding 73% of forty-five female prostitution survivors were subjected to child sexual abuse, compared to 28% of thirty-six women among a community control group of similar age, and that 100% of the prostitution survivors had been subjected to either sexual or physical abuse, compared to only 35% of the controls); Silbert & Pines, *supra* note 31, at 479 (finding 60% of 200 current and former prostituted juvenile or adult women reported childhood sexual abuse from ages three to sixteen of which 70% involved repeated abuse by the same persons, and 62% of the 200 persons reported physical abuse); Jennifer James & Jane Meyerding, *Early Sexual Experience as a Factor in Prostitution*, 7 ARCH. SEX. BEH. 31, 33, 35 (1977) (asking a sample of 136 prostituted women in a “large Western city” in the U.S. whether “prior to your first intercourse, did any older person (more than ten years older) attempt sexual play or intercourse with you?” 52% responded affirmatively). In-depth studies of survivors show higher frequencies of abuse. See, e.g., Evelina Giobbe, *Confronting the Liberal Lies About Prostitution*, in *LIVING WITH CONTRADICTIONS* 120, 123 (Alison M. Jaggar ed., 1994) (referring to organization WHISPER’s survivor interviews in Minneapolis, where 90% reported battery and 74% reported sexual abuse between three to fourteen years of age); Susan Kay Hunter, *Prostitution Is Cruelty and Abuse to Women and Children*, 1 MICH. J. GENDER & L. 91, 98–99 (1993) (finding 85% of 123 prostitution survivors reported child incest, 90% physical abuse, and 98% emotional abuse). Likewise, the Mary Magdalene Project in Reseda, California, reported in 1985 that 80% of the prostituted women it worked with were “sexually abused” during childhood, and Genesis House in Chicago reported “abuse” for 94%. Giobbe, *supra*, at 126 n.10; cf. INE VANWESENBEECK, *PROSTITUTES’ WELL-BEING AND RISK* 21–24 (1994), who summarizes early studies on childhood victimization as a predictor for entry into prostitution, with some studies indicating lower percentages than the above. Vanwesenbeeck’s summary is partly superseded by more recent studies and a refined general survey-methodology in areas of sexual abuse that has developed to avoid underreporting. See, e.g., DEAN G. KILPATRICK, ET. AL., *DRUG-FACILITATED, INCAPACITATED, AND FORCIBLE RAPE: A NATIONAL STUDY* (2007), 24–25, available at <https://www.ncjrs.gov/pdffiles1/nij/grants/219181.pdf> (stressing the importance of using “behaviorally specific terms . . . [that] do not require women to label an event as ‘rape’ in order to qualify an event as a rape incident,” at 25); Eva Lundgren et al., *Captured Queen: Men’s Violence against Women in “Equal” Sweden; A Prevalence Study* (Julia Mikaelsson & Geoffrey French trans., 2001), 15–16, available at <http://www.brottsoffermyndigheten.se> (“The questions about violence put to women by the researcher must penetrate behind any possible reinterpretations or minimizing of the violence if we are to attain knowledge of women’s experiences”). Note also that more recent studies recognize that a majority of prostituted persons shift between venues during their lives. See *infra* note 291. Hence, attempts to make distinctions in some earlier studies between preconditions to prostitution in indoor and outdoor samples have less relevance.

³⁴ See, e.g., John Briere and Diana M. Elliott, *Prevalence and Psychological Sequelae of Self-Reported Childhood Physical and Sexual Abuse in a General Population Sample of Men and Women*, 27 CHILD ABUSE &

study surveying thirty-three female prostitution survivors and thirty-six women in a community control group of similar age found that the childhood sexual abuse experienced by the prostitution survivors began at a significantly earlier age, occurred much more frequently, occurred over much longer periods, involved many more abusers, and included a “dramatic” difference that entailed a greater range of and more serious assaults for the prostituted persons than the abuse experienced by the community control group.³⁵

Several researchers have found that those women in prostitution who were abused as children often report that sexual abuse affected their entry into prostitution.³⁶ Many have been runaways,³⁷ or homeless,³⁸ and many enter prostitution during their adolescence.³⁹ Researchers Mimi Silbert and Ayala Pines found that among 200 juvenile and adult prostituted women in San

NEGLECT 1205, 1209–10 (2003) (finding that 32.3% of 471 women in a geographically stratified, random U.S. sample of 935 men and women reported childhood sexual abuse); Nancy D. Vogeltanz et al., Prevalence and Risk Factors for Childhood Sexual Abuse in Women: National Survey Findings, 23 CHILD ABUSE & NEGLECT 579, 583 (1999) (finding child sexual abuse prevalence among 1,099 women (weighted n = 733) ranged from 15.4% to 32.1%, depending on measurement criteria and interpretation of incomplete data).

³⁵ Bagley & Young, *supra* note 33, at 14–16 & tbl.3.

³⁶ See, e.g., Mimi H. Silbert & Ayala M. Pines, *Sexual Child Abuse as an Antecedent to Prostitution*, 5 CHILD ABUSE & NEGLECT 407, 410 (1981) [hereinafter Silbert & Pines, *Child Abuse as Antecedent*] (finding among 200 San Francisco prostituted juvenile and adult women that 70% of those sexually abused as children explicitly reported that sexual abuse affected their entry into prostitution, while a greater number strongly indicated so in open-ended responses); Ronald L. Simons & Les B. Whitbeck, *Sexual Abuse as a Precursor to Prostitution and Victimization Among Adolescent and Adult Homeless Women*, 12 J. FAM. ISSUES 361, 375-76 (1991) (finding, in a sample of forty adolescent runaways and ninety-five adult homeless women in Des Moines, Iowa, that “child sexual abuse increases the probability of involvement in prostitution irrespective of any influence exerted through other variables,” and that “[e]arly sexual abuse continued to be associated with prostitution . . . even after controlling for these factors” (e.g., running away, substance abuse, and delinquent/criminal behavior)); Statens Offentliga Utredningar [SOU] 1995:15 Könshandeln: Beträkande av 1993 års Prostitutionsutredning [government report series] 104 (Swed.) [hereinafter SOU 1995:15 Könshandeln [gov’t report series]] (noting that Silbert & Pines San Francisco study’s findings, *supra*, on child sexual abuse and entry into prostitution were similar to findings from interviews made by clinical and outreach workers in Gothenburg, Sweden); Bagley & Young, *supra* note 33, at 17 tbl.4 (reporting that among forty-five female prostitution survivors, 40% reported that child sexual abuse “definitely” influenced their entry into prostitution, 6.7% reported it “probably” did, and 15.5% reported it “perhaps” did so, or “not sure”).

³⁷ See, e.g., Bagley & Young, *supra* note 33, at 14 (three-quarters of forty-five prostitution survivors left homes “riven by strife, drunkenness, and abuse” by age sixteen, compared to none of thirty-six community control women of similar age; sexual abuse was the most frequent reason given for leaving home among prostitution survivors); Silbert & Pines, *Entrance into Prostitution*, *supra* note 31, at 485 (reporting over half of 200 juvenile and adult, current and former, prostituted women in San Francisco were runaways when entering prostitution; over two-thirds of the current prostituted women were runaways, and 96% of prostituted juveniles were runaways).

³⁸ See Farley et al., *Nine Countries*, *supra* note 31, at 43 (reporting 75% of 761 prostituted persons in nine countries had been homeless, either currently or in the past).

³⁹ For instance, 47% of 751 prostituted persons in nine countries reported entering prostitution under age eighteen, Farley et al., *Nine Countries*, *supra* note 31, at 40, and among a sample of 200 adult and juvenile, current and former prostituted women in San Francisco, 62% reported starting before age sixteen, and “a number” reported starting “under 9, 10, 11, and 12.” Silbert & Pines, *Child Abuse as Antecedent*, *supra* note 36, at 410. Among forty-five prostitution survivors in Alberta, Canada, 64.4% reported starting prostitution before age sixteen, and 57.8% reported being prostituted “regularly” before age sixteen. Bagley & Young, *supra* note 33, at 18 tbl.4.

Francisco, sampled through informal recruitment and advertising in order to avoid “arrestable” or “service-oriented” respondents,⁴⁰ most described an “almost total lack of positive social supports, and . . . an extremely negative self-concept and a depressed emotional state” at the time of entering prostitution.⁴¹ The “primary picture” among them was one of vulnerable runaway juveniles being solicited for prostitution and exploited by pimps “because they have no other means of support due to their young age, lack of education, and lack of the necessary street sense to survive alone.”⁴²

When young persons in prostitution get older their problems become exacerbated, as without education, job training, and resources to survive, many lack other alternative means for income than prostitution. Hence, they are likely to become further exploited by pimps and tricks. These coercive circumstances are harmful and dangerous, beyond the well-documented physical harms inflicted on prostituted persons.⁴³ Accordingly, a study of 854 persons prostituted in nine countries, Canada included, found very high levels of post-traumatic stress disorder (PTSD) among them.⁴⁴ Two-thirds met clinical criteria for PTSD equal to or higher than the levels of symptoms found in treatment-seeking Vietnam veterans, battered women seeking shelter, or refugees fleeing from state-organized torture.⁴⁵

In Mexico, the nine-country study controlled specifically for venue and obtained sufficiently large groups for intra-national comparison among 123 prostituted women; no statistically significant differences were found among prostitution in brothels, massage parlors, strip clubs, or on the street with respect to PTSD severity, nor with respect to length of time in prostitution, childhood abuse, rape in prostitution, number of types of lifetime violence experienced, or percentages who wanted to escape prostitution.⁴⁶ In Zurich, Switzerland, where adult prostitution is legal if prostituted persons are registered and no illegal conditions exist (e.g., underage prostitution or coercion),⁴⁷ researchers who studied violence and mental disorders among 193

⁴⁰ Silbert & Pines, *Entrance into Prostitution*, *supra* note 31, at 474.

⁴¹ *Id.* at 486.

⁴² *Id.* at 488–89.

⁴³ *See, e.g., infra* notes 54–57, and accompanying text regarding some common physical symptoms among prostituted persons.

⁴⁴ Farley et al., *Nine Countries*, *supra* note 31, at 44, 47–48, 56.

⁴⁵ *Id.* at 44–48. For sampling procedures, *see id.* at 37–39 where it is explained how researchers sampled prostituted persons (1) on streets in Canada; (2) in brothels, stripclubs, streets, or massage parlors in Mexico; (3) at clinics for STD controls in Turkey (prostituted persons were not “seeking assistance/treatment”); (4) by local newspaper advertisements, drop-in shelters for drug addicted women, and peer-referred in Germany; (5) randomly in four different areas on San Francisco streets; (6) at a beauty parlor in Thailand and at a job training/nonjudgmental support agency in northern Thailand; (7) at brothels, streets, and drop-in centers for prostituted persons in Johannesburg and Capetown, South Africa; (8) at a nongovernmental organization supporting approximately 600 women a week in Lusaka, Zambia; and (9) at support agencies in Bogota, Colombia. Male and transgendered persons were included among the Thai, South African, and U.S. samples. *Id.* at 39.

⁴⁶ *Id.* at 49.

⁴⁷ Wulf Rössler et al., *The Mental Health of Female Sex Workers*, 122 ACTA PSYCHIATRICA SCANDINAVICA 143, 144 (2010).

prostituted persons concluded that, compared to street prostitution, indoor prostitution was “not generally associated with more safety.”⁴⁸ Moreover, the Swiss study measured the “burden of sex work” in terms of such conditions as “income, expenditures, number of working days and of customers per week” and “motivation” for “sex work,” among others.⁴⁹ Their data suggested that “the burden of sex work” over the course of one year “impacts on the women’s mental health to an extent comparable to the rates developed during their whole previous lives.”⁵⁰ In South Korea, another recent study of forty-six formerly indoor prostituted women revealed significantly stronger symptoms of PTSD and stronger symptoms of other mental disorders compared to a control group, even when controlling for prior childhood sexual abuse.⁵¹ In Alberta, Canada, the number of months in prostitution predicted with statistical significance the mental disorders among forty-five prostitution survivors even after controlling for, inter alia, the severity of child sexual abuse before age sixteen and separation from a biological parent for five or more years before age twelve; unsurprisingly, these associations persisted with statistical significance when forty-five community controls were added to the analysis.⁵²

The above studies from Mexico, Switzerland, Korea, and Canada measured and controlled for abuse prior to entering prostitution, as well as numerous other relevant factors, but still found widespread PTSD and other mental disorders strongly being predicted by prostitution with statistical significance. These results suggest that the position taken in *Bedford* that PTSD among prostituted persons “could be caused by events unrelated to prostitution,”⁵³ as opposed to being caused by prostitution, is not very plausible. Simply put, prostitution in itself can usually be intrinsically harmful in producing the serious mental consequences of PTSD. Moreover, the similar levels of PTSD across venues within those studies where it was controlled for, together with the Swiss finding that the “burden of sex work” and mental disorders do not generally differ across different venues (see above), corroborate the conclusion that it is unlikely that a population primarily prostituted indoors would typically come from less desperate or more equal preconditions. If less desperate, presumably they would have more alternatives to prostitution and thus be in a better position to ascertain their interests and avoid harmful situations, such as prostitution, that cause psychological damage and mental disorders.

The consequences of prostitution, revealed in part by high levels of PTSD, are mirrored in a number of physical symptoms. For instance, in a sample of 700 prostituted persons from seven countries and a range of outdoor as well as indoor venues, 24% reported symptoms such as

⁴⁸ *Id.* at 150.

⁴⁹ *Id.* at 145

⁵⁰ *Id.* at 150.

⁵¹ Hyunjung Choi et al., Posttraumatic Stress Disorder (PTSD) and Disorders of Extreme Stress (DESNOS) Symptoms Following Prostitution and Childhood Abuse, 15 VIOLENCE AGAINST WOMEN 933, 942, 945–46 (2009).

⁵² See Bagley & Young, *supra* note 33, at 20–23, 21 tbl.6, 23 tbl.7. In the comparison with the control group, as distinguished from the analysis of exclusively prostitution survivors, the variable “practiced prostitution” was used instead of “months in prostitution.” *Id.*

⁵³ *Bedford* (Ont. Super. Ct. J.), *supra* note 12, at para. 353.

sexually transmitted diseases (STDs) including, inter alia, syphilis and HIV, as well as uterine infections, ovarian pain, menstrual problems, and abortion complications.⁵⁴ Among 100 Canadian prostituted women from Downtown Eastside Vancouver, there were many chronic health problems reported such as muscle aches and pains, joint pain, stomach problems, and headaches/migraines, each being reported by over half the sample.⁵⁵ Among other problems were jaw/throat pains and vomiting, each being reported by over a third.⁵⁶ In light of such severe symptoms it is not unsurprising that a Canadian federal public inquiry's final report into prostitution in 1985 quoted estimates, submitted by the City of Regina, suggesting that between violent death and drug overdose, mortality for prostituted persons may be forty times higher than the national average.⁵⁷

Without other available means for income, severe economic hardships force persons to enter and stay in prostitution. This fact is common across such socioeconomically diverse nations as Canada, South Africa, Sweden, and the United States.⁵⁸ Prostituted persons then frequently get stuck in the coercive and harmful circumstances of prostitution that they cannot leave—this situation is evident when considering that 89% of the 854 prostituted persons in nine countries wanted to escape prostitution.⁵⁹ Such statistics may also explain why, regardless of reported physical violence rates in different South Africa prostitution venues, or number of types of lifetime violence experienced in different Mexican prostitution venues, the PTSD symptoms were nonetheless in the same range, documenting the damage of prostitution in itself.⁶⁰ Apart from the fact that many prostituted persons have serious mental disorders, most persons who try to leave prostitution are poor and lack “rudimentary” job skills that could help them support themselves, as well as frequently lacking social skills required outside the world of prostitution.⁶¹ Such a situation makes it even more difficult for prostituted persons to escape prostitution and be reintegrated into society. Additionally, numerous bureaucratic or other barriers contribute to keeping persons in prostitution.⁶²

⁵⁴ Farley et al., *Nine Countries*, *supra* note 31, at 49-53.

⁵⁵ *See id.* at 54 tbl.10.

⁵⁶ *Id.*

⁵⁷ *See* SPECIAL COMM. ON PORNOGRAPHY AND PROSTITUTION IN CANADA, *supra* note 31, at 350.

⁵⁸ *See supra* note 31.

⁵⁹ Farley et al., *Nine Countries*, *supra* note 31, at 48, 51 tbl.8, 56.

⁶⁰ *See* Melissa Farley, “*Bad for the Body, Bad for the Heart*”: *Prostitution Harms Women Even if Legalized or Decriminalized*, 10 VIOLENCE AGAINST WOMEN 1087, 1100 (2004) [hereinafter Farley, “*Bad for the Body*”] (describing South African and Mexican findings where violence differed, but not PTSD symptoms); *see also* Farley et al., *Nine Countries*, *supra* note 31, at 49 (describing Mexican findings).

⁶¹ *See, e.g.*, Judith Lewis Herman, *Introduction: Hidden in Plain Sight; Clinical Observations on Prostitution*, in PROSTITUTION, TRAFFICKING, AND TRAUMATIC STRESS, *supra* note 33, at 11. For the associations between poverty and prostitution, *see supra* note 31.

⁶² For instance, in Nevada where prostitution is legal in some counties, women's shelters do not admit women with children, pets, HIV, communicable diseases, or criminal records; women who have not been drug-free for a specified time; or women recently released from prison. *See* Jody Williams, *Barriers to Services for Women Escaping Nevada Prostitution and Trafficking*, in PROSTITUTION AND TRAFFICKING IN NEVADA: MAKING THE

B. Impact of Legalizing Third Parties in Prostitution

In contrast to the Canadian courts' conclusion that decriminalizing managers, bodyguards, drivers, or other third parties in prostitution would improve the safety and well-being of persons in prostitution, numerous studies find that decriminalizing such third parties does not improve prostituted persons' safety or support, nor reduce the harm in prostitution. Prostituted persons in Victoria, Australia reported that legalization led to increasing competition and demands that women perform unsafe or high-risk practices and accept unwanted tricks.⁶³ In New Zealand, a government committee in 2008 reported that the "majority" of prostituted persons as well as brothel operators felt that the Prostitution Reform Act of 2003, which legalized some forms of prostitution, could do little about violence against women in prostitution.⁶⁴ In 2008, Amsterdam's Mayor told the *New York Times* that legalization did not result in more transparency or protection to women but rather the opposite: "'We realize that this hasn't worked, that trafficking in women continues,' he said. 'Women are now moved around more, making police work more difficult.'"⁶⁵ Similarly, a German federal government report in 2007 found that reforms legalizing certain forms of indoor prostitution generally have "not been able to make actual, measurable improvements to prostitutes' social protection," nor to their "working conditions."⁶⁶ A recent feature article in *Der Spiegel* (Germany's weekly equivalent to *Time* magazine) highlighted how their last decade of legalization policies had led to conditions becoming "worsened in recent years," as one informant expressed herself, making it more difficult for law enforcement to reveal abuses in the sex industry (e.g., not being able to access brothels) while simultaneously promoting an influx of poor foreign women; this increased supply, the article suggests, increases

CONNECTIONS, *supra* note 3, at 159–72. These are precisely the kinds of situations that affect many women in prostitution. Various policies and situations create other insurmountable barriers. Just to get a job as a housekeeper in Las Vegas at a large hotel and casino, starting at \$9 per hour, can require an immense amount of documentation, payment for required personal expenses, and other things difficult for people who just escaped, or are escaping, prostitution to provide in advance. *See id.* at 163–66. In Sweden in the early 1990s, a government inquiry reported other obstacles to escaping prostitution, noting for instance that although prostituted women with mental disorders were frequently encountered by outreach workers, it was "very difficult to get these women taken care of. This holds especially if the women are drug abusers. Neither the psychiatric care system, nor drug addiction programs, seem to want to take responsibility for them then." SOU 1995:15 *Könshandeln* [gov't report series], *supra* note 36, at 109.

⁶³ See MARY SULLIVAN, WHAT HAPPENS WHEN PROSTITUTION BECOMES WORK? AN UPDATE ON LEGALISATION OF PROSTITUTION IN AUSTRALIA 7 (2005), http://action.web.ca/home/catw/attach/Sullivan_proof_01.pdf, archived at <http://perma.cc/0vmQYRcckgR>.

⁶⁴ Ministry of Justice, N.Z. Gov't, Report of the Prostitution Law Review Committee on the Operation of the Prostitution Reform Act 2003 57 (2008), available at <http://www.justice.govt.nz/policy/commercial-property-and-regulatory/prostitution/prostitution-law-review-committee/publications/plrc-report/documents/report.pdf>, archived at <http://perma.cc/0dW66NBn2Ti>.

⁶⁵ Marlise Simons, Amsterdam Tries Upscale Fix for Red-Light District Crime, N.Y. TIMES, Feb. 24, 2008, at A10 (Westlaw).

⁶⁶ Fed. Ministry for Family Affairs, Senior Citizens, Women and Youth, Ger. Fed. Gov't, Report by the Federal Government on the Impact of the Act Regulating the Legal Situation of Prostitutes 79 (2007), available at <http://www.bmfsfj.de/BMFSFJ/Service/Publikationen/publikationsliste,did=100352.html>, archived at <http://perma.cc/0sd3L6pB1CE>.

competition and exploitative operations (e.g., dropping prices) as well as pushing the demands for more harmful sex (e.g., unlimited time, sex without condoms, or so-called “gang-bangs”).⁶⁷

Mirroring the reports from abroad, numerous testimonies from Nevada tell of unsafe sex demanded by tricks as well as pimps. During three years of research interviews there, psychologist and prostitution researcher Melissa Farley, a long-time expert and principal author of the nine-country study referred to above, was told of women fired from legal brothels upon receiving a positive HIV test while the management who ran the brothels, their assistants, and their health policies consistently seemed to favor the tricks, to the detriment of the prostituted women.⁶⁸ Farley’s accounts are corroborated by other women with experience from prostitution in legal brothels in Nevada, one attesting that “[w]e were strictly forbidden to use condoms unless the customers asked for one, as it took maximum pleasure away from the paying customer,”⁶⁹ Several others have testified that brutal beatings and rape occurred regularly in Nevada and were covered up by management as long as the perpetrating trick paid the “house.”⁷⁰

⁶⁷ See Cordula Meyer et al., *Unprotected: How Legalizing Prostitution Has Failed*, DER SPIEGEL, May 30, 2013, <http://www.spiegel.de/international/germany/a-902533.html> (Christopher Sultan trans.), archived at <http://perma.cc/0rrRuF6dpz9>.

⁶⁸ Melissa Farley, *Legal Brothel Prostitution in Nevada*, in PROSTITUTION AND TRAFFICKING IN NEVADA: MAKING THE CONNECTIONS, *supra* note 3, at 39–45; cf. LENORE KUO, PROSTITUTION POLICY: REVOLUTIONIZING PRACTICE THROUGH A GENDERED PERSPECTIVE 84 (2002) (noting that the “impression” of her visits and research interviews in legal Nevada brothels “was that the overarching focus of brothel management was the satisfaction of its customers. Little interest was shown in the well-being of the workers”)

⁶⁹ Jayme Ryan, *Legalized Prostitution: For Whose Benefit?*, in SOJOURNER: THE WOMEN’S FORUM 22, 23 (1989). Lenore Kuo, professor of Women’s Studies and Philosophy at the California State University at Fresno in 2002, found similar accounts by “at least one” of the prostituted women in Nevada legal brothels she interviewed, noting that measures meant to protect the prostituted women, “especially the requirement of condoms, were regularly disregarded for an additional fee and that brothel management made no serious effort to prevent this.” KUO, *supra* note 68, at 84; cf. Farley, *Legal Brothel Prostitution in Nevada*, in PROSTITUTION AND TRAFFICKING IN NEVADA: MAKING THE CONNECTIONS, *supra* note 3, at 44 (mentioning that tricks “bribe” prostituted women not to use condoms in legal brothels in Nevada, and elsewhere); see also SULLIVAN, *supra* note 63, at 20 (citing studies showing that some men in Victoria, Australia, do not want to use condoms in legal brothels, and that some brothel operators do not insist)

⁷⁰ See Anastasia Volkonsky, *Legalizing the “Profession” Would Sanction the Abuse*, INSIGHT ON THE NEWS, Feb. 27, 1995, at 22 (“[C]ontrary to the common claim that the brothel will protect women from the dangerous, crazy clients on the streets, rapes and assaults by customers are covered up by management.”); Ryan, *supra* note 69, at 22 (stating that “[o]nce you were alone in your room with a customer you had no protection from him. There were many different occasions where a woman was brutally beaten or raped by a john, but as long as he paid the house it was kept quiet”); see also KUO, *supra* note 68, at 84–85, who writes that all her interviewees in Nevada legal brothels, when pressed for answers, “acknowledged” that third parties and tricks were abusive there, though the women often downplayed the violence (tricks were said to be “overly rough”), or they blamed themselves for it (they were “not sufficiently ‘professional’”); cf. Farley, *Legal Brothel Prostitution in Nevada*, in PROSTITUTION AND TRAFFICKING IN NEVADA: MAKING THE CONNECTIONS, *supra* note 3, at 29–30 (interviewing former brothel manager who stated that “only a small percentage of brothel violence is reported” and that prostituted women minimize assaults because they have become “accustomed” to violence); Dan Kulin, *Prostitute Sues Musician Neil, Brothel over Alleged Assault*, LAS VEGAS SUN, Apr. 16, 2004, <http://www.lasvegassun.com/news/2004/apr/16/prostitute-sues-musician-neil->

Of Farley's sample of forty-five women in legal brothels in Nevada, 57% out of forty-four who specifically responded told interviewers that, despite fears of being secretly recorded and punished, they gave part or all of their earnings to someone other than those controlling the legal brothel; moreover, half of all women in the sample believed that at least half of the women in those brothels were controlled by external pimps.⁷¹ Thus, several levels of seemingly exploitative third parties appear to participate in controlling and influencing Nevada brothel prostitution. A coercive structure like this may be necessary for business to run smoothly, as many tricks around the world, corroborated by testimonies from prostituted women, acknowledge they solicit these women in order to have sex that others would refuse them, including violent, abusive, and degrading sex.⁷² If unsafe, abusive, and violent sex were truly prevented in prostitution, as opposed to being controlled by pimps, business might decrease significantly. The substantive demand for abusive sex is likely an important reason why other sources report that brothel management, bodyguards, or other third parties often encourage unsafe sex, are uninterested in intervening with violent tricks, cover up violence after it happened, and may not be able to stop it even if they wanted to.⁷³

brothel-over-alleged/, archived at <http://perma.cc/03Lm5Jxxs83> (reporting a civil suit by prostituted woman lodged against legal Nevada brothel owner for failure to intervene against violent trick).

⁷¹ Farley, *Legal Brothel Prostitution in Nevada*, in PROSTITUTION AND TRAFFICKING IN NEVADA: MAKING THE CONNECTIONS, *supra* note 3, at 31–32.

⁷² See, e.g., Rachel Durchslag & Samir Goswami, Deconstructing the Demand for Prostitution: Preliminary Insights from Interviews with Chicago Men Who Purchase Sex 12 (2008) (reporting that 46–48% of 113 Chicago tricks conceded that they purchased prostituted women to have sex that they “either felt uncomfortable asking of their partner or which their partner refused to perform,” including violent sex (e.g., sadomasochism) and degrading fetishes (e.g., peeing on someone); IN HARM'S WAY: THE PORNOGRAPHY CIVIL RIGHTS HEARINGS 116 (Catharine A. MacKinnon & Andrea Dworkin eds., 1997) (testimony by T.S.) (survivor testified during public hearing: “Men witness the abuse of women in pornography constantly, and if they can't engage in that behavior with their wives, girlfriends, or children, they force a whore to do it”); Melissa Farley et al., Comparing Sex Buyers with Men Who Don't Buy Sex 30 (2011), available at <http://www.prostitutionresearch.com/pdfs/Farleyetal2011ComparingSexBuyers.pdf>, available at <http://perma.cc/0iivWJ5o3oZ> (quoting trick who explained that “the people that I wanted to do it with didn't want to do it with me, so I started going to prostitutes”); Melissa Farley et al., *Attitudes and Social Characteristics of Men Who Buy Sex in Scotland*, 3 Psychol. Trauma: Theory, Res., Practice, & Policy 369, 375–76 (2011) [hereinafter Farley et al., *Men in Scotland*] (reporting that tricks in Scotland emphasized “pleasure in asserting their dominance over women in prostitution,” such as “freedom to do anything they want in a consequence-free environment”); Mimi H. Silbert & Ayala M. Pines, *Pornography and Sexual Abuse of Women*, 10 Sex Roles 857, 863–64 (1984) (among 193 prostituted women and girls who reported rape by a trick, 24% made unsolicited comments during interviews attesting that the rapists referred directly to some pornography he had seen, and insisted that victims enjoyed the rape and extreme violence); cf. Farley et al., *Nine Countries*, *supra* note 31, at 44, 46 (47% of 854 prostituted persons reported being upset by attempts to imitate pornography).

⁷³ See, e.g., Dawn Whittaker & Graham Hart, *Research Note: Managing Risks; the Social Organisation of Indoor Sex Work*, 18 SOCIOLOGY OF HEALTH & ILLNESS 399, 409 (1996) (reporting about de-facto brothels in London, U.K., where prostituted “women are subject to violence and . . . the presence of the maid has only a limited protective value”); Suzanne Daley, *New Rights for Dutch Prostitutes, but No Gain*, N.Y. TIMES, Aug. 12, 2001, § 1, at 1 (legal brothel owner in the Netherlands complaining about a government regulation requiring a pillow in the room: “You don't want a pillow in your room. It's a murder weapon.”); *supra* notes 63–72, and accompanying text;

In sum, corroborating public inquiries and research from Nevada, Germany, New Zealand, the Netherlands, and Australia, where third-party profiteers in prostitution are legal at certain places, although trafficking is not, suggest that decriminalization typically does not improve or control health, safety, or the tricks and pimps' demand for unsafe and dangerous sex. It is to be expected that decriminalization does not improve this situation since the tricks' money drives the business, not the needs of prostituted persons. Third parties are driven by profits; tricks are concerned with their perceived right to buy sex in whatever form they wish;⁷⁴ prostituted persons' vulnerable situations provide them little leverage against either of them. Making the third parties and tricks legal in prostitution does not strengthen the hand of prostituted persons; it provides greater legitimacy to their exploiters and those exploiters' interests.

A social theory debate about whether prostitution should be regarded as inherently oppressive or not is still fought in some quarters. Accordingly, some argue that “[w]hile exploitation and violence are certainly *present* in prostitution, there is sufficient variation across time, place, and sector to demonstrate that prostitution cannot be reduced to gender oppression and is much more complex in terms of workers' experiences as well as power relations between workers, customers, and managers.”⁷⁵ In response to such accounts, it should be noted though that few scholars would probably suggest that prostitution is an expression of a simple and linear “gender oppression.” The evidence of various preconditions presented above, such as poverty, racial discrimination, childhood abuse and neglect, homelessness, and sexism,⁷⁶ suggests that

cf. Farley, “*Bad for the Body*,” *supra* note 51, at 1103 (noting that “[p]anic buttons in brothels make as little sense as panic buttons in the homes of battered women,” as such alarms will not “be answered quickly enough to prevent violence”); *infra* notes 100–107, and accompanying text (Whittaker and Hart on London brothels).

⁷⁴ Several international studies show that most tricks understand that prostituted persons do not enjoy the sex, are economically vulnerable, and are subjected to violence as well as grave hardships, including being pimped/trafficked. *See, e.g.*, DURCHSLAG & GOSWAMI, *supra* note 72, at 20, 22; MELISSA FARLEY, JULIE BINDEL & JACQUELINE M. GOLDING, *MEN WHO BUY SEX* 4, 13 (2009); Andrea Di Nicola & Paolo Ruspini, *Learning from Clients*, in *PROSTITUTION AND HUMAN TRAFFICKING: FOCUS ON CLIENTS* 227, 231–32 (Andrea Di Nicola et al. eds., 2009); Farley et al., *Men in Scotland*, *supra* note 72, at 372–73, 376 (2011); Martin A. Monto, *Female Prostitution, Customers, and Violence*, 10 *VIOLENCE AGAINST WOMEN* 160, 177 (2004). Moreover, tricks often think they are entitled to any kind of sex just because they are paying for it. *See, e.g.*, DURCHSLAG & GOSWAMI, *supra* note 72, at 2, 18 (finding 43% of 113 tricks that were interviewed in Chicago stated the woman “should do anything he asks” when paid); FARLEY, BINDEL & GOLDING, *supra*, at 4, 13 (reporting that among 103 tricks in London, 27% openly explained that once having paid “the customer is entitled to engage in *any act he chooses*,” and 47% openly expressed that “women did not always have certain rights during prostitution.”); Farley et al., *Men in Scotland*, *supra* note 72, at 375 (reporting that 22% of 110 tricks in Scotland endorsed the belief that after paying, a trick is entitled to “do whatever he wants to the woman he buys”); *cf.* SOU 1995:15 *Könshandeln* [gov’t report series], *supra* note 36, at 142 (“Some tricks conceive . . . they’re paying . . . to treat the woman as they wish. The trick thinks that he . . . paid for the woman’s right to a human and dignified treatment.”).

⁷⁵ Ronald Weitzer, *Prostitution as a Form of Work*, 1 *SOCIOLOGY COMPASS* 143, 143–44 (2007); *cf.* Jane Scoular, *Criminalizing “Punters”: Evaluating the Swedish Position on Prostitution*, 26 *J. SOC. WELFARE FAM. L.* 195, 202 (2004) (stating that “[v]iewing prostitution as the epitome of gender violence . . . tends to obscure the contingencies and diversity of the structures under which it materialises”).

⁷⁶ *See supra* notes 31–42, and accompanying text.

prostitution is an *intersectional* form of oppression where multiple disadvantages converge.⁷⁷ Given this understanding, gender is still an important factor in the equation. The underlying assumption behind claims of a complex “variation across time, place, and sector,” by contrast, seems to be that variation by itself qualifies the conclusion that prostitution is not typically an intersectional expression of gender inequality and male dominance. However, unless the gendered “power relationships” in prostitution were substantively and commonly reversed (e.g., with male tricks and pimps being frequently abused and oppressed by prostituted women, and tricks being coerced to pay for sex), the “gender oppression” in prostitution does not appear particularly complex. Even though these theoretical debates may be important, the empirical problems for prostituted persons described above are vast, and make it imperative to move the attention to the policy-oriented arena. The *Bedford* court of first instance similarly implied that despite theoretical disagreements about the “intrinsic” quality of violence in prostitution, most persons recognizes that the risk of violence is highly prevalent and that something must be done about it.⁷⁸ One of the questions asked in this Article is thus whether the *Bedford* decisions have reduced the risk of such violence or not.

II. COURTS MISEVALUATED AND MISREPRESENTED EVIDENCE OF RECORD

In order to further assess the decisions to strike down the bawdy-house and avails provisions—decisions making previously prohibited third-party activities in prostitution legal—the evidence invoked in their defense will be analyzed. In Ontario Superior Court of Justice (first judicial instance), only five submitted social science studies were cited and discussed in full. These were said to be “some of the most relevant” in shedding light on whether violence toward prostituted persons could be reduced.⁷⁹ This choice indicates the strong evidentiary validity of these five studies in the eyes of the court, particularly when considering that the evidence otherwise was said to consist of “[o]ver 25,000 pages of evidence in 88 volumes, amassed over two and a half years,” including oral testimonies, studies, and affidavits.⁸⁰ Apart from the five studies, the court refers to the opinions of experts from testimony without specific citation, other than to the references of the work of that person otherwise cited.⁸¹ Similarly, the court refers to a few government reports, but without precise citation to the empirical evidence supporting the

⁷⁷ See *infra* notes 448–459, and accompanying text (discussing Kimberle Crenshaw’s concept of intersectionality applied to prostitution).

⁷⁸ *Bedford* (Ont. Super. Ct. J.), *supra* note 12, at para. 299 (stating that 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 practised that may reduce the risk of violence to prostitutes.”).

⁷⁹ *Id.* at para. 325.

⁸⁰ *Id.* at para. 84.

⁸¹ See *id.* at paras. 307–18. One exception is an unpublished M.A. thesis reportedly referred to by expert John Lowman. However, because the evidence summarized from it does not purport to support the court’s conclusion that indoor venues with third parties can improve safety and well-being, only the proposition that “prostitution is not inherently dangerous,” that study is excluded from the analysis. *Id.* at para. 318.

court's decisions.⁸² Therefore, the analysis in this Part is confined to the studies that are cited and purport to support the court's conclusion. The five studies will thus be investigated in detail below, together with some of the key expert opinions cited by the two *Bedford* courts to support their decisions to strike down or modify the avails and bawdy-house provisions. The *facta* (briefs) in the Supreme Court of Canada, by distinction, rely heavily on isolated and anecdotal evidence from individuals who were cross-examined in lower courts when dealing directly with the question of whether or not abuse in prostitution would be reduced indoors or with third parties.⁸³ The assumption seem to be that such individual statements selected to support one's side are as weighty, persuasive, and reliable as systematic studies with solid methodology, or comprehensive public inquiries.

In evaluating studies of prostitution for their methodology, it is important to recognize that there may be limits of reliability when those who are interviewed could be jeopardized or endangered if they tell the truth; as noted in several sources, third parties are frequently coercive against prostituted persons and may exercise such threats that impacts on the prostituted persons' propensity to report abuse to authorities or to researchers.⁸⁴ Hence, it is imperative to consider whether bias is more or less likely in their responses, and in what direction. As discussed further

⁸² See *id.* at paras. 302–06.

⁸³ See, e.g., Factum of Repondents/Appellants on Cross Appeal at paras. 9 n.10, 13 n.15, 22 n.24, 24 nn.26–29, 28 n.42, 31 n.50, 32 n.51, 33 nn.52–57, 34 n.59, 37 nn.65–68, Canada (Att'y Gen.) v. Bedford, No. 34788 (Can. Apr. 28, 2013), available at http://www.scc-csc.gc.ca/factums-memoires/34788/FM030_Respondents_Terri-Jean-Bedford-et-al.pdf, archived at <http://perma.cc/0ersrjUjHVK> (citing individuals); *id.* at paras. 38 n.69, 39 nn.70–73, 46 nn.83–85 (citing research and public reports); Factum of Appellant, the Attorney General of Canada, at paras. 15 n.20, 19 n.26, 75 nn.147–51 & 153, 76 n.154, 77 nn.155–57, 79 n.161, 81 n.166, 99 n.196, 122 n.218, Canada (Att'y Gen.) v. Bedford, No. 34788 (Can. May 28, 2013), available at http://www.scc-csc.gc.ca/factums-memoires/34788/FM010_Appellant_Attorney-General-of-Canada.pdf, archived at <http://perma.cc/03DWYM5FEde> (citing individuals); *id.* at paras. 26 n.45, 27 nn.46–55, 29 nn.59–61, 30 nn.62–63, 31 nn.64–68, 32–35 nn.66–75, 78 nn.159–60, 80 nn.162–64, 99 n.197, 100 n.198 (citing individuals and research or public reports); Factum of the Appellant, Attorney General of Ontario, at paras. 98 n.142, 99 nn.146 & 148, Canada (Att'y Gen.) v. Bedford, No. 34788 (Can. Mar. 20, 2013), available at http://www.scc-csc.gc.ca/factums-memoires/34788/FM020_Appellant_Attorney-General-of-Ontario.pdf (citing research and public reports); Factum of the Interveners, Canadian Ass'n of Sexual Assault Ctrs., et al., at 14 n.17, 17 n.25, Canada (Att'y Gen.) v. Bedford, No. 34788 (Can. May 30, 2013), available at http://www.scc-csc.gc.ca/factums-memoires/34788/FM075_Intervener_Coalition.pdf, archived at <http://perma.cc/0z8tNgcgBh> (citing individuals only).

⁸⁴ See, e.g., *R. v. Downey* [1992] 2 S.C.R. 10, 36–39 (Can.) (noting that pimps' threats make prostituted persons unlikely to testify about mistreatment); Farley, *Legal Brothel Prostitution in Nevada*, in *PROSTITUTION AND TRAFFICKING IN NEVADA: MAKING THE CONNECTIONS*, *supra* note 3, at 23–24 (noting various incidents and conditions during interviews suggesting that prostituted women in Nevada legal brothels were under strong pressures not to reveal information to outsiders that could cast the brothels in negative light); *ROYAL CANADIAN MOUNTED POLICE*, *supra* note 6, at 38–39 (discussing witness intimidation and difficulties to get prostituted persons to speak on record against their traffickers); *cf. id.* at 22 (noting that “numerous” domestic trafficking victims in Canada, of which most were forced to prostitution in “exotic dance clubs,” and others in “massage parlours” or “escort services” were “subjected to death threats, physical abuse and brutal assault while under the control of their trafficker”); KUO, *supra* note 68, at 84 (noting that all prostituted persons in Nevada legal brothels she interviewed seemed “more concerned with possible assault or abuse” from management than abuse from tricks).

below, the very fact that some persons work in legalized businesses may increase the incentive to underreport abuse, management misconduct, unsafe sex, or other illegal activities, as doing so could jeopardize the businesses' legal status.⁸⁵ Considering that brothels in general might benefit from preventing transparency into their businesses, if not actively preventing it,⁸⁶ suggests that there can be validity problems when interviewing persons in prostitution, as opposed to interviewing survivors who left the industry. The latter are not under influence of third parties or otherwise dependent on continuing in prostitution, and are thus less likely to provide responses biased in favor of the sex industry.

Another methodological problem to acknowledge is that scholars and researchers, along with social workers, law enforcement officers, doctors, and journalists, are often not trusted by prostituted persons.⁸⁷ This is understandable given that many experienced being let down by various authorities during their childhood and adolescence when those authorities failed to identify or prevent abuse.⁸⁸ Scholars also often fall short of accurately perceiving the complexity of prostituted persons' situations, as they may be at risk (e.g., from third parties who may threaten them for revealing incriminating information) and thereby be incentivized to give

⁸⁵ See, e.g., *infra* Part II A, B, & C, et passim (discussing various situations where respondents' responses may imply underreporting of incriminating evidence).

⁸⁶ Many brothels have accordingly refused entry for the purpose of research. See, e.g., Tooru Nemoto et al., *HIV Risk Among Asian Women Working at Massage Parlors in San Francisco*, 15 AIDS EDUCATION AND PREVENTION 245, 247 (2003) (denied entry in 13 out of 25 parlors in San Francisco); Farley, *Legal Brothel Prostitution in Nevada*, in PROSTITUTION AND TRAFFICKING IN NEVADA: MAKING THE CONNECTIONS, *supra* note 3, at 23 (denied entry in 6 out of 14 Nevada brothels). One researcher noted that when she attempted to access brothels in Nevada for research purposes she was "consistently informed that women were permitted entrance only under the auspices of George Flint, president of the Nevada Brothel Association." KUO, *supra* note 68, at 79–80.

⁸⁷ See, e.g., Silbert & Pines, *Child Abuse as Antecedent*, *supra* note 36, at 408; cf. SOU 1995:15 Könshandeln [gov't report series], *supra* note 36, at 144 (acknowledging the need for "long time and close contact with prostituted women in order to acquire knowledge of their real situation").

⁸⁸ A recent Swedish research evaluation found many accounts by prostituted persons indicating that general childhood social service and psychiatric programs as well as judicial authorities and parents often failed to identify and prevent prostitution among children and young persons, in contrast with the few specialized units that targeted persons in prostitution directly. PROSTITUTION I SVERIGE: HUVUDRAPPORT; KARTLÄGGNING OCH UTVÄRDERING AV PROSTITUTIONSGRUPPERNAS INSATSER SAMT ERFARENHETER OCH ATTITYDER I BEFOLKNINGEN [PROSTITUTION IN SWEDEN: PRIMARY REPORT; MAPPING AND EVALUATION OF THE PROSTITUTION UNITS EFFORTS, EXPERIENCES, AND ATTITUDES IN THE POPULATION] 8–10, 17–18 (Carl Göran Svedin et al., eds., 2012) (Swed.); cf. Statens Offentliga Utredningar [SOU] 2010:49 Förbud mot köp av sexuell tjänst: En utvärdering 1999–2008 [Prohibition Against Purchase of Sexual Service: An Evaluation 1999–2008] [government report series] 232 (Swed.) [hereinafter SOU 2010:49 [gov't report series]] (reporting that necessary and adequate knowledge among social service agencies to prevent or stop prostitution often doesn't exist nationally outside the few specialized units (three) in the metropolitan areas). Early studies in the U.S. have also indicated severe problems related to early prevention of prostitution, such as detecting child sexual abuse which is an early antecedent to prostitution that can predict further sexual exploitation. See, e.g., Mimi H. Silbert and Ayala M. Pines, *Early Sexual Exploitation as an Influence in Prostitution*, 28 SOCIAL WORK 285, 286–87 (1983) (reporting that only 37% of those 60% of 200 prostituted persons who reported sexual abuse as children had told anyone about it, and in only 21% of those cases did the abuse stop); *supra* notes 33–42, and accompanying text (discussing the prior role of child sexual abuse in prostitution).

researchers misleading information about prostitution—a problem that will be looked upon in all the five studies analyzed below to assess whether such bias may have been successfully avoided or not.⁸⁹ Likewise, journalists who solicit prostituted persons to do interviews may have incentives, such as providing titillating stories to commercial outlets (e.g., the tabloid press), that can lead the prostituted persons to be disbelieved or harassed in their lives. There is thus a need for researchers to establish the trust that enables prostituted persons to reveal sensitive information reliably, particularly without risking disbelief or prejudice, or being arrested or institutionalized or stigmatized for not having left prostitution. In order to do this, perceptive researchers, particularly those who are not psychologically trained and experts in the field, have frequently used interviewers who have been prostituted and can communicate their understanding of the difficulties faced based on direct experience.⁹⁰

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

One of the articles cited by the Ontario Superior Court of Justice concerned the role of “maids” in legal prostitution: a health and sociological study of women who were prostituted legally indoors in flats located in central London, United Kingdom, authored by Dawn Whittaker and Graham Hart.⁹¹ The study described, analyzed, and evaluated various strategies that were used in these indoor venues ostensibly to protect prostituted women from various “risks” to their well-being; hence, the article defines the opposite of risk in terms of “safety,” which according to the authors primarily meant “less potential for client violence,” but also guaranteed payment and safe sex with condoms.⁹² Although Whittaker and Hart described their interest as being to inquire into “the extent to which different types of working environments are associated with different degrees of exposure to risk,” they made clear that they lacked a control group in street prostitution.⁹³ In other words, their study would only be able to conclude that the risks might be different in different venues—not more or less risky per venue. Nonetheless, the court erroneously summarized their study as if it had systematically compared street prostitution with prostitution indoors, stating that the “U.K. study looks at . . . prostitutes working out of ‘flats’ and to prostitutes working on the street,”⁹⁴ despite the fact that even the journal abstract informs the reader that the study only looks at prostitution in flats.⁹⁵

⁸⁹ See *infra* Part II A-D.

⁹⁰ See, e.g., Jody Raphael & Deborah L. Shapiro, *Reply to Weitzer*, 11 VIOLENCE AGAINST WOMEN 965, 967 (2005); Silbert & Pines, *Child Abuse as Antecedent*, *supra* note 36, at 408–09.

⁹¹ *Bedford* (Ont. Super. Ct. J.), *supra* note 12, at para. 325(d) (citing Whittaker & Hart, *supra* note 73).

⁹² Whittaker & Hart, *supra* note 73, at 406.

⁹³ *Id.*

⁹⁴ *Bedford* (Ont. Super. Ct. J.), *supra* note 12, at para. 325(d) (emphasis added).

⁹⁵ See Whittaker & Hart, *supra* note 73, at 399 (“[W]e report on the flat-working women’s employment of protective strategies, such as co-working with ‘maids’”); *cf. id.* at 406 (“Not described here is our concurrent work with street-working women.”). The authors did account for statements by *some* women in the flats who ostensibly explained their choice of venue by saying that they, or people they knew, had experienced more violence

Whittaker and Hart described how the flats were operated by two women—a “maid” and a prostituted woman (the law prohibited any more than one prostituted woman in each flat).⁹⁶ There were two “ideal” features to promote increased safety in this model, outlined early in the study and later assessed in terms of whether or not they were applied effectively in “reality.” First, with respect to the premises (as distinguished from the maid), women prostituted in the flats themselves described their prostitution as being conducted “in a lit, contained environment” that allegedly constituted the woman’s “own territory” and provided her more control over the “interaction.”⁹⁷ However, the court’s summary omitted that Whittaker and Hart, who had not made a control study in the streets of their own, moderated their respondent’s accounts by noting that prostituted women in the streets also frequently conduct their encounters in hotels or their own homes after having solicited a trick.⁹⁸ These venues are not very different with regards to features such as light and familiarity. In street prostitution it may also be easier to escape a violent trick than when being contained behind four walls in a closed building.⁹⁹ In addition, when third-party profiteers are involved—such as the maids, “card boys,” landlords, and other “sex industry” actors that the authors had found were linked to the flats¹⁰⁰—other studies and accounts show that they commonly protect the violent tricks rather than the women because of the tricks’ money and the women’s comparatively lower bargaining power.¹⁰¹ Hence, the accounts by Whittaker and Hart as well as other studies suggest that the difference attributed to a lit and contained indoor environment may have been overemphasized and misinterpreted by the court, and as such might not support their conclusion that indoor prostitution is safer than outdoor prostitution.

Second, and more importantly, Whittaker and Hart described the maids as “ideally” intending to provide more safety to the prostituted woman, for example by “provisionally” assessing potential tricks, managing the time between them (e.g., knocking on the door when time is up), guarding the financial transaction, and sitting in an adjacent room in order to respond

on streets. *Id.* However, there was no control group from the streets or other information to validate the representativeness of those experiences.

⁹⁶ *Id.* at 404.

⁹⁷ *Id.* at 407; see also *Bedford* (Ont. Super. Ct. J.), *supra* note 12, at para. 325(d).

⁹⁸ Whittaker & Hart, *supra* note 73, at 407.

⁹⁹ See, e.g., ST. JAMES INFIRMARY, OCCUPATIONAL HEALTH & SAFETY HANDBOOK 89 (Naomi Akers & Cathryn Evans eds., 3d ed. 2010), available at http://stjamesinfirmary.org/wordpress/wp-content/uploads/2010/10/sji_rg_v3-2010.pdf, archived at <http://perma.cc/02CetqGsJMU>, who alerts prostituted women to be “aware of exits” and to prevent the trick from blocking them. Indeed, when being inside a closed building there are several obstacles such as walls, doors, locks, windows, elevators, and staircases, while being outside there might be none other than the physical ability to run away from a dangerous trick. There might also be more opportunity for calls for help to be heard outside compared to a padded indoor location, as well as more indirect monitoring by potential visual observers (e.g., on parking lots, in parks, or back alleys) that are generally not present in indoor locations.

¹⁰⁰ See Whittaker & Hart, *supra* note 73, at 404, 410–11 (mentioning “card boy[s]” and identifying other third parties).

¹⁰¹ See, e.g., *supra* notes 63–74, and accompanying text.

to calls for troubles during the prostitution encounter.¹⁰² However, in “reality” the study found several problems with this model. Although the “ideal function” of maids centers on their protection and company to prostituted women, the authors noted that “observational evidence suggests that in reality there is much variation from this ideal working pattern and in prostitute-maid relationships, which affect prostituted women’s safety.”¹⁰³ Reports of assault, rapes, and robberies in the flats demonstrated these problems.¹⁰⁴ For instance, during the sexual encounter, the prostituted woman is always alone in the room with the trick, and on such occasions Whittaker and Hart had found that several violent situations had occurred and concluded that women “have to develop their own protective strategies.”¹⁰⁵ Any role which the maid could “play in containing actual situations of violence” was decidedly minimal.¹⁰⁶ The authors concluded that although the “occupational risks” of prostitution might vary in different venues, and though there was no control group to compare with from the street, they nonetheless thought that what “links or cuts across women’s own accounts, regardless of the setting, is the potential client violence. This is a constant, and exists as a substantial ‘health’ risk both for women working in flats and on the streets.”¹⁰⁷ None of these findings and conclusions were reported in the Ontario Superior Court’s summary, which erroneously summarized the study as if it had compared flats and street venues and “found that working in a flat was safer.”¹⁰⁸ The authors did not have a control group from the street, thus could not conclude what the courts said it concluded, and did not attempt to make such a comparative claim; the study merely set out to “explore the hypothesis that working environment can mitigate, reduce or enhance the potential for harm,”¹⁰⁹ and described their findings regarding what aspects in the London flats mitigated, reduced, or enhanced such harm.

Other findings that counter the conclusions made by the court, and which are of particular interest in Whittaker and Hart’s study, pertain to the financial constraints in this system of indoor prostitution and how it affects safety and well-being as defined by the authors. Unlike the maids, who were paid a salary, the prostituted women had to cover all expenses, including the rent and paying the maid a daily wage, before earning anything for themselves.¹¹⁰ This finding was also not reported by the Ontario Superior Court in its brief summary of the study that only emphasized how maids *ideally* could make prostitution safer,¹¹¹ as opposed to the *reality* that was vividly

¹⁰² See Whittaker & Hart, *supra* note 73, at 407; see also *Bedford* (Ont. Super. Ct. J.), *supra* note 12, at para. 325(d).

¹⁰³ Whittaker & Hart, *supra* note 73, at 407–08.

¹⁰⁴ See *id.* at 409.

¹⁰⁵ See *id.* at 408–09.

¹⁰⁶ *Id.* at 409.

¹⁰⁷ *Id.* at 412.

¹⁰⁸ *Bedford* (Ont. Super. Ct. J.), *supra* note 12, at para. 325(d).

¹⁰⁹ Whittaker & Hart, *supra* note 73, at 406.

¹¹⁰ See Whittaker & Hart, *supra* note 73, at 404; see also *infra* note 113, and accompanying text.

¹¹¹ See *Bedford* (Ont. Super. Ct. J.), *supra* note 12, at para. 325(d) (“The authors concluded that there are two characteristics of ‘flat work’ that make it safer: (1) it takes place indoors in a lit, contained environment (2) the prostitutes work with an assistant, or ‘maid.’ The maid makes a provisional assessment of prospective clients through

described by Whittaker and Hart.¹¹² It is puzzling in particular that the courts did not note the article's lengthy description of the additional layer of exploitation of the women's prostitution that occurred in the apartments:

Unlike women working on the streets, these women have a lot of outgoing expenses. Chief among these is the *daily* rent they have to pay to their landlord: this varies from £120 to £250. The landlord also charges varying daily amounts to cover bills, such as electricity and telephone, on top of the basic rent. In addition, the women pay the maid a daily wage—£30 to £60. . . . [S]ome flats advertise in phone boxes. In this case a 'card boy' is paid a daily rate of up to £60 to place cards regularly in local phone boxes. There is also the cost of printing the cards.

. . . . Women aim to see a certain number of clients a day—usually 20. . . . “You've got to get through, like, ten punters before you've made your rent and maid. And after that you might not do any more, so you don't make any money, anyway (depth interview).” . . . Survey data to date shows the average number of clients seen by these women in a week is 76. Many women see between 20 and 30 men a day—with a few women seeing up to 50.¹¹³

These observations may have serious implications for prostituted persons' general well-being and safe sex practices. Other studies from legal brothels discussed above show how legal prostitution could not eliminate the demands for and monetary incentives to accept unsafe sex or other abuses.¹¹⁴ Many tricks will pay more if the condom is not used.¹¹⁵ It is therefore useful to know how, or if, these incentives were countered when there was a quota of meeting about ten tricks before breaking even.

Every woman to whom [Dawn Whittaker] has spoken reports always using condoms for all penetrative sex, including oral sex. It should be noted, however, that they *all* said they were frequently asked by clients for unprotected sex, and this was usually with an offer of more money. Everyone had stories of women who would 'do it without,' stories which are used to distance themselves from such activity¹¹⁶

Indeed, testimonies from legal brothels around the world suggest that the stories of unsafe sex of others above are closer to the truth for most persons than these authors might have realized.¹¹⁷ Considering that some of the women in London saw up to fifty men a day, in part to have money left when “rent and maid” were paid,¹¹⁸ there would be strong incentives for them to reduce that number by accepting more unsafe sex. However, such information may be difficult to attain as it could implicate illicit activities, which is also suggested by the recurring obstacles to

a peephole and can veto undesirable clients (such as those that appear drunk), and sits in an adjacent room during the transaction.”).

¹¹² See *supra* notes 97–107, and accompanying text; *infra* notes 113–142, and accompanying text.

¹¹³ Whittaker & Hart, *supra* note 73, at 404–05 (emphasis added).

¹¹⁴ See, e.g., *supra* notes 63–74, and accompanying text.

¹¹⁵ See, e.g., KUO, *supra* note 68, at 84; Farley, *Legal Brothel Prostitution in Nevada, in PROSTITUTION AND TRAFFICKING IN NEVADA: MAKING THE CONNECTIONS*, *supra* note 3, at 44; Ryan, *supra* note 69, at 23; cf. SULLIVAN, *supra* note 63, at 20 (citing studies showing that some men in Victoria, Australia, do not want to use condoms in legal brothels, and that some brothel operators do not insist); Meyer et al., *supra* note 67 (mentioning brothels with special offers for “sex without condoms”).

¹¹⁶ Whittaker & Hart, *supra* note 73, at 405 (emphasis added).

¹¹⁷ See *supra* notes 63–74, and accompanying text; *infra* notes 173–175, and accompanying text.

¹¹⁸ Whittaker & Hart, *supra* note 73, at 404–05.

interview people in legal brothels.¹¹⁹ Nonetheless, quite suggestive information about incentives for unsafe sex seems to be revealed in the sense that “everyone” in Whittaker and Hart’s sample mentioned that it happened to others.¹²⁰ In this context, it is important to consider that the researcher, Dawn Whittaker, had a “dual role” that included being a health practitioner as well, doing drop-in visits at the apartments and other similar work.¹²¹ The respondents were explicitly informed about her role, though they might already have met with either her or her associates previously.¹²² They could thus perceive the situation such as it would implicate them in their relation with officials to explicitly admit to her that they practiced unsafe sex in the flats. Admitting unsafe sex would also likely implicate the third parties in their de facto brothel-system which, when considering how many third parties have often been found to threaten prostituted women in order to stop them from revealing incriminating evidence, could make the women’s situation potentially more difficult, financially as well as otherwise.¹²³ In the light of these obstacles to obtaining unbiased information, it does seem more likely that the accounts of unsafe sex practices of others¹²⁴ may have been what happened to a number of respondents—not just statements of disapproval, as interpreted by the authors above—though this is hard to know for sure.

Furthermore, it was noted how the maids had an “ambiguous position within the structural organization of sex work in the flats.”¹²⁵ The findings from the London flats led the authors to conclude that there was oftentimes a hierarchy that prevented prostituted women from exercising autonomous control over their situation, though exceptions were said to exist.¹²⁶ There were flats which were “managed by the same ‘consortium,’” with “[g]roups of maids appear[ing] to have

¹¹⁹ See Farley, *Legal Brothel Prostitution in Nevada*, in PROSTITUTION AND TRAFFICKING IN NEVADA: MAKING THE CONNECTIONS, *supra* note 3, at 23-24 (noting various incidents and conditions during interviews suggesting that prostituted women in Nevada legal brothels were under strong pressures not to reveal information to outsiders that could cast the brothels in negative light); Plumridge & Abel, *infra* note 187, at 79 (mentioning three brothels which reportedly made efforts to dissuade prostituted women to participate in a research survey); see also *supra* note 86 (citing studies where legal brothels refused researchers entry).

¹²⁰ *Id.* at 405.

¹²¹ *Id.* at 402. In addition to her dual role as a researcher and health care provider, information in the article strongly suggests the interviewer was also Whittaker.

¹²² See Whittaker & Hart, *supra* note 73, at 402.

¹²³ See, e.g., Farley, *Legal Brothel Prostitution in Nevada*, in PROSTITUTION AND TRAFFICKING IN NEVADA: MAKING THE CONNECTIONS, *supra* note 3, at 23-24 (noting conditions during interviews suggesting that prostituted women in Nevada legal brothels were pressured not to reveal incriminating information to outsiders); cf. KUO, *supra* note 68, at 84 (noting that all prostituted persons in Nevada legal brothels seemed “more concerned with possible assault or abuse” from management than abuse from tricks); see also R. v. Downey [1992] 2 S.C.R. 10, 36-39 (Can.) (noting that pimps intimidate and threaten prostituted persons in order to prevent them from testifying about mistreatment); ROYAL CANADIAN MOUNTED POLICE, *supra* note 6, 38-39 (discussing witness intimidation and difficulties to get prostituted persons to testify against their traffickers).

¹²⁴ Whittaker & Hart, *supra* note 73, at 405 (“Everyone had stories of women who would ‘do it without? . . .’”)

¹²⁵ *Id.* at 409.

¹²⁶ *Id.* at 409-11.

some control over the running of groups of flats.”¹²⁷ The authors hypothesized that these conditions had “immediate and long-term implications for the health and safety of the woman.”¹²⁸ The authors found that such maids seemed to make decisions regarding what tricks a woman could not refuse, “not the woman herself, thus taking away from the woman a key element in what in other circumstances is the most vital aspect of the work.”¹²⁹ Whittaker and Hart concluded that this situation made it more difficult for the prostituted woman “to assert herself in her interactions with clients, and hence more vulnerable to client violence.”¹³⁰ In “the long-term,” they said, “her job is less secure, and she is likely to be forced to work harder and to see less of the money she is earning.”¹³¹ Put another way, these are asymmetrical and unequal conditions of power that increase exploitation in prostitution.

Whittaker and Hart also found that some landlords exercised a particular kind of control over the prostitution in the flats—e.g., moving women around between different flats so they could not control “with whom they must work”—which suggested that the landlords had a deliberate strategy to “foster dependence and uncertainty.”¹³² Several accounts also pointed to more hierarchical layers of third parties—not just maids and landlords. The flats were located within a square mile in a “well known” red-light district.¹³³ Thus, landlords were sometimes themselves under pressure from others in “the organization of the sex industry in this district” to set higher rents or conform to specified working conditions.¹³⁴ These observations suggest that women in the flats were frequently subjected to exploitation under the framework of a larger sex industry complex.

In light of everything said in Whittaker and Hart’s informative article on indoor prostitution in London, U.K., when the Ontario Superior Court’s summary states that this study allegedly found that “working in a flat was safer,” the summary is unsupported and misrepresents the study

¹²⁷ *Id.* at 410.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.* at 411.

¹³³ *Id.* at 403.

¹³⁴ *Id.* at 410–11. Whittaker and Hart makes an unqualified remark in this specific section of their article, stating that “some” of the prostituted women who “gain experience and learn how the structure works” would “fight for more bargaining power,” or move to “more sympathetic” landlords. *Id.* at 411. However, this statement appear to exhibit a fatalistic undertone when considering, e.g., that among 840 prostituted persons in nine countries, 89% explicitly said they wanted to escape prostitution and two-thirds suffered PTSD symptoms equal to or higher than treatment-seeking Vietnam veterans, battered women seeking shelter, or refugees from state torture, Farley et al., *Nine Countries*, *supra* note 33, at 44, 47–48, 56. Whittaker and Hart never asked their respondents whether or not they wanted to be in prostitution. Deeming from the exploitative conditions in the flats they studied, where they noted that the average number of tricks per week was 76 per woman, many seeing between 20 and 30 men a day, some up to 50, and a prostituted woman recounted having to service about ten tricks per day before covering the expenses associated with this form of prostitution, *see* Whittaker & Hart, *supra* note 73, at 404–05, their remark about bargaining power might imply an assumption that prostitution is as a form of exploitation that cannot be abolished.

and its findings.¹³⁵ The court ignored the exploitation actually at work, as well as the minimal (if not counterproductive) role of the maid in mitigating the harms of prostitution. As expressed by the authors of the U.K. study themselves, but unfortunately not mentioned by the court of first instance:

Such features as the pressures to “make the rent,” which result in long working hours and large numbers of clients, the absence of autonomy in those situations where it is the maid who determines which clients shall be seen, might be considered by women working the streets to be intolerable conditions of employment.¹³⁶

The accounts of how some women must sexually service about ten tricks before starting to earn anything themselves¹³⁷ should be seen in light of the fact that “many survivors view prostitution as almost entirely consisting of unwanted sex acts or even, in one person’s words, paid rape.”¹³⁸ Even tricks describe prostitution as “paid rape.”¹³⁹ In a study of prostituted persons in legal brothels in Nevada, one prostituted woman said prostitution was “like you sign a contract to be *raped*”; another said “[t]he first words that come to mind are: degraded, dehumanized, used, victim, ashamed, humiliated, embarrassed, insulted, slave, *rape*, violated”; a third explained that she “cried all the time” during her first six months in legal prostitution.¹⁴⁰ Hence, when the *Bedford* court argued that violent abuse is less extensive in indoor venues than on the streets because explicit rape might have been less reported there, they seem to disregard and minimize these experiences of prostituted persons. That rape or abuse is reported less does not necessarily mean that it occurs less. From the perspective of persons in prostitution “long working hours and large numbers of clients,” and a lack of autonomy in deciding what tricks to accept and refuse,¹⁴¹ might be experienced as multiple rapes whether or not they are called “rape” by name.¹⁴²

Summary of Analysis. The London study was inaccurately represented by the Ontario Superior Court, which failed to account for a number of abusive and exploitative practices in reality as the study documented them (see above), The court’s summary is thus decidedly misleading when stating, without comment or modification, that the “authors found that working in a flat was safer. Safety was defined in terms of guaranteed payment, sex with condoms, and

¹³⁵ *Bedford* (Ont. Super. Ct. J.), *supra* note 12, at para. 325(d).

¹³⁶ Whittaker & Hart, *supra* note 73, at 412.

¹³⁷ *Id.* at 404.

¹³⁸ Farley, “*Bad for the Body*,” *supra* note 60, at 1100; *cf* Giobbe, *supra* note 33, at 121 (noting survivors described it “like rape”).

¹³⁹ Melissa Farley, Prostitution, Trafficking, and Cultural Amnesia: What We Must Not Know in Order To Keep the Business of Sexual Exploitation Running Smoothly, 18 *YALE J.L. & FEMINISM* 101, 123 (2006) (quoting trick saying “If you look at it, it’s paid rape”);

¹⁴⁰ Farley, *Legal Brothel Prostitution in Nevada*, in *PROSTITUTION AND TRAFFICKING IN NEVADA: MAKING THE CONNECTIONS*, *supra* note 3, at 34 (emphasis added).

¹⁴¹ Whittaker & Hart, *supra* note 73, at 412.

¹⁴² *See infra* notes 448–459, and accompanying text for a discussion of the importance of the living on the avails and bawdy-house provisions in light of legal problems with applying rape laws to abuses such as prostitution when conceptualized as “paid rape”—abuses that exist in part because of multiple social disadvantages, which in turn cause intersectional problems of discrimination in law.

less potential for client violence.”¹⁴³ Contrary to the court’s summary, sex with condoms is not practiced in many instances of legal prostitution.¹⁴⁴ This finding is consistent with those of other studies from Nevada, New Zealand, and similar jurisdictions.¹⁴⁵ The London study’s policy implications were represented by the court as far more supportive of a partial decriminalization of third parties than they actually were.

B. Findings Mediated by Brothel Management in Nevada Reduce Value of Research

The court of first instance also summarized a study authored by sociologists Barbara G. Brents and Kathryn Hausbeck from the University of Nevada, Las Vegas.¹⁴⁶ They reported visiting thirteen out of twenty-six officially legal Nevada brothels, interviewing prostituted persons, managers, brothel owners, as well as talking with various officials, activists, and some clients.¹⁴⁷ The findings invoked by the court were said to show that legalized brothels in Nevada could prevent a substantial amount of violence, abuse, and unsafe sex.¹⁴⁸ The brothel’s own regulations in these respects were presented in the article as meticulous, if bordering on extreme. For instance, it was found that “the vast majority of brothels do not allow women to leave the premises while they are on contract to work, even if they are not on shift.”¹⁴⁹ Some managers explained this practice as a way to avoid having to conduct health exams when women return, while others said it was also out of concern for the women’s safety.¹⁵⁰ Though Brents and Hausbeck acknowledged that “few other professions” have such “paternalistic supervision” and lock downs, the prostituted women were said to accept these policies as “basically reasonable restrictions.”¹⁵¹ Yet, somewhat contradictorily, the women also reported that “they felt they were able to leave the brothel at any time” (whether this referred to permanent or temporary absence is unclear).¹⁵² Certain owners also reported exceptions to these rules, for instance in order to be able to use their rooms “for entertaining twenty-four hours a day.”¹⁵³

More importantly, the Brents and Hausbeck article contains a number of accounts by owners, managers, law enforcement, and prostituted women that almost unanimously present the brothels

¹⁴³ *Bedford* (Ont. Super. Ct. J.), *supra* note 12, at para. 325(d).

¹⁴⁴ *See, e.g.,* KUO, *supra* note 68, at 84; Farley, *Legal Brothel Prostitution in Nevada*, in PROSTITUTION AND TRAFFICKING IN NEVADA: MAKING THE CONNECTIONS, *supra* note 3, at 44; Ryan, *supra* note 69, at 23; *cf.* SULLIVAN, *supra* note 63, at 20; Meyer et al., *supra* note 67 (mentioning brothels with special offers for “sex without condoms”).

¹⁴⁵ *See supra*, notes 63–74, and accompanying text.

¹⁴⁶ *Bedford* (Ont. Super. Ct. J.), *supra* note 12, at para. 325(e) (citing Barbara G. Brents & Kathryn Hausbeck, *Violence and Legalized Brothel Prostitution in Nevada: Examining Safety, Risk, and Prostitution Policy*, 20 J. INTERPERSONAL VIOLENCE 270 (2005)).

¹⁴⁷ Brents & Hausbeck, *supra* note 146, at 271–72.

¹⁴⁸ *See Bedford* (Ont. Super. Ct. J.), *supra* note 12, at para. 325(e).

¹⁴⁹ Brents & Hausbeck, *supra* note 146, at 284.

¹⁵⁰ *Id.* at 285.

¹⁵¹ *Id.* at 284–85.

¹⁵² *Id.* at 285.

¹⁵³ *Id.*

as safe places with superior benefits compared to other forms of prostitution that, by contrast, were said to be dangerous and unsafe (including pornography production).¹⁵⁴ Despite the fact that “the potential for violence” in their legal brothels was “discussed by many,”¹⁵⁵ none of the managers or owners mentioned an actual occurrence of violence. Similarly, only one out of more than forty prostituted women reported any personal experience with violence while there.¹⁵⁶ These low reports of abuse in prostitution, and the absence of reported management misconduct and unsafe sex, are striking when compared with other studies and accounts from legal brothels in Nevada, where several other sources have reported that brothel management in Nevada, and other third parties tend to promote unsafe sex, show little uninterested in intervening with abusive tricks, and rather cover up violent episodes if at all being able to stop them even if they wished.¹⁵⁷ Moreover, as many tricks admit that they buy women in prostitution to have sex that others would refuse them, including the sexual violence, abuse, and degradation which prostituted women confirm they demand,¹⁵⁸ it would appear difficult for Nevada brothels to survive economically if they would not also provide such services to their tricks, whether directly or indirectly.

The discrepancy between the accounts found in Brents and Hausbeck’s article and that of others appears even more problematic, however, when considering the former’s method of soliciting informants. The Ontario Superior Court did not mention the procedure they used to select interviewees in Nevada. Brents and Hausbeck admit in their publication that their access to the brothels was mediated “through contacts with certain gatekeepers, including the head of the Nevada Brothel Association and attorneys who had worked with brothels, and through cold calls to brothels.”¹⁵⁹ Other researchers are regularly denied entry,¹⁶⁰ suggesting that there may be bias operating when the brothel association and their attorneys choose to give certain researchers

¹⁵⁴ See, e.g., *id.* at 285–92 (pornography production discussed at 288).

¹⁵⁵ *Id.* at 287.

¹⁵⁶ *Id.*

¹⁵⁷ See, e.g., *supra* notes 68–73, and accompanying text (accounts of abusive and unsafe sex practices in Nevada brothels). Farley noted that among respondents she interviewed inside eight legal brothels in Nevada, some told her they were afraid even to report violent tricks to the management because they could be blamed or fired because of it. Farley, *Legal Brothel Prostitution in Nevada*, in *PROSTITUTION AND TRAFFICKING IN NEVADA: MAKING THE CONNECTIONS*, *supra* note 3, at 29. Among Farley’s 45 respondents, many of whom risked being overheard by pimps and managers through listening devices in all rooms or even by physical interceptions, *see id.* at 24, ten nonetheless reported having been physically assaulted in prostitution during their lives, six reported having been threatened with a weapon, twelve reported having been coerced or pressured into an act of prostitution. *Id.* at 30–32 tbl.3. Although these figures were an aggregate from both legal and other prostitution, *see id.* at 29 tbl.2 (showing other forms of prostitution that respondents had been in), the respondents’ accounts indicated that legal brothels were no better than other venues where they had been prostituted. *See id.* at 29 (noting that 81% explicitly said they wanted to escape prostitution regardless of its legal status and quoting a respondent saying that “[i]t’s all the same emotionally, no matter where we work,” referring to illegal prostitution venues).

¹⁵⁸ See *supra* note 72 (including parenthetical information).

¹⁵⁹ Brents & Hausbeck, *supra* note 146, at 294 n.1.

¹⁶⁰ See sources cited with explanations, *supra* note 86.

access to certain selected venues. Although other researchers may face similar gate-keepers, it is puzzling why the court did not question why all prostituted women in Brents and Hausbeck's study claimed they felt protected, while managers and brothel owners conveniently saw "themselves as protecting women from violence on the streets by providing a legal alternative."¹⁶¹ These accounts may certainly appear as good public opinion advertisements for the brothels. The question is, however, whether they are accurate or misleading. Given the nature of the mediated access to the brothels and the informants, and the dramatic clash with otherwise well-documented reality,¹⁶² these accounts seem clearly biased and thus of limited value, if any. The lack of critical distance or methodological questioning by the Ontario court, as well as its credulous and uninformed acceptance of this study, is striking.

C. Contradictory and Unpersuasive Small Sample in Victoria, Australia

The court of first instance additionally cited a study from Melbourne, Australia, authored by Priscilla Pyett and Deborah Warr.¹⁶³ The authors interviewed twenty-four prostituted women who "were perceived as potentially vulnerable to risk because they were young, inexperienced, homeless, drug or alcohol dependent, or working in illegal brothels or on the street."¹⁶⁴ The study claimed that most of the women working in legal brothels reported that they felt "safe," and that their security was "enhanced by supportive management" and policies that claimed to promote their protection,¹⁶⁵ which stands out in contrast to many other prominent studies and sources.¹⁶⁶ Pyett and Warr noted that although "physical assault" and "difficulties with enforcing condom use" occurred, these problems "were reported much more frequently" by those prostituted on the street than by those prostituted in brothels.¹⁶⁷ The authors claimed that among legal brothels (as opposed to street prostitution, illegal massage parlors, or escort prostitution), only one woman out of nine reported experiencing a violent incident.¹⁶⁸ Even if this number was accurately reported, however, it seems difficult to draw any general conclusions from it because the legal brothel

¹⁶¹ Brents & Hausbeck, *supra* note 159, at 271.

¹⁶² For sources suggesting that abuse, exploitation, and unsafe sex occurs systematically in legal brothels in Nevada, see e.g. KUO, *supra* note 68, at 84-85; Farley, *Legal Brothel Prostitution in Nevada*, in PROSTITUTION AND TRAFFICKING IN NEVADA: MAKING THE CONNECTIONS, *supra* note 3, at 29-47; Ryan, *supra* note 69, at 22-23; Volkonsky, *supra* note 70, at 22. For sources showing similar problems in other jurisdictions with legal brothels, see generally *supra* Part I B.

¹⁶³ *Bedford* (Ont. Super. Ct. J.), *supra* note 12, at para. 325(c) (citing Priscilla Pyett & Deborah Warr, *Women at Risk in Sex Work: Strategies for Survival*, 35 J. SOCIOLOGY 183 (1999)).

¹⁶⁴ Pyett & Warr, *supra* note 163, at 184.

¹⁶⁵ *Id.* at 187.

¹⁶⁶ See, e.g., *supra* notes 63-74, 91-145, and accompanying text.

¹⁶⁷ Pyett & Warr, *supra* note 163, at 186.

¹⁶⁸ *Id.* at 187. Pyett and Warr report that among their sample of twelve women prostituted in indoor locations (which they categorize as all being "brothels"), see *id.* at 185 & 186 tbl. 1, three of the subjects were *not* prostituted in licensed brothels but in illegal "'massage parlours'" or "escort agencies." See *id.* at 190; *cf. id.* at 185 (mentioning that half of the total 24 respondents "worked in legal brothels, in 'massage parlours' (which functions as illegal brothels) or in escort agencies").

sample was so small: among the twenty-four persons interviewed, only twelve were prostituted indoors, and, as mentioned above, only nine were found in legal brothels as opposed to illegal massage parlors or escort agencies.¹⁶⁹ Although some sampling details are accounted for,¹⁷⁰ nothing is said about whether certain brothels rejected access to the researchers or not (similar information is generally provided in other social science studies¹⁷¹), nor who was in the room, or who otherwise overheard the conversations or had access to the recordings and transcriptions¹⁷²—facts that may or may not indicate further bias in the responses from the interviewees when they were asked to reveal incriminating information (e.g., about unsafe sex or management misconduct).

Moreover, not all of the licensed brothels included in the study actually adhered to the law—Pyett and Warr also noted that in “some licensed brothels where, although in contravention of the law, management did not insist on condom use for all services, women experienced competition from other workers and considerable pressure from clients.”¹⁷³ In one such case, a woman reported that “the management illegally *encouraged* some workers to provide sex without a condom.”¹⁷⁴ In other words, management did not simply fail to insist on safe sex but actively promoted unsafe sex. The woman “saw herself as having no option but to put up with this unsatisfactory situation,” saying it was ““unfair, very unfair.””¹⁷⁵

By contrast, the court’s summary of this study’s findings said that “brothel workers’ security was enhanced by supportive management, firm policies relating to condom use and price, duration and type of service, alarm systems, proximity to others and the right to legal protection.”¹⁷⁶ The court’s summary also stated that “difficulties with enforcing condom usage” were more frequently reported on the street than in the brothels.¹⁷⁷ However, the summary failed to recognize the crucial problem of bias in discouraging reporting in brothels, making the observed variance unreliable.

In contrast to Brents and Hausbeck’s study where respondents were solicited with mediated access from brothel owners and their attorneys and reported a largely positive view of the brothels,¹⁷⁸ Pyett and Warr’s respondents were not unanimous in their accounts. Similarly to

¹⁶⁹ See *supra* note 168.

¹⁷⁰ *Id.* at 184. With respect to their interviewers and the sampling methodology, Pyett and Warr state only that a reference group consisting of eight “women who had some association with the sex industry, either as current or past sex workers, or as health educators or outreach workers . . . recruited and interviewed participants and assisted with the interpretation of findings.” *Id.* at 184.

¹⁷¹ See, e.g., KUO, *supra* note 68, at 79–80; Brents & Hausbeck, *supra* note 146, at 271–72 & 294 n.1; Nemoto et al., *supra* note 86, at 247; Farley, *Legal Brothel Prostitution in Nevada*, in PROSTITUTION AND TRAFFICKING IN NEVADA: MAKING THE CONNECTIONS, *supra* note 3, at 23;

¹⁷² Pyett & Warr, *supra* note 163, at 184–85.

¹⁷³ *Id.* at 186.

¹⁷⁴ *Id.* at 190 (emphasis added).

¹⁷⁵ *Id.*

¹⁷⁶ *Bedford* (Ont. Super. Ct. J.), *supra* note 12, at para. 325(c).

¹⁷⁷ *Id.*

¹⁷⁸ See *supra* Part II B.

other less positive reports,¹⁷⁹ some respondents reported evidence of the unequal power dynamics and incentives for unsafe sex, for example the woman quoted above.¹⁸⁰ Five out of the nine women in legal brothels gave more troublesome accounts.¹⁸¹ For instance, one stated that she often used alcohol or drugs, acknowledging how their effects “rendered her ‘totally disempowered,’ ‘extremely vulnerable’ and ‘easily manipulated’” when interacting with tricks.¹⁸² She told interviewers how, when she did not like the way the “client” was “handling” her, she just “shut up anyway because [she doesn’t] want the client to go out and complain.”¹⁸³ In addition, several other women acknowledged that they needed heroin to cope with prostitution, one of them complaining in particular about “unwanted ‘groping’ from ‘enthusiastic’ clients.”¹⁸⁴ Pyett and Warr noted that interviewers had shown dismay at two of these women’s poor health condition.¹⁸⁵ Though the actual extent of exploitation, abusive conditions, and unsafe sex among this sample may be unknown, it should be considered that such information is incriminating for the brothels who claim legal protection. The women who are dependent on the brothels could be harmed for having revealed it to outsiders—third parties operating in the sex industry are not unknown for pressuring or threatening prostituted women to prevent them to reveal information that may incriminate them.¹⁸⁶ Harmful practices could have occurred more often than reported, even though the accounts may also be accurate. In any event, this Australian study, with its small subsamples, unclear bias, and differing accounts regarding exploitative and unsafe sex, is a slender reed on which to lean.

D. Correlational Surveys from New Zealand and U.K. Do Not Support the Court

Two more studies with larger samples, from New Zealand and the United Kingdom respectively, were cited by the court of first instance as providing evidence that the tricks’ violence as well as other forms of adversity occurred more frequently against those prostituted outdoors than those prostituted indoors.¹⁸⁷ These studies used quantitative survey methods and, by contrast to the other three studies discussed above, did not inquire into the role of third parties such as managers, bodyguards, drivers, or receptionists. Thus, neither study attributed a lower level of reported violence or other problems to the role of third parties, although they claimed the

¹⁷⁹ See *supra* Part I B, Part II A.

¹⁸⁰ See *supra* notes 174, 175, and accompanying text.

¹⁸¹ Pyett & Warr, *supra* note 163, at 189–90.

¹⁸² *Id.* at 189.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ See, e.g., sources discussed *supra* note 84.

¹⁸⁷ *Bedford* (Ont. Super. Ct. J.), *supra* note 12, at para. 325(a)–(b) (citing Libby Plumridge & Gillian Abel, A ‘Segmented’ Sex Industry in New Zealand: Sexual and Personal Safety of Female Sex Workers, 25 AUSTL. & N.Z. J. PUB. HEALTH 78 (2001); Stephanie Church et al., Violence by Clients Towards Female Prostitutes in Different Work Settings: Questionnaire Survey, 322 BRIT. MED. J. 524 (2001)).

occurrence of such adversity was more frequent outdoors compared to indoors.¹⁸⁸ There thus seems little support to gain from these studies in answering whether a reversal of a presumption of guilt into a presumption of innocence on behalf of those who profit from the prostitution of others would be appropriate. Nonetheless, if answering whether legalizing systematic and organized indoor prostitution is an appropriate response to some of the problems faced by persons in prostitution, the court's interest in them might be understandable because the studies could indicate whether indoor prostitution is safer per se than outdoor prostitution. Nonetheless, they did not control for the presence of third parties on the streets or in indoor venues

In order to clearly support the Supreme Court of Canada's decision to strike down the bawdy-house and avails provisions,¹⁸⁹ it must however be shown: (1) that the variance in abuse is related to the place of prostitution rather than being related to other factors, such as age or experience of the prostituted population sampled in these different places; and (2) it must be shown that these studies' reported lower frequency of abuse and adversity in indoor compared to outdoor venues is reliable and not a result of bias (e.g., underreporting). If any of these two questions are not answered affirmatively, the studies cannot reliably show that indoor prostitution is safer than outdoor prostitution per se. For instance, if age or experience are the significant predictors of variance in abuse and adversity, moving persons from outdoor to indoor prostitution (e.g., by legalizing brothels and keeping outdoor prostitution illegal) would not significantly change these problems for the persons themselves.

The study from New Zealand surveyed 303 respondents who were estimated to represent just over 80% of prostituted women in Christchurch.¹⁹⁰ The study found a lower frequency of violence in indoor venues as compared with the streets¹⁹¹—a finding sometimes seen in other studies, although not unequivocally so.¹⁹² For instance, the New Zealand study found that 41% of seventy-eight prostituted in streets reported they had been physically assaulted, while 21% of 225 prostituted persons indoors reported the same.¹⁹³ Sixty-five percent reported being physically threatened in the streets, while 26% reported the same indoors.¹⁹⁴ Twenty-one percent reported being forced to have unprotected sex in the streets, while 9% reported the same indoors.¹⁹⁵

¹⁸⁸ See Plumridge & Abel, *supra* note 187, at 82 tbl.6; Church et al., *supra* note 187, at 525 tbl.

¹⁸⁹ *Bedford* (Can. Sup. Ct), *supra* note 15, at para. 164.

¹⁹⁰ Plumridge & Abel, *supra* note 187, at 78–79. The respondents were recruited through press advertising, flyers, outreach, and telephone contact, and were interviewed by members of The New Zealand Prostitutes Collective—an organization sponsored financially by the government and reportedly operated “as a peer education and outreach organisation.” *Id.* at 78, 79.

¹⁹¹ *Id.* at 82.

¹⁹² See, e.g., Jody Raphael & Debora L. Shapiro, *Violence in Indoor and Outdoor Prostitution Venues*, 10 VIOLENCE AGAINST WOMEN 126, 134–35 (2004) (finding similar percentages of women in escort, street, and residential prostitution reporting incidents of rape).

¹⁹³ Plumridge & Abel, *supra* note 187, at 82 tbl.6.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

Twenty-three percent reported being “held somewhere against their will” in the streets, while 13% reported the same indoors.¹⁹⁶

However, other differences between the groups than their place of prostitution may have contributed to the variance between venues in reported abuse. For instance, the respondents on the streets tended to be younger and using more drugs than those indoors.¹⁹⁷ Assuming the lower frequency of violence and adversities in indoor prostitution was derived from unbiased reports—an assumption that may not be reliable (more below)¹⁹⁸—the outdoor group’s collective youth, inexperience, and higher vulnerability could be what made them targets of abusive men, not the streets per se. As research shows that many tricks believe they have a right to treat women how they want just because they are paying for sex even if it includes being violent,¹⁹⁹ it may be that tricks on these streets are more abusive because they take advantage of the younger women’s lower ability to prevent abuse due to inexperience and drugs—conditions that are less prevalent among the older indoor women. This study did not statistically control for whether younger and less experienced women were more abused indoors and outdoors than older and more experienced women were.²⁰⁰ Hence, the study does not show whether violence would differ by moving (if possible) the women from streets to indoor locations. Massage parlors or escort agencies might not even want the younger and more unstable women precisely because their vulnerability is a target for abuse.²⁰¹ Without more statistical probing, the study does not support

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at 80–81.

¹⁹⁸ See *infra* notes 204–207, and accompanying text on underreporting.

¹⁹⁹ See *supra* note 74.

²⁰⁰ The study could also have controlled for whether age and substance addiction were variables that *mediate* or *moderate* the variation in abuse. A *mediating variable* operates on a continuum where, in the most extreme end, it entirely eliminates the significant effect from the independent variable to zero; in less extreme cases the mediator significantly decreases the correlation between independent and dependent variables, but not to zero. See Reuben M. Baron and David A. Kenny, *The Moderator-Mediator Variable Distinction in Social Psychological Research: Conceptual, Strategic, and Statistical Considerations*, 51 J. PERS. & SOC. PSYCHOL. 1173, 1176 (1986). A *moderating variable* is usually posited when there are unexpected “weak or inconsistent” relations between independent and dependent variables, such as if the difference of prostitution venue was found to correlate strongly with self-reported violence only for one subpopulation and not for another (e.g., only for young but not for old women). See *id.* at 1178. Statistical tests may control for how much independent effect can be attributed to the independent and the moderating or mediating variables respectively. See *id.* at 1175 (describing tests and citing literature). If Plumridge and Abel had analyzed whether age or addictions were mediating or moderating variables to the variance in abuse, they might have found surprising results. Even if the venue alone might have predictive capability as a raw correlation, if age and addiction were found to have mediated or moderated that variance, the venue itself might become less important in the final equation, possibly losing all its statistical power.

²⁰¹ Cf. Factum of Appellant, the Attorney General of Canada, *supra* note 83, at paras. 77 (citation omitted), who noted that evidence suggests that women on the streets already have “many ‘pre-existing vulnerabilities’ particular” to their population, and that repealing the bawdy-house laws would not necessarily lead to them moving indoors “due to their lack of resources, skills to prostitute themselves online, and ‘pre-existing vulnerabilities’ that would keep them on the street.” The *factum* further concludes that there was no evidence presented in lower *Bedford* courts to support the conclusion that simply because indoor prostitution would become legal, prostituted women on the streets would move there. *Id.* at para. 78.

the court's assumptions that prostitution indoors, simply by occurring indoor, would be safer for the women.²⁰² There is still the possibility, not yet properly tested, that age and substance addition could explain either a significant part of or all the statistical correlations between the observed variance in abuse in the outdoor and indoor samples, rather than the conditions in the venues themselves.²⁰³

Moreover, when it comes to the issue of underreporting there are instances in this study that suggests some concerns. Women at three different massage parlors reported that the parlors “made efforts to dissuade women from participating.”²⁰⁴ Whether other massage parlors dissuaded respondents from reporting honestly (as distinguished from dissuading them to even participate) is unclear. As discussed in the introduction to Part II among other places, it could implicate the management if a high frequency of abuse or unsafe sex practices in massage parlors or escort prostitution were reported. Thus, it is not unlikely that management would discourage prostituted persons to reveal the full extent of such information to outsiders. The researchers seemed even to have been indirectly aware of the risks of underreporting. In order to reduce any suspicion that the study was aligned with taxation, law enforcement, or social welfare agencies in relation to legalized venues, they avoided “in-depth questioning” about age, drugs, earnings, and mental health.²⁰⁵ However, no such strategy was outlined vis-à-vis the risk of biased responses concerning the extent of violence, unsafe sex, or other abuses in the massage parlors and in escort prostitution where third parties are often involved. It is therefore difficult to know whether there was underreporting.²⁰⁶ There is hence a possibility that the frequency of abuse reported in indoor prostitution is unreliable. In this light it is unfortunate that the Ontario Superior Court of Justice did not note any of the problems of bias in its summary of the study.²⁰⁷ From their opinion, it therefore appears as if the findings reported in this study provide a more reliable support for changing long-standing prostitution laws than they might actually do.

²⁰² The Attorney General of Canada noted that evidence suggests that “it is not the venue that dictates the degree of control (and hence safety) that a prostitute will have, but the extent to which” she is “controlled by a third party . . . and whether that third party is seeking to maximize profit or the safety of the prostitute.” *Id.* at para. 76 (citation omitted). The role of third parties cannot be revealed by the data provided in Plumridge and Abel’s study.

²⁰³ *Cf. supra* note 200, on the need for making statistical tests that inquire whether there are mediating or moderating variables that affect the variance.

²⁰⁴ Plumridge & Abel, *supra* note 187, at 79.

²⁰⁵ Plumridge & Abel, *supra* note 187, at 79. This strategy unfortunately also reduces the ability to gather probative negative information on the legal brothel industry (e.g., occurrence of PTSD)—a key concern in the *Bedford* case—although it may help to reduce underreporting in specific areas.

²⁰⁶ The responses to the survey’s question about number of tricks per shift raises further suspicions about underreporting. As many as 49% in indoor prostitution only reported 1 or 2 tricks per shift, 43% reported 3 to 4 tricks per shift, 7% reported 5 to 6, and *only* 1% reported more than 6 tricks per shift. Plumridge & Abel, *supra* note 187, at 80 tbl.4. These numbers stand out in stark contrast to what was reported in the flats in London, U.K., where many women met 20 to 30 men per day, and some up to 50, with a mean of 76 tricks per week. Whittaker & Hart, *supra* note 73, at 404–05.

²⁰⁷ *See Bedford* (Ont. Super. Ct. J.), *supra* note 12, at para. 325(b).

The second quantitative study cited by the court, from the United Kingdom, was built on a questionnaire administered to 240 prostituted women from three cities (125 indoors, 115 outdoors) by three researchers.²⁰⁸ The indoor group was composed of persons who were prostituted in either saunas or in flats (fifty in Leeds, seventy-five in Edinburg), and the outdoor group was sampled from the street (forty in Leeds, seventy-five in Glasgow).²⁰⁹ The survey found a higher reported incidence of violence in outdoor prostitution compared to indoors: 81% of women in the streets reported at least one experience of violence at the hands of tricks, while 48% of women indoors reported the same; 50% of women in the streets reported violence in the past six months, while 26% of women indoors reported the same; and 47% of women in the streets reported being slapped, punched, or kicked, while 14% of women indoors reported the same.²¹⁰ The outdoor group also reported comparatively higher instances of vaginal rape, threats, strangulations, and other acts.²¹¹ In an exception to this pattern, anal rape was reported by only 5% of the women on the streets, while 6% reported it indoors. The study also found that women on the streets who experienced violence were more likely to have reported at least one incident to the police (44% versus 18%).²¹²

When summarizing the study, the Ontario Superior Court noted that the sample of street women in the U.K. were “younger, involved in prostitution earlier, reported more illegal drug use . . . than those who worked in indoor venues,”²¹³ an observation consistent with the findings of the New Zealand study above. Forty-nine percent of women on the streets reported having injected drugs in the past month, while only 3% of women indoors reported the same.²¹⁴ In an exception to this pattern, more women indoors (79%) reported using tranquilizers than women on the streets (37%), and more women indoors (30%) reported using amphetamine than women on the streets (11%).²¹⁵ On the whole, however, the court failed to notice that although the study’s authors made multiple logistic regressions to control for location, drug use, time in prostitution, and age of entry, they did *not* consider whether the *current age* of respondents predicted more or less violence.²¹⁶

Just as concluded above with regards to the New Zealand study,²¹⁷ the higher prevalence of violence in outdoor venues compared to indoors in this U.K. study, if true and not a result of bias (more below), may simply be related to the inexperience of younger women who are therefore more vulnerable to abusive men. There is no support in the study for the proposition that indoor environment per se reduces this violence. Moreover, as neither any data was provided on how

²⁰⁸ Church et al., *supra* note 187, at 524.

²⁰⁹ *Id.*

²¹⁰ *Id.* at 524, 525 tbl.1.

²¹¹ *Id.* at 525, tbl.1.

²¹² *Id.*

²¹³ *Bedford* (Ont. Super. Ct. J.), *supra* note 12, at para. 325(a).

²¹⁴ Church et al., *supra* note 187, at 525 tbl.1.

²¹⁵ *Id.*

²¹⁶ *See id.* at 525.

²¹⁷ *See supra* notes 190–203, and accompanying text.

many of the indoor women had third-party involvement, and naturally not what such actors did to prevent abuse, the study does not support the court's conclusion otherwise that third parties may contribute to make prostitution safer. In fact, other studies have shown that third parties in indoor prostitution usually do not intervene efficiently anyway; sometimes there is a lack of means for intervening (e.g., violence happens too quickly), and at other times managers and others lack the interest to do so as the money they receive from the tricks and the relations with them are more important than intervening.²¹⁸

The court also failed to address the numerous potential places for bias in this study. First, the study reports without further specification that the subjects were contacted either "in their place of work" (65%), which apparently could be brothels or alleys, or "through drop-in centres" (35%).²¹⁹ The lack of information about who might have overheard the conversations in their workplace, or who had access to the protocols is troubling, especially when considering the possibility that third parties who have a business interest in pressuring the respondents not to reveal incriminating information about abusive or exploitative practices may have been present. The authors also do not consider whether their questions about age in prostitution, illegal drug use, or violence could be perceived as suspicious or endangering by respondents precisely because that information might seriously jeopardize the flats and saunas in their relation with public authorities and the public opinion. By contrast, the authors of the other quantitative survey discussed above from New Zealand seem to have been aware of a few of these problems and had taken some measures to avoid them, albeit limited.²²⁰ The U.K. authors also failed to state whether the interviewers were formerly or currently prostituted persons, which could have indicated if they were more or less well-suited to gain the trust of their interviewers.²²¹

Summary of Analysis. Neither of the two introductory criteria outlined above for whether the survey studies from New Zealand and the U.K. would support the Court of Appeal for Ontario's decision to strike down the bawdy-house laws in question and modifying the avails provision were fulfilled. Although the studies found more violence being reported outdoors than indoors, it was (1) not shown what predicts this violence from occurring, as the studies did not control for crucial predicting variables such as the prostituted persons' age, experience, or other preexisting vulnerabilities along with controlling for venue. Women on the streets in these samples were younger,²²² thus more inexperienced than women were indoors. Such a situation could expose the former to more abusive men taking advantage of their vulnerability, regardless of prostitution venue. These problems might not disappear by moving them indoors, even if the brothels, massage parlors, or escort agencies would want them. Furthermore, it was (2) not shown that the reported frequencies of violence did not suffer significantly from bias (e.g., underreporting of exploitative abuse, unsafe sex, or drug use among certain subsamples). There is always a

²¹⁸ See *supra* notes 63–74, 102–107, and accompanying text.

²¹⁹ See Church et al., *supra* note 187, at 524.

²²⁰ Plumridge & Abel, *supra* note 187, at 79; see also *supra* note 205, and accompanying text.

²²¹ See also *supra* notes 87–90, and accompanying text.

²²² Plumridge & Abel, *supra* note 187, at 80–81; Church et al., *supra* note 187, at 525 tbl.1.

probability that respondents do not reveal information to outsiders that could incriminate the brothels, massage parlors, or escort agencies in illegal or otherwise tainted activities. The court's assumption that when prostitution is occurring indoors prostituted women will be safer from violence than when being prostituted outdoors is not a reliable conclusion that can be drawn by either of these two studies as they did (1) not control for alternative "mediating" variables (e.g., age) that might reduce the predictive effect from the venues on violence to zero,²²³ or (2) show that underreporting in indoor venues did not significantly impact the observed variance of violence there.²²⁴ Similarly, neither of these studies supports the court's conclusion that third parties in indoor prostitution may enhance prostituted persons' safety or well-being, as they did not control for the presence or behavior of third parties on the streets or in indoor venues.²²⁵ Instead, they may call into question the validity of such findings. There is evidence in the studies that may suggest underreporting among the prostituted women sampled indoors, which is consistent with a tendency seen elsewhere that persons who are being prostituted through third-party arrangements may be pressured not to reveal evidence of exploitation or abuse.²²⁶

E. Hypothetical and Naïve Opinions by Expert Witnesses Provided no Evidence

Apart from the five studies discussed above, both the Ontario Superior Court of Justice and the Court of Appeal for Ontario referred to hypothetical claims made by some experts and witnesses suggesting that if only certain prostitution provisions were repealed, bodyguards, drivers, managers, and other third parties would be available to assist vulnerable persons with measures intending to increase safety and well-being. For instance, John Lowman, a geographer and professor at the School of Criminology at Simon Fraser University who has published research on prostitution primarily in Canada and Vancouver in particular²²⁷—referred to the British system of prostitution with legal "maids" and legal landlords discussed above.²²⁸ He argued that if the challenged laws were invalidated, there was "a *possibility* that others would organize that infrastructure for those desperate and marginalized women on the Downtown

²²³ See *supra* note 200, for an explanation of the statistical concept of a mediating variable accordingly.

²²⁴ This view appears in an even stronger form in the Ontario Court of Appeal's decision, which reversed the decision to invalidate laws regulating prostitution on the streets (soliciting and communicating) but wholly affirmed the decision to invalidate the bawdy-house laws and in part the avails provision. See *Bedford* (Ont. C.A.), *supra* note 12, at paras. 325–28.

²²⁵ The court of first instance's rationale for citing these two studies is brief, only stating that all five studies (these two included) "had findings that were relevant to the issue of whether the risk of violence towards prostitutes can be reduced." *Bedford* (Ont. Super. Ct. J.), *supra* note 12, at para. 325. The court also states that the five studies were among the most relevant. Please do not omit this language because it is misleading

²²⁶ See Farley, *Legal Brothel Prostitution in Nevada*, in PROSTITUTION AND TRAFFICKING IN NEVADA: MAKING THE CONNECTIONS, *supra* note 3, at 23-24 (noting incidents and conditions suggesting that prostituted women in Nevada legal brothels were under strong pressures not to reveal incriminating information to outsiders); Plumridge & Abel, *infra* note 187, at 79 (mentioning three brothels attempting to dissuade prostituted women to participate in a research survey); see also *supra* note 86 (citing studies where researchers were refused entry into legal brothels).

²²⁷ *Bedford* (Ont. Super. Ct. J.), *supra* note 12, at para. 129.

²²⁸ For a study of this system, see *supra* Part II A.

Eastside who cannot pay for it.”²²⁹ If someone is marginalized and desperate, however, as most prostituted persons are,²³⁰ relying on the “possibility” that someone who is in a position to exploit them with complete impunity if laws against pimps and madams are invalidated might instead step in to assist them seems dangerously naïve at best.

Persons who enter prostitution are generally not in a good position to assert their interests against those who would take advantage of them to increase their profits—an assertion that the evidence from the legal brothel industry corroborates.²³¹ Indeed, the full study on the British legal system with “maids” cited by the Ontario Superior Court, also supports this conclusion, contrary to that court’s misleading summary.²³² Its authors had found that even though exceptions existed, more often a hierarchy in the system of flats prevented prostituted women from controlling their own situation.²³³ This situation included third parties (“maids”) making decisions about what tricks a woman could, or could not, refuse, hence “taking away” her control over the “most vital aspect” of her prostitution.²³⁴ This form of prostitution reduced her assertiveness when interacting with tricks, leading to that she became more vulnerable to their abuse.²³⁵ The authors hypothesized that this position of vulnerability in the long run would also entail that she was “forced” to do more work while earning less money for it.²³⁶ Not surprisingly, the accounts of expert opinions did not mention any other studies or evidence in support of the hypothetical assumption that third parties would be benign, as opposed to imposing an additional layer of exploitation onto prostituted persons’ lives that is detrimental to their well-being and safety.

In a similar same vein, the court of first instance credited the hypothetical and unsupported assumption of Augustine Brannigan, a retired sociology professor at the University of Calgary who has published on prostitution and pornography,²³⁷ where he argued that prostituted persons “are made dependant on strangers in vehicles for their safety due to the bawdy-house provisions,” and implied that they would work with a security guard, if not for the living on the avails provision.²³⁸ Nonetheless, no evidence was presented to rebut the contrary presumption, based on studies such as the one from the British legal system above, that with more indoor venues to ostensibly choose from rather than “strangers in vehicles” there would also be more exploitation of vulnerable women, not necessarily less. Another expert, Eleanor Maticka-Tyndale, a sociology professor at University of Windsor who has published extensively on sexual and general health

²²⁹ See *Bedford* (Ont. C.A.), *supra* note 13, at para. 211.

²³⁰ See *supra* Part I A.

²³¹ See evidence and analysis in Part I and Part II A, and Part II C, *supra*.

²³² See *supra* Part II A.

²³³ *Id.* at 409–11.

²³⁴ *Id.* at 410

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ Augustine Brannigan, UNIVERSITY OF CALGARY, DEPARTMENT OF SOCIOLOGY, <http://soci.ucalgary.ca/profiles/augustine-brannigan> (last visited Nov. 4, 2013).

²³⁸ See *Bedford* (Ont. Super. Ct. J.), *supra* note 12, at para. 333.

issues, with five peer-review publications covering prostitution,²³⁹ was quoted by the Ontario Superior Court along with her co-authors to a government report. Their report had stated that safety “strategies to reduce these risks [in outcall/escort prostitution], such as hiring a driver or bodyguard or meeting and communicating with a client in a public place beforehand, run afoul of the law.”²⁴⁰ It is one thing to note that a supposed practice theoretically “runs afoul of the law,” which it may of course do. However, this simple observation does not support the court’s conclusions, which go contrary to what has been documented in numerous studies discussed above: Third parties, including drivers, bodyguards, maids, managers, or others, are typically in a superior social position of power vis-à-vis prostituted persons; by contrast, the latter are commonly in a position of vulnerability.²⁴¹ These unequal relationships make the latter more vulnerable to exploitation, which does not improve their well-being and safety.²⁴² As mentioned above, many tricks admit, corroborated by prostituted persons’ accounts, that they often purchase persons for sex in order to have sex that others would refuse them (e.g., abusive, or degrading sex).²⁴³ Existing evidence suggests that brothel management, bodyguards, or other third parties accept this dynamic as they often do not stop violence or unsafe sex, whether or not they actually can;²⁴⁴ instead, they tend to cover violence up, or encourage unsafe sex.²⁴⁵ Hence, if third parties would truly prevent the sex in demand, business might be much more difficult for these third parties. The assertion voiced by these experts above suggesting that providing presumption of innocence to third-party profiteers in prostitution would reduce abuse is thus not persuasive.

F. The Evidence on Appeal to the Second and Third Instances

The decision by the Court of Appeal in particular to rely on the court of first instance’s findings is difficult to understand, as that court took the view that the findings regarding the challenge to Canada’s prostitution laws were “in the nature of social and legislative facts,”²⁴⁶ thus open to more scrutiny during appellate review than “adjudicative fact-finding” (e.g., whether a person was found to knowingly commit an act).²⁴⁷ By contrast, the Supreme Court of Canada’s view was that the level of appellate scrutiny afforded to social and legislative facts would be the same as for adjudicative fact-finding, meaning only “palpable and overriding error in fact” should be considered.²⁴⁸ In any event, even as the Court of Appeal explicitly found that social and

²³⁹ *Id.* at para. 309.

²⁴⁰ *Id.* at para. 338.

²⁴¹ *See supra* Part I A, Part II A.

²⁴² *Id.*

²⁴³ See sources and explanations cited *supra* note 72.

²⁴⁴ *See, e.g., supra* notes 63–68, 71–74, 95–145, 173, and accompanying text.

²⁴⁵ *See, e.g., supra* notes 69–70, 174–175, and accompanying text.

²⁴⁶ *Bedford* (Ont. C.A.), *supra* note 13, at para. 129.

²⁴⁷ *Id.* at para. 127 (citing cases).

²⁴⁸ *Bedford* (Can. Sup. Ct.), *supra* note 15, at para. 49. *Cf. id.* at paras. 48–56 (rejecting the Court of Appeal’s distinction between appellate review of social and legislative facts and appellate review of adjudicative fact-finding).

legislative facts are “not accorded the strong appellate deference,”²⁴⁹ it took the view that to “the extent that the application judge found the evidence of affiants in respect of specific events and occurrences credible or incredible, we defer to those findings absent some demonstrated flaw in them.”²⁵⁰ The Court of Appeal accordingly did not make its own review of the social science evidence, choosing instead to rely primarily on the court of first instance’s findings on the view that no flaw had been sufficiently demonstrated to challenge their validity; likewise, the Supreme Court of Canada did not find palpable and overriding error in the trial court’s review of facts. However, the analysis above demonstrates how the studies cited by the court of first instance were often incorrectly summarized, contained several serious flaws, or conclusions were drawn from the studies that could actually not be drawn. No reliable social science, nor expert evidence, was presented in that court’s opinion showing that third parties contribute to reducing abuse, as opposed to contributing to the increase of harmful exploitation and unsafe sex. Research was sometimes misrepresented or accepted without understanding its methodological limitations to buttress hypothetical claims that legalizing third parties and indoor prostitution establishments increases the safety and well-being of prostituted people, when much good research unmistakably shows that it does not.²⁵¹ Thus, the evidence did not demonstrably support the Court of Appeal’s findings for limiting the reach of the “living on the avails” provision and striking down the bawdy-house law—even less the Supreme Court of Canada’s decision to strike down both laws in their entirety.

In the context of the *Bedford* appeal to the Supreme Court of Canada, it is worth looking at a newer study by public health scholars in British Columbia, published in June 2012 after the Court of Appeal’s decision was rendered.²⁵² According to media reports, the lead counsel for the *Bedford* parties had invoked this study from British Columbia about a Vancouver housing program in his *factum* (brief) to the Supreme Court of Canada.²⁵³ Nevertheless, the study cannot be found in the final version of his *factum* as submitted to the Court—not with four of the five studies cited by the Ontario Superior Court which are invoked again by respondents, nor elsewhere²⁵⁴—perhaps for good reasons. As will be shown below, this study exhibits many

²⁴⁹ *Id.*

²⁵⁰ *Id.* at para. 130.

²⁵¹ See *supra* Part I B and Part II A, on research and evidence showing that third parties do not improve safe sex, abuse, or exploitation of prostituted persons.

²⁵² Krüsi et al., *supra* note 32. The Ontario Court of Appeal’s decision was rendered public on March 26, 2012. See *Bedford* (Ont. C.A.), *supra* note 13.

²⁵³ See, e.g., Kirk Makin, *In Ontario, Sides Line Up as Battle Over Bawdy Houses Set to Resume*, THE GLOBE & MAIL, Jan. 17, 2013, at A5 (Lexis), available at <http://www.theglobeandmail.com/news/national/in-ontario-sides-line-up-as-battle-over-bawdy-houses-set-to-resume/article7508125/>, archived at <http://perma.cc/0R3Cg9aYS6G> (quoting lawyer Alan Young and a study of a Vancouver housing program reportedly included in his brief).

²⁵⁴ See *Factum of Respondents/Appellants on Cross Appeal at para. 39 nn.70–73, Canada (Att’y Gen.) v. Bedford*, No. 34788 (Can. Apr. 28, 2013), available at http://www.scc-csc.gc.ca/factums-memoires/34788/FM030_Respondents_Terri-Jean-Bedford-et-al.pdf.

problems of reliability and validity similar to the studies and opinions discussed above in Part II A-E.

Thirty-eight prostituted women and one transgendered person were reportedly interviewed and six focus groups were conducted in British Columbia.²⁵⁵ These prostituted persons were said to live in “unique, low-barrier, supportive housing programs for women who are functioning as unsanctioned indoor sex work environments . . . for marginalized sex workers with substance use issues.”²⁵⁶ The buildings’ management policy was reported to only include women among the residents, staff, and management.²⁵⁷ Thirty of the thirty nine women surveyed had Aboriginal backgrounds, which is consistent with the literature that shows overrepresentation of First Nations women in Canadian prostitution.²⁵⁸ Such overrepresentation may be interpreted as an expression of the vulnerability to racism and social discrimination that tend to make historically disadvantaged groups overrepresented in prostitution.²⁵⁹ Their reported mean age was 35, with a range from 22-58.²⁶⁰ The respondents expressed feelings of safety, which they attributed to certain features of the program, such as a staffed reception that registered visitors and camera surveillance, as well as proximity to supportive neighbors.²⁶¹ There were also other benefits reported, such as the posting of a “bad-date” report at the reception, access to condoms, syringes, medication (including methadone and antiretroviral therapy), and regular visits by general practitioners, nurses, and mental health workers.²⁶²

The study reports no third-party presence in the form of pimps, bodyguards, drivers, booking agencies, or otherwise. There were both female staff, however, and local law enforcement present in order to provide support when tricks became aggressive.²⁶³ The police’s support in these situations was reportedly welcomed by most women, though exceptions among the women existed; the minority views and experiences in these regards were not elaborated further by the authors.²⁶⁴ The cooperation with law enforcement might appear surprising when considering that the bawdy-house provisions could apply to these housing programs; those provisions hold, among other things, that anyone who, as “landlord, lessor, tenant, occupier, agent or otherwise having charge or control of any place, knowingly permits” it, or “any part thereof” for prostitution, is liable on a summary conviction.²⁶⁵

²⁵⁵ Krüsi et al., *supra* note 32, at 1155.

²⁵⁶ *Id.* at 1154.

²⁵⁷ *Id.* at 1155.

²⁵⁸ *See supra* note 32.

²⁵⁹ *See infra* notes 439–449, 487–489, and accompanying text on the Canadian legal conceptualization of “disadvantage” as it may be applied to persons in prostitution.

²⁶⁰ Krüsi et al., *supra* note 32, at 1155.

²⁶¹ *Id.* at 1156–58.

²⁶² *Id.* at 1155–56.

²⁶³ *Id.* at 1156.

²⁶⁴ *Id.*

²⁶⁵ Canada Criminal Code, R.S.C. 1985, c. C-46, § 210(2)(c).

According to the authors' interpretation of the prostituted women's accounts, they suggested the program's various supportive features gave the prostituted women more control in negotiating prices, types of sex, and other health or safety issues.²⁶⁶ However, just as the studies invoked in the Ontario Superior Court could contain methodological biases, some more stronger than others,²⁶⁷ this study presents a number of serious problems. Nowhere does the study show a sensitivity to the fact that, were the respondents to reveal problems with the programs, they could jeopardize their housing situation. Given that prostituted persons are often homeless,²⁶⁸ the pressure could be strong to accentuate any positive features of actually having a place to live. This potential source of bias is nowhere methodologically noticed or attempted to be countered, but may have skewed their responses toward positive reporting on the housing programs. However, "a minority" or "a few exceptions" are nonetheless said to hold views contrary to the majority in certain respects,²⁶⁹ but further information is limited. For instance, while most prostituted persons reportedly welcomed the reception's identification of tricks and felt "able to count on staff and police for support in removing violent clients," no further details about the women who held contrary views are reported.²⁷⁰ Did these other women say that staff and police were unsupportive or, as often reported in legalized situations,²⁷¹ unable to respond quickly enough? By contrast, the authors reported in greater detail the complaints from women on the street regarding regular police activity, which was also criticized by the prostituted persons in part for preventing them from bringing tricks to their apartments.²⁷²

Additionally, the authors never provide any information about the rent or other fees, such as a percentage of each trick, which the women may have had to pay, formally or informally, and to whom. Such information is crucial when assessing the immediate conditions of their prostitution, in order to know whether or not their conditions are exploitative or relatively supportive; i.e., whether their prostitution is harmful or less harmful compared to other forms of prostitution. For

²⁶⁶ Krüsi et al., *supra* note 32, at 1157.

²⁶⁷ See *supra* Part II A-E.

²⁶⁸ See Farley et al., *Nine Countries*, *supra* note 31, at 43 (75% of 854 prostituted persons in nine countries reported homelessness, either currently or in the past). Not surprisingly, studies report that many prostituted women have also been runaways, which is likely associated with homelessness during shorter or longer periods of time. See, e.g., Silbert & Pines, *Entrance into Prostitution*, *supra* note 31, at 485 (reporting over half of 200 juvenile and adult, current and former, prostituted women in San Francisco were runaways when entering prostitution; over two-thirds of the current prostituted women were runaways; and 96% of prostituted juveniles were runaways see also Bagley & Young, *supra* note 33, at 14 (three-quarters of thirty-six prostitution survivors were runaways due to family abuse by age sixteen, compared to none of forty-five community control women of similar age).

²⁶⁹ Krüsi et al., *supra* note 252, at 1156.

²⁷⁰ *Id.* A minority of respondents complained that identification of visitors obstructed them from bringing tricks to their apartments, as tricks may not have picture identification or want to avoid to be made known to law enforcement, families, or partners. *Id.* Nothing more is said with respect to those "exceptions" who complained about the law enforcement's involvement in removing violent tricks at the housing sites. *Id.*

²⁷¹ See, e.g., *supra* notes 63–74, and accompanying text; see also Whittaker & Hart, *supra* note 73, at 409 ("[T]hese women are subject to violence and . . . the presence of the maid has only a limited protective value.").

²⁷² Krüsi et al., *supra* note 252, at 1156–57.

example, pressures to make the “rent” may easily create incentives for unsafe sex practices that provide higher monetary rewards, as in the London apartments’ “maid system” brothels mentioned above.²⁷³ Similarly, there is no information about the costs for the many health services said to exist on the housing sites,²⁷⁴ as compared to external providers. Considering the potential bias in reporting caused by the women’s concern for keeping their homes, complaints about third parties who might unduly exploit the delivery of such services as well as other forms of substantial support are not likely to be heard—unless, of course, the authors had actively and carefully inquired into such problems.²⁷⁵ As these important aspects, which are needed to assess potential exploitation, are not available to the readers’ scrutiny, the question is not whether or not the value of the study is undermined, but how much of it has value.

The authors’ interpretations of some of their respondents’ interviews further undermine the credibility of this study, as they often appear as one-sided and convenient defenses of the brothel system. For instance, the authors asserted that “a few residents’ narratives also showed how a lack of formal sex industry regulations [e.g., unions] . . . can result in undercutting and competition for dates.”²⁷⁶ Such statements might appear reasonable were prostituted women to have an equal hand while bargaining with tricks and third parties, but the evidence of their intrinsically unequal situation suggest they do not have such equal power generally.²⁷⁷ In fact, undercutting and competition is precisely what has been reported from jurisdictions with legal prostitution that do have a regulatory scheme, in part because brothels import foreign populations

²⁷³ See *supra* Part II A.

²⁷⁴ See, e.g., Krüsi et al., *supra* note 252, at 1155 (mentioning “[a]ccess to health, prevention, and harm reduction resources,” such as “condoms, syringes, and other harm reduction paraphernalia” being “available on site,” and medication being “dispensed on site (including methadone and antiretroviral therapy),” without any account of the costs applied to these services).

²⁷⁵ There are several studies where prostituted persons have revealed that third parties in legal brothels exploit them by, e.g., imposing various fees and/or charging them for questionable services or extracting exorbitant rents. See, e.g., Farley, *Legal Brothel Prostitution in Nevada*, in *PROSTITUTION AND TRAFFICKING IN NEVADA: MAKING THE CONNECTIONS*, *supra* note 3, at 19, 31 (reporting that Nevada brothels charge inflated prices for everything inside the brothels (e.g., food), impose high “fines” for changing contracts, and that 57% of 44 women admitted they gave part or all of their earnings to external “pimps”); KUO, *supra* note 68, at 82–83 (noting requirements to “tip” shift managers in Nevada brothels, to pay for outside “errands” since not being permitted outside, to pay for weekly medical exams, to pay percentages to cab drivers, and reporting a split of earnings with 20% going to the prostituted women); Meyer et al., *supra* note 67 (reporting that prostituted Romanian women in Germany had to pay pimps approximately \$1,100 per week for a shared bedroom without furniture, and that rooms for prostituted women in Nuremberg where other prostituted women work and live cost approximately \$70 to \$220 per day); Whittaker & Hart, *supra* note 73, at 404–05 (reporting that before earning anything themselves, prostituted women in London, U.K., were charged *daily* rents by landlords from £120 to £250 in the mid-1990s for flats that could be used for prostitution, and they needed to pay a “maid” a daily wage of £30 to £60, as well as in some cases also pay up to £60 daily for advertisement that were placed regularly in phone boxes).

²⁷⁶ Krüsi et al., *supra* note 32, at 1158.

²⁷⁷ See *supra* Part I & II A.

to meet the increased demand.²⁷⁸ By contrast, in jurisdictions where purchase of sex became illegal in 1999 while being bought for sex was not, as in Sweden, similar large populations of foreign prostituted women were absent as those which existed in neighboring Norway and Denmark where prostitution was legal in 2008.²⁷⁹ Not surprisingly, some prostituted persons in Sweden expressed an increased leverage in the mid-2000s when dealing with abusive tricks because the Swedish law was principally on their side.²⁸⁰ Similarly, persons who managed to escape prostitution in Sweden said the law made it easier because it had moved the stigma to the tricks who exploited them, which provided feelings of empowerment to survivors.²⁸¹

Moreover, the Vancouver study included worrisome methodological flaws, which, as discussed above, are common in this field: there is no account of who was in the room or otherwise overheard the conversations or had access to the recordings and transcriptions.²⁸² Considering the specific situation of respondents here, where they might risk homelessness if the study was to reveal serious problems with the housing programs, this lack of methodological care is troubling. Similarly, the study did not employ persons with actual experience in prostitution as interviewers of prostituted persons,²⁸³ a strategy that could increase trust among respondents.²⁸⁴ These flaws can militate against the ability of the subjects to reveal sensitive and incriminating

²⁷⁸ See, e.g., SULLIVAN, *supra* note 63, at 7 (reporting pressure by brothels in Victoria, Australia to accept abusive tricks due to increased competition since legalization); Meyer et al., *supra* note 67 (reporting dropping prices, riskier conditions, and increased competition in Germany since legalization, in part due to an influx of foreign women). Consistent with observations of large foreign populations in jurisdictions with legal prostitution, in 1994 and 1995 the Amsterdam police estimated that approximately 75% of all prostituted persons “behind windows in the Red Light district, De Wallen, were foreigners and that 80% of all foreign prostitutes are in the country illegally.” Gerben J. N. Bruinsma & Guus Meershoek, *Organized Crime and Trafficking in Women from Eastern Europe in the Netherlands*, in *ILLEGAL IMMIGRATION AND COMMERCIAL SEX: THE NEW SLAVE TRADE* 105, 107 (Phil Williams ed., 1999). More recent reports suggest that over 75% of Amsterdam’s 8000 to 11,000 prostituted persons are from Eastern Europe, Africa and Asia. Simons, *supra* note 65, at A10.

²⁷⁹ Charlotta Holmström & May-Len Skilbrei, *Nordiska prostitutionsmarknader i förändring [Nordic Markets for Prostitution Under Change]*, in *PROSTITUTION I NORDEN: FORSKNINGSRAPPORT [PROSTITUTION IN THE NORDIC: RESEARCH REPORT]* 9, 16–17 (2008).

²⁸⁰ SOCIALSTYRELSEN [SOS] [NAT’L BD. OF HEALTH AND WELFARE], SWED. GOV’T, *PROSTITUTION IN SWEDEN 2003 34* (2004), available at http://www.socialstyrelsen.se/Lists/Artikelkatalog/Attachments/10488/2004-131-28_200413128.pdf, archived at <http://perma.cc/0vWJVMQN1Ea> (mentioning prostituted persons who reportedly “dared to file rape complaints against clients, thanks to the law against purchasing sex which, in these cases, has been a source of strength and support”).

²⁸¹ SOU 2010:49 [gov’t report series], *supra* note 88, at 130.

²⁸² Statements that “participants provided informed consent” and that the study received “ethical approval” from a research board, Krüsi et al., *supra* note 32, at 1155, do not satisfy these concerns, as many researchers apparently do not realize the scope of the problems of interviewing prostituted persons.

²⁸³ According to the study, “[t]wo experienced interviewers conducted interviews and focus groups at the study office,” but only the focus groups which “were conducted prior to the interview phase . . . to gain a preliminary understanding of the women’s experiences with the housing programs,” were “facilitated by a sex worker trained in cofacilitating peer focus groups.” *Id.* at 1155. Apparently one of the authors, Andrea Krüsi, conducted the interviews. *Id.* at 1159.

²⁸⁴ See *supra* notes 87–90, and accompanying text.

information critical of the sex industry.²⁸⁵ The primary result of the study's methodological deficiencies is that its finding that respondents expressed feelings of safety and attributed them to the housing program are far less reliable, thus less useful for legal purposes.²⁸⁶

The Vancouver study presents many validity problems. First, the respondents' dependency on their current housing is not countered or analyzed for whether or not it could affect their responses, and if so, how. Second, no procedures are accounted for that might have secured the trust among interviewees or confidentiality of the interview process. Third, interpretations are at times one-sided while important counter-evidence documented in the literature in parallel situations is ignored. Fourth, crucial questions were not asked about potential exploitation and disincentives for safe sex. Because of these problems, the information gained in this study is unreliable and of less use for policy consideration on the realities of legal indoor prostitution than it might have been. The unreliable information presented in this study does not counter the compelling evidence documenting the exploitation and damage that endemically occurs in prostitution,²⁸⁷ nor the conclusion that it becomes no less exploitative or harmful when legalized and moved indoors.²⁸⁸

The Vancouver study above exhibits several typical methodological problems of validity that other studies of legal indoor prostitution with third parties do.²⁸⁹ Several other findings with similar methodological problems are reported in the literature, as when a recent comment asserted that abusive and destitute preconditions are a less common cause for entering prostitution among those who are prostituted indoors, as distinguished from "street" prostitution.²⁹⁰ Such a claim appear more unlikely when considering that numerous studies show that a majority of people in prostitution are prostituted *both* indoors and outdoors during their lives.²⁹¹ This means that distinguishing between populations indoors and outdoors, based on the

²⁸⁵ See *supra* notes 87–90, and accompanying text.

²⁸⁶ Krüsi et al., *supra* note 32, at 1155–58.

²⁸⁷ See *supra* Part I A.

²⁸⁸ See *supra* Part I B and Part II A.

²⁸⁹ See *supra* Part II A-E.

²⁹⁰ Ronald Weitzer, *Sociology of Sex Work*, 35 ANN. REV. SOCIOLOGY 213, 219 (2009) ("Childhood abuse (neglect, violence, incest) is part of the biography of some prostitutes, though it is more common among street workers.").

²⁹¹ For instance, a team of researchers studying 1022 prostituted women in Colorado Springs observed that "the same woman may work in different settings, simultaneously or sequentially. Rigid stratification of prostitutes into 'high-class' or lower categories is not meaningful, either socially or ecologically." John J. Potterat et al., *Estimating the Prevalence and Career Longevity of Prostitute Women*, 27 J. SEX RES. 233, 234 (1990). Several more recent studies, with sample sizes ranging from 23 to 222, also suggest that a rough majority of prostituted persons drift between indoor and outdoor venues. See, e.g., Lois A. Jackson et al., *Female Sex Trade Workers, Condoms, and the Public-Private Divide*, 17 J. PSYCHOL. & HUM. SEXUALITY 83, 87 (2005); ULLA-CARIN HEDIN & SVEN-AXEL MÅNSSON, VÄGEN UT! OM KVINNORS UPPBROTT UR PROSTITUTIONEN [THE WAY OUT! ON WOMEN'S BREAK-UP FROM PROSTITUTION] 28 (1998); Lisa A. Kramer, *Emotional Experiences of Performing Prostitution, in PROSTITUTION, TRAFFICKING, AND TRAUMATIC STRESS*, *supra* note 33, at 191; Farley, *Legal Brothel Prostitution in Nevada, in PROSTITUTION AND TRAFFICKING IN NEVADA: MAKING THE CONNECTIONS*, *supra* note 3, at 29; Raphael

preconditions of poverty and abuse (i.e., events happening before they even enter prostitution, e.g, childhood abuse and neglect), seems less likely to yield significant differences. Additional evidence suggests that prostitution indoors and outdoors is generally equally harmful.²⁹² Taken together, the individuals' shifting of venue over time and the generally equally harmful conditions among indoor and outdoor venues suggest less likelihood of preconditions correlating with venue except in exceptional cases. Not surprisingly, only two empirical studies were relied on to suggest otherwise by the commentator in question.²⁹³ Both studies used poor and unreliable data, failed to meet reliable scholarly standards in general—e.g., one had no control groups²⁹⁴ from street prostitution and contained a very large missing response rate—and featured many of the particular problems that appear in the methodology of prostitution research.²⁹⁵ Such facts

& Shapiro, *Violence in Indoor and Outdoor Prostitution Venues*, *supra* note 192, at 131; Farley, “*Bad for the Body*,” *supra* note 60, at 1099 (citing data from New Zealand).

²⁹² See *supra* notes 45–74, and accompanying text. This conclusion is questioned by the *Bedford* courts who claimed the opposite, for which they are questioned in turn in this Article. See *supra* Part II A-E.

²⁹³ Weitzer, *Sociology of Sex Work*, *supra* note 290, at 219 (citing ROBERTA PERKINS AND FRANCES LOVEJOY, *CALL GIRLS: PRIVATE SEX WORKERS IN AUSTRALIA* (2007); N. Jeal and C. Salisbury, *Health Needs and Service Use of Parlour-Based Prostitutes Compared with Street-Based Prostitutes: A Cross-Sectional Survey*, 114 *BJOG: INT'L J. OBSTETRICS & GYNAECOLOGY* 875 (2007)).

²⁹⁴ When comparing different studies the lack of a control group makes it very difficult to account for the bias of specifics, such as interviewers and their techniques, geographic location, population samples, survey wordings, and other particulars.

²⁹⁵ The first of the two studies invoked to support these claims did not survey any women in street prostitution—only “call girls” (i.e., escort prostitution), with women in brothels as a “control group.” See PERKINS & LOVEJOY, *supra* note 293, at 10. Further, only 95 responded to the survey out of 244 women who responded to telephone calls and of which most were also spoken to by appointment; initially, half of the total calls had however been left unanswered. *Id.* at 7, 161. A total response of 95 from this large sample provides a response-rate of approximately 20% out of approximately 500 calls to potential “call girls.” *Id.* at 7, 161. Nevertheless, the study presents no analysis of what causes may lie behind the decision among 80% in their sample *not* to respond. Moreover, no information regarding non-response rates or other sampling problems is provided regarding the brothel “control group.” *Id.* at 10, 161. There could be particularly important sources of bias here, e.g., if only the least vulnerable persons responded while those prostituted under worse conditions decided not to participate. If this is the case, it would provide an erroneous representation of the sample as a whole. By contrast, when a Swedish survey on attitudes to prostitution had a missing response rate of 54.6%, the researchers spent two pages of their article’s method section to discuss potential biases and to make comparisons with three earlier similar survey studies and other research just to validate the findings. See Jari Kuosmanen, *Attitudes and Perceptions about Legislation Prohibiting the Purchase of Sexual Services in Sweden*, 14 *EUR. J. SOC. WORK* 247, 251–52 (2011). Altogether there can thus be a very serious sampling bias at work in the Australian survey, which may make results incomparable to other studies in general, and studies including street prostitution in particular as there is no control group from the streets to begin with in this study. The second citation directs the reader to a study of a Bristol sample of 71 prostituted women in massage parlors compared to an equal number on the streets. Jeal & Salisbury, *supra* note 293, at 875. The parlor respondents likely would have realized that a negative survey could implicate their employer’s activity—a situation not present among the street sample. Nonetheless, the two Bristol authors did not mention how they approached such problems of bias among respondents. Nor did they use interviewers with previous experience from prostitution, as others have done in order to better secure the trust of the respondents. See *supra* notes 87–90, and accompanying text. There is thus a potential for bias in this survey as well as it is in the Australian case above.

should caution the reader whenever prostitution studies purport to show low levels of abuse or trauma.

III. BEDFORD EXPOSES PERSONS TO EXPLOITATION AND PROTECTS THEIR EXPLOITERS

A. Avails and Bawdy-House Laws Integral to Comprehensive Anti-Trafficking Framework

The bawdy-house and avails provisions helped facilitate Canada’s fight against sex trafficking, as explained more below, even though the word “trafficking” itself was not included in the statutes. The Ontario Court of Appeal acknowledged this fact when interpreting the legislative objectives of the bawdy-house laws to be “safeguarding public health and safety.”²⁹⁶ That court observed that these objectives animated the legislative history in the late 19th and early 20th centuries of both the bawdy-house and “living on the avails” provisions, evidenced by the legislature’s emphasis on the “pressing social problem of so-called ‘white slavery.’”²⁹⁷ This term refers to an abusive form of prostitution that always involves unscrupulous pimps; indeed it is a historically-specific reference to prostitution understood as a form of slavery tantamount to the North American domestic equivalent to what the term sex trafficking generally means today.²⁹⁸ The court further observed that the “concept of public health and safety” was “wide enough to encompass measures that target human trafficking and child exploitation, both of which may tragically arise through the operation of bawdy-houses.”²⁹⁹ By thus noting the links between children who are ruthlessly exploited in the sex industry and pernicious trafficking networks, and by acknowledging that brothels are often the destination of persons who are

The Bristol survey did, however, raise concerns that “[t]he small sample size for each group may mean that important differences have not reached significance.” Jeal & Salisbury, *supra* note 293, at 879.

²⁹⁶ *Bedford* (Ont. C.A.), *supra* note 13, at para. 192.

²⁹⁷ *Id.* at para. 202. *See also* SPECIAL COMM. ON PORNOGRAPHY AND PROSTITUTION IN CANADA, *supra* note 31, at 403–04 (mentioning a legislative concern to protect women and girls from the “scourges of ‘white slavery’” during late 19th and early 20th century, which introduced provisions such as “living on the avails” in the criminal code together with the bawdy-house law and led to other “legislation designed both to rehabilitate prostitutes and to prevent children opting for that way of life”).

²⁹⁸ *See, e.g.,* SHEILA JEFFREYS, *THE IDEA OF PROSTITUTION* 8–15, 23 (1997), who shows how “white slavery” appeared as a code word for explicitly coercive prostitution in the turn of the 20th century debates, typically perceived as international cross-jurisdictional prostitution rather than domestic prostitution. Such a perception is similar to how “trafficking” is understood in contemporary popular discourse, even though it is a legally incorrect mischaracterization. *See, e.g.,* ROYAL CANADIAN MOUNTED POLICE, *supra* note 6, at 41 (complaining about how media “contributed to the sensationalism and general misinterpretation between human trafficking and human smuggling”); Max Waltman, *Prohibiting Sex Purchasing and Ending Trafficking: The Swedish Prostitution Law*, 33 *MICH. J. INT’L L.* 133, 133–35 (2011) (noting that law students conflated international “kidnapping” with “trafficking”).

²⁹⁹ *Bedford* (Ont. C.A.), *supra* note 13, at para. 193. As noted above, *see supra* note 39, a majority of all prostituted women seem to have been prostituted for the first time before passing the age of majority, which in those cases could constitute child sexual exploitation.

trafficked for sex,³⁰⁰ the court observed that the bawdy-house prohibition can be used to target traffickers and sexual exploiters, even though the statutory wording does not explicitly refer to them: “The fact that there are specific provisions that also deal with these alarming social problems does not mean that Parliament cannot rely on more general measures such as the bawdy-house provisions to combat them.”³⁰¹

Other Canadian jurisprudence makes clear that while the bawdy-house and avails provisions were originally passed to fight what was at times termed “white slavery,” their legislative objective can be inferred “through the impact produced by the operation and application of the legislation.”³⁰² In this light, the “ultimate impact” of the bawdy-house and avails provisions “are clearly linked, if not indivisible”³⁰³ from the purpose of the trafficking laws, because they combat interconnected social scourges. The combination of such contemporaneous concerns and the effects of the legislation today meant that the “legislative objectives” of the bawdy-house laws were not “arbitrary”—a fact acknowledged by the Ontario Court of Appeal in *Bedford*.³⁰⁴ Rather, as recognized by the court, their purposes were rationally related to a legitimate objective of fight trafficking and child exploitation, even though the explicit legislative history might also imply the more old-fashioned concern for “combating neighborhood disruption or disorder.”³⁰⁵ As the court further noted, in connection with human trafficking and child exploitation,³⁰⁶ public health and safety are concepts “capable of evolving without violating the prohibition against shifting purpose.”³⁰⁷

Surprisingly, nowhere in the opinion of the Supreme Court of Canada is the Ontario Court of Appeal’s analysis of the bawdy-house law’s objectives to fight trafficking noticed; neither is that objective rejected, nor recognized. Although “public health and safety” are abstract objectives mentioned in passing by the Supreme Court,³⁰⁸ the more concrete objective to prevent sex trafficking never is. Trafficking is thus effectively ignored in favor of a much more limited objective to “prevent community harms in the nature of nuisance,” or to deter “community

³⁰⁰ *Bedford* (Ont. C.A.), *supra* note 13, at para. 195 (“Frequently, police investigating residential bawdy-houses have found vulnerable women brought in from abroad or underage girls working as prostitutes. The appellants’ witnesses gave evidence that bawdy-houses are often an integral part of human trafficking syndicates where victims are trained and housed, and then transported elsewhere for the purpose of sexual exploitation.”).

³⁰¹ *Bedford* (Ont. C.A.), *supra* note 13, at para. 193 (citing *R. v. Malmö-Levine*, 2003 SCC 74, [2003] 3 S.C.R. 571, para. 137 (Gonthier and Binnie, J.J.) (Can.) (holding that, in a case concerning marijuana, “[o]ne type of legal control to prevent harm,” such as restrictions for driving while intoxicated, “does not logically oust other potential forms of legal control” per se)).

³⁰² *R. v. Big M. Drug Mart Ltd.*, [1985] 1 S.C.R. 295, 331 (Dickson J.) (Can.).

³⁰³ *Id.*

³⁰⁴ *Bedford* (Ont. C.A.), *supra* note 13, at para. 196.

³⁰⁵ *Id.* at para. 192.

³⁰⁶ See *supra* note 299, and accompanying quoted text.

³⁰⁷ *Bedford* (Ont. C.A.), *supra* note 13, at para. 193 (citing *R. v. Butler*, [1992] 1 S.C.R. 452, 496 (holding that the harms to society of undue exploitation of sex in printed and other expressive materials was capable of evolving beyond a concept of “public morality” to a modern standard of dignity and gender equality) (Can.)).

³⁰⁸ *Bedford* (Can. Sup. Ct), *supra* note 15, at para. 132.

disruption,” invoked by the Supreme Court when striking down the bawdy-house law.³⁰⁹ The Supreme Court’s disregard for trafficking is further contrasted by the Ontario Court of Appeal, who when deciding to strike down the bawdy-house prohibition as applied to prostitution implied that other laws “that deal directly with the critical issue of human trafficking” would be sufficient protection.³¹⁰ However, as explained further below, trafficking laws are more difficult to apply effectively, which makes it imperative to retain laws that actually work against the realities of sex trafficking, such as the bawdy-house and avails provisions. To understand the problems of tackling trafficking without the two latter provisions, it is necessary to outline how trafficking is defined internationally at present, and then to analyze the obstacles to addressing trafficking as implemented in Canadian law compared with the bawdy-house and avails provisions.

The internationally and widely ratified definition of “trafficking” is found in the United Nation’s Protocol to Prevent, Suppress and Punish Trafficking in Persons (“Palermo Protocol”), which entered into force on December 25, 2003.³¹¹ There are currently 164 countries, including Canada, China, Sweden, and the U.S., among others, who have adopted this definition.³¹² The definition includes, among other things, “the abuse of power or of a position of vulnerability . . . for the purpose of exploitation” by any third party.³¹³ In the legislative history (*travaux préparatoires*), “position of vulnerability” has been further defined as “any situation in which the

³⁰⁹ *Id.* at paras. 131, 136.

³¹⁰ *Bedford* (Ont. C.A.), *supra* note 13, at para. 217. Apart from citing Canada’s trafficking provisions, *id.* at para. 217 n.12 (citing Canada Criminal Code, R.S.C. 1985, c. C-46, §§ 279.01, 279.011, 279.02), the court also cited a few prostitution regulations in the criminal code that were not challenged in *Bedford*, for instance “procuring” a person to “become” a prostituted person or “an inmate of a bawdy-house,” or “concealing” persons in bawdy-houses. *Id.* (citing Canada Criminal Code, R.S.C. 1985, c. C-46, §§ 212(1)(c)–(e)). Such provisions appear to target those who are expressly coerced, deceived, or procured without previously having been in prostitution—persons that in popular discourse are generally perceived as “innocent” victims when being exploited for sex. *Cf.* Waltman, *supra* note 298, at 133–35 (describing how law students conflated international “kidnapping” with “trafficking” in a symposium panel title, implying that trafficking by default must be international and include an element of kidnapping); Andrea Dworkin, *Prostitution and Male Supremacy*, 1 MICH. J. GENDER & L. 1, 3 (1993) (questioning that “gang rape” is inherently different from prostitution because it is perceived as entailing an “innocent woman” being “taken by surprise” when a contrasting perspective could be that prostituted women are “taken by surprise over and over” again, the only relevant differences being that her gang rape “is punctuated by a money exchange”). By contrast to the laws that were invalidated and modified by *Bedford*, the former procuring and concealing offenses do not target third-party profiteers who exploit prostituted persons who have been in prostitution for a while, have PTSD, and wish to leave but cannot. *See, e.g.,* Farley et al., *Nine Countries*, *supra* note 31, at 44, 47–48, 51, 56 (among 854 prostituted persons in nine countries 89% explicitly said they wanted to escape prostitution, and two-thirds of total sample had mean PTSD symptoms that were in the range or higher than treatment-seeking Vietnam veterans, battered women seeking shelter, or refugees fleeing from state-organized torture).

³¹¹ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, *opened for signature* Dec. 12, 2000, T.I.A.S. No. 13127, 2237 U.N.T.S. 319 (entered into force Dec. 25, 2003) [hereinafter Palermo Protocol].

³¹² *See* UNITED NATION’S TREATY COLLECTION, <http://treaties.un.org/> (follow “Status of Treaties (MTDSG)” hyperlink; then follow “CHAPTER XVIII Penal Matters” hyperlink; then follow “12a. Protocol to Prevent” hyperlink) (last visited Nov. 4, 2013).

³¹³ Palermo Protocol, *supra* note 311, art. 3(a).

person involved has no *real and acceptable alternative* but to submit to the abuse involved.”³¹⁴ According to the protocol, consent is irrelevant in all such situations.³¹⁵ In light of the empirical evidence which suggest that an overwhelming majority of persons in prostitution want to escape it but cannot,³¹⁶ the Palermo Protocol definition of trafficking includes such prostitution where third parties are involved, even in legalized settings.³¹⁷ This position has been taken by the U.N.’s Trafficking Rapporteur in 2006.³¹⁸ The Rapporteur also took the view that the “abuse of power” and a position of vulnerability in the trafficking context “must be understood to include power disparities based on gender, race, ethnicity and poverty.”³¹⁹ Indeed, as discussed above, gender, race, ethnicity, and poverty intersect in prostitution so that women, particularly poor women, minorities, or those of color, are overrepresented.³²⁰ In line with these thoughts of the U.N.’s Rapporteur, those who “traffic” persons for sexual purposes are abusing the power they gain relative the pre-existing vulnerabilities of the trafficked persons, including such pre-existing vulnerabilities that are linked to multiple disadvantages that can include belonging to LGBT populations. Exploiting people who are so vulnerable seems just to be another name for pimping; hence, trafficking and pimping are the same.³²¹

The key insights of international trafficking law, its history, and its evolving doctrine as informed by all the empirical investigations of the last half century do not seem to be applied in practice, even in ratifying countries such as Canada. If it were, pimps and profiteers in the sex industry could be charged for trafficking. Despite the fact that Canada ratified the Palermo

³¹⁴ Rep. of the Ad Hoc Comm. on the Elaboration of a Convention Against Transnational Organized Crime on the Work of Its First to Eleventh Sessions, Addendum, Interpretative Notes for the Official Records (*Travaux Préparatoires*) of the Negotiation of the United Nations Convention Against Transnational Organized Crime and the Protocols Thereto, ¶ 63, U.N. Doc. A/55/383/Add.1 (Nov. 3, 2000) (emphasis added) [hereinafter *Travaux Préparatoires* to the Palermo Protocol].

³¹⁵ Palermo Protocol, *supra* note 311, art. 3(b).

³¹⁶ See, e.g., Farley et al., *Nine Countries*, *supra* note 31, at 56 (finding among 854 prostituted persons in nine countries that 89% explicitly said they wished to leave); see also *supra* Part I.

³¹⁷ See Farley, *Legal Brothel Prostitution in Nevada*, in PROSTITUTION AND TRAFFICKING IN NEVADA: MAKING THE CONNECTIONS, *supra* note 3, at 27 tbl.1, who addressed this issue by asking prostituted women in legal brothels whether they wanted to escape prostitution, and found that 81% of the 45 respondents wished to leave, despite that many respondents were subject to surveillance by listening devices and responded in whispers. *Id.* at 23.

³¹⁸ Report of the Special Rapporteur on the Human Rights Aspects of the Victims of Trafficking in Persons, Especially Women and Children, 66th Sess., Jan.–Feb. 2005, ¶ 42, U.N. Doc E/CN.4/2006/62 (Feb. 20, 2006) (submitted by Sigma Huda) [hereinafter *2006 U.N. Trafficking Report*] (reporting that “prostitution as actually practised in the world usually does satisfy the elements of trafficking”).

³¹⁹ 2006 U.N. Trafficking Report, *supra* note 281, ¶ 42.

³²⁰ See *supra* notes 31–42, and accompanying text; see also Catharine A. MacKinnon, *Trafficking, Prostitution, and Inequality*, 46 HARV. C.R.-C.L. L. REV. 271, 276–81 (2011).

³²¹ See Harvey Schwartz et al., *Pimp Subjugation of Women by Mind Control*, in PROSTITUTION AND TRAFFICKING IN NEVADA: MAKING THE CONNECTIONS, *supra* note 3, at 49–84, for an illuminating account of pimping based on three different cases, where men pimped women into prostitution with different amounts and forms of coercion along a continuum—overt force on one end, *id.* at 75–80, exploitation of persons’ inequality and lack of equal alternatives due to racism, sexism, or social class on the other end. *Id.* at 70–75.

Protocol,³²² neither its criminal code trafficking law nor its related statutory provisions contain “the abuse of a . . . position of vulnerability” as it is worded in the Protocol.³²³ Canada’s trafficking provision instead prohibits “exploitation.”³²⁴ Exploitation under the trafficking statute entails that someone causes another person “to provide, or offer to provide, labour or a service by engaging in conduct that, in all the circumstances, could reasonably be expected to cause the other person to believe that their *safety* or the safety of a person known to them would be *threatened* if they failed to provide, or offer to provide, the labour or service.”³²⁵ Sex trafficking by this definition is a situation in which a third party exploits someone’s prostitution because they threatened that person’s safety, or the safety of a person known to the person who is exploited. By contrast, sex trafficking according to the *travaux préparatoires* of the Palermo Protocol can be a situation in which a third party abuses someone’s position of vulnerability, which may include the exploitation of a person’s lack of alternatives to prostitution.³²⁶ Such a position of vulnerability appears to harbor a more inclusive definition of trafficking than exploiting a threat to someone’s safety (unless being prostituted is regarded as a threat to the person’s safety in itself).

It would have been preferable if Canada had retained the exact wordings in the Palermo Protocol definition of trafficking in their domestic law if to retain all behavior included under it. However, the Canadian Criminal Code further suggests certain “factors” that courts may consider in order to facilitate their interpretation of what constitutes an exploitation of threats: these could include whether there was an “abuse” of “a position of trust, power or authority.”³²⁷ Consistent with the U.N.’s Trafficking Rapporteur’s view above of power as including disparities based on gender, race, ethnicity, and poverty,³²⁸ Canada’s reference to the “abuse of power” may describe what most men who are buying women in prostitution are doing, given the many forms of power they exert over the women they buy—economic, racial, often age, and fundamentally gender-based.³²⁹ This dimension of the Canadian trafficking definition has potential to cover a lot of prostitution, hand in hand with the existing bawdy-house and avails provisions that ought to be upheld. Such an inclusive definition is also consistent with Canada’s constitutional commitment to promote substantive equality for groups such as prostituted persons who are suffering social,

³²² See Palermo Protocol, *supra* note 311, signed by Canada Dec. 14, 2000, 2002 Can. T.S. No. 25 (ratified May 13, 2002, entered into force Sept. 29, 2003), record available at <http://publications.gc.ca/site/eng/283815/publication.html>.

³²³ Palermo Protocol, *supra* note 311, art. 3(a).

³²⁴ Canada Criminal Code, R.S.C. 1985, c. C-46, § 279.01.

³²⁵ § 279.04(1) (emphasis added).

³²⁶ See *supra* notes 311–321, and accompanying text.

³²⁷ Canada Criminal Code, R.S.C. 1985, c. C-46, § 279.04(2)(c).

³²⁸ 2006 U.N. Trafficking Report, *supra* note 318, ¶ 42.

³²⁹ As mentioned, gender, race, ethnicity, and poverty intersect so that men often buy prostituted women who are poor or belong to minorities or those of color. See *supra* notes 31–42, and accompanying text; see also MacKinnon, *supra* note 320, at 276–81.

political and legal disadvantage in society, and would therefore benefit to be covered by the legal protections afforded those who are recognized as being trafficked.³³⁰

The evidence³³¹ of what prostitution tends to look like when third parties exploit people in prostitution might appear sufficient to secure a legal trafficking conviction, hence to put the perpetrators behind bars and provide the survivors with restitution and support as victims of crime. However, a report on trafficking published by the Royal Canadian Mounted Police in 2010 found that prostituted persons often changed their previous testimonies when their cases were brought to court, or even refused to participate altogether as the benefits appeared “so minute” compared with the risks of re-victimization by their former pimps.³³² Those who are victimized by trafficking for sexual exploitation are typically concerned not only with their own safety but that of their families as well; or they fear public exposure and stigma and may suffer from PTSD³³³ and other traumatic sequelae that make testifying difficult.³³⁴ Moreover, foreign persons often feel a compelling need to earn more money to send home.³³⁵ These problems amounted to critical obstacles, according to the report, because many cases rested “almost solely on the witness to reliably testify against the accused in court.”³³⁶ Although legal proceedings could be made more witness-friendly, giving the survivors a voice, the report suggested that many investigations relied too much on testimonies by prostituted persons, failing to make use of alternative evidence, becoming reactive rather than proactive in the situation.³³⁷

³³⁰ See the analysis in Part IV of Canada’s constitutional substantive equality doctrine and its application on laws regulating prostitution. It should be noted that the same precise wording included as part of the interpretive guidelines under the trafficking provision, “abusing a position of trust, power or authority,” can also be found in Canada’s definition of sexual exploitation of persons with mental or physical disabilities, where threats or consent are irrelevant. Canada Criminal Code, R.S.C. 1985, c. C-46, § 153.1(3)(c). Thus, the similar wording in these two different provisions could suggest that “abusing a position of power” was not meant to cover otherwise non-disabled adults in prostitution. Nevertheless, even if Parliament forgot to include “position of vulnerability” in the criminal code definition of trafficking, their official ratification of the Palermo Protocol’s definition of trafficking makes no reservation in that regard. In other words, Canada’s international commitment suggests that the Palermo Protocol jurisprudence on trafficking is controlling rather than textual interpretations on basis of other provisions in the criminal code that are not necessarily meant to be read together.

³³¹ See *supra* Part I-II.

³³² ROYAL CANADIAN MOUNTED POLICE, *supra* note 6, at 38.

³³³ For documentation about the extremely high post traumatic stress disorder symptoms among prostituted persons, the consequences for their ability to exit prostitution, and the evidence from controlled studies showing that other causes are less likely to cause the symptoms than prostitution per se (e.g., violence, childhood abuse, or legal status), see *supra* notes 45–53, and accompanying text.

³³⁴ ROYAL CANADIAN MOUNTED POLICE, *supra* note 6, at 38.

³³⁵ *Id.*

³³⁶ See, e.g., *id.* at 13, 16, 38–40 (quotations).

³³⁷ *Id.* at 38–40. Considering a prosecution under the Palermo Protocol’s definition of trafficking, the research presented here, if used as evidence, would readily corroborate a position of vulnerability for most persons in prostitution, suggesting that they would not be in prostitution if they had any other real and acceptable alternative. See *supra* notes 33–62, and accompanying text. If investigators secured PTSD assessments of every plaintiff from licensed psychologists, as was done in a British case decided in 2010, the connections with the literature would be further substantiated. See *AT v. Dulghieru*, [2009] EWHC (QB) 225, [16], [21], [29], [34] (Eng.) (citing, *inter alia*, a

With a lack of robust preliminary investigations that also use alternative evidence, it is not surprising that the Royal Canadian Mounted Police’s report found that when there was no cooperation from victims, law enforcement were often “left with the option of laying other charges or sometimes no charge at all.”³³⁸ Accordingly, “[i]n most human trafficking investigations that resulted in charges, prostitution-related charges were also laid against the accused.”³³⁹ Hence, the bawdy-house and avails provisions are regularly used in trafficking cases to secure a legal charge when trafficking, for a range of reasons, has become difficult to prove, which it often or even usually is. For instance, under the avails provision there is typically only a need to prove that someone “lives with or is habitually in the company of a prostitute” to assume that they live on the “avails” from the prostitution of others,³⁴⁰ in contrast to trafficking laws which include additional requirements that need to be proven to apply them against exploitation in prostitution; the trafficking laws require a “threat” against the prostituted person’s “safety,” or against someone’s safety that she/he knows, and the threat must also be reasonably known to the prostituted person herself/himself.³⁴¹ No such requirements exist under the avails provision. Moreover, the avails provision generally does not need testimony by prostituted persons against their former pimps, whom would typically abuse prostituted persons’ fear of retribution; this fact was so important that a prior Supreme Court holding took it to support the otherwise reversed criminal burden of proof which the presumption of living on the avails effectively creates, for instance whenever someone is habitually in company with a prostituted person.³⁴²

Similarly, as the bawdy-house laws create criminal liability when someone “keeps,” “controls,” or knowingly “permits” a place to be used for prostitution, the bawdy-house

report from Dr. Monica Thompson, a single joint expert). The research already shows how prostitution predicts PTSD symptoms among many persons, as distinguished from other external predictors of PTSD. *See supra* notes 38–44, and accompanying text. An individual assessment would show whether a plaintiff is typical of those who are exploited and harmed by prostitution, and subject to exploitation as defined under the Palermo Protocol definition of trafficking. Similar standardized protocols of best practices could include any other tangible documentation of harm or coercive preconditions, e.g., physical symptoms or personal biographies of social hardship, childhood abuse or neglect. Together with the other evidence, these might corroborate an assessment of whether or not the person had a real and acceptable alternative to prostitution. All of these investigative procedures would benefit immensely from assistance from real survivors, as they have been found competent in acquiring the trust of prostituted persons when dealing with similar matters. *See supra* notes 87–90, and accompanying text. Recruitment and consultation of these survivors could be facilitated through credible NGOs, e.g., via the international umbrella organization Sex Trafficking Survivors United (STSU), and referred to by government lawyers in prostitution-related investigations. In a recent letter to the White House, this umbrella organization accounted for 177 survivor signatories and twenty one independent survivor-led NGOs (including eight NGOs that were run by nine of the STSU board members), as well as hundreds of additional signatures from NGOs and various knowledgeable individuals. Letter from Sex Trafficking Survivors United, to President Barack Obama, The White House (May 20, 2013), *available at* <http://www.sextraffickingsurvivorsunited.org/wp-content/uploads/2013/05/STSUWhiteHouseLetterFINAL-2.pdf>.

³³⁸ ROYAL CANADIAN MOUNTED POLICE, *supra* note 6, at 38.

³³⁹ *Id.* at 10.

³⁴⁰ Canada Criminal Code, R.S.C. 1985, c. C-46, § 212(3).

³⁴¹ For further comment on Canadian trafficking statutes, see *infra* notes 322–330, and accompanying text.

³⁴² *R. v. Downey*, [1992] 2 S.C.R. 10, 17, 36–39 (Can.).

provisions facilitate prosecuting traffickers who are otherwise creative in avoiding revealing financial transactions or other evidence that would incur liability under the avails provision, or activities that would otherwise suggest trafficking.³⁴³ In short, the bawdy-house and avails provisions create a *change in presumptions* which benefits prostituted persons who are victimized by pimps, in contrast to the trafficking law which proceeds from the assumption that pimps are innocent until proven guilty beyond reasonable doubt. The documented difficulties in applying trafficking laws, short of their reform, make it all the more important to retain laws that work more effectively.

B. Bawdy-House Laws Are Demonstrably Effective in Combatting Sex Trafficking

Because of their relatively more simple design and wider scope of application when compared with trafficking laws, the bawdy-house provisions are among the most effective tools of all Canadian laws against exploitation in the sex industry. They hold that “[e]veryone who keeps a common bawdy-house” for prostitution is liable to imprisonment (at maximum two years).³⁴⁴ It is even enough to convict a third party for a summary offense given that they were “found, without lawful excuse, in a common bawdy-house,” or “as owner, landlord, lessor, tenant, occupier, agent or otherwise having charge or control of any place, knowingly permits the place or any part thereof to be let or used for the purposes of a common bawdy-house.”³⁴⁵ Alternatively, someone may incur such liability “who knowingly takes, transports, directs, or offers to take, transport or direct, any other person to a common bawdy-house.”³⁴⁶ An “owner, landlord or lessor” who, after having been served with a notice that others were convicted on their premises, fails to take “all reasonable steps to prevent the recurrence of the offence,” also becomes liable for keeping “a common bawdy-house” with the possibility of imprisonment at a maximum of two years.³⁴⁷

The effectiveness of the bawdy-house laws in fighting sex trafficking is evident when pimps both psychologically intimidate prostituted persons and hide behind various legitimate business facades. As observed by the Royal Canadian Mounted Police report, even when traffickers use fronts such as “massage parlours,” though they “offer illicit services,” they are usually found with “valid business licenses, offering services like ‘acupuncture’ or ‘aromatherapy’ and performed by licensed masseuses.”³⁴⁸ Apparently in these cases, the tricks are only charged for the legitimate services, while the sexual purchase is made to appear as something that was “offered” by the masseuse (who in reality is pimped) at her or his discretion; alternatively, as something that

³⁴³ See *infra* notes 344–354, and accompanying text discussing application of bawdy-house laws.

³⁴⁴ Canada Criminal Code, R.S.C. 1985, c. C-46, § 210(1).

³⁴⁵ *Id.* §§ 210(2)(b)–(c).

³⁴⁶ *Id.* § 211.

³⁴⁷ *Id.* §§ 210(1), (3), (4).

³⁴⁸ ROYAL CANADIAN MOUNTED POLICE, *supra* note 6, at 11.

happened without the house knowing about it.³⁴⁹ Apart from making it difficult to secure evidence to apply the trafficking laws, such practices even make “living on the avails” (i.e., living economically of someone else’s prostitution or being habitually in the company of a prostituted person³⁵⁰) harder to enforce; when there is no financial transaction or other visible proof that can be documented between the prostituted person and the third party without testimony, there is no clear evidence to incur liability under the avails provision. Moreover, Canadian police found that owner-operators are “well-versed in loopholes of municipal by-laws and licensing that regulates therapeutic establishments” where sex trafficking may occur.³⁵¹ While exotic dance clubs, or strip clubs, for instance, have been associated with trafficking for many years, and are far from therapeutic even in pretense, they do not explicitly endorse prostitution on the premises but rather turn a blind eye to its existence.³⁵² In other words, when pimps make it difficult to apply trafficking laws, or laws against “living on the avails,” the bawdy-house provision seem to help the law enforcement to take some form of legal action that ensures that traffickers do not hide behind an alternative legitimate facade or otherwise abuse their social power to suppress necessary evidence without accountability for their exploitation of people in prostitution. The bawdy-house provisions thus work in tandem with trafficking laws and laws against prostitution, such as the avails provision, with a shared objective: to fight and deter trafficking and sexual exploitation of human beings—an objective that the Court of Appeals for Ontario associated with the bawdy-house laws.³⁵³ Law enforcement witnesses in *Bedford* testified that bawdy-house provisions are important tools in human trafficking investigations in Canada.³⁵⁴

In light of the Ontario Court of Appeal’s analysis above of the compelling legislative objective of the bawdy-house provisions to combat sex trafficking and child exploitation,³⁵⁵ one might wonder why they invalidated these laws, as they are demonstrably more effective than the more burdensome trafficking provisions. The Court of Appeal clearly recognized that trafficking laws to prevent harm do not by themselves exclude alternative legal measures,³⁵⁶ such as the bawdy-house provisions. However, they believed the latter were “overbroad”—even “grossly

³⁴⁹ *Id.* (“Payments are made separately, allowing owner-operators to deflect prostitution as a mere agreement between the masseuse and the client and not condoned by the business. Some parlour operators avoid discussing sexual services with clients at the onset and may even deny that they are offered on the premises.”); *cf. id.* at 17 (discussing trafficking of Asian women in Canada, noting that “[o]wner operators employ tactics to insulate themselves from the prostitution aspects of their business”).

³⁵⁰ See *infra* Part III C, for an explanation of the law against “living on the avails.”

³⁵¹ ROYAL CANADIAN MOUNTED POLICE, *supra* note 6, at 11.

³⁵² *Id.* at 11–12.

³⁵³ *Bedford* (Ont. C.A.), *supra* note 13, at para. 192–97.

³⁵⁴ *Id.* at para. 208.

³⁵⁵ See *supra* notes 296–307, and accompanying text.

³⁵⁶ *Bedford* (Ont. C.A.), *supra* note 13, at para. 193 (citing *R. v. Malmø-Levine*, 2003 SCC 74, [2003] 3 S.C.R. 571, para. 137 (Gonthier and Binnie, J.J.) (Can.) (holding that, in a drug-related case, “[o]ne type of legal control to prevent harm,” such as restrictions for driving while intoxicated, “does not logically oust other potential forms of legal control”)).

disproportionate” to serve this purpose.³⁵⁷ Accordingly, it was said that bawdy-house laws “prevent prostitutes from taking the basic safety precaution of moving indoors to locations under their control,” and accordingly that the bawdy-house laws “dramatically impact on prostitutes’ security of the person.”³⁵⁸ To support these conclusions, the Court of Appeal relied, inter alia, on Professor John Lowman, one of the respondents’ experts in the court of first instance, quoted above,³⁵⁹ who implied that the brothel-system with “maids” in London apartments improved safety for prostituted women.³⁶⁰ However, a study of those London brothels (one that was even mentioned by the court of first instance) showed a situation harboring considerable exploitation, with unanimous accounts from all prostituted women whom were interviewed entailing that “other” women in those apartments practiced unsafe sex when being offered more money to do so.³⁶¹ Similar findings have been shown in other studies on legal forms of prostitution where, as mentioned previously, brothel management appear either more interested in the money from tricks than the women’s safety, or they simply cannot interact quickly and efficiently to stop the violence.³⁶²

In the Supreme Court of Canada, John Lowman’s affidavit was cited again to support an undocumented claim that a now defunct brothel in Vancouver, with the picturesque name “Grandma’s House,” had been “established to support street workers . . . at about the same time as fear were growing that a serial killer was prowling the streets . . . materialized in the notorious Robert Pickton.”³⁶³ No independent investigation or research has been cited, either by Lowman or the courts or the respondents for *Bedford*,³⁶⁴ suggesting that this brothel did effectively protect prostituted persons who were otherwise operating on the streets (as opposed to already operating indoors). Nor has it been similarly shown that this brothel did not exploit vulnerable persons for financial gain or otherwise, increasing unsafe and abusive sex as research shows that indoor establishments often tend to do.³⁶⁵ Here it should be considered that the court of first instance could not cite even five social science studies that reliably showed that brothels by themselves generally reduce abuse and unsafe sex.³⁶⁶ A sixth study of a housing program in Vancouver that resembles the purported description of Grandma’s House above, where prostitution was allowed on premises, similarly lacked reliable information, and was apparently excluded from the

³⁵⁷ *Bedford* (Ont. C.A.), *supra* note 13, at para. 198–218.

³⁵⁸ *Id.* at para. 207.

³⁵⁹ *See supra* notes 229–232, and accompanying text.

³⁶⁰ *Bedford* (Ont. C.A.), *supra* note 13, at para. 211.

³⁶¹ *See supra* Part II A.

³⁶² *See supra* notes 63–74, 102–108, 173–175, and accompanying text.

³⁶³ *Bedford* (Can. Sup. Ct.), *supra* note 15, at para. 64 (emphasis added).

³⁶⁴ For respondents, *see* Factum of Respondents/Appellants on Cross Appeal at paras. 9-10, 37, 98, Canada (Att’y Gen.) v. *Bedford*, No. 34788 (Can. Apr. 28, 2013), available at http://www.scc-csc.gc.ca/factums-memoires/34788/FM030_Respondents_Terri-Jean-Bedford-et-al.pdf (referring to “Grandma’s House,” citing no other source than Lowman’s Affidavit).

³⁶⁵ *See supra* Part I B, Part II A & C.

³⁶⁶ *See supra* Part II A-D.

respondent's briefs in the Supreme Court of Canada.³⁶⁷ The assumption that Grandma's House was a benign source of empowerment during a time when an admittedly dangerous individual sexual predator roamed the streets is built entirely on Lowman's unverified affidavit—a weak link in an otherwise unreliable chain of evidence supporting the invalidation of Canada's laws against brothels.

Following their reading of the empirical evidence from the court below, which is criticized in this Article, the Ontario Court of Appeal analyzed doctrines related to the balancing of conflicting constitutional imperatives when laws may be regarded as overbroad, arbitrary, or grossly disproportional with respect to Canada's 1982 Charter of Rights and Freedoms' guarantee of "life, liberty and security of the person."³⁶⁸ The Supreme Court of Canada also made a similar doctrinal analysis,³⁶⁹ though they applied it slightly differently on the three provisions they invalidated. However, these two courts' discussions of these doctrinal concepts rest entirely on the assumptions adopted in the trial court's review of the empirical evidence, where it was found that third parties in indoor prostitution would improve the safety of prostituted persons, as opposed to increase their exploitation without necessarily making meaningful safety improvements. As seen above, the five strongest social science studies according to the court did not reliably show such an effect, though some of them purported to do this.³⁷⁰ Given the position of vulnerability of the majority of prostituted persons, who typically have several pre-existing problems related to poverty, childhood abuse and neglect as well as other social disadvantages,³⁷¹ they would not appear to be in a position to negotiate with equal power as the third party businesses who might benefit from their prostitution. Considering their unequal bargaining positions, it seems surprising if the courts' conclusions that third parties may improve safety without exploiting the prostituted persons' vulnerable situation would be reliably and demonstrably supported by social science studies. From this point of view, it is not remarkable that the studies claimed to be "among the most relevant"³⁷² in support of the court of first instance's decision were sometimes misrepresented and also, as argued above, exhibited potentially serious methodological flaws.³⁷³ A dissenting appellate judge in British Columbia argued against allowing a similar wholesale challenge to the prostitution laws in that jurisdiction as the one brought in *Bedford* on a related rationale: courts are institutionally incompetent to adequately assess social and legislative evidence on issues such as prostitution:

Courts are not legislatures, nor are they commissions of inquiry. Courts lack the institutional capacity to explore issues that are not directly relevant to the questions that they must decide. . . .

³⁶⁷ See *supra* Part II F.

³⁶⁸ Canadian Charter of Rights and Freedoms, *supra* note 17, § 7.

³⁶⁹ See, e.g., *Bedford* (Can. Sup. Ct), *supra* note 15, at paras. 96–123.

³⁷⁰ See *supra* Part II A-E.

³⁷¹ See *supra* Part I A.

³⁷² *Id.* at para. 325.

³⁷³ See *supra* Part II A-E.

They are unable to conduct investigations on their own, and, with limited exceptions, are completely reliant on the parties to provide evidence.³⁷⁴

Perhaps this is overly conservative. One might think that courts should be able to assess social and legislative evidence accurately, including from scholarly studies on contested social issues, even though some judges or panels may fail. Attesting to the relatively contested nature of the *Bedford* decisions, their decisions do also appear to be inconsistent with the reasoning that the Supreme Court of Canada used in 1992 to defend the presumption of guilt as it is defined by the Criminal Code under the living on the avails provision.³⁷⁵

C. Avails Provision Demonstrably Justified, and Erroneously Found Overbroad

The “living on the avails” provision states that anyone who “lives wholly or in part on the avails of prostitution of another person is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years.”³⁷⁶ The objective of this provision aims at the person “who have an economic stake in the earnings of a prostitute.”³⁷⁷ According to the doctrine, this target of the provision “is commonly and aptly termed a pimp.”³⁷⁸ A pimp is further defined as a “person who lives *parasitically* off a prostitute’s earnings.”³⁷⁹ A parasite is regarded as a person whose occupation “would not exist if his customers were not prostitutes.”³⁸⁰ As held in a case against an escort agency, the court found the element of parasitism to exist because the agency manager was “in the business of rendering services to the escorts *because they*” were prostituted persons.³⁸¹ As such, their economic relationship was sufficient proof of parasitism.³⁸²

Case law long before *Bedford* recognized that the avails provision did not apply to landlords or other people who provide *general* services to prostituted persons that are not directly related to their prostitution—services that are the same as those these people provide to non-prostituted persons, as is the case of a “grocer who supplies groceries, the doctor or lawyer.”³⁸³ Otherwise, to date the Canadian Criminal Code makes clear that even when someone is only proven to live “with” or being “habitually in the company of a prostitute in a common bawdy-house,” it can be presumed that they are living on the “avails of prostitution” unless evidence to the contrary exists.³⁸⁴ There are exceptions to this presumption though, as in Ontario where cases concerning

³⁷⁴ *Downtown Eastside Sex Workers United Against Violence Soc’y v. Canada (Att’y Gen.)*, 2010 BCCA 439, 10 B.C.L.R. 5th 33, para. 81 (Can. B.C. C.A. 2010) (Groberman J., dissenting).

³⁷⁵ See *infra* Part III C.

³⁷⁶ Canada Criminal Code, R.S.C. 1985, c. C-46, § 212(1)(j).

³⁷⁷ *R. v. Downey*, [1992] 2 S.C.R. 10, 32 (Can.).

³⁷⁸ *Id.*

³⁷⁹ *Id.* (emphasis added).

³⁸⁰ *Shaw v. Director of Public Prosecutions*, [1962] A.C. 220 at 270, [1961] 2 W.L.R. 89 (House of Lords), Lord Reid J (U.K.) (Westlaw) [*Shaw* cited to A.C.]; cf. *Downey*, [1992] 2 S.C.R. at 32 (Cory, J.) (citing *Shaw*) (S.C.C.).

³⁸¹ *R. v. Barrow* (2001), 54 O.R. 3d 417, para. 29 (Can. Ont. C.A.) (emphasis added).

³⁸² *Id.*

³⁸³ *Shaw v. Director of Public Prosecutions*, [1962] A.C. 220 at 263 (Viscount Simonds J.); see also *id.* at 270 (Lord Reid J.); *Downey*, [1992] 2 S.C.R. at 32 (Cory J.) (citing *Shaw*).

³⁸⁴ Canada Criminal Code, R.S.C. 1985, c. C-46, § 212(3).

domestic relationships needed a further finding of exploitation since 1991 in order to prove that a person living with a prostituted person is “living on the avails” in the parasitic sense.³⁸⁵ In 1992, when the Supreme Court of Canada faced a constitutional challenge to the presumption in *R. v. Downey*,³⁸⁶ it was nonetheless saved as a reasonable limitation of the right otherwise to be presumed innocent until proven guilty beyond reasonable doubt; this decision was justified under Section 1 of the Charter in light of the unquestionable “importance of successfully prosecuting pimps,”³⁸⁷ and the concomitant need to avoid forcing prostituted persons to testify against pimps, which many prostituted persons are reluctant to do.³⁸⁸ As explained back in 1992, without that presumption, prostituted persons would need to testify in order to gather evidence of parasitic living, which they rarely would do for fear of retribution and other reasons that supported, and did not contradict, a pimping relationship.³⁸⁹ Similar observations have been made more recently by the Royal Canadian Mounted Police in their report on trafficking in Canada, where they conclude that there are many difficulties with the cooperation of victims due to their fear of reprisal, which creates critical obstacles to successful trafficking convictions.³⁹⁰ Similar problems are widely encountered.³⁹¹ In part because of such difficulties, the avails provision’s strong presumption of guilt was upheld by the Supreme Court in *Downey*.³⁹² Their decision held that this presumption is a rational legal response to the pressing and substantial objective of fighting sexual exploitation in Canada.³⁹³ Furthermore, this presumption was viewed as proportional to its objectives, and as such justified under Section 1 of the Charter,³⁹⁴ thus *not* overbroad.

In contrast to the Supreme Court’s decision in 1992, even the requirement to prove “exploitation” that was added as a rewrite by the Court of Appeal for Ontario in 2012,³⁹⁵ but subsequently rejected in favor of a complete invalidation in the Supreme Court of Canada in

³⁸⁵ *R. v. Grilo* (1991), 2 O.R. 3d 514, 521–22 (Can. Ont. C.A.) (holding that “[i]n the case of a person living with a prostitute, one must turn to indicia which will serve to distinguish between legitimate living arrangements between roommates or spouses, and living on the avails of prostitution. . . . Living on the avails is directed at the idle parasite who reaps the benefits of prostitution without any legal or moral claim to support from the person who happens to be a prostitute.”).

³⁸⁶ *Downey*, [1992] 2 S.C.R. at 17 (Cory J.).

³⁸⁷ *Downey*, [1992] 2 S.C.R. at 39 (Cory J.) (stating that “there cannot be any question of the importance of successfully prosecuting pimps”).

³⁸⁸ *Id.* at 36–39.

³⁸⁹ *Id.*

³⁹⁰ ROYAL CANADIAN MOUNTED POLICE, *supra* note 6, at 38–40.

³⁹¹ *See, e.g., Farley, Legal Brothel Prostitution in Nevada, in PROSTITUTION AND TRAFFICKING IN NEVADA: MAKING THE CONNECTIONS, supra* note 3, at 23–24 (noting various incidents and conditions during interviews suggesting that prostituted women in Nevada legal brothels were under strong pressures not to reveal information to outsiders that could cast the brothels in negative light); *cf. KUO, supra* note 68, at 84 (noting that all prostituted persons in Nevada legal brothels she interviewed seemed “more concerned with possible assault or abuse” from management than abuse from tricks).

³⁹² *Downey*, [1992] 2 S.C.R. at 35–39.

³⁹³ *Id.*

³⁹⁴ *Id.*

³⁹⁵ *Bedford* (Ont. C.A.), *supra* note 13, paras. 327–29.

2013,³⁹⁶ seems to make proving “living on the avails” substantially more difficult. If the Court of Appeal’s rewrite had been accepted in the higher instance, it would also in practice have reinstated a stronger requirement for further cooperation by typically intimidated and often incapacitated witnesses, if evidence of exploitation is to be available for the prosecution. As the Royal Canadian Mounted Police recently noted with regards to the trafficking provisions, when there is no cooperation from victims law enforcement are “sometimes” left with the option of laying “no charge at all,” whether under the avails or other provisions.³⁹⁷ Hence, in effect a requirement to prove “exploitation” would have replaced a prior presumption of a pimping relationship when anyone lives wholly or in part on someone else’s prostitution with a presumption that such relationships are innocent until proven otherwise. Even such a more benign rewrite in *Bedford* (as distinguished from complete invalidation) would have been in conflict with the Supreme Court of Canada’s reasoning in *Downey* that emphasized the need to facilitate prosecution of pimps.

The Court of Appeal for Ontario recognized that striking down the avails provision in its entirety would “neutralize the presumption” of parasitical living that was upheld by the Supreme Court in 1992 and “played an important role” in successfully prosecuting pimps.³⁹⁸ The rationale offered for adding a new requirement to prove “exploitation” nonetheless, absent complete invalidation, was that the avails provision “targets anyone with an economic stake in the earnings of the prostitute, even persons who offer no threat to the prostitute’s economic or physical well-being.”³⁹⁹ Even given this rationale, the Court of Appeal seems however to have rejected the reasoning behind the balancing analysis in *Downey*, where facilitating efficient prosecution of pimps was prioritized over the interests of third parties (even those who offer no ostensible threat to prostituted persons).⁴⁰⁰ In reaching this decision the Court of Appeal for Ontario had also assumed, as did the Supreme Court of Canada, that third parties in general could improve the safety or well-being for prostituted persons,⁴⁰¹ as opposed from being exploitative and taking advantage of the pre-existing vulnerabilities of prostituted persons.⁴⁰² However, these two courts relied on social science evidence that, contrary to their claims, did not reliably support their assumptions.⁴⁰³

³⁹⁶ See, e.g., *Bedford* (Can. Sup. Ct), *supra* note 15, at paras. 143-44, 162-64.

³⁹⁷ See ROYAL CANADIAN MOUNTED POLICE, *supra* note 6, at 38.

³⁹⁸ *Bedford* (Ont. C.A.), *supra* note 13, para. 258.

³⁹⁹ *Id.* at para. 259.

⁴⁰⁰ *R. v. Downey*, [1992] 2 S.C.R. 10, 38-39 (Can.).

⁴⁰¹ See, e.g., *Bedford* (Ont. C.A.), *supra* note 13, paras. 253-54 (agreeing with the application judge’s finding that the avails provision “prevents prostitutes from hiring bodyguards, drivers or others who could keep them safe”); *cf. Bedford* (Can. Sup. Ct), *supra* note 15, at para. 162 (finding that “the law not only catches drivers and bodyguards, who may actually be pimps, but it also catches clearly non-exploitative relationships, such as receptionists or accountants who work with prostitutes.”)

⁴⁰² See *supra* Part I B.

⁴⁰³ See *supra* Part II A-E.

When making it easier to prosecute third parties without requiring that prostituted persons testify directly against them, *Downey* had for practical purposes recognized that pimps were manipulative in their behavior in a way which only recent psychological literature seem to have begun unravelling in a systematic sense: Psychologists now describe how pimps use a range of sophisticated and manipulative techniques to entrap persons in prostitution,⁴⁰⁴ which makes prostitution difficult to leave even if the persons want to get out. Brutal techniques that are commonly used to ensnare young people include creating traumatic bonding by a process of exposing the prostituted person to severe violence, social isolation, and degradation, which is followed by strategic rewards.⁴⁰⁵ These and more subtle methods are used to exploit older or more mature persons, who, often in combination with facing stacked cards in life due to race and sex discrimination, can be especially vulnerable because of prior sexual or physical abuse, poverty, homelessness, or the need to support dependents.⁴⁰⁶

In defending its view that the avails provision was overbroad, the Ontario Court of Appeal made an example with a previous decision they made in *R. v. Barrow*.⁴⁰⁷ In that case the court found that a madam's escort agency in Ontario took a third of the earnings from her prostituted women,⁴⁰⁸ which means that those women had to have sex with more men in order to compensate for her cut. As discussed above,⁴⁰⁹ seeing more tricks typically entails a risk of more exploitative abuse and might provide incentives for unsafe sex. Researchers have explained that prostituted persons rarely trust public authorities such as social service officials with information about their lives, in part because prostituted persons are often distrusted and stigmatized by for it.⁴¹⁰ This distrust presumably holds for testifying in court as well, and in that sense *Barrow* is no exception. Indeed, the decision in *Downey* was build on the recognition of the difficulties to acquire testimonies from prostituted persons, especially those that would speak out against their exploiters.⁴¹¹ Four women who had been prostituted for Barrow testified that she was helpful at times,⁴¹² but evidence above do not suggest that such experiences (even if correct in their case) should be taken as representative of the majority of relationships between prostituted persons and

⁴⁰⁴ See, e.g., Schwartz et al., *supra* note 321, at 52–59 (describing pimping in various forms with different extents of mental and physical coercion).

⁴⁰⁵ *Id.* at 52-56

⁴⁰⁶ See *id.* at 70-75 (presenting case story of a nonviolent pimp who exploited the economic needs or aspirations of educated African American women burdened by the realities of sex and racial discrimination and additional multiple workloads, e.g., supporting a dependent); see also *supra* notes 31-42, and accompanying text (summarizing research and documentation of childhood abuse, poverty, homelessness, and the overrepresentation of ethnic or racial minorities among prostituted populations).

⁴⁰⁷ *Bedford* (Ont. C.A.), *supra* note 13, at paras. 243, 251, 270 (citing *R. v. Barrow* (2001), 54 O.R. 3d 417 (Can. Ont. C.A.)).

⁴⁰⁸ *Barrow*, 54 O.R. 3d at para. 6.

⁴⁰⁹ See *supra* Part I B and Part II A.

⁴¹⁰ See *supra* notes 87–90, and accompanying text.

⁴¹¹ *R. v. Downey*, [1992] 2 S.C.R. 10, 36-39 (Can.).

⁴¹² *Barrow*, 54 O.R. 3d at paras. 7–11.

third parties.⁴¹³ In this light their testimonies that Ms. Barrow was helpful should be interpreted cautiously. As noted by the Royal Canadian Mounted Police with regards to trafficking survivors, it is not unusual that the benefits of cooperating with prosecutors are “so minute” for them that it’s not worth their troubles.⁴¹⁴ Deeming from such observations it is debatable whether there are sufficient incentives for a prostituted person to testify in court, particularly if they would expose themselves to more trouble if the person they are testifying against is not successfully convicted. In this regard there is little reason to question the Supreme Court of Canada’s prior balancing of the interest of the prostituted persons against those who profit from their prostitution, which was clarified when the Criminal Code’s presumption of living on the avails for persons who merely lives with, or is habitually in company of prostituted persons,⁴¹⁵ was defended:

Prostitutes are a particularly vulnerable segment of society. The cruel abuse they suffer inflicted by their parasitic pimps has been well documented. The impugned section is aimed not only at remedying a social problem but also at providing some measure of protection for the prostitute by eliminating the necessity of testifying. It would be unfortunate if the Charter were used to deprive a vulnerable segment of society of a measure of protection.⁴¹⁶

The Supreme Court also concluded that the reverse claim is not too difficult to disprove in exceptional cases, such as where an accused third party is not living parasitically off prostituted persons’ backs but providing services that further their safety and well-being. The court thus found that “[a]ll that is required of the accused is to point to evidence capable of raising a reasonable doubt. That can often be achieved as a result of cross-examination of Crown witnesses. The section does not necessarily force the accused to testify.”⁴¹⁷ Third parties whose actions have genuinely supported prostituted people rather than violate or exploit them should thus be able to readily cast reasonable doubt on the presumption. From what is known about prostitution,⁴¹⁸ there is much evidence suggesting that persons who are habitually in the company of prostituted persons, and who cannot provide evidence to the contrary, are living parasitically off prostituted persons. Already the *Bedford* decision in the Court of Appeal effectively changed this presumption into a presumption that such persons are innocent when it required proof of exploitation of living on the avails. In effect, that decision seems to have promoted the interests of pimps and brothel owners, who would have been *presumed* to be legitimate business parties. Needless to say, the further decision in the Supreme Court of Canada to completely invalidate the avails provision goes even further.

⁴¹³ See *supra* Part I B and Part II A.

⁴¹⁴ ROYAL CANADIAN MOUNTED POLICE, *supra* note 6, at 38.

⁴¹⁵ Canada Criminal Code, R.S.C. 1985, c. C-46, § 212(3).

⁴¹⁶ R. v. Downey, [1992] 2 S.C.R. 10, 39 (Cory, J.) (Can.).

⁴¹⁷ *Id.*

⁴¹⁸ See *supra* Part I.

D. Bawdy-House Laws Should Not Apply to Prostituted Persons Who Do Not Facilitate Prostitution of Others

The Supreme Court's decision to invalidate the bawdy-house laws as applied to prostituted persons should arguably stand in certain respects. As stated below in the Court of Appeal, it was found that the bawdy-house provision was "most significantly overbroad in its extension to the prostitute's own home for her own use" as a result of an amendment from 1907,⁴¹⁹ which now can be found in the Criminal Code's definition of a "common bawdy-house" as a "place that is (a) kept or occupied, or (b) resorted to by one or more persons for the purpose of prostitution."⁴²⁰ A "single person discretely operating out of her own home by herself," this court asserted, "would be unlikely to cause most of the public health or safety problems to which the legislation is directed."⁴²¹ Indeed, as the Court of Appeals in effect observed, to contend that it is prostituted persons themselves who cause the vast bulk of the public health or safety problems of the sex industry, such as trafficking or the exploitation of children,⁴²² is inconsistent with most empirical evidence which suggest that it is third parties and tricks who drives the demand for sexual exploitation.⁴²³ Studies indicate that as many as nine out of ten prostituted persons want to escape prostitution.⁴²⁴ On top of this situation, there are a number of serious obstacles to escape that make it extremely difficult for most prostituted persons to exit without strong social support.⁴²⁵ Acknowledging in part that prostituted women typically wanted to leave the sex industry, Sweden enacted a law in 1999 targeting the tricks while simultaneously decriminalizing prostituted persons; thus, when its government faced criticism from one faction of opponents in 1998 who wanted to criminalize both the buyer and the person who is bought for sex, it responded in its final bill that "it is not reasonable also to criminalize the one who, at least in most cases, is the weaker party who is exploited by others who want to satisfy their own sexual drive," and that in order to "encourage the prostituted persons to seek assistance to get away from prostitution," it was important that "they do not feel they risk any form of sanction because they have been active as prostituted persons."⁴²⁶ In fact, criminalizing prostituted persons causes them additional troubles that prevent them from escaping.⁴²⁷ In this light, the decision to invalidate the bawdy-house law *as applied* to prostituted persons themselves, especially in their own home, should stand. The invalidation should also cover a person "who is an inmate of a common

⁴¹⁹ *Bedford* (Ont. C.A.), *supra* note 13, at para. 204.

⁴²⁰ Canada Criminal Code, R.S.C. 1985, c. C-46, § 197(1).

⁴²¹ *Bedford* (Ont. C.A.), *supra* note 13, at para. 204.

⁴²² *Bedford* (Ont. C.A.), *supra* note 13, at para. 195.

⁴²³ See *supra* Part I.

⁴²⁴ See Farley et al., *Nine Countries*, *supra* note 31, at 48, 51, 56.

⁴²⁵ See *supra* notes 58–62, and accompanying text.

⁴²⁶ Proposition [Prop.] 1997/1998:55 Kvinnofrid [Women's Sanctuary] [government bill] 104 (Swed.); see also Justitiekottets betänkande [Bet.] 1997/1998:JuU13 Kvinnofrid [parliamentary committee report] (Swed.) (passed) (dismissing motions proposing criminalizing all parties), available at http://www.riksdagen.se/sv/Dokument-Lagar/Utskottensdokument/Betankanden/Kvinnofrid_GL01JuU13/.

⁴²⁷ See, e.g., *supra* notes 60–62, and accompanying text.

bawdy-house,”⁴²⁸ so far as the term covers persons who are prostituted rather than third parties who benefit from or facilitate the prostituting of someone else.⁴²⁹

IV. BEDFORD IGNORES EQUALITY UNDER THE CANADIAN CHARTER

A. *Substantive Inequality, Intersectionality (Multiple Disadvantage), and Prostitution*

Canada’s doctrine regarding social equality is entrenched in the 1982 Charter of Rights and Freedoms Section 15, its equality provision. Summarizing Section 15’s equality doctrine situates and defines the role of the living on the avails and bawdy-house provisions in the context of Canada’s general ambition to promote social equality. The Supreme Court of Canada has viewed Section 15(1) since its inception as “the broadest of all guarantees. It applies to and supports all other rights guaranteed by the *Charter*.”⁴³⁰ Section 15(1) provides that “[e]very individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.”⁴³¹ Section 15(2) guarantees that “[s]ubsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.”⁴³² Recently in *R. v. Kapp* (2008), the Supreme Court of Canada clarified the objectives of Section 15:

Under s. 15(1), the focus is on *preventing* governments from making distinctions based on the enumerated or analogous grounds that: have the *effect* of perpetuating group disadvantage and prejudice; or impose disadvantage on the basis of stereotyping. Under s. 15(2), the focus is on *enabling* governments to pro-actively combat existing discrimination through affirmative measures.⁴³³

⁴²⁸ Canada Criminal Code, R.S.C. 1985, c. C-46, § 210(2)(a).

⁴²⁹ *Cf.* Factum of the Interveners, Canadian Ass’n of Sexual Assault Centres et al., *supra* note 83, at para. 4 (submitting that the provision against being an “inmate of a bawdy house” is unconstitutional, and that the other bawdy-house laws are “unconstitutional only to the extent that they apply to prostituted persons”) (emphasis deleted). Some may argue that two persons who are prostituted in an apartment could support each other without anyone profiting from the other’s prostitution. Even though this may happen in some cases, evidence suggests that prostitution is generally exploitative and unequal. See *supra* Part I and Part II A-E. As such, prostitution invites persons without scruples to take advantage of other people. Some prostituted persons could do this against other prostituted people. In other terms, extending the exceptions under the bawdy-house provisions to more than one person would also open up the door for more exploitation.

⁴³⁰ *Andrews v. Law Soc’y of B.C.*, [1989] 1 S.C.R. 143, 185 (McIntyre J., dissenting only in the results as to the application of § 1 of the Canadian Charter) (Lamer J., concurring) (Can.); *cf. id.* 151 (Wilson J., concurring as to the interpretation of § 15(1)) (Dickson, C.J., L’Heureux-Dubé J., concurring); *id.* 193 (La Forest J., concurring) (“I am in substantial agreement with the views of my colleague” as to the “meaning of § 15(1)).

⁴³¹ Canadian Charter of Rights and Freedoms, *supra* note 17, § 15(1).

⁴³² *Id.* at § 15(2).

⁴³³ *R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483, para. 25 (Can.) (second emphasis added).

Decisions prior to *Kapp* held that the meaning of discriminatory distinctions under Section 15 is not restricted to facial discrimination (de jure),⁴³⁴ but also covers disparate impact under facially neutral laws (de facto discrimination; e.g., discriminatory “effects”) whether or not they are intentional.⁴³⁵ The Supreme Court of Canada guarantees not only non-discrimination in the formal sense but equality through the operation of law in the social, political, or cultural sense, as expressed in the seminal *Andrews v. Law Society of British Columbia* (1989), which recognized that “every difference in treatment between individuals under the law will not necessarily result in inequality and, as well, that identical treatment may frequently produce serious inequality.”⁴³⁶ The Canadian approach is thus often termed “substantive equality,”⁴³⁷ distinguished from “formal equality,” with substantive equality necessitating a more searching inquiry into the consequences of a challenged law in its social, political, economic, and historical context.⁴³⁸

Early on, the Supreme Court of Canada developed a proactive and substantive equality approach under Section 15 that aimed to help eliminate “discrimination against groups suffering social, political and legal disadvantage in our society.”⁴³⁹ Such groups were identified by indicia “such as stereotyping, historical disadvantage or vulnerability to political and social prejudice.”⁴⁴⁰ Prostituted persons fit the subset of Canada’s population that merits solicitude under Section 15 well as they have historically been vulnerable to multiple disadvantages,⁴⁴¹ such as extreme poverty, childhood abuse and neglect, sexism, and racial discrimination; for example, prostituted women in Canada are disproportionately of First Nations descent.⁴⁴² Their disadvantages that pre-exist the operation of law are either specifically enumerated in Section 15, are directly related to them, or are analogous to the grounds enumerated in Section 15.⁴⁴³ The overwhelming majority

⁴³⁴ See *Andrews*, [1989] 1 S.C.R. at 171 (McIntyre J., dissenting on other ground). (“§ 15 has a much more specific goal than the mere elimination of distinctions”).

⁴³⁵ *Id.* at 173 (McIntyre J., dissenting on other ground) (recognizing “adverse effect” discrimination, and that “intent” is not a required element of it); *cf. id.* 174 (McIntyre J., dissenting on other ground) (“discrimination may be described as a distinction, whether *intentional or not* but based on grounds relating to personal characteristics of the individual or group, which has *the effect* of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society.”) (emphasis added).

⁴³⁶ *Id.* at 164 (McIntyre, J., dissenting on other ground).

⁴³⁷ See, e.g., *Withler v. Canada* (Att’y Gen.), 2011 SCC 12, [2011] 1 S.C.R. 396, paras. 2, 39-40, 42-43, 51-52, 55, 60, 61, 65-66 (Can.); *Peavine Métis Settlement v. Alberta*, 2011 SCC 37, [2011] 2 S.C.R. 670, paras. 38, 40, 44-45, 49, 52-53, 59 (Can.); *Kapp*, 2008 SCC 41, at paras. 3, 14-16, 20, 24, 37, 100.

⁴³⁸ See, e.g., *Withler* 2011 SCC 12, at paras. 39-40, 51-52; *cf.* Catharine A. MacKinnon, *Toward a New Theory of Equality*, in *WOMEN’S LIVES, MEN’S LAWS* 44, 54-57 (2005) (analyzing the Canadian *Andrews* decision and its progeny of cases); Catharine A. MacKinnon, *Substantive Equality: A Perspective*, 96 MINN. L. REV. 1, 1-27 et passim (2011) (discussing substantive equality in the U.S. legal context).

⁴³⁹ *R. v. Turpin*, [1989] 1 S.C.R. 1296, 1333 (Can.); *cf. Andrews*, [1989] 1 S.C.R. at 154 (Wilson, J.).

⁴⁴⁰ *Turpin*, [1989] 1 S.C.R. at 1333.

⁴⁴¹ See *supra* notes 31-45, and accompanying text.

⁴⁴² See *supra* note 32.

⁴⁴³ See Canadian Charter of Rights and Freedoms, *supra* note 17, § 15(1) (enumerations in accompanying text).

of prostituted persons wish to escape the sex industry.⁴⁴⁴ Nonetheless, many prostituted persons have, in the words of the early Supreme Court of Canada, historically been and currently are subjected to “stereotyping” and “political and social prejudice”⁴⁴⁵ through criminal fines and the public stigmatization and victim-blaming that comes with being regarded as criminals under many of Canada’s laws that addressed prostitution before *Bedford*, sometimes just as severely as the pimps and profiteers who exploited them were.⁴⁴⁶ Such legal treatment obstructed their opportunities to escape prostitution, victimizing them further by imposing fines, criminal records, and other troubles that can prevent them from getting jobs, acquiring housing, or gaining access to women’s shelters.⁴⁴⁷

Prostitution as an institution for the prostituted persons could be described as an *intersectional*⁴⁴⁸ problem of inequality, converging the multiple disadvantages of prior child abuse and neglect, poverty, racial discrimination, homelessness, and sexism. Intersectionality highlights important legal problems of the connections between inequalities for groups that “are marginalized in the interface between antidiscrimination law and race and gender hierarchies,”⁴⁴⁹ or within and between many inequalities. Problems due to intersectionality may complicate access to substantive equality for certain disadvantaged groups, and obscure the full scope of their disadvantage and its sources. As suggested by law professor Kimberle Crenshaw, a problem with discrimination of Black women have been that remedies were “generally available only to those who—due to the singularity of their burden and their otherwise privileged position” could be recognized by relatively one-dimensional political and legal categories.⁴⁵⁰ Similarly, although gender-based violence such as rape and domestic abuse can be seen as problems of sex inequality,⁴⁵¹ they may involve racial, age, or class factors. Racism and/or poverty often amplify

⁴⁴⁴ Farley et al., *Nine Countries*, *supra* note 31, at 48, 51, 56 (finding that 89% of 854 prostituted persons in nine countries said they wanted to escape prostitution); *cf.* Farley, *Legal Brothel Prostitution in Nevada*, in PROSTITUTION AND TRAFFICKING IN NEVADA: MAKING THE CONNECTIONS, *supra* note 3, at 27 tbl.1 (81% of the 45 respondents in legal brothels said they wished to leave prostitution during interviews, while many were subject to surveillance by listening devices and responded in whispers, *see id.* at 23).

⁴⁴⁵ *Turpin*, [1989] 1 S.C.R. at 1333; *cf.* *Andrews*, [1989] 1 S.C.R. at 180-81 (McIntyre, J.).

⁴⁴⁶ *See, e.g.*, Canada Criminal Code, R.S.C. 1985, c. C-46, § 210(2)(a) (criminalizing anyone who “is an inmate of a common bawdy-house”), § 213(1)(c) (criminalizing anyone who “stops or attempts to stop any person or in any manner communicates or attempts to communicate with any person for the purpose of engaging in prostitution”), *invalidated in Bedford* (Can. Sup. Ct), *supra* note 15, at para. 164.

⁴⁴⁷ *Cf. supra* notes 61–62, and accompanying text.

⁴⁴⁸ For the origins of the seminal political and legal theory of intersectional discrimination and how to challenge it, *see e.g.*, Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 151-52 (1989).

⁴⁴⁹ *Id.* at 151.

⁴⁵⁰ *Id.* at 151-52.

⁴⁵¹ Legal recognition that rape and domestic abuse are violations of sex equality (which is recognized as a human rights imperative internationally although scarcely glimpsed in the domestic law of any country) is a progressive development. *See, e.g.*, M.C. v. Bulgaria, 15 Eur. Ct. H.R. 627 (2004) (rape); *Opuz v. Turkey*, App. No. 33401/02, Eur. Ct. H.R. (2009) (on domestic violence); U.N. Comm. on the Elimination of Discrimination Against Women, General Recommendation No. 19, U.N. Doc. A/47/38 ¶¶ 6-7 (Feb. 1, 1992); U.N. Comm. on the Elimination of

discriminatory attitudes or aggravate economic obstacles that make some women more vulnerable than others to forms of gender-based violence, including in prostitution. Such violence then becomes an intersectional problem in which gender interacts with other social categories, some of which are also covered by Canadian equality law.⁴⁵²

The problems of law and politics posed by multiple disadvantages can be seen in prostitution. The many disadvantages of prostituted persons place them in coercive circumstances that usually force them to accept, for lack of other options, being exploited sexually in ways that most non-prostituted persons would simply define as “rape.”⁴⁵³ However, prostituted persons typically are not seen as victims of rape under existing law—not in the routine occurrence of paid sex, and frequently not when forced by violence and not paid.⁴⁵⁴ This problem is apparent when the law requires evidence of ostensive use of violence or threats in order to establish non-

Discrimination Against Women, Communication No. 18/2008 (Opt. Protocol), 46th Sess., July 12-30, 2010, U.N. Doc. CEDAW/C/46/D/18/2008 (Sept. 1, 2010). Thus, gender-based violence, including rape and domestic abuse, in the private as well as public spheres, is now regarded as a human rights violation and forms of sex discrimination for which states are obliged to provide adequate protections and remedies. *See, e.g.*, Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, pmbl. para. 9 (“further noting”), arts. 3(4), 4(2), July 11, 2003 (repeatedly mentioning gender-based or, alternatively, violence against women as practices incompatible with provisions guaranteeing human rights and the elimination of all forms of discrimination), *available at* http://www.achpr.org/files/instruments/women-protocol/achpr_instr_proto_women_eng.pdf; Organization of American States, Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (Convention of Belém do Pará), art. 6, June 9, 1994, 33 I.L.M. 1534, 1536 (1994), *archived at* <http://perma.cc/0rRB1H36K4W> (suggesting discrimination and violence are interrelated by stating: “The right of every woman to be free from violence includes . . . [t]he right of women to be free from all forms of discrimination”); Declaration on the Elimination of Violence Against Women, G.A. Res. 48/104, pmbl., U.N. doc. A/Res/48/104 (Dec. 20, 1993) (recognizing that implementation of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) would contribute to the elimination of violence against women and “that violence against women is one of the crucial social mechanisms by which women are forced into a subordinate position compared with men”); Fourth World Conference on Women, Sept. 4–15, 1995, Beijing Declaration and Platform for Action, ¶ 118, U.N. Doc. A/CONF.177/20/Rev.1. (“Violence against women . . . [has] led to domination over and discrimination against women by men.”); *see also* Report of the Comm. on the Elimination of Discrimination Against Women, 8th Sess., Feb. 20–Mar. 3, 1989, ¶ 392, U.N. Doc A/44/38 (Feb. 13, 1990) (“considering that arts. 2, 5, 11, 12 and 16 of the [CEDAW] Convention “require the States parties to act to protect women against violence of any kind occurring within the family, at the workplace or in any other area of social life.”).

⁴⁵² For an explicit application of the concept of intersectionality to gender-based violence, see Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1241-99 passim (1991).

⁴⁵³ *See supra* notes 139–142, and accompanying text.

⁴⁵⁴ For examples of rapes committed against prostituted women in Sweden but not recognized as such by courts, *see* PETITIONERS ET AL., SUGGESTIONS TO THE GOVERNMENT’S REVIEW OF THE SEX PURCHASE ACT 22-29 (SWEDEN) (2010) (13 signatories) (officially received by government commissioner on Mar. 17, 2010), *available at* http://www.statsvet.su.se/homepages/max_waltman.htm.

consent—a typical approach taken under many rape laws.⁴⁵⁵ For instance, until July 2013, the Swedish Criminal Code’s rape provision was premised upon a showing of express force by assault, violence, or “threat of a criminal act,” with an exception only for persons in a “helpless state.”⁴⁵⁶ If prostituted persons negotiate the price for their sexual use, arguably they are not entirely “helpless.” Nonetheless, evidence suggest that the overwhelming majority are sexually exploited under such compelling circumstances that roughly nine in ten want to leave prostitution, and two-thirds have posttraumatic stress disorder symptoms higher than battered women, refugees from state-organized torture, and treatment-seeking Vietnam veterans.⁴⁵⁷ From this point of view, the avails and bawdy-house provisions are useful, even necessary, given the difficult to impossible requirements of other laws in their applications to prostituted women, including not only most rape laws, but so far also most trafficking laws.⁴⁵⁸ The lack of recognition of much exploitation in prostitution makes retaining those laws that can stop and prevent exploitative behavior in situations of multiple inequalities imperative.⁴⁵⁹

B. Section 15 Protects Prostitution Laws that Promote Equality

Canadian criminal laws, civil laws, policies, and programs that are shown to *promote* social equality can be saved under the Charter’s Section 15 equality guarantees. They may even withstand challenges based on conflicting and central democratic imperatives, such as the freedom of expression.⁴⁶⁰ However, laws that *amplify* inequality are not consistent with the Charter’s equality guarantees. The Supreme Court of Canada stated in *Andrews* that the

⁴⁵⁵ See, e.g., CATHARINE A. MACKINNON, *SEX EQUALITY* 779, 779–834 (2d ed. 2007) (discussing, inter alia, different degrees of requirements for a showing of violence, threats of violence, and similar forced conditions under various state rape laws in the United States).

⁴⁵⁶ Brottsbalken [BrB] [Criminal Code] 6:1, paras. 1–2 (Swed.). On July 1, 2013, the statutory expression “helpless state” was changed to a “particularly vulnerable situation.” Proposition [Prop.] 2012/13:111 En skärpt sexualbrottslagstiftning [A Strengthened Sexual Offenses Legislation] [government bill] 6 (Swed.) (passed). Whether this wording change will facilitate a change in the application of the statute remains to be seen.

⁴⁵⁷ Farley et al., *Nine Countries*, *supra* note 31, at 48 tbl.6 & 56; For more details regarding preconditions to prostitution and circumstances while there, see *supra* Part I and Part II A.

⁴⁵⁸ See *supra* notes 311–354, and accompanying text.

⁴⁵⁹ See generally *supra* notes 296–429, and accompanying text.

⁴⁶⁰ See, e.g., *R. v. Keegstra*, [1990] 3 S.C.R. 697, 713, 756 (Can.) (finding that a law which prohibited willful promotion of hatred against identifiable groups that were distinguished by color, race, religion or ethnic origin was saved by § 1 under the Charter against challenge under § 2(b) of the Charter (freedom of expression), in part because the law was consistent with “the *Charter* commitment to equality, . . . in so far as it seeks to ensure the equality of all individuals in Canadian society.”); cf. *R. v. Butler*, [1992] 1 S.C.R. 452, 509-10 (Can.) (finding that a law against degrading or dehumanizing pornography promotes equality since it “seeks to enhance respect for all members of society, and non-violence and equality in their relations with each other,” and is therefore saved by § 1 under the Charter against challenges under § 2(b) under the Charter in part because “the restriction on freedom of expression does not outweigh the importance of the legislative objective”); *Little Sisters Book & Art Emporium v. Canada*, 2000 SCC 69, [2000] 2 S.C.R. 1120, para. 60 (affirming that the equality rationale under *Butler*, also applies to same-sex materials, in part because “non-violent degradation of an ostensibly willing sex slave is no less dehumanizing if the victim happens to be of the same sex, and no less (and no more) harmful in its reassurance to the viewer that the victim finds such conduct both normal and pleasurable.”).

“promotion of equality entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration.”⁴⁶¹ Arguably, a person who is sexually exploited in prostitution, under circumstances that are coercive, including conditions of extreme inequality, is not being treated with equal respect, consideration, and dignity. The living on the avails and bawdy-house provisions, given that they prevent exploitation and promote equality, can thus be considered to find support in the Charter’s equality guarantees. Without recognizing that their purposes are equality-promoting, the Court of Appeal for Ontario nonetheless provided support for this conclusion when it identified the objective of the avails provisions as aiming “to protect vulnerable persons from being coerced, pressured or emotionally manipulated into prostitution,” and “to prevent pimps from exploiting prostitutes and from profiting from the prostitution of others,” and that the bawdy-house laws were also “measures that target human trafficking and child exploitation, both of which may tragically arise through the operation of bawdy-houses.”⁴⁶²

To the extent that third parties amplify and preclude ameliorating the severe discrimination and inequality that prostituted persons face in societies—as evidence suggest⁴⁶³—and the avails and bawdy-house provisions are effective in prosecuting their exploiters—as, compared with other laws and compared with lack of any such laws, they have been⁴⁶⁴—those laws promote the substantive equality of prostituted persons in society, a group that merits protection under Section 15. By contrast, having changed the presumption of exploitation under the avails provision to a presumption of innocence for third parties, the Court of Appeal’s attempted rewrite that required proving exploitation in every case would have provided more protection to third parties who exploit prostituted persons (as would the Supreme Court’s complete invalidation of the provision), and less protection for the vast majority of prostituted persons whose equality, dignity, and humanity arguably are being violated by being exploited in prostitution. Similarly, invalidating the bawdy-house laws as applied to other persons apart from the prostituted person herself (or himself) provides more protection to those who exploit and take advantage of the vulnerabilities and multiple disadvantages of prostituted persons, depriving them of their dignity and humanity, hence their equality.

According to the reasoning above, *Bedford* does not promote social equality. The *Bedford* decisions favor the groups that have had the upper hand in an unequal social institution. Favoring pimps and profiteers this way arguably contravenes the Charter’s equality guarantees, since the Supreme Court of Canada has previously taken the position that “the effects of entrenching a guarantee of equality in the *Charter* are not confined to those instances where it can be invoked

⁴⁶¹ See *Andrews v. Law Soc’y of B.C.*, [1989] 1 S.C.R. 143, 171 (Can.).

⁴⁶² *Bedford* (Ont. C.A.), *supra* note 13, paras. 193, 238–39. While the court may disagree with the Attorney General’s further argument that the living on the avails “offence reflects a Parliamentary objective to *eradicate* prostitution,” *Id.* at para. 238 (emphasis added), Parliament need not express a desire to “eradicate” a practice in order for it to fall under the ambit of the Charter’s equality provision.

⁴⁶³ See *supra* Part I A-B, Part II A.

⁴⁶⁴ See *supra* Part I B (on the impact of legalizing third parties in prostitution).

by an individual against the state.”⁴⁶⁵ The Supreme Court of Canada would have similarly favored racists had it invalidated a demonstrably justified law against hate-propaganda in the 1990 case *R. v. Keegstra*.⁴⁶⁶ Instead, the Court saved the law, precisely because it promoted social equality.⁴⁶⁷ When the Court of Appeal in *Bedford* changed the presumption of parasitism into a presumption of innocence, it made the avails provision markedly more difficult to prove, which disempowers the majority of prostituted persons by making more remote a sanction against their exploiters that the legal presumption of parasitism had previously provided.⁴⁶⁸ The Supreme Court’s subsequent decision to invalidate the avails provision in its entirety eliminates the sanction even more unequivocally. Similarly, invalidating the bawdy-house laws makes it far easier for pimps and profiteers to exploit persons in prostitution in brothel systems, and to hide behind their various purportedly legitimate businesses (e.g., massage parlors, strip clubs, or “aromatherapy”).⁴⁶⁹ With their decisions, the *Bedford* courts have disempowered prostituted persons, who should be recognized as a protected group under Section 15, in those situation when they might be victimized by pimps.

If one assumes that benign third parties can be found in prostitution, as the *Bedford* Court of Appeal for Ontario assumed about the escort agency madam in *Barrow*,⁴⁷⁰ their decision to reverse the presumption of guilt under the avails provision in favor of third parties favors *only* those few prostituted persons, if at all, who might be less vulnerable than the majority and are more able to ascertain their interest and actually benefit from third parties. The research suggests that the majority of prostituted persons are not in such an equal position vis-à-vis third parties that they can ascertain their interests and benefit from forming business relations with them. Instead, they are likely to be more exploited, for instance having to meet more tricks to break even, without necessarily receiving tangible improvements of safety or well-being.⁴⁷¹ *Bedford* rather benefits those few hypothetical persons who are least vulnerable among the general population of prostituted persons, while those who are most vulnerable and unequal compared to the general population in Canada receive significantly less protection when laws that could effectively put their exploiters behind bars and out of business are invalidated. Consequently, the outcomes of the *Bedford* decisions have a negative impact on a population that should merit protection under Section 15. By contrast, upholding the avails and bawdy-house provisions as they stand would *promote* social equality, with the exception of such applications that criminalize

⁴⁶⁵ *Keegstra*, [1990] 3 S.C.R. at 755.

⁴⁶⁶ *Id.* at 755–56.

⁴⁶⁷ *Id.* (saving law against hate-propaganda under s. 1 of the Charter with reference to § 15 of the Charter, in part on the rationale that harms caused by such messages “run directly counter to the values central to a free and democratic society, and in restricting the promotion of hatred Parliament is therefore seeking to bolster the notion of mutual respect necessary in a nation which venerates the equality of all persons”).

⁴⁶⁸ *See supra* Part III C.

⁴⁶⁹ *See supra* Part III B.

⁴⁷⁰ *Bedford* (Ont. C.A.), *supra* note 12, paras. 236, 251, 270 (taking the position that *Barrow* was an overbroad application of the avails provision).

⁴⁷¹ *See supra* Part I and Part II A.

individual prostituted persons for what is their own sexual exploitation and from which they typically wish to escape.⁴⁷²

In *Bedford*, constitutional equality was argued neither by the plaintiffs to attack the statutes nor by the Crown to defend them, though some interveners mentioned equality in their *facta*.⁴⁷³ But in a recent case in British Columbia, the appellants (hereinafter *B.C. Plaintiffs*) argued in brief that the avails and bawdy-house provisions be overturned on equality grounds, because they keep third parties from working with prostituted persons: Accordingly, appellant's claimed that the avails and bawdy-house provisions "offend s. 15 of the *Charter* because sex workers are disproportionately members of disadvantaged classes"⁴⁷⁴ who were, by the operation of the statutes, not allowed "to form business relationships with others for the purpose of advancing their economic well-being."⁴⁷⁵ Labor and insurance regulations were also said to be precluded from operating on their behalf under the prostitution laws, which allegedly violated Section 15 equality guarantees.⁴⁷⁶ The *B.C. Plaintiffs* hence argued that these laws against prostitution-related activities operated to "draw a formal distinction or, in the alternative, have a severe and disproportionate impact on sex workers, as compared to those persons in other occupations, by making prostitution more dangerous" than it would have been without the laws.⁴⁷⁷ This case is not yet resolved.⁴⁷⁸

While the *B.C. Plaintiffs* correctly contend that prostituted persons are members of disadvantaged groups, hence deserving of special solicitude under Section 15, they draw the same mistaken conclusions on the evidence that was drawn in *Bedford*. Third parties who live parasitically on others' prostitution were defined as "pimps" according to the prior Canadian doctrine,⁴⁷⁹ and these persons do not generally protect prostituted persons as *Bedford* would want us to believe; the empirical evidence suggest that they typically endanger and exploit them.⁴⁸⁰

⁴⁷² Today, when bawdy-house laws are used to criminalize "inmates" or those individuals who "keep" a bawdy-house in their own homes, the law arguably is counterproductive by making it more difficult for such people to escape prostitution, if or when they so wish. *Cf. supra* notes 419–429, and accompanying text.

⁴⁷³ *See, e.g.,* Factum of the Interveners, Canadian Ass'n of Sexual Assault Ctrs., et al., *supra* note 83, at paras. 3, 8 & et passim (referring to "substantive equality" and citing §§ 15 & 28 of the Canadian Charter, *supra* note 17).

⁴⁷⁴ *Downtown Eastside Sex Workers United Against Violence Soc'y v. Canada (Att'y Gen.)*, 2010 BCCA 439, 10 B.C.L.R. 5th 33, para. 8 (Can. B.C. C.A.).

⁴⁷⁵ *Downtown Eastside Sex Workers United Against Violence Soc'y v. Canada (Att'y Gen.)*, 2008 BCSC 1726, 90 B.C.L.R. 4th 177, para 26 (Can. B.C. Sup. Ct.) (quoting from plaintiffs' brief).

⁴⁷⁶ *Downtown Eastside*, 2010 BCCA 439, at paras. 8–9 (Saunders, J.).

⁴⁷⁷ *Downtown Eastside*, 2008 BCSC 1726, para. 26 (quoting from plaintiffs' brief).

⁴⁷⁸ Only standing has been litigated. *See Downtown Eastside Sex Workers United Against Violence Society v. Canada (Att'y Gen.)*, 2012 SCC 45, [2012] 2 S.C.R. 524 at paras. 76–77 (Can.) (granting public interest standing to parties seeking to challenge various prostitution laws). Given the *B.C. Plaintiffs'* challenge to the prostitution laws under § 15 of the Charter in their own case, it is slightly surprising that their intervening *factum* (an equivalent to amicus brief) in *Bedford* does not raise a § 15 argument at all. *See* Factum of Interveners, *Downtown Eastside Sex Works United Against Violence Soc'y, et al., Canada (Att'y Gen.) v. Bedford*, No. 34788 (Can. May 30, 2013), available at http://www.scc-csc.gc.ca/factums-memoires/34788/FM090_Intervener_Pivot.pdf.

⁴⁷⁹ *R. v. Downey*, [1992] 2 S.C.R. 10, 32 (Can.).

⁴⁸⁰ *See supra* Part I B.

Hence, prohibiting third parties from living off the prostitution of other persons, or prohibiting those who do from otherwise organizing or controlling prostituted people's lives, whether indoors or outdoors, does not make prostitution more dangerous per se. On this recognition, legal action against third parties does not damage the equality rights of prostituted persons. On the contrary, to the extent they operate as intended, they restrain, restrict, and deter pimps—who tend to hide behind various otherwise legitimate facades⁴⁸¹—to prostituted persons' benefit. Indeed, these laws work in the direction of equalizing the relationship between pimps and the people they sell. Pimps disempower prostituted persons while exploiting the vulnerabilities they can find or create.⁴⁸² Removing laws designed to counter their dominant power will empower them further. To argue the reverse turns the Charter's guarantee of substantive equality on its head.

An implicit assumption of the *B.C. Plaintiffs'* call for legalizing third parties seems to be that prostitution and prostituted persons are *similarly situated* to workers, businesses, and the service sector in general, attributing to them an arm's length relation to their employers and clients that prostituted persons simply do not have in relation to pimps, brothel owners, tricks, and other profiteers of prostitution.⁴⁸³ They contend that the two prostitution provisions impermissibly make "distinctions," or alternatively, that they have a disparate impact on prostituted persons,⁴⁸⁴ because the avails and bawdy-house provisions do not operate equally against the rest of the Canadian population of third-party business entrepreneurs. On their logic, either no third party living off the work of another should be criminalized, or all such third parties should be criminalized—such as plumbing, acting, or cab driving agencies—because these agencies might be exploitative and parasitic. Social security plans and collective bargaining fees should also be subjected to a similarly situated test, on the *B.C. Plaintiffs'* assumption that economic relationships and agreements with those who profit from prostitution may legally be presumed to be as legitimate as third-party contracts with plumbers or cab drivers are. This approach clearly fails to account for the substantive inequality that characterizes prostituted persons compared with those who work in many other occupations. While many workers have distinct vulnerabilities, the evidence suggests that no other group shares the vulnerabilities of prostituted persons, and few apart from combat veterans seeking treatment might be harmed to the same

⁴⁸¹ See, e.g., *supra* notes 348–354, and accompanying text discussing how third parties circumvent liability for sex trafficking and "living on the avails" by avoiding association with the financial trails of prostitution, or by conducting prostitution in conjunction with legal businesses performed by licensed masseuses, or in proximity to strip clubs that ostensibly have no prostitution on the premises.

⁴⁸² See, e.g., Farley, *Legal Brothel Prostitution in Nevada*, in PROSTITUTION AND TRAFFICKING IN NEVADA: MAKING THE CONNECTIONS, *supra* note 3, at 58-59 (noting that pimps sometimes deliberately impregnate women to increase their control over the adult through her child, or to increase the supply of prostituted persons).

⁴⁸³ See *supra* Part I and Part II on the unequal relationships between the prostituted persons and the other profiteers and actors in prostitution.

⁴⁸⁴ *Downtown Eastside Sex Workers United Against Violence Soc'y v. Canada* (Att'y Gen.), 2008 BCSC 1726, 90 B.C.L.R. 4th 177, para 26 (Can. B.C. Sup. Ct.) (quoting from plaintiffs' brief).

extent during the course of their activities.⁴⁸⁵ They thus need stronger protections of the sort provided by the challenged provisions than nonprostituted persons do at work.

Noting that prostituted persons belong to disadvantaged groups that merit particular attention under Section 15 might have suggested another analysis to the *B.C. Plaintiffs*. Substantive inequality, including multiple disadvantages that operate intersectionally as they tend to do in prostitution, are produced through the interplay between exploitative social forces, legal frameworks, and enforcement practices that either reinforce the exploitation or leave it unaddressed. Whether legal distinctions create or produce inequality or mitigate it depends on the conditions on the ground. As the Supreme Court of Canada said in *Andrews*:

[M]ere equality of application to similarly situated groups or individuals does not afford a realistic test for a violation of equality rights. For, as has been said, a bad law will not be saved merely because it operates equally upon those to whom it has application. Nor will a law necessarily be bad because it makes distinctions.⁴⁸⁶

To promote equality under this approach, laws such as the bawdy-house and avails provisions are needed precisely because they disparately criminalize only those who exploit or profit from the sale of prostituted persons in ways that people in prostitution are distinctively and characteristically exploited, and do not criminalize every social form of exploitation equally severely. In sum, Section 15 thus protects prostitution laws such as the bawdy-house or avails provisions where they so promote *equality*. It also would militate against reformulating them so they promote *inequality*—contrary to what the decision in *Bedford* did. Parliament’s de facto criminalization of pimps—third parties who live parasitically off the prostitution of others—accordingly should have been upheld by the Supreme Court.

C. Retain the Criminalization of Tricks and Pimps, Decriminalize Prostituted Persons

Kapp defined “disadvantaged” as connoting “vulnerability, prejudice, and negative social characterization,” and stated that “conditions of a specific and identifiable disadvantaged group” was the focus of Section 15—not “broad societal legislation.”⁴⁸⁷ Exploitation in prostitution is a “condition” of a “specific and identifiable group” that is amplified by social, economic, political, and cultural “vulnerability.” Research suggests that exploitation in prostitution may have more serious measurable consequences, such as very high rates of PTSD and physical injuries and symptoms,⁴⁸⁸ than what occurs in other areas that have been the subject of “broad societal legislation, such as social assistance programs,”⁴⁸⁹ or the labor market regulations that were

⁴⁸⁵ For comparison of PTSD symptoms among prostituted persons and Vietnam Veterans requesting treatment, Farley et al., *Nine Countries*, *supra* note 31, at 44, 48 & tbl.6, 56. For other physical and psychological symptoms, *see id.* at 42-60. *See also supra* Part I A on the vulnerability of prostituted persons in general; *see also infra* notes 487-489, and accompanying text.

⁴⁸⁶ *Andrews v. Law Soc’y of B.C.*, [1989] 1 S.C.R. 143, 167 (McIntyre, J.).

⁴⁸⁷ *R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483, para. 55 (Can.).

⁴⁸⁸ For studies on prostitution, PTSD, and similar mental disorder symptoms, and physical symptoms, *see supra* notes 44-57, and accompanying text.

⁴⁸⁹ *Kapp*, 2008 SCC 41, at para. 55.

invoked as a comparison in the B.C. Plaintiffs' case against the avails and bawdy-house laws.⁴⁹⁰ Accordingly, a law that has the objective of protecting against exploitation in prostitution, as the presumption of avails does, or to combating human trafficking and child exploitation, as the bawdy-house law does, also "has as its object the amelioration of conditions of disadvantaged individuals or groups."⁴⁹¹

By contrast, if there were a law against prostitution, striking down the criminalization of persons who are sold for prostitution would promote equality since that group is prostituted under unequal, exploitative, and coercive conditions.⁴⁹² Thus, they should not be punished as criminals but rather be understood as victimized by others and by social circumstances. Similarly, Canadian legislatures could create a law that provides support for prostituted persons, and only them, for exiting prostitution if, or when, they want to, promoting equality consistent with Section 15.⁴⁹³ Laws that do not ameliorate the conditions of the disadvantaged would criminalize prostituted persons themselves, rather than those penalizing their profiteers and tricks. A law that provided prostituted persons a civil cause of action for damages from pimps, brothel owners, and tricks for violating their human rights, specifically their human equality, would be fully constitutional. A criminal law against buying a person in prostitution, as exists in Sweden,⁴⁹⁴ would also be constitutional under this approach.⁴⁹⁵ Contrary to the concerns expressed by the Supreme Court of Canada with regards to the Canadian law that criminalized both those being bought for sex and those buying them on the streets for increasing the risks to the safety of prostituted persons,⁴⁹⁶ such concerns have been repeatedly and independently proven not to have materialized in Sweden after the criminalization of the buyers only (while those being bought were decriminalized).⁴⁹⁷ This is not a surprising outcome when considering that Sweden's law is fundamentally different from Canada's. The Swedish law has also dramatically reduced the

⁴⁹⁰ *Downtown Eastside Sex Workers United Against Violence Soc'y v. Canada (Att'y Gen.)*, 2008 BCSC 1726, 90 B.C.L.R. 4th 177, paras. 22-27 (Can. B.C. Sup. Ct.).

⁴⁹¹ Canadian Charter of Rights and Freedoms, *supra* note 17, § 15(2).

⁴⁹² For the empirical evidence, see *supra* Part I and Part II A.

⁴⁹³ See, e.g., *Kapp*, 2008 SCC 41, at paras. 3, 25, 28, 37, 40, 48-49 (stating that laws, programs, or activities making distinctions on the grounds enumerated under § 15(1) or analogous grounds in order to ameliorate the conditions of disadvantaged groups, hence to promote equality and further § 15's guarantee of substantive equality, are generally constitutional under § 15(2) of the Charter).

⁴⁹⁴ Brottsbalken [BrB] [Criminal Code] 6:11 (Swed.).

⁴⁹⁵ For further analysis of the Swedish law's rationales, impact, and potential, see generally Max Waltman, *Sweden's Prohibition of Purchase of Sex: The Law's Reasons, Impact, and Potential*, 34 WOMEN'S STUD. INT'L F. 449, et passim (2011); Waltman, *Ending Trafficking*, *supra* note 298, et passim.

⁴⁹⁶ *Bedford* (Can. Sup. Ct), *supra* note 15, at paras. 70-71.

⁴⁹⁷ See Waltman, *Ending Trafficking*, *supra* note 298, at 151-53 (summarizing independent research and government reports and analyzing misinformation); cf. Waltman, *Sweden's Prohibition*, *supra* note 495, at 461-62.

occurrence of prostitution and trafficking since 1999, both in a strictly national perspective as well as relative to its neighboring countries that had other laws until at least 2009.⁴⁹⁸

The objections from the *B.C. Plaintiffs* that prostituted persons may be denied a beneficial business relationship with third parties because of the avails provision is neither consistent with the actual law, nor consistent under a Section 15 analysis; *Downey* already acknowledged that if evidence was available to the court that indicated a genuinely mutual business relationship, a defendant could easily disprove the charge under the avails provision.⁴⁹⁹ Because research and evidence suggest that a large majority of prostituted persons would be more disempowered if third parties receive a presumption of legitimacy as under *Bedford*,⁵⁰⁰ there seems to be little reason to change this presumption by invalidating the law when a viable and sufficient option for a defendant to disprove an allegation of living on the avails already exists. Moreover, the research suggests that it is only a minority of prostituted persons, likely very small in number, who might benefit from having their third-party relationships legally treated the way those of third parties are treated in other business areas.⁵⁰¹ These would be those prostituted persons who are *least* unequal, compared with the general population, if they exist, thus *least* disadvantaged—not the vast majority of prostituted persons, who merit consideration under Section 15 according to *Kapp*: “Not all members of the group need to be disadvantaged, as long as the group as a whole has experienced discrimination.”⁵⁰²

The “same treatment” advocated by the *B.C. Plaintiffs*’ logic has long been criticized by discrimination scholars as obscuring reality through a legal “neutrality” that proceeds from the privileged group’s perspective and is blind to substantive inequality: such similar treatment reinforces inequality by making the equality laws useless, except for those who least need them,⁵⁰³ as the more substantively unequal and vulnerable to exploitation a person is, the less she

⁴⁹⁸ See Waltman, *Ending Trafficking*, *supra* note 298, at 146-50 (summarizing and analyzing independent research and government reports and other evidence); *cf.* Waltman, *Sweden’s Prohibition*, *supra* note 495, at 458-460.

⁴⁹⁹ *R. v. Downey*, [1992] 2 S.C.R. 10, 35–39 (Can.).

⁵⁰⁰ See *supra* Part I and Part III.

⁵⁰¹ See *supra* Part I A-B. Considering that in-depth interview studies or surveys with behaviorally specific definitions (as opposed to general concepts such as “escape,” “rape,” or “abuse”) tend to reveal more abuse and adverse conditions, see *supra* note 33, the 89% of 854 prostituted persons who consciously stated that they wished they could escape prostitution in the nine country survey study, Farley et al., *Nine Countries*, *supra* note 31, at 48, 51, 56, could also be an underestimation. It may also be confusing to consider a question regarding a wish to escape that may be impossible when there is no alternative to prostitution. Assuming that at least those 89% are not in an equal position to bargain with third parties as they do not appear to have a real or acceptable alternative to prostitution and given the potential that adversity in prostitution is often underreported, see *supra* note 33, and notes 84-90, and accompanying text, the minority who are able to bargain on a more equal plane in prostitution may be considerably smaller than a tenth.

⁵⁰² *R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483, para. 55 (Can.).

⁵⁰³ See Catharine A. MacKinnon, *Sex Equality: On Difference and Dominance*, TOWARD A FEMINIST THEORY OF THE STATE 233–34 (1989) (“Those who most need equal treatment will be the *least* similar, socially, to those whose situation sets the standard against which their entitlement to equal treatment is measured. The deepest problems of sex inequality do not find women ‘similarly situated’ to men.”); *cf. id.* at 225 (“[t]he women that gender neutrality

or he is recognized as unequal. “Neutrality” along those lines would make it even more difficult to ameliorate intersectional multiple disadvantages in prostitution. For these reasons, the “similar treatment” advocated by the *B.C. Plaintiffs* has been criticized as taking the perspective of privileged groups, such as men who do not typically need protection from gender-based violence.⁵⁰⁴ The same critique could be made with regards to privileged women who do not need legal protections against the sexual exploitation of prostitution.

Had the Supreme Court of Canada considered a Section 15 substantive equality analysis, the Court of Appeal for Ontario’s explicit recognition that the avails provision’s objective is “to protect vulnerable persons from being coerced, pressured or emotionally manipulated into prostitution,” and “to prevent pimps from exploiting prostitutes and from profiting from the prostitution of others,”⁵⁰⁵ would support upholding the law against a challenge of discrimination. Similarly, a Section 15 substantive equality analysis supports the bawdy-house laws on the recognition that the objective of that law is to improve “measures that target human trafficking and child exploitation, both of which may tragically arise through the operation of bawdy-houses.”⁵⁰⁶

CONCLUSION

The evidence suggests that pimps and brothel-keepers do not improve the well-being and safety of prostituted persons. This could be expected, for prostitution is intrinsically unequal, and builds on multiple recognized inequalities, providing high incentives and vulnerable targets for exploitation and abuse. By contrast with the evidence analyzed here, including of the record in *Bedford* itself, the Canadian courts took the view that providing presumptive legality to third-party profiteers in prostitution would enhance the safety and well-being of prostituted persons. However, social science research studies analyzed in the court of first instance were either misrepresented and/or contained potentially serious flaws that were never considered. Expert opinions cited in all courts were hypothetical at best, naïve at worst, and as such did not support the trial court’s conclusions. The higher courts did not correct mistakes from below or provide

benefits . . . are mostly women who have achieved a biography that somewhat approximates the male norm . . . the least of sex discrimination’s victims. When they are denied a man’s chance, it looks the most like sex bias.”); Crenshaw, *supra* note 448, at 152 (noting that antidiscrimination doctrines do not work well for Black women when they “cannot conclusively say that “but for” their race or “but for” their gender they would be treated differently”); *cf.* *Andrews v. Law Soc’y of B.C.*, [1989] 1 S.C.R. 143, 167-68 (Can.) (criticizing the similarly situated test).

⁵⁰⁴ *Cf.* Catharine A. MacKinnon, *On Torture, in ARE WOMEN HUMAN? AND OTHER INTERNATIONAL DIALOGUES* 26 (2006) (“Where the lack of similarity of women’s condition to men is extreme because of sex inequality, the result is that the law of sex equality does not properly apply.”).

⁵⁰⁵ *Bedford* (Ont. C.A.), *supra* note 12, at paras. 238–39.

⁵⁰⁶ *Bedford* (Ont. C.A.), *supra* note 12, at paras. 193, 238–39. While the court may disagree with the Attorney General’s further argument that the living on the avails “offence reflects a Parliamentary objective to *eradicate* prostitution,” *id.* at para. 238 (emphasis added), Parliament need not express a desire to “eradicate” a practice in order for it nonetheless to fall under the ambit of the Charter’s equality provision.

additional evidence. The inference drawn by these courts, that indoor prostitution by itself reduces violence compared to street prostitution, can thus not be reliably supported by data.

As the Supreme Court of Canada of 1992 recognized when upholding an initial presumption of guilt under the avails provision, many pimps will intimidate, threaten, and even murder, to prevent prostituted persons from providing courts with evidence of further exploitation.⁵⁰⁷ Contrary to their reasoning, the Ontario Court of Appeal suggested a rewrite of the avails provision that would require proof of exploitation in each case, putting more pressures on prostituted persons to testify in order to successfully prosecute pimps. This will likely expose them to more threats and violence, while increasing legal protection to pimps. The Supreme Court of Canada of 2013, in invalidating the avails provision in its entirety, doubtlessly made the situation even worse. In a similar disregard of facts and practicalities, bawdy-house laws were invalidated that assist law enforcement in prosecuting traffickers and exploiters of minors and adults in prostitution who are creative at avoiding provable associations with the sex trade.

The consequences of the decisions in *Bedford* amplify the vulnerability and social, political, and legal disadvantage of a group that already suffers multiple disadvantages in society. The impact of its ruling stands out as being in discord with the imperatives to promote equality under the Charter that have been recognized by the Supreme Court of Canada since 1989. If anything, Section 15 directs Canadian courts to reframe the prostitution laws so they promote equality: not invalidating existing criminal laws against those who profit from the misery and foreclosed options of others, but decriminalizing prostituted people fully and criminalize tricks more powerfully, while providing further support for those who want to leave the life. Laws that enable people in prostitution to bring damage claims directly against those individuals who are most responsible for violating their equality and dignity—pimps and tricks—would also help redress part of the power imbalance intrinsic to the industry. Such a law, which exists in Sweden,⁵⁰⁸ along with serious criminalization of purchase of people for sex, provides a real means for people to make choices in their lives, as the majority of prostituted persons say they want.⁵⁰⁹

⁵⁰⁷ See, e.g., *Downey*, *supra* note 6, at 33–35. (quoting and citing government reports and research studies).

⁵⁰⁸ See Proposition [Prop.] 2010/2011:77 Skärpt straff för köp av sexuell tjänst [government bill] at 14–15 (Swed.), *passed* Justitieutskottets betänkande [Bet.] 2010/11:JuU22 Skärpt straff för köp av sexuell tjänst [Raised Punishment for Purchase of Sexual Service] [parliamentary committee report] at 11–12 (Swed.) (May 12, 2010) (clarifying that the Sex Purchase law provides an opportunity for prostituted persons to claim damages from tricks). For an analysis of this law, see Waltman, *Ending Trafficking*, *supra* note 298, at 153–56; Waltman, *Sweden's Prohibition*, *supra* note 495, at 463–68.

⁵⁰⁹ See, e.g., Farley et al., *Nine Countries*, *supra* note 31, at 48, 51, 56 (noting that 89% of 854 prostituted persons in nine countries said they wanted to escape prostitution).