

## SOCIAL ISSUES

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### Sex, Risk and Responsibility

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*In 2010 the Ontario Superior Court of Justice struck down substantial provisions of the laws governing prostitution, ruling that they were unconstitutional. This case (Bedford v. Canada) does not go far enough in recognising the rights of sex trade workers in Canada. The battle for individual autonomy and agency for female sex trade workers still has a long way to go. It is argued that this is largely because sex trade workers are still being represented as victims yet continue to be held responsible for their actions. This article illustrates the competing feminist discourses which shape the way prostitution is understood in Canada, analyses the Bedford decision and examines the decision through a process of what Foucault and other governmentality scholars call self-responsibilisation and self-governance.*

*The prostitute is not, as feminists claim, the victim of men but rather their conqueror; an outlaw who controls the sexual channel between nature and culture (Paglia 1992: 16).*

#### **Introduction**

On March 26, 2012 the Ontario Court of Appeal agreed with the ruling of Justice Susan Himel of the Ontario Superior Court of Justice which

struck down two key prostitution laws in Canada. After hearing arguments from three applicants, Justice Himel decided that sections 210, 212(1)(j) and 213(1)(c) of the Criminal Code of Canada (prohibiting the keeping of a common bawdy house, living off the avails of prostitution and communicating for the purposes of prostitution respectively) violated their right to life, liberty and security of the person under section seven of the Charter and could not be saved under section one,<sup>1</sup> making them unconstitutional and not in accordance with fundamental justice.<sup>2</sup> While the act of prostitution itself has never been illegal in Canada these provisions essentially criminalised all activity surrounding the act of prostitution and thus made the act effectively illegal. This means that sex trade workers<sup>3</sup> are widely seen as victims, yet the government holds them responsible for the outcomes of their work in neo-liberal Canadian society through a process of what Foucault and other governmentality scholars call self-responsibilisation and self-governance (Gordon 1991: 82).

This article argues that while any step forward is to be celebrated, the battle for individual autonomy and agency for female sex trade workers still has a long way to go. This is largely because sex trade workers are still being represented as victims yet continue to be held responsible for their actions. This article illustrates the competing feminist discourses which shape the way prostitution (sex trade work) is understood in Canada, and subsequently examines the decision through a process of what Foucault and other governmentality scholars call self-responsibilisation and self-governance. The two competing feminist viewpoints (held by

the individualists and the structuralists)<sup>4</sup> are antithetical to each other and it is important to understand this dichotomy as it relates to framing of sex trade workers in its current context. It will be argued that the Canadian government is engaging in a process of risk management and responsabilisation in dealing with sex trade workers, which intentionally creates a process in which these women are supposed to govern themselves. The striking down of legislation may be seen as progress, perhaps as a first step, or almost a victory for the individualist feminists. Sex trade workers are no longer being seen by the courts as helpless victims unable to control their own fate, but as agents who are making a conscious choice that needs to be respected. However, the problem lies in that all of the governance and responsabilisation is now forced back on these women and is not in the hands of the state. Instead of Parliament responding to the judicial decision and implementing legislation to keep sex workers safe, the state has essentially said 'work at your own risk', something that would not be tolerated in any other industry.

### **Opposing Feminist Discourses**

In order to understand feminist views on sex trade work and the arguments for and against the decriminalization of sex trade work the two main theoretical approaches within the feminist camp must be explored. The structural feminists and the individualistic feminists could not be more opposed, as they view this issue from completely different sides. Sex work can be seen as creating a dichotomy in feminism and the two main issues that arise between these camps are centred on the notion of consent and coercion (Freeman 1989: 75).

#### **a. Structural Feminism**

<sup>1</sup> Canadian Charter of Rights and Freedoms, Part I of the Constitution Act 1982, schedule B to the Canada Act 1982 (U.K.) c.11.

<sup>2</sup> Bedford v. Canada, 2010 ONSC 4264, at para 3.

<sup>3</sup> I acknowledge that while the vast majority of sex trade workers are female, there are some men who work in the trade. However, due to the fact that the cases dealt with only female prostitution and in order to adequately explain the feminist dichotomy I am choosing to focus only on female sex trade workers.

<sup>4</sup> Sometimes these feminist groups are referred to as liberal and radical feminists respectively, however these terms are used to ensure consistency.

Structural feminists<sup>5</sup> believe that all sex trade workers are victims of coercion and are incapable of consenting to the lifestyle in which they are living because of the inherently uneven power structure which leaves these women vulnerable to this line of work (Angelovicova 2006: 3). To the structuralists, there is no such thing as ‘consent’ because, in one way or another, sex work is always coercive, whether it is a consequence of extreme poverty, colonialism, victimization, patriarchy or class hierarchies (Sullivan 2000: 1). Structuralists compare sex work to modern day slavery and believe that female sex workers are completely submissive to men (Sullivan 2000: 1). From this viewpoint, sex workers do not have any type of agency, as they are so oppressed and marginalized, regardless of whether they are consciously aware of it or not. This extends to the supposed ‘choice’ of sex trade work to begin with: the structuralists argue that no woman chooses to work in the sex trade, but rather that they are coerced and forced to do so, and that sex trade work only serves to further objectify and subordinate women (Freeman 1989: 75). Prostitution is a form of slavery because “the prostitute cannot sell sexual services alone; what she sells is her body”, and the

*...representation of prostitution as a ‘free contract’ is simply another example of how women’s sexual submission is confused with consent and free association. Prostitution is unilateral subjection to sexual acts with the consolation of payment (Sullivan 2000: 2).*

Most structural feminists are abolitionists who believe that all sex work should be eradicated and harsher criminal sanctions applied to all who benefit from sex; with the exception of criminalizing the sex worker her-

<sup>5</sup> Examples of structural feminism can be seen in the work of Catherine McKinnon, Andrea Dworkin, Kathleen Barry and Jane Freeman.

self. Such laws currently exist in Finland, Norway and Sweden<sup>6</sup> and are supported by structuralists (Outshoom 2004: 9). Structuralists even go so far as to reject the terms ‘sex-work’ or ‘sex worker’ as they believe these discount women as victims in this supposed ‘industry’. According to Janice Raymond, structuralists argue:

*If women in prostitution are counted as workers, pimps as businessmen, and buyers as customers then governments can abdicate responsibility for making sustainable employment available to women (Angelovicova 2006: 4).*

Problems with the structuralist view arise because it almost entirely negates women’s ability for individual self-determination. Instead of viewing these women as agents capable of choice, structuralists act in a paternalistic manner, believing that these women are so oppressed they cannot consent to any type of behaviour. This view demeans women in the sex trade who maintain that they choose and enjoy working in this industry and revictimises them, by stating or implying that they are in fact being degraded (Halley 2006: 351).

#### **b. Individualist Feminism**

In contrast, the individualist feminists believe that sex trade workers are engaging in a consensual, legal work activity to earn an income and are making this decision based on freedom of individual choice. This view is perhaps best explained by Ericsson who argues:

*If two adults voluntarily consent to an economic arrangement concerning sexual activity and this activity takes place in private, it seems plainly absurd to maintain that there is some-*

<sup>6</sup> See Sweden’s Sex Purchase Act, 1999, part of Kvinnofrid (Violence against Women Act); Section 202a of the Norwegian Penal Code; and Finland’s Sexköpslag (Sex Purchase Act).

*thing intrinsically wrong with it... that is prostitutes [are] no more economically exploited than wage workers in general (1980: 339-340).*

From this viewpoint the individual autonomy of all persons involved is paramount: all persons involved in the sex trade enter into a contractual business agreement and no woman is 'forced' into the sex trade more than into any other profession that is dominated by females such as secretarial work or child rearing (Peterson-Iyer 1998: 25-26). As one Canadian prostitute illustrates in Peterson-Iyer's article:

*Let's stop the victim shit.... Let's recognize that we're not crippled as women in this industry. We are capable of exercising healthy control over our own environment (1998: 25).*

The goal for individualist feminists is the decriminalization of all aspects of sex work and the normalization of sex work through legislation, usually requiring the implementation of new laws to guarantee sex workers rights and safety (Outshoorn 2004: 9). There are also several prostitution rights groups that lobby for decriminalization of all aspects of prostitution, regulation and safer environments provided by legally sanctioned brothels in both America and Canada. Such groups include 'Call off Your Old Tired Ethics', the 'National Task Force on Prostitution' and the 'International Committee for Prostitutes Rights' (Peterson-Iyer 1998: 24). These organizations make a very important distinction between voluntary sex work (engaged in by adults as a form of employment) and forced sex work (which can include children, human trafficking and or sex trafficking) (Peterson-Iyer 1998: 24). They advocate the decriminalisation and legalization of voluntary sex work, but not forced sex work (Peterson-Iyer 1998: 24). Individualist feminists defend the freedom to work, the right to self-expression of sex trade workers, and perhaps most importantly, the right to consent to sex for pay (Angelovicova 2006: 4).

Individualists support models of legalisation and regulation that exist in other jurisdictions such as the Netherlands, Nevada, New Zealand and parts of Australia (Halley et al 2006: 399).

The problem with both of these feminist viewpoints is that because they are so diametrically opposed they fail to acknowledge the middle ground. Although both perspectives do represent some of the women in the sex trade it is problematic that both feminist camps tend to view these women as groups belonging to categories. Instead of looking at sex trade workers as individuals on a continuum, from victim to agent, or coerced to consenter and everywhere in between each camp takes an all or nothing approach and argues that every sex trade worker falls into their camp.

In the jurisdictions where prostitution and the surrounding acts are legal, such as Nevada and Holland, regular health checks are required, precautions against sexually transmitted infections are taken, employers and brothel owners are screened for criminal records and have to be licensed, sex workers are registered and the sex workers pay taxes on their earnings (Peterson-Iyer 1998: 20; Feminists for Choice 2011). This is a harm reduction approach which would not be difficult to implement in Canada. Justice Himel read several research articles and heard expert testimony herself in reviewing the more than 25,000 pages of evidence submitted by the parties citing a variety of sources including former prostitutes, politicians, lawyers, researchers and social workers and other experts in the field.<sup>7</sup> Himel paid particular attention to the change in the criminalisation and subsequent legalisation in several countries including Sweden, Nevada (United States), Australia, New Zealand and The Netherlands.<sup>8</sup>

Prostitution is legal and regulated in twenty-three countries and not only

<sup>7</sup> Bedford v. Canada, 2010 ONSC 4264 at para 84.

<sup>8</sup> Bedford v. Canada, 2010 ONSC 4264 at para 84.

does this decrease harm to the individual sex workers, but also to the surrounding communities by having the sex workers healthy, contributing to society, and for the most part, off the streets (Peterson-Iyer 1998: 20). According to Shannon, the:

*...enforcement of criminal sanctions targeting sex work...displaces sex workers to isolated alleys and industrial settings away from health and support services. Enforced displacement and lack of access to safer indoor work environments independently increase sex workers' risk of physical violence and rape, and reduces their ability to safely negotiate condom use with clients thereby protecting themselves from sexually transmitted infections and unwanted pregnancies. Qualitative evidence further describes how criminal sanctions limiting sex workers' ability to regulate safer industry practices (e.g., create unions, safer indoor work spaces. etc.) compound health-related risks (2010: 1388).*

In order to fully explore sex work in context, as it exists in a neoliberal framework, this paper now turns to Michel Foucault to begin illustrating the concepts of self-governance and self-responsibilisation.

### **Foucault, Neoliberalism and Sex Trade Work**

Foucault's 'governmentality' approach (government-mentality or government rationality) discusses the way that citizens are subject to rule, initially through a monarch and later through state and non-state systems of government. He argues that governmentality is in a 'broad sense about the techniques and procedures for directing human behaviour... government of a state or one's self' (Burchell, Gordon & Miller 1991: 82). In late-modern societies such as Canada, the 'state' has changed in terms of both its construction and the way in which it governs and controls subjects (Scoular and O'Neill 2007: 766). One of the central claims of

Foucault's theory of governmentality is that "we are 'governed' through and by means of our 'freedom'" (Rose 1999: 62) and that this has the effect of producing 'free persons' or people who perceive themselves to be free (Garland 1997: 196). This is consistent with Foucault's view of governmentality and neoliberalism, or the idea that individuals are regulated from the inside. In Foucaultian theory self-regulation occurs when power is de-centred and individuals have to take responsibility for their own welfare and play a large role in their own responsabilisation (Garland 1997: 197).

Venn defines Foucault's version of neoliberal governmentality as "a kind of governmentality based on the predominance of market mechanisms and of the restriction of the action of the state; the knowledge produced allows the construction of auto-regulated or auto-correcting selves" (Venn 2010). When it comes to prostitution the neo-liberal agenda, "bifurcates control by offering social inclusion to those who responsibly exit and 'resume' normal lifestyles" (Scoular and O'Neill 2007: 764). It results in the continued exclusion of those who remain involved or choose to be involved in street sex work; they are constructed and reproduced in law as anti-social, and are 'othered' (Scoular and O'Neill 2007: 765).

There are numerous key characteristics of a neoliberal governmentality approach: the first is that the "management of specific populations is no longer assumed to be located within the state" (Lippert & Park in Kramar 2010: 5) and that expertise should be purchased by each individual acting carefully and sensibly (Lippert & Park in Kramar 2010: 6). This has the effect of essentially decriminalising most aspects of sex work which has been seen with the two decisions in Bedford. Despite the courts putting a stay on their rulings for one year the state has not responded with any political action to regulate this industry and ensure safety or start a process of harm reduction. Instead it has adopted a 'hands off' approach

by telling sex workers that it will not intervene or help them in any way as they have adopted the responsibility for their own industry. This has had the effect of shifting the responsibility for the risky conditions of sex trade work from the state to the private market, in this case the sex workers and their clients, which allows the state to engage in a process of 'risk management' (Lippert & Park in Kramar 2010: 6). By doing so the state is free to abdicate its responsibility to provide safe working conditions and social safety nets such as pensions, retirement funds, and basic labour rights. This is something that would be unthinkable in any other line of work.

Hannah-Moffatt argues that the management of risk by the state incorporates both moral and political components which are thereby passed down onto its citizens (Hannah-Moffatt 1999). In terms of sex work reform, the (im)morality of the sex trade industry is tied in with the political decision making capabilities of the state. The state still perceives sex work to be primarily an immoral, mostly legal act, and therefore shies away from regulating and governing it due to the political risk of doing so. In this way the collective risk of the entire sex trade industry is no longer seen as the state's responsibility, nor that of the community, but now is solely borne by the individual sex trade worker.

The second important characteristic of this approach is that responsibility shifts to more local levels. This is seen by an increasing emphasis on the 'community' which displaces the social as the governing field (Lippert & Park 2010: 6). In relation to sex trade work, the state's goal of 'protecting victims and communities' allows the state to remove itself from any role in the process of social exclusion of women who sell sex while extending its control over subjects. In so doing, it represents itself as not only the protector of the community and family values but also lets the community demonize and exclude sex trade workers without being seen as causing the discord. Hence, "the state's role in structural

exclusion and in perpetuating norms of the sex industry is thus masked by the progressive (neoliberal) governance of sex work" (Lippert & Park 2010: 6). In this sense, the community takes on the responsibility of moral judgements of risk and deciding which actors and activities need governance.

The third and perhaps most important characteristic of neoliberal governmentality is the notion of 'empowerment' (Scoular and O'Neill 2007: 769). This supposes that individuals, seen as "subjects of responsibility, autonomy and choice" are more active in their own governance (Hannah-Moffatt 2001: 163). The responsible citizen is one who self-governs and attempts to increase their productivity and capacity for understanding while minimizing their risk exposure (Hannah-Moffatt 1999). In this way, by constructing the women involved in the sex trade as high risk subjects rather than recognizing them as perceptive subjects who manage risks, it is easier to continue to marginalize their behaviour (Scoular and O'Neill 2007: 770). Contemporary forms of governance are able to operate through responsabilisation techniques, whereby the individual sex worker is supposed to do one of two things. She can either recognize the industry she is in as dangerous, and subsequently find other means of employment; or, take all of the responsibility for the work she engages in and enter into the line of work fully aware that the state has no mechanisms in place to reduce her harm and as such, will not protect her (Scoular and O'Neill 2007: 770).

### **Conclusion**

This article has discussed the neoliberal self-governing strategy of self-responsibilisation that is currently in place with regard to sex trade workers in Canada, and has examined the two competing feminist discourses which shape the way sex trade work is understood there. These viewpoints (the individualists and the structuralists) are antithetical to each other and it is important to understand the dichotomy as it relates to the

framing of sex trade workers particularly when considering the enactment of new legislation. More problems with the current state of the sex trade industry lie in that all of the governance and responsabilisation of the profession is now forced back on these individual women as sex trade workers, and not where it should be, which according to the courts, is in the hands of the state. Instead of Parliament implementing legislation to keep sex workers safe the state has essentially told all sex trade workers in Canada that they can work at their own risk: this would not be tolerated in any other industry. According to the Bedford decision it is of pivotal importance that citizens recognize that sex trade workers are women earning a legal income through legitimate means and that they deserve to be treated with the same level of respect as any other income earner. It is the role of Parliament to respond to the court's decision. Parliament's silence means that sex trade workers have had to self-responsibilise and self-govern; a role that they should not have had to undertake. It is time now in the light of two affirmative rulings on prostitution that legislation be passed to protect sex workers and allow them the agency and autonomy afforded to all other working individuals.

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