

The Good Governance of Empirical Evidence About Prostitution, Sex Work, and Sex Trafficking in Constitutional Litigation

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In Canada (AG) v Bedford, the Supreme Court of Canada delivered a landmark decision unanimously striking down Canada's prostitution laws, finding that they violated section 7 of the Canadian Charter of Rights and Freedoms. In response, Parliament enacted the Protection of Communities and Exploited Persons Act (PCEPA), making prostitution itself unlawful for the first time in Canada. This paper considers the published peer-reviewed empirical evidence about prostitution, sex work, and sex trafficking in Canada since the PCEPA was enacted. Canada's new policy approach focusses on the activity of prostitution rather than on the interests of sex workers, based in part on claims that prostitution cannot be made safe and is inconsistent with a gender equal society. This paper argues that the body of peer-reviewed empirical scholarship identified reflects what policy studies scholars call "issue bias" by failing to account for all of the populations and concerns in the contemplation of Parliament in enacting the new policy.

The paper is organized into four parts. First, the author describes Canada's new policy approach to prostitution. Second, the author sets out the methodology used to identify scholarly empirical literature on the topic. The author considers the scope of the peer-reviewed empirical literature and identifies areas in need of future research. These include, among others: the experiences of individuals who engage in prostitution as a result of trafficking; information on individuals who have exited prostitution; the impact of prostitution on females and on communities where prostitution takes place; and more comprehensive geographic coverage. Lastly, the author argues that what is known about prostitution, sex work, and sex trafficking in Canada remains incomplete, with the empirical knowledge demonstrating issue bias. The author holds that this issue bias occurs as the peer-reviewed literature does not meaningfully include some populations and concerns in the contemplation of Parliament in choosing its current policy approach.

The author concludes with observations about future empirical research to fill the gaps in knowledge about sex work and prostitution, and how to ensure the legitimacy of the court processes in which this evidence is used.

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Introduction

I. Framing the Literature Review

- A. *Canada's Policy Approach to Prostitution*
- B. *The Concern Over Issue Bias*

II. Methodology

III. Scope of Empirical Evidence

- A. *Theoretical Framework: Sex Work is Work*
- B. *Research Questions: Harm Reduction*
- C. *Research Participants: Active Sex Workers*
- D. *Geographic Limitations*

IV. Implications and Recommendations

- A. *Acknowledging Issue Bias in Peer-Reviewed Empirical Literature*
- B. *The Use of Empirical Research in the First Constitutional Challenges to the PCEPA*
- C. *Good Governance of Evidence About Prostitution and Sex Work*

Conclusion

Appendices

“A core task of activists and academics has been amassing evidence that criminalization of the seller, buyer, and associated activities impacts negatively on the safety and well-being of sex workers.”¹

Katie Cruz, 2019

Introduction

Canada's policy approach to prostitution changed dramatically in 2014 in response to the decision of the Supreme Court of Canada in *Canada (AG) v Bedford* (*Bedford*) declaring most of Canada's criminal laws then applicable to adult prostitution unconstitutional.² The *Protection of Communities and Exploited Persons Act* (*PCEPA*) came into force on December 6, 2014.³ Canada's new prostitution policy aims to reduce the incidence of prostitution to the greatest extent possible based on claims that prostitution cannot be made safe, and that prostitution is inconsistent with a gender-equal society.⁴ Two

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1. Katie Cruz, “The Future of Sex Work: Labour Unfreedom and Criminality at Work” (19 June 2019), online (blog): *Critical Legal Thinking* <www.criticallegalthinking.com/2019/06/19/the-future-of-sex-work-labour-unfreedom-criminality-at-work>.

2. 2013 SCC 72 [*Bedford* SCC].

3. SC 2014, c 25 [*PCEPA*].

4. For a discussion of the objectives of the new legislation, see Debra M Haak, “The Initial Test

Ontario courts have already considered the constitutionality of some of the new criminal prostitution laws.⁵ In 2018, the Ontario Superior Court of Justice upheld the constitutionality of three new criminal offences in *R v Boodhoo* (*Boodhoo I*), citing the objectives of the new laws as pressing and substantial.⁶ In 2020, the Ontario Court of Justice found those same offences unconstitutional in *R v Anwar* on the basis that they violated sex workers' right to security of the person in a way that could not be demonstrably justified.⁷ A committee of the House of Commons was supposed to undertake a comprehensive review of the provisions and operation of the *PCEPA* within five years of its coming into force.⁸ To date, the House of Commons has yet to designate and establish a committee for that review.

With Canada's new prostitution policy, Parliament made a political choice to focus on the activity of prostitution rather than on the concerns of sex workers in its response to the Supreme Court of Canada's decision in *Bedford*. Prostitution policy is made in a contested public policy space where stakeholders pursue different goals and objectives based on divergent theoretical, ideological, and normative commitments.⁹ For some time, the debate over prostitution policy in Canada and internationally has appeared to centre on whether the commercial exchange of sex should be understood as inherently exploitive or as a form of labour.¹⁰ While one side in the contemporary policy debate posits the activity of prostitution as a structural example of sexual exploitation, gender

of Constitutional Validity: Identifying the Legislative Objectives of Canada's New Prostitution Laws" (2017) 50:3 UBC L Rev 657 [Haak, "Legislative Objectives"].

5. A third decision was released immediately prior to publication of this article. See *R v NS*, 2021 ONSC 1628 (where the court found these offences unconstitutional). Submissions on the appropriate remedy had not been made at the time of finalizing this article.

6. 2018 ONSC 7205 [*Boodhoo I*]. See also *R v Boodhoo*, 2018 ONSC 7207 [*Boodhoo II*]. There the Court sets out in greater detail the adjudicative facts in the context of finding the mandatory minimum sentences violated section 12 of the *Canadian Charter of Rights and Freedoms*. See *Canadian Charter of Rights and Freedoms*, s 12, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK), 1982*, c 11 [*Charter*].

7. 2020 ONCJ 103.

8. See *supra* note 3, s 45.1(1).

9. Prostitution policy has also been characterized as "manifest morality policy", where political conflicts are predominantly shaped by value conflicts rather than conflicts over material interest. See Eva-Maria Euchner & Christoph Knill, "Prostitution: Sin, Unavoidable Evil, or Recognized Profession?" in Christoph Knill, Christian Adam & Steffen Hurka, eds, *On the Road to Permissiveness?: Change and Convergence of Moral Regulation in Europe* (Oxford, UK: Oxford University Press, 2015) 129.

10. See Christine Overall, "What's Wrong with Prostitution? Evaluating Sex Work" (1992) 17:4 *Signs* 705 (where the author identifies these competing discourses as split between "an emphasis on sexual freedom and pleasure that views women exclusively as agents, on the one

inequality, and violence against women, the other posits sex work as a legitimate form of labour reflecting the individual exercise of choice and agency, and a site to expand the boundaries of sexuality and gender.¹¹ What is often overlooked in evaluating policy responses to prostitution, including criminal prostitution laws, is how these normative claims about the nature of the commercial exchange of sex tend to prioritize different concerns and different populations.¹² Canada's current criminal laws apply to "sexual services for consideration", a term capturing the activity of prostitution as it has been defined by Canadian courts.¹³ As I have argued elsewhere, the term "sex work" is not synonymous with prostitution, and conceptual clarity is important for legal thinking, in

hand, and an emphasis on sexual danger and degradation that sees women exclusively as victims on the other" at 707). Both theoretical approaches rest on contested and divergent normative claims about what it means to exchange sexual acts for consideration. See generally Elizabeth Bernstein, *Temporarily Yours: Intimacy, Authenticity, and the Commerce of Sex* (Chicago: University of Chicago Press, 2007) (where the author refers to them as "normative visions of sexuality" and "political and ethical disputes over what sexuality should mean" at 167–68); Julia O'Connell Davidson, *Prostitution, Power and Freedom* (Cambridge, UK: Polity Press, 1998) (where the author refers to them as assumptions about the essential properties of prostitution and argues that the power relations in prostitution are more complicated than either position suggests).

11. For a more detailed discussion of the ideologies emerging from feminist theory about prostitution and sex work, see generally Rebecca Beegan & Joe Moran, "Prostitution and Sex Work: Situating Ireland's New Law on Prostitution in the Radical and Liberal Feminist Paradigms" (2017) 17:1 Irish J Applied Soc Studies 59. For a discussion of sex as violence, sex radicalism, and sex as work, see also Carisa R Showden, *Choices Women Make: Agency in Domestic Violence, Assisted Reproduction, and Sex Work* (Minneapolis: University of Minnesota Press, 2011) at 137–66.

12. See also Graham Hudson & Emily van der Meulen, "Sex Work, Law, and Violence: *Bedford v Canada* and the Human Rights of Sex Workers" (2013) 31:1 Windsor YB Access Just 115 (where the authors note that different discourses or narratives invoke different rights claims at 141).

13. See *Reference Re ss 193 and 195.1(1)(c) of the Criminal Code (Man)*, [1990] 1 SCR 1123, [1990] 4 WWR 481 [*Prostitution Reference*] (where the Supreme Court of Canada identified the word prostitution as a term of common usage and defined it as "the exchange of sexual services by one person in return for payment by another" at 1159). This use of the word prostitution is consistent with how it has historically been defined and used in Canadian jurisprudence. See e.g. *R v Mara* (1996), 27 OR (3d) 643, 133 DLR (4th) 201 (CA) (where the Court of Appeal for Ontario stated that "[t]he basic definition of prostitution is the exchange of sexual services in return for payment" at 210); *R v Tremblay*, [1991] RJQ 2766, 68 CCC (3d) 439 (CA) (where the Court of Appeal of Quebec identified prostitution as a term of common usage at 450); *R v Juneja*, 2009 ABQB 243 (where the Court of Queen's Bench of Alberta defined prostitution to mean "sexual acts performed for money" at para 27); *R v Evans*, 2017 ONSC 4028 (where the

particular when adjudicating constitutional rights claims.¹⁴ The term sex work almost always refers to prostitution (and other sex industry activities that would not constitute sexual services for consideration as that term has been interpreted by Canadian courts¹⁵) when engaged in by adults who have not been subject to third party coercion or trafficking.¹⁶ Thus, the term “sex workers” usually refers to only a subset of those who engage in the activity of prostitution, as well as to individuals engaging in activities that would not constitute prostitution as legally defined in Canada.¹⁷ Because Parliament chose to focus its policy approach on the activity of prostitution rather than on the concerns of sex workers, close attention to the conceptual distinctions between prostitution and sex work is therefore critical to understanding the concerns and populations considered in the policy-making process, and to adjudicating constitutional rights claims.

Close attention to the distinction between prostitution and sex work is also critical to evaluating evidence about sexual services for consideration in Canada. Social science evidence increasingly plays a significant role in constitutional

Superior Court of Justice reasoned that “[a] prostitute is, for all intents and purposes, a person who offers or provides sexual services for consideration” at para 136).

14. See Debra Haak, “Re(de)fining Prostitution and Sex Work: Conceptual Clarity for Legal Thinking” (2019) 40:1 Windsor Rev Legal Soc Issues 67 [Haak, “Conceptual Clarity”].

15. Generally, courts will consider whether the service is sexual in nature and whether the purpose of providing the service is to sexually gratify the person who receives it. Canadian courts have found that pornography and stripping, for example, do not constitute sexual services for consideration. For a discussion of activities that have and have not been found by Canadian courts to constitute sexual services for consideration, see Canada, Department of Justice, *Technical Paper: Bill C-36, Protection of Communities and Exploited Persons Act* (Ottawa: Department of Justice, 1 December 2014), online: <www.justice.gc.ca/eng/rp-pr/other-autre/protect/index.html> [Department of Justice, “Technical Paper”].

16. The use of the term sex work in this context, therefore, reflects a decision to treat voluntary or consensual sex work distinctly from human trafficking. Whether voluntary and non-voluntary prostitution can or should be separated for policy purposes is itself contested. See e.g. Catharine A MacKinnon, “Trafficking, Prostitution, and Inequality” (2011) 46:2 Harv CR-CLL Rev 271 (where the author discusses the illusory and ideological distinctions that are used to make some forms of prostitution appear less problematic and more socially tolerable than others); Monica O’Connor, “Choice, Agency Consent and Coercion: Complex Issues in the Lives of Prostituted and Trafficked Women” (2017) 62:1 Women’s Studies Intl Forum 8 (where the author questions whether it is possible to distinguish forced from free prostitution).

17. Not every adult who exchanges sexual services for consideration in the absence of third party coercion or trafficking identifies as a “sex worker” or accepts that the removal of all criminal sanctions applicable to prostitution would reduce the harm they experience in prostitution. See also Haak, “Conceptual Clarity”, *supra* note 14 at 108, n 194.

litigation¹⁸ and can significantly impact constitutional cases, in particular in areas of shifting social norms.¹⁹ In considering the constitutionality of Canada's prior criminal prostitution laws, the application judge in *Bedford* was presented with over 25,000 pages of evidence in eighty-eight volumes amassed over two and a half years.²⁰ That evidence included expert evidence²¹ from a range of social science disciplines including anthropology,²² criminology,²³ psychology,²⁴ sociology,²⁵ history,²⁶ medical ethics,²⁷ political science,²⁸ and forensic psychology.²⁹ Evidence from four expert witnesses was also before the Ontario Court of Justice in *Anwar*,³⁰ although no expert evidence was mentioned by the Ontario Superior Court of Justice in its decision in *Boodhoo I*.³¹ In both *Boodhoo I*

18. See generally Benjamin Perryman, "Adducing Social Science Evidence in Constitutional Cases" (2018) 44:1 Queen's LJ 121 (where the author cites the use of social science evidence as the "new normal" in *Charter* litigation in Canada at 125).

19. For a discussion of *Bedford* as an example of how changing social science evidence can impact a constitutional case, see e.g. Michelle Bloodworth, "A Fact Is a Fact Is a Fact: *Stare Decisis* and the Distinction Between Adjudicative and Social Facts in *Bedford* and *Carter*" (2014) 32:2 NJCL 193 at 200. See also Suzanne B Goldberg, "Constitutional Tipping Points: Civil Rights, Social Change, and Fact-Based Adjudication" (2006) 106:8 Colum L Rev 1955 (where the author critically examines how courts "tip" from one understanding of a social group and its constitutional claims to another through fact-based adjudication, particularly when norms are contested).

20. See *Bedford v Canada*, 2010 ONSC 4264 [*Bedford* Sup Ct].

21. See *ibid* at paras 97–134. For a critical assessment of the treatment of expert opinion evidence and social science research in *Bedford*, see Dana Phillips, *Epistemological Justice in Strategic Challenges To Legislation under Section 7 of the Canadian Charter Of Rights And Freedoms* (PhD Thesis, York University, 2021) [unpublished] at 203–76.

22. See *Bedford* Sup Ct, *supra* note 20 at paras 123 (Dr. Elliott Leyton), 309 (Dr. Eleanor Maticka-Tyndale).

23. See *ibid* at paras 129 (Dr. John Lowman), 181 (Dr. John Pratt).

24. See *ibid* at para 132 (Dr. Melissa Farley).

25. See *ibid* at paras 156 (Dr. Augustine Brannigan), 171 (Dr. Gayle MacDonald), 181 (Dr. Ronald Weitzer), 309 (Dr. Eleanor Maticka-Tyndale), 311 (Dr. Cecilia Benoit), 314 (Dr. Frances Shaver).

26. See *ibid* at para 181 (Dr. Lotte Constance Van de Pol).

27. See *ibid* (Dr. Janice Raymond).

28. See *ibid* (Drs. Mary Lucille Sullivan and Barbara Sullivan).

29. See *ibid* at para 324 (Dr. Alexis Kennedy).

30. See *supra* note 7 at paras 23–75 (Chris Atchison, Andrea Sterling, Cherry Smiley, and Dr. Madeleine Coy).

31. The applicant in *R v NS* presented one expert, Chris Atchison, who had also given evidence in *R v Anwar*. The crown presented no witnesses. See *R v NS*, *supra* note 5.

and *Anwar*, the courts had before them a Parliamentary Record including a Technical Paper prepared by the Department of Justice referencing all the empirical evidence available up to 2014 that was considered by Parliament in enacting the *PCEPA*.³²

In areas of contested public policy, it matters to have rigorous, systematic, and technically valid pieces of evidence, as well as evidence that is representative of and accountable to all impacted populations.³³ While evidence-based policy-making is premised on the idea that properly developed public policy should be based on the best available evidence,³⁴ policy studies scholars caution that focussing only on what has been or can be empirically measured can obscure the political nature of policy-making.³⁵ Scholars and community activists who promote evidence-based prostitution policy often argue that the best available evidence supports the removal of criminal sanctions over adult sex work.³⁶ However, public

32. See *R v Anwar*, 2020 ONCJ 103 (Evidence, Summary of the Parliamentary Record) [*Anwar*, “Parliamentary Record”]; Department of Justice, “Technical Paper”, *supra* note 15.

33. See Justin Parkhurst, *The Politics of Evidence: From Evidence-Based Policy to the Good Governance of Evidence* (Abingdon: Routledge, 2017) at 4 [Parkhurst, *Politics*]. See also Emily St Denny, “‘The Personal is Political Science’: Epistemological and Methodological Issues in Feminist Social Science Research on Prostitution” (2014) 16:1 *J Intl Women’s Studies* 76 (where the author identifies that the epistemological nature and theoretical scope of claims in prostitution research are rarely explicit, making it difficult to clearly identify what is known and what meaning to attach to it at 80).

34. See Shaun P Young, “Evidence-Based Policy-Making: The Canadian Experience” in Shaun P Young, ed, *Evidence-Based Policy-Making in Canada* (Don Mills: Oxford University Press, 2013) 1 at 4.

35. From a public policy perspective, “what makes something *political* is the existence of disagreement over values and competition between groups”. See Parkhurst, *Politics*, *supra* note 33 at 65. See also Justin Parkhurst & Sudeepa Abeyasinghe, “What Constitutes ‘Good’ Evidence for Public Health and Social Policy-Making? From Hierarchies to Appropriateness” (2016) 30:5–6 *Social Epistemology* 665 (where the authors discuss the hierarchy inherent when some methodological approaches are placed as pre-eminent, including claims of objectivity); Aziza Ahmed, “Medical Evidence and Expertise in Abortion Jurisprudence” (2015) 41:1 *Am J L & Med* 85 (where the author cautions against overestimating the objectivity of scientific and medical expertise and under-theorizing the role of politics in judicial decision-making).

36. See generally Ronald Weitzer, “The Mythology of Prostitution: Advocacy Research and Public Policy” (2010) 7:1 *Sexuality Research & Soc Policy* 15. See also Andrea Krüsi et al, “Criminalisation of Clients: Reproducing Vulnerabilities for Violence and Poor Health Among Street-Based Sex Workers in Canada—A Qualitative Study” (2014) 4:6 *BMJ Open* (where the authors suggest that the results of their study highlight the critical role of sex workers’ lived experiences in any evidence-based policy-making in Canada and globally); Annalee Lepp & Borislav Gerasimov, “Editorial: Gains and Challenges in the Global Movement for Sex Workers’

policy decisions invariably involve choices among and between competing social values, and competition between interested groups.³⁷

This article examines the body of peer-reviewed empirical evidence about prostitution, sex work, and sex trafficking in Canada since the *PCEPA* was enacted to consider the scope and comprehensiveness of that evidence and whether it is representative of and accountable to all of the populations and concerns in the contemplation of Parliament in making the political choice to enact the *PCEPA*. To do this, I looked to sociologists and other researchers who study and measure prostitution, sex work, and sex trafficking in Canada through a review of recent peer-reviewed empirical literature. In the first part, I describe Canada's current policy approach to prostitution and set out some foundational concepts relevant to this literature review. In the second part, I set out the methodology I used to identify peer-reviewed empirical literature. Next, I discuss the peer-reviewed empirical literature and what scholarly researchers have and have not studied. I conclude that what is known about prostitution, sex work, and sex trafficking in Canada remains incomplete and that the body of peer-reviewed empirical knowledge demonstrates what policy studies scholars have termed "issue bias". It does not meaningfully include some of the populations in the contemplation of Parliament in choosing the current policy approach and enacting the current criminal commodification offences, and it focusses principally on the sexual health of individuals continuing to engage in sex work. In the context of constitutional litigation, this body of evidence has the potential to obscure the political questions that underpinned Parliament's policy choice and, importantly, to shift political decision-making in this area of contested public policy from the government to the courts under the guise of objective fact-finding.³⁸ Additionally, the peer-reviewed empirical literature identified in this review is not geographically comprehensive, relying largely on data from one urban centre, where enforcement of Canada's current criminal commodification offences is not a policing priority.³⁹ I explore reasons

Rights" (2019) 12 Anti-Trafficking Rev 1 (where the authors suggest that decriminalisation is supported by "extensive evidence-based research" at 5).

37. See Justin Parkhurst, "Appeals to Evidence for the Resolution of Wicked Problems: The Origins and Mechanisms of Evidentiary Bias" (2016) 49:4 Policy Sciences 373 at 375 [Parkhurst, "Appeals"]. For a discussion of wicked problems and the importance of recognizing the value perspectives that frame understandings of complex social issues, see Brian W Head & John Alford, "Wicked Problems: Implications for Public Policy and Management" (2015) 47:6 Admin & Soc'y 711.

38. See e.g. Goldberg, *supra* note 19 (where the author discusses the concept of "thick" facts, or factual statements that contain normative judgments at 1965).

39. See Kristie McCann, Richard Akin & Cita Airth, "Sex Work Enforcement Guidelines" (Vancouver: Vancouver Police Department, January 2013) at 4; VPDOonline, "VPD Sex Work Enforcement Guidelines" (15 December 2015), online (video): *YouTube*

for this issue bias and discuss some possible implications. I conclude with some observations about future empirical research to fill the gaps in knowledge and about how to ensure the legitimacy of the court processes in which this evidence is used.

I. Framing the Literature Review

Policy studies scholars express concern over relying solely on social scientific and scientific evidence in policy-making. Justin Parkhurst notes that “policymaking typically involves trade-offs between multiple competing social values, with only a very small proportion of policy decisions simply concerned with technical evidence”.⁴⁰ Canada’s current prostitution policy reflects a political choice founded on claims that prostitution is inconsistent with equality for women and girls and that prostitution cannot be made safe.⁴¹ Opposition to this policy approach principally rests on the claim that prostitution-specific criminal laws, whomever they target, have the effect of increasing the risks faced by sex workers when engaging in prostitution. This section describes Canada’s current policy approach to prostitution, the concerns and populations relevant to Parliament in enacting the *PCEPA*, and the concerns and populations highlighted in the first constitutional challenges to new criminal commodification offences enacted by the *PCEPA*, and introduces the concept of issue bias.

<www.youtube.com/watch?v=-gKafb7TN4>. In jurisdictions where criminal laws are not enforced, de facto decriminalization can result, sitting in direct opposition to not only the legislation itself, but also its underlying objectives. For a discussion of what the author refers to as de facto legalization, see generally Ronald Weitzer, *Legalizing Prostitution: From Illicit Vice to Lawful Business* (New York: New York University Press, 2012) at 79–81.

40. Parkhurst, *Politics*, *supra* note 33 at 5.

41. This framing of equality is contested. For a discussion of opposing positions on inequality and prostitution, see e.g. Cecilia Benoit et al, “‘The Prostitution Problem’: Claims, Evidence, and Policy Outcomes” (2018) 48:7 Archives Sexual Behavior 1905 [Benoit et al, “Prostitution Problem”]. But see *Boodhoo I*, *supra* note 6, where the Ontario Superior Court of Justice reasoned:

Prostitution reinforces gender inequalities in society at large by normalizing the treatment of primarily women’s bodies as commodities to be bought and sold. In this regard, prostitution harms everyone in society by sending the message that sexual acts can be bought by those with money and power. Prostitution allows men, who are primarily the purchasers of sexual services, paid access to female bodies, thereby demeaning and degrading the human dignity of all women and girls by entrenching a clearly gendered practice in Canadian society.

See *ibid* at para 52.

A. Canada's Policy Approach to Prostitution

Prior to 2013, prostitution was not illegal in Canada, but criminal laws curtailed how and where prostitution could legally take place. Those laws aimed to reduce the nuisance associated with prostitution for the communities in which prostitution took place⁴² and, to a much lesser extent, to reduce the exploitation of those engaged in prostitution.⁴³ In 2013, the Supreme Court of Canada in *Bedford* declared three criminal offences applicable to adult prostitution inconsistent with the *Canadian Charter of Rights and Freedoms* (the *Charter*),⁴⁴ and therefore void, because they prevented “prostitutes” from taking measures to protect themselves while engaging in a risky but legal activity. The Supreme Court of Canada provided Parliament with twelve months in which to respond before adult prostitution would have been effectively decriminalized in Canada.⁴⁵

In response to the Supreme Court of Canada's decision in *Bedford*, the Minister of Justice introduced Bill C-36, *An Act to amend the Criminal Code in response to the Supreme Court of Canada decision in Attorney General of Canada v. Bedford and to make consequential amendments to other Acts*.⁴⁶ Prior to introducing this legislation, the government considered a significant body of evidence about prostitution in Canada and beyond and conducted a public consultation. Following the introduction of this legislation, briefs were submitted, and witnesses testified before the House Standing Committee on Justice and Human Rights and the Senate Standing Committee on Legal and Constitutional Affairs.⁴⁷ The *PCEPA* received Royal Assent on November 6, 2014 and came into force on December 6, 2014.⁴⁸ This new legislative scheme

42. See *Bedford* SCC, *supra* note 2 (where the Court also refers to safeguarding public health and safety at para 132).

43. See *ibid* at para 137. See also *Bedford* Sup Ct, *supra* note 20 at paras 259, 272.

44. See *supra* note 6.

45. The word “decriminalized” is used here to refer to the removal of prostitution-specific criminal sanctions.

46. 2nd Sess, 41st Parl, 2014 (assented to 6 November 2014), SC 2014, c 25.

47. For a bibliography of the research that informed the development of Bill C-36, see Department of Justice, “Technical Paper”, *supra* note 15, at Annex A. For an overview of the Parliamentary Record on Bill C-36 and background on what led to the bill's development, see Anwar, “Parliamentary Record”, *supra* note 32. For a critique of the Parliamentary Committee Hearings, see Genevieve Fuji Johnson, Mary Burns & Kerry Porth, “A Question of Respect: A Qualitative Text Analysis of the Canadian Parliamentary Committee Hearings on *The Protection of Communities and Exploited Persons Act*” (2017) 50:4 Can J Pol Sc 921.

48. For an overview of the process leading to the enactment of the *PCEPA*, see generally Anwar, “Parliamentary Record”, *supra* note 32; Department of Justice, “Technical Paper”, *supra* note 15.

aims to end demand for prostitution in an effort to end the practice of prostitution itself.

Canada's current policy approach to prostitution is an example of what has been referred to as a Nordic or abolitionist policy regime.⁴⁹ Prostitution policy regimes set out the laws and practices governing prostitution within a particular jurisdiction. Prostitution policy defines a state's values and aspirations around the commercial exchange of sex. These values and aspirations are manifested through a policy decision (made in Canada by Parliament) and implemented through the allocation of funding and through enforcement.⁵⁰ Prostitution policy regimes are often categorized with reference to how law is mobilized: prohibition (or complete criminalization), abolition (or partial (de)criminalization), legalization (including prostitution-specific regulation), and decriminalization (removal of all criminal sanctions directly applicable to prostitution and avoidance of regulation directed specifically at prostitution).⁵¹

49. But see May-Len Skilbrei & Charlotta Holmström, "Is There a Nordic Prostitution Regime?" (2011) 40:1 *Crime & Justice* 479 (where the authors resist the idea of one "Nordic Model" of prostitution law, pointing to context as relevant to understanding how and why legal reforms came about in each country and how legal reforms in that region came about at different times, informed by different discourses on prostitution, gender, sexuality, public space, social work, criminal justice, human trafficking, immigration, and welfare state policies). For a comprehensive description, contextualization, and analysis of Nordic prostitution policies, see May-Len Skilbrei & Charlotta Holmström, *Prostitution Policy in the Nordic Region: Ambiguous Sympathies* (Surrey and Burlington: Ashgate, 2013) [Skilbrei & Holmström, *Nordic Region*].

50. See Joyce Outshoorn, "Introduction: Prostitution, Women's Movements and Democratic Politics" in Joyce Outshoorn, ed, *The Politics of Prostitution: Women's Movements, Democratic States and the Globalisation of Sex Commerce* (Cambridge, UK: Cambridge University Press, 2004) 1 at 6 [Outshoorn, *Politics of Prostitution*]. For a critical account of the role of law in governing prostitution, see generally Jane Scoular, "What's Law Got to Do With It? How and Why Law Matters in the Regulation of Sex Work" (2010) 37:1 *JL & Soc'y* 12.

51. Some scholars now propose that prostitution policies be characterized by their consequences for sex workers. See e.g. Petra Östergren, "From Zero-Tolerance to Full Integration: Rethinking Prostitution Policies" (2017) DemandAT Working Paper No 10; Benoit et al, "Prostitution Problem", *supra* note 41 (where the authors use a typology of repressive, restrictive, and integrative at 1910–11, 1914). Other scholars question the overall utility of typologies in analysing policy approaches, pointing to the unique character of the policy when implemented and the unique jurisdictional means and methods whereby policy is implemented. See e.g. Liz Kelly, Maddy Coy & Rebecca Davenport, "Shifting Sands: A Comparison of Prostitution Regimes Across Nine Countries" (2009), online (pdf): *London Metropolitan University Child & Woman Abuse Studies Unit*, <wasu.org/wp-content/uploads/2016/07/shifting-sands-published-

Sweden was the first country to adopt a policy approach criminalizing the purchase of sex and promoting the abolition of prostitution.⁵² The Swedish law prohibiting the purchase of sexual services came into force on January 1, 1999,⁵³ making it a criminal offence to obtain “casual sexual relations” in return for payment.⁵⁴ Situated within a broader gender equality discourse and introduced as part of a package of laws aimed at redressing violence against women, the Swedish law treats prostitution as a manifestation of gendered power relations between men and women.⁵⁵ In enacting this policy approach, Sweden’s Riksdag recognized prostitution as harmful to women and children engaging in it as well as to society at large.⁵⁶ They decided that prostitution and human trafficking are issues that cannot and should not be separated.⁵⁷ The abolitionist policy model is understood to have three equally important components: community education, social services, and law enforcement.⁵⁸ When adopted, Sweden’s

version.pdf>; Hendrik Wagenaar, Helga Amesberger & Sietske Altink, *Designing Prostitution Policy: Intention and Reality in Regulating the Sex Trade* (Bristol, UK: Bristol University Press & Policy Press, 2017) at 6–7.

52. For a discussion of the political process leading to the adoption of this policy, see Yvonne Swanström, “Criminalizing the John – A Swedish Gender Model?” in Outshoorn, *Politics of Prostitution*, *supra* note 50; Skilbrei & Holmström, *Nordic Region*, *supra* note 49 at 104–06.

53. See *Lag om förbud mot köp av sexuella tjänster* (Sweden), SFS 1998:408. See generally Swanström, *supra* note 52 at 240; Gunilla Ekberg, “The Swedish Law That Prohibits the Purchase of Sexual Services: Best Practices for Prevention of Prostitution and Trafficking Human Beings” (2004) 10:10 *Violence Against Women* 1187 at 1191–92.

54. *The Swedish Criminal Code*, SFS 1962:700, c 6, s 11.

55. See Bernstein, *supra* note 10 at 149. See also Ekberg, *supra* note 53 at 1191–92 (where the author describes the initiative as originating from the Swedish women’s movement and the legislation as resulting from two 1995 commissions of inquiry, one on prostitution and one on violence against women).

56. For a discussion of Sweden’s approach to prostitution, see Ekberg, *supra* note 53 at 1191–92.

57. See *ibid* at 1189 (where the author argues that trafficking in human beings for sexual purposes cannot be eliminated without measures directly targeting prostitution).

58. See Ane Mathieson, Easton Branam & Anya Noble, “Prostitution Policy: Legalization, Decriminalization and the Nordic Model” (2016) 14:2 *Seattle J for Soc Justice* 367 at 398. One of the experts who provided evidence to the court in *Anwar* described this three-pronged approach as including: criminalizing buyers and those who benefit from women’s prostitution but not sellers, offering robust social services and funding to assist women to exit prostitution and to prevent them from entering prostitution, and a public education campaign “to change values and ideas about what prostitution actually is and what is harmful about it”. See *R v Anwar*, 2020 ONCJ 103 (Testimony of Cherry Smiley, transcript of 15 February 2018 at 163–64) [*Anwar*, “Smiley Testimony”].

policy approach to prostitution centred social measures (as opposed to criminal law enforcement measures) as the primary means of reducing the incidence of prostitution.⁵⁹

Canada's current policy approach is similarly grounded in an understanding of prostitution as exploitive of women and girls and accompanied by a high risk of violence.⁶⁰ Express statements of legislative purpose accompanied the *PCEPA* when enacted. The *PCEPA* included a lengthy preamble in which Parliament expressed "grave concerns about the exploitation that is inherent in prostitution and the risks of violence posed to those who engage in it", as well the social harm caused by objectification of the human body and commodification of sexual activity, and the need to protect human dignity and equality.⁶¹ Parliament claimed that prostitution has a disproportionate adverse effect on women and children. In enacting the *PCEPA*, Parliament focussed on the prevalence of risk in prostitution alongside its overall contribution to sex inequality. In considering how to approach prostitution in Canada following the Supreme Court of Canada's decision in *Bedford*, the government took the view that prostitution could not be made safe. The Minister of Justice said at the Second Reading of Bill C-36: "[W]e do not believe that other approaches, such as decriminalization or legalization, could make prostitution a safe activity".⁶² In a

59. These measures include social programs to assist those engaged in prostitution to transition to other jobs and education aimed to bolster the underlying equality objectives of the policy. See Skilbrei & Holmström, *Nordic Region*, *supra* note 49 (where the authors identify that social work and police work often interact in the Nordic countries, sometimes described as being complementary, and that when prostitution is primarily viewed as a criminal justice concern, social work tends to move away from harm reduction to making women exit prostitution). But see Susanne Dodillet & Petra Östergren, "The Swedish Sex Purchase Act: Claimed Success and Documented Effects" (Paper delivered at the International Workshop: Decriminalizing Prostitution and Beyond: Practical Experiences and Challenges, The Hague, 3–4 March 2011) [unpublished] at 6 (where the authors note that because no guidelines accompanied the objective of reducing prostitution, different jurisdictions in Sweden take different approaches, with Stockholm focussing on therapy as a means of assisting people to stop selling sex and Malmö focussing instead on harm reduction).

60. The use of exploitation in this context is problematic because it leads to confusion as between the exploitation present in trafficking and the concept of prostitution itself as exploitive of women and girls. For a clarification of this distinction, see Canada, House of Commons, Standing Committee on Justice and Human Rights, *Evidence*, 41–2, No 97 (10 May 2018) (Janine Benedet) (where the witness described the distinction between the exploitation required pursuant to the *Criminal Code* offences and the exploitation that exists in prostitution overall as being about the role of a "middle man" at 1544).

61. *PCEPA*, *supra* note 3 at Preamble.

62. *House of Commons Debates, Hansard*, 41–2, Vol 147, No 101 (11 June 2014) at 1700.

Technical Paper intended to provide an overview of the decision of the Supreme Court of Canada in *Bedford* and to explain the objectives of the legislation, the scope of its offences, and the evidence that informed its development, the Department of Justice explained that “Bill C-36 maintains that the best way to avoid prostitution’s harms is to bring an end to its practice.”⁶³ In its Technical Paper, the Department of Justice said that the new legislation was informed by the evidence and decision in *Bedford*, public consultations held in February and March of 2014, jurisprudence, and domestic and international research and government reports.⁶⁴ The Department of Justice specifically pointed to the connection between prostitution and human trafficking.⁶⁵

The *PCEPA* created four new criminal offences contained in Part VIII of the *Criminal Code*, “Offences Against the Person and Reputation”, under a new heading “Commodification of Sexual Activity” (the “Commodification Offences”).⁶⁶ The centrepiece of the new legislative scheme is a provision that makes it an offence to obtain sexual services for consideration, rendering prostitution illegal for the first time in Canada.⁶⁷ Along with the Commodification Offences, the legislative framework applicable to prostitution in Canada includes two offences remaining in Part VII of the *Criminal Code*, “Disorderly Houses, Gaming and Betting”, under a new heading “Offences in Relation to Offering, Providing or Obtaining Sexual Services for

63. Department of Justice, “Technical Paper”, *supra* note 15 at 4.

64. See *ibid* at 3.

65. See *ibid*. See also *Boodhoo I*, *supra* note 6 at para 52.

66. Section 286.1 of the *Criminal Code* provides that “[e]veryone who, in any place, obtains for consideration, or communicates with anyone for the purpose of obtaining for consideration, the sexual services of a person” is guilty of an indictable or summary conviction offence. See *Criminal Code*, RSC 1985, c C-46, s 286.1. The remaining three Commodification Offences target those who contribute to creating or perpetuating a market for sexual services. See *ibid*, ss 286.2, 286.3, 286.4.

67. See *House of Commons Debates, Hansard*, *supra* note 62 (where, at second reading, the Minister of Justice said: “[t]he purchasing offence targets the demand for prostitution, thereby making prostitution an illegal activity” at 1700); *Debates of the Senate, Hansard*, 41–2, Vol 149, No 86 (9 October 2014) (where the Honourable Denise Batters said: “the purchasing offence makes the prostitution transaction illegal” at 1430–40); Department of Justice, “Technical Paper”, *supra* note 15 (where the Department of Justice set out that the Purchasing Offence makes prostitution itself an illegal practice: “[E]very time prostitution takes place, regardless of venue, an offence is committed” at 5); *R v Alexander*, 2016 ONCJ 452 (where the Ontario Court of Justice held that section 286.1 of the *Criminal Code* rendered prostitution illegal in Canada at para 14); *R v Anwar*, *supra* note 7 (where the Ontario Court of Justice noted the activity is now illegal at para 122).

Consideration”.⁶⁸ To support the implementation of the new policy approach, the government committed \$20 million to assist those engaging in prostitution to leave prostitution.⁶⁹ While Parliament’s aspiration in enacting the *PCEPA* was to abolish prostitution, Canada’s new prostitution policy differs in important ways from the Swedish model, and these differences are very likely to impact its potential to achieve its objectives.⁷⁰

While sex workers’ safety was not a direct objective of the new legislative scheme, Parliament tailored the new legislation to ensure that those who continued to engage in prostitution (despite the change in its legal status) were not precluded by the Commodification Offences from taking measures identified in *Bedford* as having the potential to reduce their risk of experiencing violence. These measures include selling sexual services from fixed indoor

68. *Criminal Code*, *supra* note 66, s 213. The *PCEPA* also amended the trafficking offences to align with the prostitution-related offences and amended the definition of “weapon” applicable to three separate offences. See *PCEPA*, *supra* note 3, ss 2, 19.

69. See Department of Justice and Public Safety Canada, News Release, “Government of Canada Announces \$20 Million to Help Victims Leave Prostitution” (1 December 2014), online: <www.canada.ca/en/news/archive/2014/12/government-canada-announces-20-million-help-victims-leave-prostitution.html>. See also Canada, Department of Justice, *Prostitution Criminal Law Reform: Bill C-36, the Protection of Communities and Exploited Persons Act* (14 September 2018), online: <www.justice.gc.ca/eng/rp-pr/other-autre/c36fs_fi>.

70. As noted, the abolitionist policy approach enacted in Sweden included not only criminal laws, but also social policies and public education. While \$20 million was initially allocated to support exit strategies in Canada, no further funds have been allocated, and to date there has been no evaluation of whether those funds have been effective in reducing the number of people engaged in prostitution in Canada. Aside from limited education about the new criminal laws, notably the Technical Paper, no education or public awareness campaign accompanied the change in law. Attitudinal shifts attributable to the law are, therefore, unlikely. Public attitudes toward prostitution in Canada, at least for the time being, remain split. See Liqun Cao, Ruibin Lu & Xiaohan Mei, “Acceptance of Prostitution and Its Social Determinants in Canada” (2017) 61:10 *Intl J Off Ther & Comp Crim* 1171. In addition, local prostitution policy implementation is foundational to the potential for policy to be effective. See Hendrik Wagenaar, “Why Prostitution Policy (Usually) Fails and What to Do About It?” (2017) 6:2 *Soc Sciences* 43. In Canada, implementation and enforcement of criminal laws are largely a matter of provincial and municipal jurisdiction, and police forces have taken different approaches to enforcement of the new criminal laws. See e.g. *R v Mercer*, 2016 NSPC 48 at paras 11–19 (for a discussion of Operation John Be Gone in Cape Breton); McCann, Akin & Airth, *supra* note 39; VPDOnline, *supra* note 39 (where the Vancouver Police Department says sex work involving consenting adults is not an enforcement priority). See also Carolyn Rebecca Mouland, *Selling What No One Can Buy* (LLM Thesis, University of Toronto, 2018) [unpublished] (where the author says this discretionary approach to enforcement is consistent with statements made at the time of the Canadian Police Association’s endorsement of Bill C-36 at 160–61) [Mouland, *Selling*].

locations, hiring persons to enhance safety, and negotiating conditions for the sale of sexual services in public places.⁷¹ To ensure that taking these measures does not require sex workers to choose between their liberty and their security of the person interests,⁷² Parliament immunized those engaged in exchanging their own sexual services for consideration from prosecution for the Commodification Offences.⁷³ Parliament also excluded certain non-exploitive relationships from the new Material Benefit Offence so that those who continue to exchange their own sexual services for consideration are not prevented from hiring bodyguards and others to enhance their safety.⁷⁴ Finally, Parliament limited the locations where communicating would constitute an offence so that those offering or providing their own sexual services for consideration were not precluded from communicating in all public spaces.⁷⁵

B. The Concern Over Issue Bias

Canada's policy approach to prostitution is contested. Two divergent theories largely ground contemporary debates over prostitution policy. One posits the activity of prostitution as a structural example of sexual exploitation, gender inequality, and violence against women, while the other posits sex work as a legitimate form of labour reflecting the individual exercise of choice and agency and a site to expand the boundaries of sexuality and gender.⁷⁶ The policy objectives associated with these divergent approaches are political, centering different concerns and different populations. One side in this policy debate

71. See Bill C-36, *supra* note 46.

72. See *Bedford* Sup Ct, *supra* note 20 at para 362 (where the application judge found that the impugned laws played a sufficient contributory role in preventing prostitutes from taking steps to reduce their risk of experiencing violence by forcing them to make this choice).

73. See *Criminal Code*, *supra* note 66, s 286.5. Parliament did not *decriminalize* offering or providing one's own sexual services for consideration. Rather, it immunized persons from prosecution in circumstances where the offence relates to offering or providing their own sexual services.

74. See *ibid*, s 286.2(4).

75. See *ibid*, s 213(1.1). The Technical Paper notes that "Bill C-36, on the other hand, creates, first, a new offence that criminalizes communicating *in any place* for the purpose of *purchasing* sexual services and, second, a separate offence that criminalizes communicating for the purpose of *selling* sexual services, but only *in public places that are or are next to school grounds, playgrounds or day care centres.*" See Department of Justice, "Technical Paper", *supra* note 15 at 11–12 [emphasis in original].

76. While these are the dominant feminist positions, including in relation to prostitution and sex work policy in Canada, they are not the only positions. For a discussion of the ideologies emerging from feminist theory about prostitution and sex work, see generally Beegan & Moran, *supra* note 11.

sees prostitution itself as a problem for those who engage in it, for women and girls more generally, and for the communities in which it takes place.⁷⁷ This side promotes policy like the *PCEPA* that aims to reduce or eliminate prostitution. The other side in the contemporary policy debate centres the harms and opportunities associated with sex work and the ways in which those harms might be reduced and those opportunities optimized.⁷⁸ Because criminal laws, law enforcement, and social stigma are seen to inhibit the exercise of agency, increase the risks faced by sex workers, and reduce their economic, employment, and sexual opportunities, this side in the policy debate advocates for the removal of all prostitution-specific criminal laws.

Whether Canada's current legislative approach to prostitution is constitutionally permissible is also contested. Scholars disagree on whether and how the Supreme Court of Canada's decision in *Bedford* constrained the government's range of available policy choices.⁷⁹ The constitutionality of three

77. See e.g. Andrea Dworkin, "Prostitution and Male Supremacy" (1993) 1:1 Mich J Gender & L 1; Kathleen Barry, *The Prostitution of Sexuality* (New York: New York University Press, 1995); Carole Pateman, "What's Wrong with Prostitution?" (1999) 27:1–2 Women's Studies Q 53; MacKinnon, *supra* note 16; Sheila Jeffreys, "Beyond 'Agency' and 'Choice' in Theorizing Prostitution" in Maddy Coy, ed, *Prostitution, Harm and Gender Inequality: Theory, Research and Policy* (Farnham: Ashgate, 2012) 69; Janice G Raymond, *Not a Choice, Not a Job: Exposing the Myths About Prostitution and the Global Sex Trade* (Virginia: Potomac Books, 2013); Janine Benedet, "Marital Rape, Polygamy, and Prostitution: Trading Sex Equality for Agency and Choice" (2013) 18:2 Rev Const Stud 161.

78. See e.g. Valerie Jenness, *Making it Work: The Prostitutes' Rights Movement in Perspective* (New York: Aldine de Gruyter, 1993); Gail Pheterson, *The Prostitution Prism* (Amsterdam: Amsterdam University Press, 1996); Wendy Chapkis, *Live Sex Acts: Women Performing Erotic Labor* (New York: Routledge, 1997); Noah D Zatz, "Sex Work/Sex Act: Law, Labor, and Desire in Constructions of Prostitution" (1997) 22:2 Signs 277; Martha C Nussbaum, "Whether from Reason or Prejudice": Taking Money for Bodily Services" (1998) 27:2 J Leg Stud 693; Kamala Kempadoo, "Slavery or Work? Reconceptualizing Third World Prostitution" (1999) 7:1 Positions 225; Gayle S Rubin, "Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality" in *Deviations: A Gayle Rubin Reader* (Durham, NC: Duke University Press, 2011) 137; Julia O'Connell Davidson, "Prostitution and Trafficking for Sexual Labour" in Darrel Moellendorf & Heather Widdows, eds, *The Routledge Handbook of Global Ethics* (Abingdon: Routledge, 2015) 279.

79. See e.g. Angela Campbell, "Sex Work's Governance: Stuff and Nuisance" (2015) 23:1 Fem Leg Stud 27 (where the author argues that *Bedford* mandated Parliament to reform the criminal law to ensure it did not endanger sex workers at 29); Manpreet Abrol, "The Criminalization of Prostitution: Putting Women's Lives at Risk" (2014) 3:1 J Historical Studies 1 (where the author argues that the decision established that criminalizing sex work increased the harm experienced by sex workers at 6–7); Lisa Dufraimont, "*Canada (Attorney General) v. Bedford* and the Limits on Substantive Criminal Law under Section 7" (2014) 67 SCLR (2d) 483 (where the author

of the new criminal offences—the Material Benefit Offence, the Procuring Offence, and the Advertising Offence—has already been the subject of constitutional challenges. In *Boodhoo I*, the Ontario Superior Court of Justice upheld the constitutionality of these offences while in *Anwar*, the Ontario Court of Justice found them to be unconstitutional, resulting in the charges against the applicants being dismissed. Further constitutional challenges have been commenced.⁸⁰ To date, section 286.1 of the *Criminal Code*, the legislative provision that makes the exchange of sexual services for consideration an unlawful commercial activity in Canada, has not been subject to constitutional challenge.

Recognizing the conceptual distinction between prostitution and sex work, including whether and how trafficking is reflected in theory, law, evidence, and argument, is critical to any evaluation of Canada's current prostitution policy and associated criminal laws, and something to which courts have, to date, paid insufficient attention. Canada's current policy approach focusses on the activity of prostitution, and makes no distinction between those who engage in prostitution through trafficking, and those who identify as sex workers. It is premised on an understanding that exchanging sexual services for consideration is itself harmful to women and girls and to the societies in which it takes place, in part due to the connection between prostitution and human trafficking. It is also founded on a claim that prostitution is inconsistent with gender equality and cannot be made safe.⁸¹

To date, the constitutional challenges to Canada's criminal prostitution laws have been argued based on claims that the impugned offences violate sex workers' rights by increasing sex workers' risks while engaging in prostitution.⁸² In *Boodhoo I* and *Anwar*, the applicants contended that the impugned criminal

concludes that it remained open to Parliament after *Bedford* to criminalize prostitution itself because the primary objection to the then-existing laws was that they made it more dangerous to engage in a lawful activity, and exploitation and equality-related objectives would set a higher bar than nuisance objectives at 488, 503); Michael Plaxton, "First Impressions of Bill C-36 in Light of *Bedford*" (2014) University of Saskatchewan College of Law Working Paper, online: <dx.doi.org/10.2139/ssrn.2447006> [unpublished] (where the author observes that the Supreme Court of Canada did not conclude that people have a constitutional right to engage in prostitution or that Parliament was precluded from criminalizing prostitution at 2). See also Carolyn Mouland, "Remedying the Remedy: *Bedford's* Suspended Declaration of Invalidity" (2018) 41:3 Man LJ 281 (where the author points to the ambiguity in paragraph 165 of the Supreme Court of Canada's decision as a potential source of the uncertainty at 299–301).

80. See e.g. *R v NS*, *supra* note 5.

81. See *Boodhoo I*, *supra* note 6 at para 52.

82. See e.g. Alan Young, "Afterword" in Emily van der Meulen, Elya M Durisin & Victoria Love, eds, *Selling Sex: Experience, Advocacy, and Research on Sex Work in Canada* (Vancouver: University of British Columbia Press, 2013) 323 (where the author, who represented one of the applicants in *Bedford*, explains that *Bedford* was specifically designed to attack the prostitution

provisions had an unconstitutional impact on individuals described in hypothetical scenarios variously as escorts, prostitutes, and other sex workers. In *Boodhoo I*, the application judge did not define any of those terms. In *Anwar*, the application judge constructed a definition that was both unclear and obscured important distinctions between prostitution and sex work: “For consistency and clarity of language, I will refer to the sale of sexual services for money as sex work, and the practice of prostitution as the sex industry.”⁸³ Notwithstanding this definition, the application judge appeared to accept the applicants’ argument that adult consensual prostitution should not be conflated with human trafficking or exploitation.⁸⁴ He did so notwithstanding that the Crown’s response to the constitutional challenge rested, in part, on the connection between human trafficking and prostitution,⁸⁵ and on Parliament’s claims that human trafficking and prostitution are linked and that it is difficult to distinguish between coercion and autonomous decision-making in the context of prostitution.⁸⁶

Recognizing the conceptual distinction between prostitution and sex work, including whether and how trafficking is reflected in empirical literature, is also critical to any evaluation of Canada’s current prostitution policy and associated criminal laws. The constitutionality of laws applicable to the activity of prostitution are being evaluated with reference to whether those laws violate the rights of sex workers. Those constitutional rights claims are usually argued on the basis of legislative fact evidence about the impact of those laws on sex workers. However, sex workers were not the only population in the contemplation of Parliament when the new laws were enacted, and their concerns were not the only concerns considered by Parliament in choosing Canada’s current policy approach to prostitution.

In his recent monograph *The Politics of Evidence*, Parkhurst reminds us that it is common for there to be disagreement in society about what social outcomes are important and how to value social outcomes in a policy-making process. He points to evidence in the policy-making context as a tool of measurement; evidence can help identify who will benefit from different policy choices and how different choices will impact different groups.⁸⁷ However, he cautions that

laws’ contribution to the risks faced by sex workers at 324). See also *R v Anwar*, 2020 ONCJ 103 (Notice of Constitutional Questions at 2) [*Anwar*, “Constitutional Questions”].

83. *Supra* note 7 at para 22.

84. See *R v Anwar*, 2020 ONCJ 103 (Factum of the Applicants at para 184) [*Anwar*, “Applicants’ Factum”].

85. See *R v Anwar*, 2020 ONCJ 103 (Factum of the Respondent at para 84) (referencing the evidence of Dr. Coy about the connection between prostitution and human trafficking, and the utility of abolitionist legislation in combatting human trafficking in prostitution).

86. See Department of Justice, “Technical Paper”, *supra* note 15.

87. See Parkhurst, *Politics*, *supra* note 33 at 9.

evidence alone cannot determine the best choice between different policies or which social outcomes should be pursued over others. That decision is political.

Evidence itself is also political. Parkhurst identifies two forms of bias that can impact the use of evidence. The first, technical bias, refers to situations in which evidence is either scientifically invalid or cherry-picked from a larger body of relevant evidence to pursue a political goal. Scholars including Isabel Crowhurst and May-Len Skilbrei cite this as a particular concern in prostitution policy-making.⁸⁸ The second, issue bias, refers to the ways in which forms of evidence may obscure the political nature of decisions and bias decisions towards particular outcomes. Issue bias has the potential to “shift political debates to particular questions or marginalise policy-relevant social concerns”.⁸⁹ Parkhurst notes that it is important to recognize whether evidence has the effect of shifting policy priority to one set of values over another, noting that issue bias may be problematic “if it obscures or undermines the explicit consideration of the multiple sets of values that are important to the public”.⁹⁰

Issue bias may manifest in the creation of evidence itself: “[T]he decision to create evidence on one or another issue, will inevitably prioritize certain concerns over others (biasing the decision on particular issues)”.⁹¹ Parkhurst points to how the choice of research question is important in shaping policy alternatives. You do not know what you have not asked. In some cases, issue bias can reflect a deliberate bias against studying the needs of particular societal groups. Vanessa Munro suggests that when empirical methods amplify some voices and obscure others, the power dynamics of empirical work are revealed, and the pretence of rationality and neutrality is lifted.⁹²

In considering evidence about the exchange of sexual services for consideration in Canada and, in particular, the usefulness of that evidence in evaluating the constitutionality and effectiveness of Canada’s criminal prostitution laws, it is relevant to consider whether that evidence is representative of and accountable to all impacted populations in the contemplation of Parliament in enacting the new prostitution policy. It is also relevant to consider whether that evidence is representative of all of the concerns of those impacted populations. What

88. See e.g. Isabel Crowhurst & May-Len Skilbrei, “International Comparative Explorations of Prostitution Policies: Lessons from Two European Projects” (2018) 31:2 *European J Soc Science Research* 142 (where the authors point to selective use of evidence by policy-makers at 156).

89. Parkhurst, *Politics*, *supra* note 33 at 2.

90. *Ibid* at 43. See also *ibid* at 71.

91. Parkhurst, “Appeals”, *supra* note 37 at 377. See also Parkhurst, *Politics*, *supra* note 33 at 10, 54.

92. See Vanessa Munro, “The Master’s Tools?: A Feminist Approach to Legal and Lay Decision-Making” in Dawn Watkins & Mandy Burton, eds, *Research Methods in Law*, 2nd ed (New York: Routledge, 2018) 194 at 208–09.

counts as harm and what harms are counted is a central concern of this empirical literature review.⁹³ The remainder of this article considers the body of peer-reviewed empirical literature with these questions in mind.

II. Methodology

To consider what is known and not known about prostitution in Canada, I conducted a modified scoping review to identify scholarly empirical literature about prostitution, sex work, and sex trafficking from social sciences, health sciences, and psychology in Canada for the period 2014 to 2019.⁹⁴ My intuition was that evidence about prostitution in Canada was focussed on adult sex workers and promoted the goal of decriminalization, with potentially significant implications, in particular for constitutional decision-making. I wanted to test this hypothesis in a systematically rigorous and transparent way. I limited my review to studies undertaken with participants located in Canada.⁹⁵ I chose the time frame because it captured literature published between the enactment of the *PCEPA* and the date of the searches. I limited my review to studies exclusively about prostitution, sex work, and/or sex trafficking.⁹⁶

With this literature review, I considered only peer-reviewed scholarly work. While there are studies about the experiences of individuals engaging in prostitution conducted outside of a scholarly context,⁹⁷ it is challenging

93. See also Mariana Valverde, “The Harms of Sex and the Risks of Breasts: Obscenity and Indecency in Canadian Law” (1999) 8:2 Soc & Leg Stud 181 (where the author identifies that harm can mean many things at 187).

94. Scoping reviews aim to quickly map key concepts underpinning a research area, and the main sources and types of evidence available. They also help to identify gaps in an existing evidence base. For a discussion of scoping reviews, see generally Hilary Arksey & Lisa O’Malley, “Scoping Studies: Towards a Methodological Framework” (2005) 8:1 Intl J Soc Research Methodology 19.

95. Scholars increasingly acknowledge prostitution policy must be responsive to the context in which it is to be applied. See e.g. Kelly, Coy & Davenport, *supra* note 51; Wagenaar, Amesberger & Altink, *supra* note 51 at 6–7.

96. I did not include literature about other subject matter where the focus was not solely on prostitution, sex work, or sex trafficking. Some excluded studies, for example, examined issues related to drug use and HIV, and included sex workers within a broader group of research participants, but did not focus exclusively on the experiences of sex workers or on sex work.

97. There is a significant body of literature about prostitution, sex work, and sex trafficking not captured by this review. This includes scholarly empirical literature drawing on data with participants situated outside of Canada and scholarly empirical research drawing on data with participants in Canada published outside of the search parameters or otherwise not captured in this review. It also includes non-scholarly or community-based empirical research, often

to ensure that any consideration of such work is fully inclusive. In addition, an examination of scholarly work identifies areas for future scholarly research and research funding. Finally, courts and policy-makers are increasingly asked to and do rely on peer-reviewed studies as authoritative.⁹⁸ This makes having a clear understanding of what has and has not been studied by scholars and subjected to peer review particularly relevant in legal contexts.

To locate relevant studies, I searched four databases—Sociological Abstracts, Psycinfo, Medline, and Embase—using the search terms: “prostitution or sex work or (sex and trafficking)” and “Canada or any province or territory” for the period from 2014 (all dates)⁹⁹ to 2019 (all dates).¹⁰⁰ The search strategies are included in Appendix A and Appendix B. The search results included scholarly literature published between January 1, 2014 and January 8, 2019.¹⁰¹ The combined database searches yielded 723 records,¹⁰² of which 19 duplicate records and

conducted in the context of improving the provision of community services for sex workers. Beyond scholarly and community-based empirical literature, there is a growing body of literature that aims to share the experiential voices of those who engage in prostitution and sex work—voices often identified as absent from scholarly consideration, public discourse, and policy-making. Edited volumes reflect wide-ranging experiences of those who engage in prostitution and sex work. See e.g. Jill Nagle, ed, *Whores and Other Feminists* (New York: Routledge, 1997); Caroline Norma & Melinda Tankard Reist, “Prostitution Survivors Speak Out” in Caroline Norma & Melinda Tankard Reist, eds, *Prostitution Narratives: Stories of Survival in the Sex Trade* (Victoria: Spinifex Press, 2016) 1.

98. See e.g. *R v Anwar*, *supra* note 7 (where the judge appears to make much of the reliability of scholarly social science research, particularly quantitative social science research, preferring it over scholarly research employing other methodologies). It is not clear that the application judge understood the difference between quantitative and qualitative methods.

99. I intended to focus on literature published after the coming into force of the *PCEPA* on December 6, 2014. Due to the search engine capabilities, and in the interest of consistency, I included literature for all of 2014. The searches were run on January 8, 2019 (Psycinfo, Medline, and Embase) and January 16, 2019 (Sociological Abstracts).

100. Assistance in identifying databases and constructing searches was gratefully received from librarians at Queen’s University: Sandra McKeown (Health Sciences Librarian), Gillian Akenson (Liaison Librarian for Political Studies, Industrial Relations, Religious Studies, Jewish Studies, and Psychology) and Sylvia Andrychuk (Collections, Research, and Instruction Librarian for Cultural Studies, Gender Studies, Philosophy, and Sociology).

101. Conference proceedings, gray literature, and non-English publications were excluded from this review. One potentially relevant article was only available in French and therefore not included in this review. See Jacqueline Comte, “Parcours de travailleuses du sexe offrant des services d’escorte au Québec” (2016) 40:2 *Déviante & Soc* 201.

102. I used Covidence, a web-based software platform, to review and code the search results. While the searches yielded 723 results, only 722 were reviewed. In uploading the results to Covidence, one record could not be located or uploaded (from the Sociological Abstracts

644 irrelevant records were removed prior to the review.¹⁰³ The final review examined fifty-nine records, the citations for which are listed in Appendix C. For the purposes of this article, I did not evaluate the strength of the evidence (quality or methodological sufficiency or deficiencies) but focussed instead on the scope of the evidence (which of the populations and which of the concerns in the contemplation of Parliament in enacting the current prostitution policy and laws have and have not been studied).

III. Scope of Empirical Evidence

In this part, I discuss the scope of the peer-reviewed empirical evidence about prostitution, sex work, and sex trafficking identified in this literature review with a view to its salience in reviewing the provisions and operation of the *PCEPA* and in evaluating the constitutionality of Canada's current criminal prostitution laws. I identify areas in need of future research and offer some observations for legal decision-makers about whether the body of empirical research does or does not include evidence about populations and concerns in the contemplation of Parliament in enacting the new prostitution policy and laws. As a preliminary matter, most of the articles identified in this literature review consider data collected before the *PCEPA* came into force. Only five of the articles consider data collected after the *PCEPA* came into force. This is relevant when considering the effects and effectiveness of the *PCEPA*, for both policy review and constitutionality purposes.

A. Theoretical Framework: Sex Work is Work

Academic research about prostitution is mostly written from the perspective of a particular stakeholder or a single theoretical framework.¹⁰⁴ When researchers begin with either an understanding of prostitution as itself a problem or seek to reduce the harms associated with sex work, it affects the choice of research

review). I have been unable to identify the missing record, or to confirm whether it is a duplicate, irrelevant, or relevant to the study.

103. All papers were reviewed by reading the titles and abstracts. The title and abstract review used the following inclusion criteria: publication in English, published after January 1, 2014 in a peer-reviewed journal, and including only data referable to Canada. All articles meeting these criteria were read in their entirety.

104. See Gert Vermeulen & Nina Peršak, "Prostitution Undressed: From Discourse to Description, from Moralisation to Normalisation?" in Nina Peršak & Gert Vermeulen, eds, *Reframing Prostitution: From Discourse to Description, from Moralisation to Normalisation?* (Antwerp: Maklu, 2014) 315 at 315.

question, the research participants selected, how data is interpreted, and what recommendations are made as a result of research findings.¹⁰⁵ Scholars recognize that identifying problems and considering how to respond to them from within only one theoretical or normative frame invariably silences some perspectives.¹⁰⁶ Skilbrei refers to prostitution as “a field of policy-based evidence”.¹⁰⁷

Scholarly empirical research about the commercial exchange of sex in Canada is founded on a theoretical and normative understanding of that exchange as work. Every article located by this literature review used the term sex work as opposed to the word prostitution in discussing the study and findings.¹⁰⁸ While all the articles used the terms sex work and sex worker, only two of the articles defined those terms.¹⁰⁹ Some of the authors directly acknowledged a normative foundation for their research and analysis, identifying studies as situated within a sex as work paradigm. For example, Julie Ham noted:

I use the term sex work (rather than prostitution) to situate this study within a labour perspective or the view that sex work constitutes a form of labour that should be recognized as such. The term sex work is also used as this is the preferred term by most sex worker rights organisations, researchers and stakeholders that work from a sex workers’ rights perspective.¹¹⁰

105. See e.g. Hudson & van der Meulen, *supra* note 12 (where the authors identify that the normative commitments of researchers impact interpretation and presentation of empirical evidence at 132).

106. See May-Len Skilbrei, “Speaking the Truth About Prostitution” in Marlene Spanger & May-Len Skilbrei, eds, *Prostitution Research in Context: Methodology, Representation and Power* (London, UK: Routledge, 2017) 33.

107. *Ibid* at 33.

108. While thirty-six of fifty-nine articles also used the word prostitution at least once, it was almost always used only when referring to law and sometimes in parentheses. The word prostitution was not defined in any of the articles using it, nor was it distinguished in any way from sex work.

109. See Elizabeth Manning & Vicky Bungay, “‘Business Before Pleasure’: The Golden Rule of Sex Work, Payment Schedules and Gendered Experiences of Violence” (2017) 19:3 *Culture, Health & Sexuality* 338; Adina Landsberg et al, “Criminalizing Sex Work Clients and Rushed Negotiations Among Sex Workers Who Use Drugs in a Canadian Setting” (2017) 94:4 *J Urban Health* 563 (where the definition is included as part of the participant inclusion criteria).

110. Julie Ham, *Sex Work, Immigration and Social Difference* (Abingdon: Routledge, 2017) at 4 (a monograph by the author considering the study from the article identified in this literature review).

In another article, Trenea Orchard et al. noted: “We use the term ‘sex work’ to refer to the spectrum of activities that inform our participants’ sex for material exchange experiences and to also acknowledge that sex work is a form of gendered labour.”¹¹¹

Cecilia Benoit et al. recently observed that researchers’ ideological biases weaken research on prostitution, pointing to the negative consequences of prostitution research grounded in an understanding of prostitution as sexual exploitation.¹¹² However, grounding research entirely or almost entirely in an understanding of sex work as labour can similarly weaken research, including by failing to account for the experiences of other populations in the contemplation of Parliament in enacting law and policy, most notably individuals who engage in prostitution as a result of trafficking. Most empirical research about the commercial exchange of sexual acts now epistemically privileges the voices of sex workers.¹¹³ When all or close to all research studies undertaken begin from one theoretical and normative perspective, whatever that perspective is, it impacts what is and is not known through the research questions asked (and not asked) and the study participants identified (and not identified).¹¹⁴

B. Research Questions: Harm Reduction

Researchers who conduct their research from within a sex work paradigm generally focus on minimizing the harms associated with engaging in sex work.¹¹⁵ The term “harm reduction” generally refers to reducing the negative

111. Trenea Orchard et al, “Expanding the Scope of Inquiry: Exploring Accounts of Childhood and Family Life Among Sex Workers in London, Ontario” (2014) 23:1 Can J Human Sexuality 9 at 11.

112. See Benoit et al, “Prostitution Problem”, *supra* note 41 at 1907.

113. See e.g. Lorraine Nencel, “Epistemologically Privileging the Sex Worker: Uncovering the Rehearsed and Presumed in Sex Work Studies” in Spanger & Skilbrei, *supra* note 106, 67; Carol Harrington, “Collaborative Research with Sex Workers” in Spanger & Skilbrei, *supra* note 106, 85.

114. See Michelle Madden Dempsey, “How to Argue About Prostitution” (2012) 6:1 Crim L & Philosophy 65 (where the author notes that “[b]y constructing their research projects with an eye primarily on the task of making a difference in the real world and influencing their audience to adopt particular policies, they leave behind the paradigmatic task of the empirical researcher—that is, adding to our body of empirical knowledge” at 76). For a discussion of “sex trade academics” and the domination of the sex work perspective within the academy, see also Julie Bindel, *The Pimping of Prostitution: Abolishing the Sex Work Myth* (London, UK: Palgrave Macmillan, 2017) at 239–75.

115. In his evidence, one of the expert witness in *Anwar* described it as a “harm reduction

consequences of engaging in what is usually understood to be a dangerous activity, and is increasingly used when referring to the harms associated with engaging in sex work and to means whereby such harms might be reduced.¹¹⁶ This section considers the harms with which the peer-reviewed literature contended.

More than half of the articles located in this literature review examine the health of sex workers. Over one-third of the articles located in this literature review (twenty-two of fifty-nine) focus on the sexual health of sex workers; most of these (eighteen of fifty-nine) focus exclusively on HIV and sexually transmitted infections (“STIs”), while four focus on sexual and reproductive health.¹¹⁷ Three articles focus on sellers’ emotional health.¹¹⁸ Four articles

and opportunity . . . maximization or choice maximization” approach, clarifying this to mean opportunity “to ensure one’s safety . . . choices and agencies and . . . to respect one’s decisions and opportunities for the fulfilment of self”. See *R v Anwar*, 2020 ONCJ 103 (Testimony of Chris Atchison, transcript of 6 February 2018 at 34–35) [*Anwar*, “Atchison Testimony”].

116. However, unlike in the case of harm reduction related to drug use, the harms associated with prostitution are harms often caused by third parties. For a discussion of harm reduction policies in prostitution, see generally Erin Graham, *More Than Condoms and Sandwiches: A Feminist Investigation of the Contradictory Promises of Harm Reduction Approaches to Prostitution* (PhD Thesis, University of British Columbia, 2014) [unpublished]. See also Maddy Coy, Cherry Smiley & Meagan Tyler, “Challenging the ‘Prostitution Problem’: Dissenting Voices, Sex Buyers, and the Myth of Neutrality in Prostitution Research” (2019) 48:7 *Archives Sexual Behavior* 1931.

117. See Putu Duff et al, “The Relationship Between Social, Policy and Physical Venue Features and Social Cohesion on Condom Use for Pregnancy Prevention Among Sex Workers: A Safer Indoor Work Environment Scale” (2015) 69:7 *J Epidemiology & Community Health* 666; Putu Duff et al, “Sex Work and Motherhood: Social and Structural Barriers to Health and Social Services for Pregnant and Parenting Street and Off-Street Sex Workers” (2015) 36:9 *Health Care for Women Intl* 1039; Putu Duff et al, “Pregnancy Intentions Among Female Sex Workers: Recognising Their Rights and Wants as Mothers” (2015) 41:2 *J Family Planning & Reproductive Health Care* 102; Soyoun Rachel Kim et al, “Uptake of a Women-Only, Sex-Work-Specific Drop-In Center and Links with Sexual and Reproductive Health Care for Sex Workers” (2015) 128:3 *Intl J Gynecology & Obstetrics* 201.

118. See Cecilia Benoit et al, “Would You Think About Doing Sex for Money? Structure and Agency in Deciding to Sell Sex in Canada” (2017) 31:5 *Work, Employment & Society* 731 [Benoit et al, “Would You Think?”] (where the authors considered self-esteem); Putu Duff et al, “Poor Working Conditions and Work Stress Among Canadian Sex Workers” (2017) 67:7 *Occupational Medicine* 515 (where the authors considered workplace stress); Nitasha Puri et al, “Burden and Correlates of Mental Health Diagnoses Among Sex Workers in an Urban Setting” (2017) 17:1 *BMC Women’s Health* 133 (where the authors considered mental health diagnoses among sex workers).

consider sex workers' ability to access healthcare.¹¹⁹ A further two articles consider drug use among sex workers.¹²⁰

Only ten per cent (six of fifty-nine) of the articles located in this review consider the experience of and exposure to violence in prostitution.¹²¹ Two of these are specific to violence experienced by transgender sellers.¹²² Thus, only four of the fifty-nine articles uniquely consider the physical or sexual violence experienced by women,¹²³ notwithstanding the significant risk it poses to them and its relevance to Parliament in enacting the new prostitution policy.¹²⁴ Three of the studies examine socio-structural means of either reducing the risk of experiencing violence (where decriminalization was recommended)¹²⁵ or removing barriers to healthcare after violence has occurred (where a reduction in stigma was suggested as helpful).¹²⁶ None of the articles consider exit from prostitution as a means of avoiding the risk of violence in prostitution. The remaining articles consider various aspects of policing and incarceration (seven articles), sex worker identity construction (four articles), factors linked to first

119. Three of these considered access to both health care and police services.

120. See Elena Argento et al, "Prevalence and Correlates of Nonmedical Prescription Opioid Use Among a Cohort of Sex Workers in Vancouver, Canada" (2015) 26:1 Intl J Drug Policy 59; Kathleen N Deering et al, "Piloting a 'Spatial Isolation' Index: The Built Environment and Sexual and Drug Use Risks to Sex Workers" (2014) 25:3 Intl J Drug Policy 533.

121. An additional article considered what the authors referred to as "financial violence". See Manning & Bungay, *supra* note 109.

122. See Tara Lyons et al, "The Impact of Construction and Gentrification on an Outdoor Trans Sex Work Environment: Violence, Displacement and Policing" (2017) 20:8 Sexualities 881; Tara Lyons et al, "Negotiating Violence in the Context of Transphobia and Criminalization: The Experiences of Trans Sex Workers in Vancouver, Canada" (2017) 27:2 Qualitative Health Research 182.

123. The word "women" when used in these articles includes trans women. It is likely that the sex equality concerns underpinning the current policy approach relate specifically to biological females. For this reason, disaggregation of data may be relevant.

124. Only one of these articles linked violence in prostitution to the broader context of violence against women in Canada. See Katherine Muldoon et al, "Sexual Relationship Power and Intimate Partner Violence Among Sex Workers with Non-Commercial Intimate Partners in a Canadian Setting" (2015) 27:4 AIDS Care 512.

125. See Solanna Anderson et al, "Violence Prevention and Municipal Licensing of Indoor Sex Work Venues in the Greater Vancouver Area: Narratives of Migrant Sex Workers, Managers and Business Owners" (2015) 17:7 Culture, Health & Sexuality 825; Argento et al, *supra* note 120.

126. See Rebekah M Baumann et al, "Experiences of Violence and Head Injury Among Women and Transgender Women Sex Workers" (2018) 16:3 Sexuality Research & Soc Policy at 278.

involvement in sex work (three articles), mobility and migration experiences (two articles), the experience of stigma (one article), and the effect of closed-circuit television on the visibility of sex workers (one article).

C. Research Participants: Active Sex Workers

Consistent with a harm reduction approach that prioritizes reducing the risks of harm for those who continue to engage in sex work, almost all the data relates to the experiences of individuals who exchanged sexual services for consideration at the time of study. Of the fifty-nine articles located in the literature review, fifty-five include data from studies with participants who themselves exchanged sexual services for consideration.¹²⁷ Only two of the studies refer to any participants that identified as having been trafficked, for a total of eight study participants.¹²⁸ Most of the studies include only participants who continued to engage in sex work at the time of the study. For studies conducted after the new prostitution policy and criminal prostitution laws came into force, these participants were engaging in an unlawful activity. There is little information contained in the articles about the experiences of individuals who formerly engaged in sex work but who no longer did so at the time of study (nor of how their experiences might differ from the experiences of those continuing to engage in sex work, including their exposure to and potential to avoid risks, notably the risk of violence). This is noteworthy because Canada's new prostitution policy promotes exit from prostitution as a means of avoiding the risks associated with prostitution. The Department of Justice identified exit from prostitution as a research gap and research priority in Canada as early as 2001.¹²⁹ One study published shortly thereafter considers individuals who began engaging in prostitution as youths and who subsequently exited; all of the participants in that study said prostitution was something no one should do.¹³⁰ Two of the studies identified in this literature review challenge the idea of

127. Two studies examine data about the experiences of purchasers, one considered online advertisements, and one considered the experiences of third parties.

128. See Ham, *supra* note 110 at 29, n 1 (where the single participant did not initially identify her experience as trafficking but did so after the definition of trafficking was explained to her); SM Goldenberg et al, "Complexities of Short-Term Mobility for Sex Work and Migration Among Sex Workers: Violence and Sexual Risks, Barriers to Care, and Enhanced Social and Economic Opportunities" (2014) 91:4 J Urban Health 736 at 743 (where 7 of 646 participants identified as having been trafficked or traded).

129. See Canada, Department of Justice, *Identifying Research Gaps in the Prostitution Literature*, by John Lowman (Ottawa: Research & Statistics Division, 2001) at 8–9 [Department of Justice, "Research Gaps"].

130. See Canada, Department of Justice, *Strolling Away*, by Susan McIntyre (Ottawa: Research & Statistics Division, 2002) at 3.

exit as distinct from sex work; one of these finds that for some sex workers, sex work is something that one is never truly in or out of.¹³¹

The remaining four articles consider the experiences of purchasers and third parties. Two articles include data about purchasers (one through an analysis of purchaser postings on online forums). One article considers data about men who both purchase and sell sexual services. Only one article considers data relating to third parties not directly exchanging sexual services for consideration. This study includes “individuals who do (or did since the year 2000) for (direct or indirect) financial compensation or benefit, supervise, control and/or take part in the coordination of the labour process (what s/he does, when and where) and/or the labor practices (how s/he works) of an adult sex worker”.¹³² Thus, none of the articles consider the experiences of other populations potentially impacted by prostitution and prostitution laws, who were directly in the contemplation of Parliament in enacting those laws.

Some of the articles located in the literature review include data about participants engaged in activities falling outside of sexual services for consideration, as that phrase has been interpreted by courts in Canada.¹³³ One article, for example, includes “dancers and porn actors” and “live erotic performances”.¹³⁴ While the sex industry is often described to include activities beyond prostitution, when evaluating evidence about sex work it is important to be vigilant as to whether experiences of non-prostitution participants are included, particularly when the goal of research is to provide an analysis relevant to evaluating the constitutionality of prostitution-specific laws.¹³⁵

Thus, the peer-reviewed empirical research identified in this scoping review focusses on the experiences of sex workers. Almost nothing is known about the experiences of other prostitution participants, notably individuals who do or

131. See Raven R Bowen, “Squaring Up: Experiences of Transition from Off-Street Sex Work to Square Work and Duality – Concurrent Involvement in Both – in Vancouver, BC” (2015) 52:4 *Can Rev Sociology* 429; Julie Ham & Fairleigh Gilmour, “We All Have One’: Exit Plans as a Professional Strategy in Sex Work” (2017) 31:5 *Work, Employment & Society* 748.

132. Stacey Hannem & Chris Bruckert, “I’m Not a Pimp but I Play One on TV’: The Moral Career and Identity Negotiations of Third Parties in the Sex Industry” (2017) 38:7 *Deviant Behavior* 824 at 827.

133. See generally Haak, “Conceptual Clarity”, *supra* note 14 at 84–85; Department of Justice, “Technical Paper”, *supra* note 15 (where the Department of Justice identified that “[i]n most cases, physical contact, or sexual interaction, between the person providing the service and the person receiving it is required” at 5–6).

134. Bowen, *supra* note 131 at 438.

135. Whether the law ought to deal differently with prostitution than with other activities falling generally within the description of sex work is a normative question outside the scope of this article. The law in Canada currently treats prostitution (the exchange of sexual services for consideration) as distinct from other activities often included in the term sex work.

did engage in prostitution as a result of trafficking. Very little is known about the experiences of those who have exited prostitution. None of the studies examine the impact of prostitution on women and girls more broadly, or the impact of prostitution on the communities in which it takes place. In light of the concerns and populations in the contemplation of Parliament in choosing Canada's current policy approach, the experiences of all these populations are relevant.

D. Geographic Limitations

The literature identified in this review is not geographically comprehensive. Of the fifty-nine articles published between 2014 and 2019, over seventy per cent (forty-two articles) include data from only one urban center in Canada—Vancouver. In addition, over half of the articles use data from one longitudinal qualitative and ethnographic study in that city—An Evaluation of Sex Workers' Health Access (AESHA).¹³⁶ Data from a second study in Vancouver were used for at least two of the identified articles, as well as some additional now-published articles located outside of this review.¹³⁷

Vancouver's response to prostitution and sex work is unique in Canada. Between 1978 and 2002, more than sixty women, many of whom were street-based sex workers or prostitutes, were murdered or went missing from Vancouver's Downtown Eastside. In December 2010, the provincial government in British Columbia launched the Missing Women Commission of Inquiry to investigate police errors and wrongdoing in these cases. These missing and murdered women galvanized the sex workers' rights movement in Vancouver.¹³⁸ In 2000, Vancouver officially adopted a harm reduction approach. Alongside

136. For a discussion of this study, see Julie Sou et al, "Structural Determinants of Inconsistent Condom Use with Clients Among Migrant Sex Workers: Findings of Longitudinal Research in an Urban Canadian Setting" (2015) 42:6 *Sexually Transmitted Diseases* 312 at 315; Andrea Krüsi, Brenda Belak & Sex Workers United Against Violence, "'Harassing the Clients is Exactly the Same as Harassing the Workers': Street-Based Sex Workers in Vancouver" in Elya M Durisin, Emily van der Meulen & Chris Bruckert, eds, *Red Light Labour: Sex Work Regulation, Agency, and Resistance* (Vancouver: University of British Columbia Press, 2018) 213 at 215–16.

137. Sex, Power, Agency, Consent, Environment & Safety (SPACES) is a research study about people of all genders who are involved in the off-street sex industry in Vancouver as service providers (sex workers), clients, and third party facilitators and support staff. See SPACES Team, *Recommendations from the Off-Street Sex Industry in Vancouver* (Vancouver: University of British Columbia School of Nursing, 2016), online (pdf): <open.library.ubc.ca/media/download/pdf/52383/1.0340040/5>.

138. For a discussion of the sex worker movement in Vancouver, where rights activists began to organize community-based initiatives in the 1980s and where, since that time, more than twenty-six sex worker rights groups have formed, see Joyce Arthur, Susan Davis & Esther

a devolution of social programs, prostitution was prioritized as a public health problem.¹³⁹ In light of a perceived absence of political will to respond to the needs and concerns of sex workers in Vancouver, activists increased their efforts to offer the health and safety supports that the government did not and does not offer.

Scholars consistently point to the need for more context-specific research about prostitution. In 2015, the Scottish Centre for Crime and Justice Research assessed existing evidence on the impact of the criminalisation of the purchase of sex. Consistent with observations made throughout this article, its conclusion begins by identifying the following:

The available evidence is variable in quality and focus, highlighting that evidence can only provide so much “scientific” knowledge in this area. All evidence is partial and open to dispute and challenge. Assessing the evidence available illuminates the challenging nature of conducting research in the area of prostitution and the difficulties of evidencing legislative changes which are likely to be located within wider social and political contexts.¹⁴⁰

The authors conclude that prostitution legislation must be context-specific, identifying that implementation of the abolitionist model in Sweden was situated in a context of existing exit services, education campaigns linking prostitution with human trafficking, and funds to support police in meaningfully implementing and enforcing the new laws. Drawing on their work exploring prostitution policies in Europe, Crowhurst and Skilbrei likewise identify the importance of prioritizing context-specific approaches and analysis, concluding

Shannon, “Overcoming Challenges: Vancouver’s Sex Worker Movement” in van der Meulen, Durisin & Love, *supra* note 82, 130. See also Tamara O’Doherty, “Illustrating the Limits of Law in Achieving Justice and Dignity for Sex Workers: The Canadian Experience” (Paper delivered at the Law & Society Association Annual Meeting, Washington, 30 May 2019) [unpublished] (where the author discussed British Columbia’s approach to sex work, including its unique municipal laws and enforcement strategies).

139. See Graham, *supra* note 116 at 61.

140. Margaret Malloch, Laura Robertson & Emma Forbes, *Evidence Assessment of the Impacts of the Criminalisation of the Purchase of Sex: A Review* (Scotland: Scottish Centre for Crime and Justice Research, 2017) at 37. See also Hendrik Wagenaar, “Policy as Practice: Explaining Persistent Patterns in Prostitution Policy” (2018) 57:3 *Howard J Crime & Justice* 379 (where the author suggests that precise and reliable data on even the most basic aspects of prostitution, such as the number of people engaging in it, is lacking at 380).

that a “best model” for all of Europe, for example, might not be possible.¹⁴¹ Hendrick Wagenaar similarly notes that prostitution policy must confront what he refers to as “‘domain-specific’ obstacles, impediments, demands, and restrictions that shape and constrain the possibilities of concerted action”.¹⁴²

It is important for research about prostitution, sex work, and sex trafficking in Canada to be geographically comprehensive. While criminal law is a matter of federal jurisdiction, if prostitution is decriminalized in whole or in part, questions of provincial and municipal jurisdiction arise. The need for prostitution research to be geographically comprehensive and interprovincial was identified as a research priority in Canada in 2001.¹⁴³ Where context is frequently used to refer to a specific country, context within Canada certainly includes the distinct features of each province and municipality, including, but not limited to, the socio-structural supports available to those engaged in prostitution, and how and whether sex work can be disaggregated from sex trafficking in the context of prostitution. In discussing the limitations of their study undertaken in Vancouver, one group of researchers identifies some of these concerns:

The pilot program was also implemented in an urban context where there has already been concerted efforts by various local actors (i.e. community organizations, police) to improve the well-being of sex workers. However, urban contexts vary significantly across Canada in [this] regard. It is unlikely that the community empowerment approach outlined will be successful in settings that have not developed an environment [where] sex workers are viewed as active members of the community and deserving non-judgmental health care and other services, similar to other citizens.¹⁴⁴

141. See Crowhurst & Skilbrei, *supra* note 88.

142. Hendrik Wagenaar, “Introduction: Prostitution Policy in Europe—An Overview” in Synnøve Økland Jahnsen & Hendrik Wagenaar, eds, *Assessing Prostitution Policies in Europe* (Abingdon: Routledge, 2018) 1 at 7.

143. See Department of Justice, “Research Gaps”, *supra* note 129 at 8–9.

144. Cecilia Benoit et al, “Sex Workers as Peer Health Advocates: Community Empowerment and Transformative Learning Through a Canadian Pilot Program” (2017) 16:1 *Intl J for Equity in Health* 160 at 174. See also Cecilia Benoit, Nadia Ouellet & Mikael Jansson, “Unmet Health Care Needs Among Sex Workers in Five Census Metropolitan Areas of Canada” (2016) 107:3 *Can J Public Health* 266 (where the authors identify that health and social services systems vary across provinces and may influence their interpretations of data, but conclude that “it is not possible to control for such geographic variation” at 270).

At least one other scholar has also identified regional variation in law and the implementation of criminal prostitution laws in Canada, suggesting this is a largely unexploited new opportunity for future research.¹⁴⁵

IV. Implications and Recommendations

The limited scope of peer-reviewed empirical research about prostitution, sex work, and sex trafficking in Canada since the *PCEPA* was enacted could bias decisions about the constitutionality of Canada's new criminal prostitution laws in favour of the concerns of one relevant population, and obscure the experiences and concerns of other populations relevant to Parliament in enacting the *PCEPA*. This section explains that the existing body of peer-reviewed empirical research about prostitution, sex work, and sex trafficking in Canada reflects what policy studies scholars have termed issue bias, and considers how this issue bias may have impacted the first two constitutional challenges to Canada's new criminal prostitution laws. This section also makes some preliminary suggestions about the good governance of evidence to avoid the potential that issue bias in the body of existing empirical literature could bias judicial decision-making in areas of complex public policy towards one population in the contemplation of Parliament in policy-making and remove political decisions from Parliament to the courts under the guise of expert or legislative fact evidence. I express concern over how incomplete knowledge production could politicize judicial decision-making and circumscribe the potential range of policy options available to Parliament through privileging some knowers, and some ways of knowing, over others.

B. Acknowledging Issue Bias in Peer-Reviewed Empirical Literature

The peer-reviewed empirical literature identified in this review reflects what Parkhurst has termed issue bias. It is conducted entirely from within one theoretical and normative framing of a complex and contested area of public policy. As a result, it focusses almost exclusively on the experiences and concerns of one relevant population—sex workers—who represent a subset of all those engaging in prostitution and only one population in the contemplation of Parliament in deciding to enact the current prostitution policy. It notably excludes other relevant populations, including those who have been trafficked, those who have exited prostitution, women and girls in Canada who may be impacted by

145. See Lauren Jones, "Canadian Prostitution Law: History and Market Impacts" in Scott Cunningham & Manisha Shah, eds, *The Oxford Handbook of the Economics of Prostitution* (New York: Oxford University Press, 2016) 391 (where the author provides an overview of developments in Canadian prostitution law to facilitate future economics research).

prostitution and by the policy approach taken to it, and the communities in which prostitution takes place.¹⁴⁶ It largely ignores or obscures the concerns of anyone other than active sex workers who may be impacted by prostitution, prostitution policy choices, prostitution-specific laws, or the absence of such laws. Some of the literature also includes individuals whose activities in the sex industry would not constitute sexual services for consideration as that term has been interpreted by Canadian courts. It is principally concerned with the sexual health of sex workers, rather than their emotional health or the violence they experience in prostitution. It is geographically limited in scope.

The issue bias reflected in the empirical literature may result from several different factors. First, it is difficult to access some relevant populations. Scholars consistently acknowledge that data about prostitution, sex work, and sex trafficking is hard to gather.¹⁴⁷ It appears to be generally well accepted that due to the hidden nature of prostitution, it is not possible to generate a representative or statistically relevant sample of those who do or have engaged in prostitution.¹⁴⁸ This limitation is expressed in a variety of ways in the articles located in this literature review. Some authors note: “It is not possible to gain a statistically representative sample of a hidden population such as sex workers.”¹⁴⁹ Others identify: “As is the case with many marginalised, stigmatised and hidden groups, it is impossible to draw a statistically representative sample of clients. As a result, our findings cannot be taken to be representative of the entire client population in Canada.”¹⁵⁰ Benoit et al. suggest some reasons for this, identifying that bias may result from failures in inclusivity: “The sample may have been biased through non-participation by those who did not wish to talk about their past or current situations, by those who had fears over breaches in confidentiality or those who were prevented from participating.”¹⁵¹

146. See Michelle Madden Dempsey, “Sex, Work, and Criminalization” in Alan Bogg et al, eds, *Criminality at Work* (Oxford, UK: Oxford University Press, 2020) 173.

147. See e.g. Benoit et al, “Prostitution Problem”, *supra* note 41 (where the authors discuss methodological challenges to prostitution research at 1918).

148. Frances Shaver attributes this difficulty to three things: the size and boundaries of the population are unknown; due to stigmatization and illegality, individuals may refuse to participate in research or give unreliable answers; and ideological framings of victimhood or labour fail to sufficiently account for nuanced experiences. See Frances M Shaver, “Sex Work Research: Methodological and Ethical Challenges” (2005) 20:3 *J Interpersonal Violence* 296. See also Haak, “Legislative Objectives”, *supra* note 4 at 662, n 19.

149. Cecilia Benoit et al, “Lack of Confidence in Policy Creates a ‘Blue Ceiling’ for Sex Workers’ Safety” (2016) 42:4 *Can Pub Pol’y* 456 at 459.

150. Chris Atchison & Patrick John Burnett, “The Social Dynamics of Safe Sex Practices Among Canadian Sex Industry Clients” (2016) 38:6 *Sociology Health & Illness* 939 at 953.

151. Benoit et al, “Would You Think”, *supra* note 118 at 743–44

Data about the incidence of trafficking and about the experiences of those involved in it are particularly hard to obtain. Jody Raphael argues that researchers will never be able to fully ascertain the prevalence of trafficking in prostitution, in part due to the clandestine nature of prostitution.¹⁵² Ronald Weitzer identifies that prostitution varies tremendously by location “and in how it is practiced, organized, and experienced by participants”,¹⁵³ and suggests that estimating the size of the trafficking problem, for example, is only possible at the micro level, if at all.¹⁵⁴ Researchers from Georgetown University undertook a study for the United States National Institute of Justice to identify and analyze the state of empirical research on human trafficking, noting the importance of this literature for both policy discussions and programming for victims of trafficking. They conclude that despite increased interest in human trafficking, little systematic, empirically grounded research has been done on the issue; methodologies to study human trafficking are in their infancy, and the need to deepen knowledge about this topic is urgent.¹⁵⁵

Lack of conceptual clarity between prostitution and sex work may also contribute to this issue bias. As discussed, the word prostitution refers to an activity, no matter how or by whom participation in that activity is motivated,

152. See Jody Raphael, “The Confluence of Gender and Poverty: The Shameful History of the Trafficking of Poor Persons for Sexual Exploitation” (2016) 4:1 *Indiana JL & Social Equality* 77 at 79–80. See also Hayli Millar, Tamara O’Doherty & Katrin Roots, “A Formidable Task: Reflections on Obtaining Legal Empirical Evidence on Human Trafficking in Canada” (2017) 8:1 *Anti-Trafficking Rev* 34.

153. Ronald Weitzer, “Sex Trafficking and the Sex Industry: The Need for Evidence-Based Theory and Legislation” (2011) 101:4 *J Crim L & Criminology* 1337 at 1368.

154. See *ibid* at 1351.

155. See Elżbieta Goździak & Micah Bump, *Data and Research on Human Trafficking: Bibliography of Research-Based Literature* (Washington, DC: Georgetown University Institute for the Study of International Migration, 2008); Elżbieta Goździak et al, *Bibliography of Research-Based Literature on Human Trafficking: 2008-2014* (Washington, DC: Georgetown University Institute for the Study of International Migration, 2015). See also May-Len Skilbrei & Marianne Tveit, “Defining Trafficking Through Empirical Work: Blurred Boundaries and Their Consequences” (2008) 12:1 *Gender, Technology & Development* 9 (where the authors encourage researchers to be vigilant as to the differences between trafficking and migration). Notwithstanding the significant difficulties associated with gathering data about human trafficking, scholars in Canada argue that policy cannot meaningfully redress the harms of human trafficking in the absence of empirical evidence. See e.g. Kamala Kempadoo et al, *Challenging Trafficking in Canada: Policy Brief* (Toronto: York University Centre for Feminist Research, 2017); Hayli Millar & Tamara O’Doherty, “The Palermo Protocol & Canada: The Evolution and Human Rights Impacts of Anti-Trafficking Laws in Canada (2002-2015)” (15 October 2015), online (pdf): [ICCLR <icclr.org/wp-content/uploads/2019/06/Palermo-Project-Key-Findings-Report-15-October-2015-with-copyright-2.pdf>](http://ICCLR.org/wp-content/uploads/2019/06/Palermo-Project-Key-Findings-Report-15-October-2015-with-copyright-2.pdf).

while sex work generally refers to that activity and others when engaged in as a matter of choice or in the absence of third party coercion. However, the term sex work is increasingly seen to be more progressive than prostitution and is often used as if interchangeable with prostitution. Without a clear understanding of whose experiences are and are not reflected in research about sex work and with sex workers (as opposed to research about the activity of prostitution), the lack of empirical research with and about other populations engaging in or impacted by prostitution will continue to be obscured. Issue bias in research about prostitution and sex work in Canada may also result from the openly political agenda of researchers working in the field,¹⁵⁶ the failure of funders to appreciate the distinct experiences of differently situated populations,¹⁵⁷ and the increased focus on harm reduction or minimization as a distinct policy goal.¹⁵⁸

The theoretical framework grounding the harm reduction research identified in this review stands in opposition to the theoretical framework grounding Canada's new prostitution policy. Some of the concerns relevant to Parliament in enacting the *PCEPA*—notably sex equality and the inability to avoid violence—may be less amenable to testing through traditional social science research methods. Without a clear understanding of which harms can and cannot be measured by empirical methods, overreliance on empirical research has the potential to bias decision-making towards those things that can be empirically measured. This illustrates why policy-making in areas of contested social

156. See e.g. Laura Connelly & Teela Sanders, “Disrupting the Boundaries of the Academe: Co-Creating Knowledge and Sex Work ‘Academic-Activism’” in Sandra Walklate et al, eds, *The Emerald Handbook of Feminism, Criminology and Social Change* (Beaverton: Emerald Publishing Limited, 2020) (where the authors note that sex work scholarship is applied in nature, aiming to improve the lived realities of sex workers, including by contributing to and lobbying for social change). See also “CRN06 Sex, Work, Law and Society” (last modified 26 February 2021), online: *Law & Society Association* <lawandsociety.org/cm06> (where researchers consider sex work in a labour framework and promote the dissemination of scholarship from this perspective, including the use of scholarship to promote the decriminalization of sex work in the countries in which the research is conducted). For a discussion of “knowledge production” in the context of prostitution policy, see Skilbrei & Holmström, *Nordic Region, supra* note 49 at 37–69.

157. My intuition is that those funding research about and with sex workers are likely unaware of the populations and concerns not considered in these research projects. An analysis of publicly funded research projects with this question in mind would be useful to ensure funding is granted to study the other populations and concerns relevant to questions of constitutionality and identified in this article.

158. Political and policy goals impact the socio-structural supports and programs that receive funding. Some have expressed concern over constraints on how organizations supporting sex workers' rights are permitted to use funds they receive to support anti-trafficking initiatives. See e.g. Alison Clancey, Noushin Khushrushahi & Julie Ham, “Do Evidence-Based Approaches Alienate Canadian Anti-Trafficking Funders?” (2014) 3:1 *Anti-Trafficking Rev* 87.

values is not and cannot be based solely on social science evidence. Parliament made a political choice as among the concerns and populations reflected in the submissions and evidence it heard.¹⁵⁹ Whether the choice they made is constitutionally permissible is a question of whether and how the *Charter* constrains the range of available policy choices, including importantly whether and how the substantive laws and evidentiary rules applied in *Charter* litigation may circumscribe the range of concerns and populations that may or must drive policy choices in the area of commercial sex. That range of concerns and populations should not be unwittingly circumscribed by what can and cannot be empirically measured.

B. The Use of Empirical Research in the First Constitutional Challenges to the PCEPA

In both *Boodhoo I* and *Anwar*, the first two constitutional challenges to criminal laws enacted with the *PCEPA*, individuals were charged under the Procuring Offence, the Material Benefit Offence, and the Advertising Offence.¹⁶⁰ None of the accused were themselves sex workers. In both cases, the accused challenged the constitutionality of the offences relying on reasonable hypotheticals, a device that allows judges to evaluate whether a law has an adverse impact on third parties other than the accused.¹⁶¹ The hypotheticals were constructed around situations where sex workers wished to take measures found, including in *Bedford*, to reduce their risks of experiencing harm while engaging in prostitution, a legal activity in Canada when *Bedford* was heard. The sex workers in the hypotheticals engaged in prostitution by choice, and there was no mention of them experiencing any harms associated with their engaging in prostitution.

In *Boodhoo I*, the Ontario Superior Court of Justice upheld the constitutionality of the three impugned criminal offences. While the Court based its decision in part on evidence contained in the Parliamentary Record, no other expert or legislative fact evidence is referenced in the decision.¹⁶² In

159. For an overview of the process leading to the enactment of the *PCEPA*, see *Anwar*, “Parliamentary Record”, *supra* note 32.

160. In *Boodhoo*, the charges related to a person under the age of eighteen.

161. See Lauren Witten, “Proportionality as a Moral Process: Reconceiving Judicial Discretion and Mandatory Minimum Penalties” (2017) 48:1 *Ottawa L Rev* 81 at 87–88; Debra M Haak, “The Case of the Reasonable Hypothetical Sex Worker: Determining the Constitutionality of Canada’s New Prostitution Laws” (Paper delivered at the Law & Society Association Annual Meeting, Washington, DC, June 2019) [unpublished] (where the author discusses the potential implications of the use of reasonable hypotheticals in evaluating the constitutionality of the new commodification offences).

162. See *Boodhoo I*, *supra* note 6 at paras 22–23, 52.

that case, following their convictions, the offenders applied for an order declaring the impugned offences unconstitutional on the basis that they were overbroad and grossly disproportionate, offending section 7 of the *Charter*; and that the Advertising Offence was arbitrary, offending section 7 of the *Charter* and also offended section 2(b) of the *Charter*.¹⁶³ The applicants founded their section 7 arguments on the contention that the impugned provisions had an unconstitutional impact on individuals referred to in the reasonable hypotheticals as “escorts”,¹⁶⁴ apparently used interchangeably by the Court with the term “sex workers”, neither of which was defined. In dismissing the application, the Court held that none of the offences were overbroad or grossly disproportionate to their objectives, nor was the Advertising Offence arbitrary. While the Court found that the limitation on advertising sexual services was a limit on freedom of expression, the application judge held that the Advertising Offence was justified by section 1 of the *Charter*, pointing to the pressing and substantial concerns on which Parliament based their objectives in enacting the *PCEPA*. These pressing and substantial concerns included: that the majority of those who sell their own sexual services are women and girls, with Indigenous women and girls disproportionately represented in prostitution; that prostitution is an extremely dangerous activity that poses a risk of violence and psychological harm regardless of venue or legal framework; and that trafficking occurs in prostitution.¹⁶⁵ The Court also found the equality concerns on which Parliament based the legislative objectives of the *PCEPA* to be pressing and substantial concerns.¹⁶⁶

163. See also *Boodhoo II*, *supra* note 6, where the applicants also argued that the mandatory minimum sentences constituted cruel and unusual punishment in violation of section 12 of the *Charter*. These were found to be unconstitutional. The court also expressed displeasure with the fact that the application was brought after the convictions and after a five-week trial.

164. *Boodhoo I*, *supra* note 6 at para 14.

165. See *ibid* at para 52.

166. In *Boodhoo I*, the Court held:

Prostitution reinforces gender inequalities in society at large by normalizing the treatment of primarily women’s bodies as commodities to be bought and sold. In this regard, prostitution harms everyone in society by sending the message that sexual acts can be bought by those with money and power. Prostitution allows men, who are primarily the purchasers of sexual services, paid access to female bodies, thereby demeaning and degrading the human dignity of all women and girls by entrenching a clearly gendered practice in Canadian society.

See *ibid*. The Court also identified as a pressing and substantial concern the negative impact of prostitution on the communities in which it takes place.

By contrast, in *Anwar*, where the court heard evidence from four expert witnesses, the Ontario Court of Justice found the same three offences unconstitutional.¹⁶⁷ The constitutional challenge in that case was founded on a contention that the impugned provisions violated the security of the person of, variably, “sex workers”,¹⁶⁸ “escorts and other sex workers”,¹⁶⁹ and/or “escorts, prostitutes, and other sex workers”.¹⁷⁰ No definition of escort, prostitute, or sex worker was provided by the applicants or the court. The applicants in *Anwar* argued that the impugned provisions deprived them of the right to security of the person guaranteed by section 7 of the *Charter*; that the Advertising Offence prohibited and restricted commercial expression, thereby infringing and denying freedom of expression guaranteed by section 2(b) and freedom of association guaranteed by section 2(d); and that the impugned provisions were of no force and effect because the term “sexual services” was unconstitutionally void for vagueness,¹⁷¹ depriving the applicants of their right to liberty guaranteed by section 7.

Exclusive reliance on legislative fact evidence, including empirical research identified in this literature review, appears to have impacted the court’s finding that the laws were unconstitutional in *Anwar*. The application judge referred to the applicants’ two experts qualified in the field of social science (sociology and criminology) as taking “an evidence-based approach to the study of prostitution” and contributing “significant evidence-based opinions” to the factual underpinnings of the case.¹⁷² These two experts, some of whose research was located in the literature review conducted for this article, were qualified to provide evidence within the scope of “[s]ocial science research and theory on the structure and operation of the sex industry in Canada and other jurisdictions, and in the legal regimes surrounding the sex industry in

167. See *supra* note 7 at para 21. The witnesses were qualified by agreement of the parties, meaning that the court undertook no gatekeeping function in allowing the evidence to be heard. The experts provided their evidence in affidavits and *viva voce*. The scope of the experts’ expertise was as set out in their affidavits and was agreed upon by the parties.

168. See *Anwar*, “Applicants’ Factum”, *supra* note 84.

169. See *R v Anwar*, 2020 ONCJ 103 (Notice of Application Re: Constitutionality of ss 286.2, 286.3 and 286.4 of the *Criminal Code* at 2).

170. See *Anwar*, “Constitutional Questions”, *supra* note 82.

171. See also Andrea Sterling & Emily van der Meulen, “We Are Not Criminals’: Sex Work Clients in Canada and the Constitution of Risk Knowledge” (2018) 33:3 CJLS 291 at 299. But see *Prostitution Reference*, *supra* note 13 (where the Supreme Court of Canada found that section 195.1(1) of the *Criminal Code*, containing the term “sexual services”, was not impermissibly vague). For a discussion of the term “sexual services for consideration” and how it has been interpreted by the courts, see Department of Justice, “Technical Paper”, *supra* note 15 at 5.

172. *R v Anwar*, *supra* note 7 at para 78 (Chris Atchison and Andrea Sterling).

Canada and other jurisdictions”.¹⁷³ Both conduct their research within a sex work paradigm and promote harm reduction and the removal of criminal laws directly applicable to sex work.¹⁷⁴ Individuals who were trafficked or coerced by third parties into prostitution were specifically excluded from one of the expert’s research.¹⁷⁵ The application judge accorded no weight to the Crown’s expert witnesses, whose expertise related directly to concerns and populations in the contemplation of Parliament in enacting the *PCEPA*. These experts were qualified to give evidence on “the study of the overrepresentation of Indigenous women and girls in prostitution”¹⁷⁶ and “the theory, research and policy on prostitution as a practice in gender inequality”.¹⁷⁷ In according their evidence no weight, the application judge found that they lacked impartiality and objectivity, in part because they were unwilling to separate human trafficking and child prostitution from “the concept of the prostitution of adults who were not coerced into sex work”.¹⁷⁸ As noted, whether this distinction can or should be drawn in policy-making is contested. In enacting *PCEPA*, Parliament took the view that human trafficking could not and should not be separated from the activity of prostitution. The court made little of the evidence contained in the Parliamentary Record.¹⁷⁹

Both of the Crown’s expert witnesses in *Anwar* opined that no research about prostitution is value-free. Cherry Smiley began her evidence by identifying that all research about prostitution is subjective and controversial, and that researchers’ subjective positions impact the language they use, and the research questions they do and do not ask.¹⁸⁰ Dr. Maddy Coy likewise said that claims of objectivity should be viewed with skepticism, noting it to be an established tenet of social scientific research that objectivity is not possible and that “we all carry with us values and understandings . . . the issue is how those are made transparent in terms of research design and analysis”.¹⁸¹ She added that those who understand prostitution as work focus their research questions on the conditions in which prostitution operates, rather than on prostitution itself.¹⁸²

173. See *R v Anwar*, *supra* note 7 at paras 24, 40.

174. See *Anwar*, “Atchison Testimony”, *supra* note 115 at 33–34; *R v Anwar*, 2020 ONCJ 103 (Testimony of Andrea Sterling, transcript of 14 February 2018 at 15).

175. See *R v Anwar*, *supra* note 7 at para 41.

176. *Ibid* at para 52 (Cherry Smiley).

177. *Ibid* at para 62 (Dr. Maddy Coy).

178. *Ibid* at paras 79–82.

179. See *Boodhoo I*, *supra* note 6.

180. See *Anwar*, “Smiley Testimony”, *supra* note 58 at 155–56.

181. *R v Anwar*, 2020 ONCJ 103 (Testimony of Dr. Maddy Coy, transcript of 16 March 2018 at page 11).

182. See *ibid*.

C. Good Governance of Evidence About Prostitution and Sex Work

To contend with concerns over how bias could impact the policy-making process, Parkhurst recommends what he refers to as the good governance of evidence. Citing David Cash et al., he notes the importance of each of credibility, salience, and legitimacy in evaluating and relying on evidence in policy-making:

Credibility involves the scientific adequacy of the technical evidence and arguments. Salience deals with the relevance of the assessment to the needs of decision-makers. Legitimacy reflects the perceptions that the production of information and technology has been respectful of stakeholders' divergent values and beliefs, unbiased in its conduct, and fair in its treatment of views and interest.¹⁸³

Credibility relates to the question of technical bias: is the evidence scientifically valid and fairly used? Salience relates to the question of issue bias: does the evidence adequately reflect the populations and concerns relevant to policy-makers? Legitimacy refers to the process through which those assessments are seen to be made: how should legal decision-makers contend with the issue of evidentiary bias in a manner that takes the issue seriously? In this article, I do not consider the credibility of the evidence identified. I am primarily concerned with the salience of the body of evidence about prostitution, sex work, and sex trafficking in Canada, and how what is known and not known relates to the needs of judicial decision-makers in circumstances where the experiences of populations in the direct contemplation of Parliament, and concerns of particular relevance to Parliament, are not reflected (or are only minimally considered) in the body of available peer-reviewed empirical evidence. I conclude by making some observations relevant to legitimacy and how the available evidence might be used in constitutional litigation in a way that respects divergent values and beliefs, is unbiased, and fairly treats divergent and relevant concerns reflected in the policy-making process.

Recognizing the issue bias in the body of peer-reviewed empirical research is important because this bias has the potential to depoliticize what was in fact a political decision, and privilege the voices of some populations and some concerns over others in evaluating the constitutionality of that political decision. This could adversely affect the legitimacy of constitutional decisions about Canada's current criminal commodification offences. More attention must be paid to how evidence about prostitution, sex work, and sex trafficking

183. Parkhurst, *Politics*, *supra* note 33 at 109, citing David W Cash et al, "Knowledge Systems for Sustainable Development" (2003) 100:14 Proceedings National Academy Sciences 8086 at 8086.

is used by courts.¹⁸⁴ Constitutional challenges to Canada's current and former criminal prostitution laws position claims that the laws increase risks for sex workers (and therefore violate the *Charter* rights of sex workers) in opposition to claims that the laws are necessary to further equality rights, because prostitution cannot be made safe and adversely impacts the women and girls who engage in it and the communities in which it takes place. Recognizing the conceptual distinction between prostitution and sex work exposes the distinction between those prostitution participants claiming a violation of rights (sex workers) and the other populations, including other prostitution participants, whose interests were central to Parliament's policy decision about how to contend with the commercial exchange of sexual services in Canada.

Issue bias could be corrected through further research to generate a more complete and comprehensive understanding of prostitution in Canada and of the effectiveness and effects of Canada's new prostitution policy and accompanying criminal laws. That research should, wherever possible, include the populations in the contemplation of Parliament in enacting the current prostitution laws and policy, including individuals who have exited prostitution, individuals who have or do exchange sexual services for consideration as a result of human trafficking,¹⁸⁵ and individuals engaging in prostitution who do not identify as sex workers.¹⁸⁶ It should be more geographically comprehensive. More research on the violence associated with prostitution, particularly how and whether violence might be reduced, and for whom violence might or might not be reduced through taking identified measures is critical. Research should also include the impact of prostitution, and prostitution policy and laws, on women, girls, and the communities in which prostitution takes place. Beyond that, some research must be conducted outside of a theoretical framing of sex work as work, and outside of a harm reduction lens, to consider prostitution itself as a cause of harm. This research would allow for a consideration of how and whether the harms caused by prostitution itself might be reduced or eliminated.

In the absence of a more complete body of peer-reviewed empirical research about prostitution, sex work, and sex trafficking in Canada, judges tasked

184. See generally Phillips, *supra* note 21 (where the author explores the epistemological implications of the wide-ranging fact-finding processes that have come to characterize progressive constitutional challenges to legislation, especially under section 7 of the *Charter*).

185. See e.g. Robert W Christmas, "Modern Day Slavery and the Sex Industry: Raising the Voices of Survivors and Collaborators While Confronting Sex Trafficking and Exploitation in Manitoba, Canada" (PhD Thesis, University of Manitoba, 2017) [unpublished]; Robert Christmas, *Sex Industry Slavery: Protecting Canada's Youth* (Toronto: University of Toronto Press, 2020).

186. See note 17 and the accompanying text.

with evaluating the constitutionality of Canada's new criminal prostitution laws must attend to what is known and not known about the different populations and concerns relevant to Parliament in choosing a Nordic model policy approach for Canada, and to the impact of theoretical and normative framing on how research has been, might be, and is conducted. They must do this when they consider scholarly research, and also when they apply relevant constitutional tests. Empirical evidence usually comes before the court through expert witnesses.¹⁸⁷ There are at least two ways courts might better recognize the limited scope of the body of peer-reviewed empirical evidence. The first is through appropriately construing and meaningfully attending to the expert witnesses' scope of expertise, asking not only whether a witness is an expert, but whether they are an expert on the subjects about which they are offering evidence.¹⁸⁸ As Doherty JA cautioned in *R v Abbey*: "[T]he trial judge sets not only the boundaries of the proposed expert evidence but also, if necessary, the language in which the expert's opinion may be proffered so as to minimize any potential harm to the trial process".¹⁸⁹ Expertise about sex work, for example, is not necessarily expertise about prostitution. Expertise about the harms associated with sex work, and how those harms might be reduced, is not necessarily expertise about whether those harms can, in fact, be reduced, for whom, and in what circumstances. Both judges and lawyers might more directly question whether violence can be meaningfully reduced and, if so, for whom. Evidence about how to make sex work *safer* is not expertise about whether prostitution can be made *safe*, for whom, and how. Maddy Coy, Meagan Tyler, and Cherry Smiley recently asked: "How much harm is acceptable for women to live with if harm reduction is the goal? And who decides?"¹⁹⁰ Reducing the risk of experiencing STIs, while important, is not necessarily linked to or reflective of a potential to reduce the risk of violence. Reducing the risk of harm for those engaging in sex work may obscure the fact that for some, engaging in the activity of prostitution is itself harmful. A clear

187. For a summary of the law around admissibility of expert evidence, see generally Lisa Dufraimont, "Update on Admissibility of Expert Evidence" (Paper presented to the Law Society of Upper Canada, Six Minute Criminal Lawyer 2016, 9 April 2016) [unpublished]; Lisa Dufraimont, Case Comment on *White Burgess Langille Inman v Abbott and Haliburton Co.*, (2015) 18 CR (7th) 312.

188. See David Paciocco, "Taking a 'Goudge' out of Bluster and Blarney: An 'Evidence-Based Approach' to Expert Testimony" (2009) 13:2 Can Crim L Rev 135 at 140; *R v Sekhon*, 2014 SCC 15 at paras 46–48. Relatedly, courts might better gatekeep the relevance of the evidence they are offering.

189. 2009 ONCA 624 at para 62.

190. Coy, Smiley & Tyler, *supra* note 116 at 1931.

recognition of the distinction between sex work and prostitution, for example, could help ensure the legitimacy of the process whereby peer-reviewed empirical evidence is received by the court and used in constitutional decisions.¹⁹¹

The second way courts might more meaningfully attend to what is known and not known about prostitution, sex work, and sex trafficking is through an expanded understanding of what might constitute bias in prostitution research. The concerns raised by the Crown's experts in *Anwar*, and their implications on the scope of evidence proffered by the applicants' expert witnesses, were not acknowledged by the judge, who instead relied exclusively on the evidence of the applicants' experts in holding that three of the new criminal prostitution laws were unconstitutional. The applicants' experts were not, in fact, objective and neutral, but as subjective and value-laden as the Crown's experts admitted to being. They too began their research from within one theoretical and normative framing of the issue, focussed as a result on harm reduction in sex work, and referred to a body of peer-reviewed empirical literature that reflects issue bias.

The scope and limits of available evidence must also be front of mind for judges in applying relevant constitutional tests. In assessing whether there has been a violation of sex workers' right to security of the person, for example, courts should clearly set out the nature of that right and seriously consider whether and how the impugned laws violate that right. As a preliminary matter, courts should carefully evaluate whether the circumstances set out in hypotheticals constitute an offence in light of the exemptions and immunities provided in the current legislative framework. Another important preliminary consideration is whether section 7 extends to protect economic and commercial decisions made by adults by choice.¹⁹² In considering whether a section 7 rights violation fails to accord with the principles of fundamental justice, courts must be vigilant as to the objectives of the impugned laws. The overall objective of the *PCEPA* is to reduce "the demand for prostitution with a view to discouraging

191. See also Paciocco, *supra* note 188 at 146–47 (where the author synthesizes the elements of an evidence-based approach to evaluating expertise from the Goudge Report, pointing to the fact that an expert must be objective and complete in collecting evidence).

192. Overall, the legislative scheme aims to reduce or eliminate the market for sexual services. This necessarily constrains the ability to engage in economic and commercial activity within that market. In a context where exchanging sexual services for consideration is unlawful, recognizing sex workers' right to security of the person post-*PCEPA* could expand the nature and scope of the right to security of the person to include economic rights, something Canadian courts have, to date, been reluctant to do. See e.g. *Siemens v Manitoba (AG)*, 2003 SCC 3 ("[t]he ability to generate business revenue by one's chosen means is not a right that is protected under s. 7 of the *Charter*" at para 46).

entry into it, deterring participation in it and ultimately abolishing it to the greatest extent possible”.¹⁹³

Section 1 must also be meaningfully considered, including in section 7 cases, because this is where the hard work of evaluating Parliament’s justification in balancing the interests of competing populations in policy-making takes place. In *Bedford*, McLachlin CJ highlighted the important distinction between section 7 and section 1 of the *Charter*, and left open the possibility that the government could establish that a section 7 violation was justified under section 1 depending on the importance of the legislative goal and the nature of the section 7 infringement.¹⁹⁴ The question under section 1 is whether “the negative impact of a law on the rights of individuals is proportionate to the pressing and substantial goal of the law in furthering the public interest”.¹⁹⁵ While few courts have taken up the challenge to reinvigorate section 1 with the power to justify infringement of a section 7 right,¹⁹⁶ both the nature of the right and rights infringement, and the pressing and substantial concerns motivating the impugned laws, are relevant to analysis of the constitutionality of the *PCEPA*. This analysis is all the more important in light of the Supreme Court of Canada’s decision in *Bedford* that a grossly disproportionate, overbroad, or arbitrary effect on one person is sufficient to establish a breach of section 7,¹⁹⁷ and

193. Department of Justice, “Technical Paper”, *supra* note 15 at 6. See generally Haak, “Legislative Objectives”, *supra* note 4.

194. The Supreme Court of Canada reasoned that, while rooted in similar concerns, section 7 and section 1 are analytically distinct because they ask different questions:

The question under s. 7 is whether the law’s negative effect on life, liberty, or security of the person is in accordance with the principles of fundamental justice. With respect to the principles of arbitrariness, overbreadth, and gross disproportionality, the specific questions are whether the law’s purpose, taken at face value, is connected to its effects and whether the negative effect is grossly disproportionate to the law’s purpose.

See *Bedford* SCC, *supra* note 2 at para 125. See also *ibid* at paras 129, 161–63.

195. *Ibid* at para 125.

196. For a recent consideration of this intersection and of the applicable tests, see *R v Sullivan*, 2020 ONCA 333. In *R v NS*, *supra* note 5, in finding the impugned commodification offences unconstitutional, no meaningful section 1 analysis was undertaken.

197. See *Bedford* SCC, *supra* note 2 at paras 123–27. But see *R v Michaud*, 2015 ONCA 585 at paras 146–50. There, the Court of Appeal for Ontario applied the law as set down by the Supreme Court of Canada in *Bedford* in finding a breach of section 7 of the *Charter*, but found it “problematic” to do so (in the context of safety regulation) for two reasons: the “singular or individual focus” in evaluating arbitrariness, overbreadth, and gross disproportionality as principles of fundamental justice, and the loosening of the strong language of deprivation in

the recent decision of the Ontario Court of Justice in *Boodhoo I* that the objectives of the Commodification Offences are pressing and substantial.

Conclusion

Scholars and activists in Canada increasingly call for “evidence-based research on the actual lived experiences of sex workers, and how various criminal law and regulatory approaches impact their human rights and dignity”.¹⁹⁸ However, empirical data about *sex work* do not directly produce evidence-based conclusions about *prostitution*. Rather, data are mediated by the choice of research question, the choice of research participants, and the interpretation of the evidence.¹⁹⁹ Evidence is not apolitical, especially when it has the effect of obscuring some of the concerns and populations that motivated policy-making in a particular area.²⁰⁰ It is challenging to assess the evidence about prostitution and sex work in Canada when researchers begin with a theoretical and normative framing that points to some interventions but not others, includes only a subset of those engaging in prostitution as study participants, and produces findings that can be interpreted in different ways.²⁰¹ Data showing that sex workers experience high levels of violence, for example, is equally supportive of a conclusion that the commodification and inequality reflected in and reinforced by prostitution leads to violence as it is of a conclusion that criminalization creates and perpetuates stigma that in turn leads to violence. These are theories and the empirical data provide no clear support for either of them. The risks and harms to which sellers are exposed may have multiple causes. Studies focus on some causally connected factors, notably the structural contexts that might reduce the risk of harm and the measures those engaging in sex work might take to reduce their risks, and not on others, notably direct causes of violence.²⁰²

favour of looser language of “limits” or “negatively impacts”, which seem easier to establish than a deprivation.

198. Cecilia Benoit et al, “‘Well, It Should be Changed for One, Because It’s Our Bodies’: Sex Workers’ Views on Canada’s Punitive Approach Towards Sex Work” (2017) 6:2 Soc Sciences 52 at 53.

199. See Raymond, *supra* note 77 at xii.

200. See Parkhurst, *Politics*, *supra* note 33 at 65–74 (where the author notes that because policy-making is fundamentally political, it incentivizes both technical bias and issue bias).

201. See e.g. Charlotta Holmström & May-Len Skilbrei, “The Swedish Sex Purchase Act: Where Does it Stand?” (2017) 4:2 Oslo L Rev 82 (where the authors discuss this concern in the context of the Swedish legislation).

202. None of the studies identified in this review considered the high mortality rate associated with prostitution. Researchers have consistently identified that no population of women has a percentage of deaths due to murder even approximating that of women engaged in

Very little research was conducted about prostitution in Canada prior to 1970.²⁰³ In March of 2001, the Research and Statistics Division at the Department of Justice Canada commissioned two examinations of prostitution-related literature to identify research gaps. Nine research priorities were identified, including the need for a comprehensive study of exit from prostitution and the need for prostitution research to be geographically comprehensive and interprovincial.²⁰⁴ In the two decades since, while a significant and growing body of empirical research has been conducted in Canada about sex work, what we know about prostitution remains incomplete.

When what is known is incomplete, we need to be vigilant as to the work we suggest this knowledge is doing for us.²⁰⁵ Peer-reviewed empirical research about prostitution in Canada focusses almost exclusively on sex workers and on reducing their risks of harm while engaging in sex work. This knowledge is unquestionably important. But it is incomplete. It does not include the experiences and concerns of all of the populations in the contemplation of Parliament in enacting the current laws and policy.

As Parkhurst suggests, the appeal to evidence can itself be decidedly political, promoting a choice as amongst competing values “by giving political priority to those things which have been measured or those things which are conducive

prostitution. See e.g. Canada, Department of Justice, *Violence Against Persons Who Prostitute: The Experience in British Columbia*, by John Lowman & Laura Fraser, TR1996-14e, unedited (Ottawa: Research, Statistics and Evaluation Directorate, 1995) (describing patterns of violence against people who sell sexual services before and after the enactment of the communicating law in 1985); John J Poterat et al, “Mortality in a Long-Term Open Cohort of Prostitute Women” (2004) 159:8 *Am J Epidemiology* 778 (where the authors considered a cohort of 1,969 prostitutes in Colorado); John Lowman, “Violence and the Outlaw Status of (Street) Prostitution in Canada” (2000) 6:9 *Violence Against Women* 987 (where the author constructed a profile of murders of sex workers in British Columbia from 1964 to 1998). Between 1991 and 2014, there were 294 homicides in Canada where the victim was identified as a “sex worker”. Between 1997 and 2014, the vast majority of the victims were female (ninety-six per cent), and, where identified by police, the majority of accused were male (ninety-four per cent). See Statistics Canada, *Prostitution Offences in Canada: Statistical Trends*, by Cristine Rotenberg, in *Juristat*, Catalogue No 85-002-X (Ottawa: Statistics Canada, November 2016) at 11–13, online (pdf): <www150.statcan.gc.ca/n1/en/pub/85-002-x/2016001/article/14670-eng.pdf>.

203. See Department of Justice, “Research Gaps”, *supra* note 129 at 1 (where the author notes that the first Canadian survey research with prostitutes was conducted during the 1970s and the first ethnography of Canadian prostitution was published in 1980).

204. See *ibid* at 4–9.

205. See generally Sally Haslanger, *Resisting Reality: Social Construction and Social Critique* (New York: Oxford University Press, 2012) (where the author examines what makes something real or knowable); Phillips, *supra* note 21 at 50–51 (where the author posits that doctrinal

to measuring”.²⁰⁶ While Canada’s current prostitution policy reflects a political choice founded on claims that prostitution is inconsistent with equality for women and girls and that prostitution cannot be made safe, opposition to this policy approach principally rests on the claim that prostitution-specific criminal laws, whomever they target, have the effect of increasing the risks faced by sex workers when engaging in prostitution. In seeking to make sense of findings in this complex and highly contested field of research, it is important for legal decision-makers to recognize that some of these claims are more conducive to empirical measurement than others. It is very likely that there is much about prostitution that cannot be empirically known. It is very difficult to gather information or data about prostitution, most notably in circumstances where it involves human trafficking. Some research questions and some populations are easier to consider and access through traditional empirical methods than others. Research that includes only a subset of prostitution participants but is read to suggest conclusions about the experiences of most or all prostitution participants, or prostitution more generally, is problematic.

If the available body of empirical scholarship does not include the experiences and concerns of all populations in the contemplation of Parliament in enacting the impugned legislation, or all individuals or groups relevant to the applicable constitutional tests, courts might reconsider the role of legislative fact evidence in constitutional litigation. Rather than relying on bias to accord no weight at all to those whose scholarly research is openly situated in a theoretical framing, courts should directly acknowledge that almost all research about prostitution and sex work begins with a theoretical (and normative) framing. The challenge is to better understand how theoretical frames were implicated in policy-making by Parliament, how theoretical frames impact the body of empirical knowledge, and how, as a result, the *Charter* and the substantive and evidentiary tests applied by courts in evaluating constitutionality may usurp Parliamentary policy-making power under the guise of objectivity when reliance is placed exclusively on legislative fact evidence.²⁰⁷

One straightforward way of ensuring that the experiences of a broader range of interested populations are considered in evaluating constitutionality would be to include adjudicative fact evidence in cases where constitutional challenges arise in criminal proceedings, where individuals with direct experience are

evidence rules are important in *Charter* litigation because they influence what counts as knowledge).

206. Parkhurst, *Politics*, *supra* note 33 at 6. See also Parkhurst & Abeysinghe, *supra* note 35.

207. See also Aya Gruber, “When Theory Met Practice: Distributional Analysis in Critical Criminal Law Theorizing” (2015) 83:6 *Fordham L Rev* 3211 (where the author identifies that experts design studies, gather evidence, and interpret information within a framework and that, rather than being “objective truth”, data “is often ideology masquerading as objectivity” at 3231–32).

already before the court as complainants.²⁰⁸ In this way, courts can base their decisions in part on the experiences of the very individuals whose sexual services were exchanged for consideration in the cases before them. In neither *Boodhoo I* nor *Anwar* was experiential or adjudicative fact evidence from the very women and girls in relation to whose sexual services for consideration the accused were charged directly before the court in the hearing of the constitutional challenge to the criminal offences.²⁰⁹ However, in *Boodhoo I*, the reasonable hypotheticals upon which the constitutional claim was argued were far from the experiences of, and adjudicative fact evidence provided by, the very individual whose sexual services had been exchanged for consideration by the offenders. In a related decision, in *Boodhoo II*, she testified that over the course of six weeks shortly following her sixteenth birthday, she was compelled to continue engaging in prostitution when she did not want to, physically assaulted on a daily basis, punished if she did not provide sexual services, and that the offenders determined when she worked, where she worked, when she ate, and when she slept. While these facts are not referenced in the decision about the constitutionality of the impugned offences, they were known to the judge who found those offences constitutional.

The courts at all levels in *Bedford* clearly recognized that policy is a matter for Parliament and that questions about whether or how prostitution should be regulated were not a matter for the courts.²¹⁰ If, as some policy studies scholars suggest, policy-making necessarily requires decisions that cannot and should not be based only on empirical evidence, then the incomplete body of peer-reviewed empirical research about prostitution, sex work, and sex trafficking cannot be allowed to depoliticize the policy-making process, including through its use in constitutional litigation. If the concerns underpinning Parliament's policy choice cannot be measured through empirical means, does this mean that Parliament is precluded from making a policy choice responsive to those concerns and the populations for whom they are important?²¹¹ The most

208. See e.g. *Boodhoo I*, *supra* note 6; *Boodhoo II*, *supra* note 6.

209. See also *Boodhoo II*, *supra* note 6 (where, in its decision in a concurrent sentencing hearing, the Ontario Superior Court of Justice included a summary of the evidence about the experience of the sixteen-year-old girl in that case); *R v Anwar*, *supra* note 7 (where the only evidence about the experiences of women and girls who exchanged sexual services for consideration heard by the Ontario Court of Justice was included in an Agreed Statement of Facts).

210. See *Bedford* Sup Ct, *supra* note 20 at paras 1–2, 539; *Canada (AG) v Bedford*, 2012 ONCA 186 at paras 1–2, 9; *Bedford* SCC, *supra* note 2 at para 2.

211. This ought not to be the case. See e.g. Mouland, *Selling*, *supra* note 70 (where the author identifies that deference to Parliament can be justified when rationality is “rooted in a social or political philosophy that is not susceptible to proof in the traditional sense” at 90, citing *Sauvé v Canada (Chief Electoral Officer)*, 2002 SCC 68 at para 186). Mouland concludes that “it

important question is this: how might the privileging of social scientific evidence in constitutional litigation remove policy-making choices from Parliament and instead place them in the hands of researchers and constitutional judges?

remains legally acceptable for Parliament to ink social values through criminal legislation”. See Moulard, *Selling*, supra note 70 at 90.

Appendices

Appendix A: ProQuest Search Strategy

Set	Searched for	Databases	Results
S1	Prostitution AND PEER(yes) AND pd(2014–2019)	Sociological Abstracts	1686
S3	“sex work” AND PEER(yes) AND pd(2014–2019)	Sociological Abstracts	741
S4	(sexANDtrafficking) AND PEER(yes) AND pd(2014–2019)	Sociological Abstracts	815
S9	(canada OR ontario OR “british columbia” OR alberta OR saskatchewan OR manitoba OR ontario OR quebec OR “new brunswick” OR “nova scotia” OR newfoundland OR “prince edward island” OR nunavut OR northwest OR yukon) AND PEER(yes) AND pd(2014–2019)	Sociological Abstracts	17616
S10	((prostitution AND PEER(yes) AND pd(2014–2019)) OR (“sex work” AND PEER(yes) AND pd(2014–2019)) OR ((sex AND trafficking) AND PEER(yes) AND pd(2014–2019))) AND ((canada OR ontario OR “british columbia” OR alberta OR saskatchewan OR manitoba OR ontario OR quebec OR “new brunswick” or “nova scotia” OR newfoundland OR “prince edward island” OR nunavut OR northwest OR yukon) AND PEER(yes) AND pd(2014–2019))	Sociological Abstracts These databases are searched for part of your query	621

Appendix B: Embase/PsycINFO Search Strategy

Database(s): Ovid MEDLINE(R), Ovid MEDLINE(R) Daily and Epub Ahead of Print, In-Process & Other Non-Indexed Citations 1946 to Present, Embase Classic+Embase 1947 to 2019 January 07, PsycINFO 1806 to December Week 5 2018.

Search Strategy:

#	Searches	Results
1	prostitution.mp. [mp=ti, ab, ot, nm, hw, fx, kf, px, rx, ui, sy, tn, dm, mf, dv, kw, dq, tc, id, tm]	15281
2	“sex work”.mp. [mp=ti, ab, ot, nm, hw, fx, kf, px, rx, ui, sy, tn, dm, mf, dv, kw, dq, tc, id, tm]	10392
3	(trafficking and sex).mp. [mp=ti, ab, ot, nm, hw, fx, kf, px, rx, ui, sy, tn, dm, mf, dv, kw, dq, tc, id, tm]	2361
4	1 or 2 or 3	24189
5	(canada or british columbia or alberta or ontario or quebec or saskatchewan or manitoba or nova scotia or newfoundland or new brunswick or prince edward island or yukon or northwest territories or nunavut).mp. [mp=ti, ab, ot, nm, hw, fx, kf, px, rx, ui, sy, tn, dm, mf, dv, kw, dq, tc, id, tm]	487352
6	4 and 5	820
7	remove duplicates from 6	522
8	limit 7 to conference abstracts [Limit not valid in Ovid MEDLINE(R),Ovid MEDLINE(R) Daily Update,Ovid MEDLINE(R) In-Process,Ovid MEDLINE(R) Publisher,PsycINFO; records were retained]	235
9	7 not 8	287
10	limit 9 to yr=“2014 -Current”	102

Appendix C: Articles Identified

Anderson, Solanna et al, “Violence Prevention and Municipal Licensing of Indoor Sex Work Venues in the Greater Vancouver Area: Narratives of Migrant Sex Workers, Managers and Business Owners” (2015) 17:7 Culture, Health & Sexuality 825.

Anderson, S et al, “Condoms and Sexual Health Education as Evidence: Impact of Criminalization of In-Call Venues and Managers on Migrant Sex Workers Access to HIV/STI Prevention in a Canadian Setting” (2016) 16:1 BMC Intl Health & Human Rights 1.

Argenta, Elena et al, "Social Cohesion Among Sex Workers and Client Condom Refusal in a Canadian Setting: Implications for Structural and Community-Led Interventions" (2016) 20:6 AIDS & Behavior 1275.

Argenta, Elena et al, "High Prevalence and Partner Correlates of Physical and Sexual Violence by Intimate Partners Among Street and Off-Street Sex Workers" (2014) 9:7 PLoS One e102129.

Argenta, Elena et al, "The Role of Dyad-Level Factors in Shaping Sexual and Drug-Related HIV/STI Risks Among Sex Workers with Intimate Partners" (2015) 157 Drug & Alcohol Dependence 166.

Argenta, Elena et al, "The Loss of Boystown and Transition to Online Sex Work: Strategies and Barriers to Increase Safety Among Men Sex Workers and Clients of Men" (2018) 12:6 Am J Men's Health 1994.

Argenta, Elena et al, "Prevalence and Correlates of Nonmedical Prescription Opioid Use Among a Cohort of Sex Workers in Vancouver, Canada" (2015) 26:1 Intl J Drug Policy 59.

Atchison, Chris & Patrick John Burnett, "The Social Dynamics of Safe Sex Practices Among Canadian Sex Industry Clients" (2016) 38:6 Sociology Health & Illness 939.

Barreto, Daniella et al, "Food Insecurity Increases HIV Risk Among Young Sex Workers in Metro Vancouver, Canada" (2017) 21:3 AIDS & Behavior 734.

Baumann, Rebekah M et al, "Experiences of Violence and Head Injury Among Women and Transgender Women Sex Workers" (2018) 16:3 Sexuality Research & Soc Policy 1.

Benoit, Cecilia et al, "Lack of Confidence in Policy Creates a 'Blue Ceiling' for Sex Workers' Safety" (2016) 42:4 Can Pub Pol'y 456.

Benoit, Cecilia et al, "Sex Workers as Peer Health Advocates: Community Empowerment and Transformative Learning Through a Canadian Pilot Program" (2017) 16:1 Intl J for Equity in Health 160.

Benoit, Cecilia et al, "Would You Think about Doing Sex for Money? Structure and Agency in Deciding to Sell Sex in Canada" (2017) 31:5 Work, Employment & Society 731.

Benoit, Cecilia et al, "Canadian Sex Workers Weigh the Costs and Benefits of Disclosing Their Occupational Status to Health Providers" (2019) 16:3 Sexuality Research & Social Policy 329.

Benoit, Cecilia et al, "Sex Work and Three Dimensions of Self-Esteem: Self-Worth, Authenticity and Self-Efficacy" (2018) 20:1 Culture, Health & Sexuality 69.

Bingham, Brittany et al, "Generational Sex Work and HIV Risk Among Indigenous Women in a Street-Based Urban Canadian Setting" (2014) 16:4 Culture, Health & Sexuality 440.

Bird, Yelena et al, "Third-World Realities in a First-World Setting: A Study of the HIV/AIDS Related Conditions and Risk Behaviors of Sex Trade Workers in Saskatoon, Saskatchewan, Canada" (2016) 13:1 Sahara J 152.

Bodkin, Kate, Alannah Delahunty-Pike & Time O'Shea, "Reducing Stigma in Healthcare and Law Enforcement: A Novel Approach to Service Provision for Street Level Sex Workers" (2015) 14:1 *Intl J for Equity in Health* 35.

Bowen, Raven & Vicky Bungay, "Taint: An Examination of the Lived Experiences of Stigma and its Lingering Effects for Eight Sex Industry Experts" (2016) 18:2 *Culture, Health & Sexuality* 186.

Bowen, Raven R, "Squaring Up: Experiences of Transition from Off-Street Sex Work to Square Work and Duality – Concurrent Improvement in Both – in Vancouver, BC" (2015) 52:4 *Can Rev Sociology* 429.

Corriveau, Patrice & Christopher Greco, "Misunderstanding (Mis) Understandings: Male Sex Workers and the Canadian Criminal Code" (2014) 18:2 *Sexuality & Culture* 346.

Deering, KN et al, "Successes and Gaps in Uptake of Regular Voluntary HIV Testing for Hidden Street- and Off-Street Sex Workers in Vancouver, Canada" (2015) 27:4 *AIDS Care* 499.

Deering, Kathleen N et al, "Piloting a 'Spatial Isolation' Index: The Built Environment and Sexual and Drug Use Risks to Sex Workers" (2014) 25:3 *Intl J Drug Policy* 533.

Duff, Putu et al, "The 'Stolen Generations' of Mothers and Daughters: Child Apprehension and Enhanced HIV Vulnerabilities for Sex Workers of Aboriginal Ancestry" (2014) 9:6 *PLoS ONE* e99664.

Duff, Putu et al, "Barriers to Viral Suppression Among Female Sex Workers: Role of Structural and Intimate Partner Dynamics" (2016) 73:1 *J Acquired Immune Deficiency* 83.

Duff, Putu et al, "Sex Work and Motherhood: Social and Structural Barriers to Health and Social Services for Pregnant and Parenting Street and Off-Street Sex Workers" (2015) 36:9 *Health Care for Women International* 1039.

Duff, Putu et al, "The Relationship Between Social, Policy and Physical Venue Features and Social Cohesion on Condom Use for Pregnancy Prevention Among Sex Workers: A Safer Indoor Work Environment" (2015) 69:7 *J Epidemiology & Community Health* 666.

Duff, Putu et al, "Pregnancy Intentions Among Female Sex Workers: Recognising Their Rights and Wants as Mothers" (2015) 41:2 *J Family Planning & Reproductive Health Care* 102.

Duff, P et al, "Poor Working Conditions and Work Stress Among Canadian Sex Workers" (2017) 67:7 *Occupational Medicine* 515.

Goldenberg, Shira M et al, "Complexities of Short-Term Mobility for Sex Work and Migration Among Sex Workers: Violence and Sexual Risks, Barriers to Care, and Enhanced Social and Economic Opportunities" (2014) 91:4 *J Urban Health* 736.

Goldenberg, Shira M et al, "Early Sex Work Initiation Independently Elevates Odds of HIV Infection and Police Arrest Among Adult Sex Workers in a Canadian Setting" (2014) 65:1 *J Acquired Immune Deficiency Syndromes* 122.

Goldenberg, Shira M et al, "Community Mapping of Sex Work Criminalization and Violence: Impacts on HIV Treatment Interruptions Among Marginalized Women Living with HIV in Vancouver, Canada" (2017) 28:10 *Intl J STD & AIDS* 1001.

Goldenberg, Shira M et al, "Structural Determinants of Health Among Im/migrants in the Indoor Sex Industry: Experience of Workers and Managers/Owners in Metropolitan Vancouver" (2017) 12:1 *PLoS ONE* e0170642.

Goldenberg, Shira M et al, "Dual Sexual and Drug-Related Predictors of Hepatitis C Incidence Among Sex Workers in a Canadian Setting: Gaps and Opportunities for Scale-Up of Hepatitis C Virus Prevention, Treatment, and Care" (2017) 55 *Intl J Infectious Diseases* 31.

Ham, Julie & Fairleigh Gilmour, "'We All Have One': Exit Plans as a Professional Strategy in Sex Work" (2017) 31:5 *Work, Employment & Society* 748.

Hannem, Stacey & Chris Bruckert, "'I'm Not a Pimp, but I Play One on TV': The Moral Career and Identity Negotiations of Third Parties in the Sex Industry" (2017) 38:7 *Deviant Behavior* 824.

Kille, Julie et al, "A Content Analysis of Health and Safety Communications Among Internet-Based Sex Work Advertisements: Important Information for Public Health" (2017) 19:4 *J Medical Internet Research*.

Kim, Soyoun Rachel et al, "Uptake of a Women-Only Sex-Work-Specific Drop-In Center and Links with Sexual and Reproductive Health Care for Sex Workers" (2015) 128:3 *Intl J Gynecology & Obstetrics* 201.

Krüsi, Andrea et al, "Criminalisation of Clients: Reproducing Vulnerabilities for Violence and Poor Health Among Street-Based Sex Workers in Canada—A Qualitative Study" (2014) 4:6 *BMJ Open* e005191.

Krüsi, Andrea et al, "'They Won't Change it Back in their Heads that We're Trash': The Intersection of Sex Work-Related Stigma and Evolving Policing Strategies" (2016) 38:7 *Sociology Health & Illness* 1137.

Landsberg, Adina et al, "Criminalizing Sex Work Clients and Rushed Negotiations among Sex Workers Who Use Drugs in a Canadian Setting" (2017) 94:4 *J Urban Health* 563.

Lyons, Tara et al, "The Impact of Construction and Gentrification on an Outdoor Trans Sex Work Environment: Violence, Displacement and Policing" (2017) 20:8 *Sexualities* 881.

Lyons, Tara et al, "Negotiating Violence in the Context of Transphobia and Criminalization: The Experiences of Trans Sex Workers in Vancouver, Canada" (2017) 27:2 *Qualitative Health Research* 182.

Lyons, Tara et al, "Youth, Violence and Non-Injection Drug Use: Nexus of Vulnerabilities among Lesbian and Bisexual Sex Workers" (2014) 26:9 *AIDS Care* 1090.

Manning, Elizabeth & Vicky Bungay, "'Business Before Pleasure': The Golden Rule of Sex Work, Payment Schedules and Gendered Experiences of Violence" (2017) 19:3 *Culture, Health & Sexuality* 338.

Matthen, Premala et al, "I Walked into the Industry for Survival and Came Out of a Closet': How Gender and Sexual Identities Shape Sex Work Experiences Among Men, Two Spirit, and Trans People in Vancouver" (2018) 21:4 *Men & Masculinities* 479.

McCarthy, Bill, Cecilia Benoit & Mikael Jansson, "Sex Work: A Comparative Study" (2014) 43:7 *Archives Sexual Behavior* 1379.

Muldoon, Katherine A et al, "Sexual Relationship Power and Intimate Partner Violence Among Sex Workers with Non-Commercial Intimate Partners in a Canadian Setting" (2015) 27:4 *AIDS Care* 512.

Orchard, Treena et al, "Expanding the Scope of Inquiry: Exploring Accounts of Childhood and Family Life Among Sex Workers in London, Ontario" (2014) 23:1 *Can J Human Sexuality* 9.

Orchard, Treena et al, "You Just Have to Be Smart': Spatial Practices and Subjectivity Among Women in Sex Work in London, Ontario" (2016) 23:11 *Gender, Place & Culture* 1572.

Puri, Nitasha et al, "Burden and Correlates of Mental Health Diagnoses Among Sex Workers in an Urban Setting" (2017) 17:1 *BMC Women's Health* 133.

Raguparan, Menaka, "If I'm Gonna Hack Capitalism': Racialized and Indigenous Sex Workers' Experiences Within the Neo-Liberal Market Economy" (2017) 60 *Women's Studies Intl Forum* 69.

Sociás, M Eugenia et al, "Universal Coverage Without Universal Access: Institutional Barriers to Health Care Among Women Sex Workers in Vancouver, Canada" (2016) 11:5 *PLoS ONE* e0155828.

Sociás, ME et al, "Social and Structural Factors Shaping High Rates of Incarceration Among Sex Workers in a Canadian Setting" (2015) 92:5 *J Urban Health* 966.

Sociás, M Eugenia et al, "Use of Injectable Hormonal Contraception and HSV-2 Acquisition in a Cohort of Female Sex Workers in Vancouver, Canada" (2017) 93:4 *Sexually Transmitted Infections* 284.

Sociás, M Eugenia et al, "Gaps in the Hepatitis C Continuum of Care Among Sex Workers in Vancouver, British Columbia: Implications for Voluntary Hepatitis C Virus Testing, Treatment and Care" (2015) 29:8 *Can J Gastroenterology & Hepatology* 411.

Sou, Julie et al, "Structural Determinants of Inconsistent Condom Use with Clients Among Migrant Sex Workers: Findings of Longitudinal Research in an Urban Canadian Setting" (2015) 42:6 *Sexually Transmitted Diseases* 312.

Sterling, Andrea & Emily van der Meulen, "We Are Not Criminals': Sex Work Clients in Canada and the Constitution of Risk Knowledge" (2018) 33:3 *CJLS* 291.

Wright, Jordana, Robert Heynen & Emily van der Meulen, "It Depends on Who You Are, What You Are': 'Community Safety' and Sex Workers' Experience with Surveillance" (2015) 13:2 *Surveillance & Society* 265.