

Marital Rape, Polygamy, and Prostitution: Trading Sex Equality for Agency and Choice?

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In this article, the author considers three cases in which criminal laws apply to gendered harms: sexual assault, polygamy and prostitution. The first of these, the Supreme Court of Canada's decision in R v. JA was framed as being about the legal recognition of advance consent to sexual activity while unconscious. While the Court reached a positive result for women in rejecting this doctrine, it did so in a way that obscured the realities for women of domestic violence and sexual assault in spousal relationships. Instead the case was framed by both sides in the language of choice, agency and autonomy. The author argues that similar tensions are present in the Charter challenges to the criminal laws on polygamy and prostitution. In the Polygamy Reference, the BC Supreme Court was unconvinced by evidence of individual choice, instead focusing on the gendered harms of polygamy as practiced. In Bedford, the Ontario Court of Appeal treated prostitution as a question of women's individual choice, leading to a focus on the locations in which women choose to prostitute rather than choice of men to buy sex or the inequalities that drive women into prostitution. The author argues that all of these practices should be understood as causing gendered harms that can justify legal intervention to address them.

Dans cet article, l'auteure examine trois cas où les lois criminelles s'appliquent aux maux sexuels : l'agression sexuelle, la polygamie et la prostitution. Le premier, le jugement de la Cour suprême du Canada dans R c. J.A., a été abordé du point de vue de la reconnaissance juridique du consentement à une activité sexuelle donné avant une période d'inconscience. Bien que la Cour soit arrivée à un résultat positif pour les femmes en rejetant cette doctrine, sa façon de faire a obscurci les réalités des femmes qui connaissent la violence familiale et l'agression sexuelle dans leur relation conjugale. Les deux parties ont plutôt parlé de choix, de libre arbitre et d'autonomie. L'auteure soutient qu'il existe des tensions similaires dans les contestations fondées sur la Charte aux lois criminelles relatives à la polygamie et la prostitution. Dans son renvoi sur la polygamie, la Cour suprême de la Colombie-Britannique n'a pas été convaincue par la présence de choix personnel, se concentrant plutôt sur les maux sexuels liés à la polygamie tel que pratiqué. Dans Bedford, la Cour d'appel de l'Ontario a considéré la prostitution comme une question de choix personnel des femmes, ce qui a mené la cour à accorder la priorité aux endroits où les femmes choisissent de se prostituer plutôt que sur le choix des hommes d'acheter le sexe ou les inégalités qui poussent les femmes à se prostituer. L'auteure soutient qu'il devrait être entendu que toutes ces pratiques causent des maux sexuels pouvant justifier une intervention juridique pour les aborder.

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Introduction

The Supreme Court of Canada in the 1990s recognized in a number of cases that sexual assault law, and the criminal trial process in sexual assault cases, must be understood through the lens of the right to sex equality guaranteed by s. 15(1) of the *Charter*. Led by Justice L'Heureux-Dubé,¹ but joined by other members of the court, the Supreme Court issued a series of decisions affirming that non-consent for the purposes of the *actus reus* is to be measured according to the complainant's state of mind;² that a mistaken belief in consent requires evidence that consent was affirmatively communicated as well as evidence of reasonable steps to ascertain consent;³ that restrictions could be placed on access to private records in the hands of third parties;⁴ and that the right to make full answer and defence does not require abuse of the complainant on the witness stand or the reliance on myths and stereotypes about sexual assault.⁵

These decisions reflected and reinforced legislative amendments designed to counteract historical myths and stereotypes about women who complain of sexual assault.⁶ These amendments were drafted after consultation with the women's anti-violence movement and feminist scholars. It would take the argument too far to claim that these understandings were universally held or even always applied by the Supreme Court in its judgments.⁷ Nonetheless, these were important jurisprudential advances that in turn contributed to shifting social understandings about sexual violence.⁸ What is more, scholars and activists identifying as feminists were, for the most part, unified in their support for these developments and united in their criticism when things went awry.⁹

1 *R v Osolin*, [1993] 4 SCR 595, 109 DLR (4th) 478; *R v Park*, [1995] 2 SCR 836, 169 AR 241, L'Heureux-Dubé J, concurring; *R v Seaboyer*, [1991] 2 SCR 577, 83 DLR (4th) 193, L'Heureux-Dubé J, dissenting.

2 *R v Ewanchuk*, [1999] 1 SCR 330, 169 DLR (4th) 193.

3 *Ibid.*

4 *R v Mills*, [1999] 3 SCR 668, 180 DLR (4th) 1.

5 *R v Darrach*, 2000 SCC 46, [2000] 2 SCR 443.

6 Most notably, these include the 1992 amendments incorporating a statutory definition of consent into the *Criminal Code*, the itemization of situations in which consent was not present, and the addition of a reasonable steps provision to the doctrine of mistaken belief in consent. One recent account of this history can be found in Lucinda Vandervort, "Affirmative Sexual Consent in Canadian Law, Jurisprudence and Legal Theory" (2012) 23 *Colum J Gender & L* 395 at 407.

7 *R v Esau*, [1997] 2 SCR 777, 148 DLR (4th) 662; *R v Shearing*, 2002 SCC 58, [2002] 3 SCR 33.

8 Sheila McIntyre et al, "Tracking and Resisting Backlash Against Equality Gains in Sexual Assault Law" (2000) 20 *Canadian Women Studies* 3.

9 *Ibid.*

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The criminal laws relating to prostitution have not had a similar history. With a few notable exceptions, courts have generally failed to make the link between the prostitution industry and women's inequality.¹⁰ Where inequality has been raised, the response has generally been that the protection of women was not part of the government's objective in passing the criminal laws that effectively prohibit prostitution.¹¹ Courts have also largely ignored the formally unequal reality that prostitution laws criminalize both prostitutes and their buyers, but are mostly applied against the former group, who are predominantly women, poor, racialized or Aboriginal.

Many Canadian women's groups argue that the abolition of prostitution is a necessary precondition of equality for women and have come to support a legislative response of asymmetrical criminalization targeting male buyers, pimps, and profiteers.¹² This legal response would be buttressed by measures to discourage male demand and provide livable incomes to those currently reliant on prostitution. However, other groups and individual women have advanced arguments in favour of the total decriminalization of prostitution in the interests of what they consider to be the majority of women who freely choose prostitution, as well as the minority who do not. In this analysis, prostitution is understood not as a practice of sex discrimination, in which a woman earns income through being sexually harassed, but as a form of "sex work" that should be treated in law as a form of employment.¹³

A similar split can be observed on the issue of polygamy. Polygamy, like prostitution and sexual assault, is highly gendered and is almost always practised as polygyny. On the other hand, it is both less common than sexual assault and prostitution, and is interwoven with claims of religious freedom. The lack of judicial involvement with the criminal prohibition on polygamous marriage means that the courts have not led the discussion of the relationship of polygamy to both male supremacy and women's inequality. In the arenas of scholarship and advocacy some have argued that polygamy is a practice of sex discrimination, while others have

10 Janine Benedet, "Paradigms of Prostitution: Revisiting the Prostitution Reference" in Kim Brooks, ed, *Justice Bertha Wilson: One Woman's Difference* (Vancouver: UBC Press, 2009).

11 *Ibid.*

12 These groups include the Native Women's Association of Canada, the Canadian Association of Elizabeth Fry Societies, federations of Anglophone and Francophone rape crisis centres and transition houses, among others.

13 Kate Sutherland, "Work, Sex and Sex-Work: Competing Feminist Discourses on the International Sex Trade" (2004) 42 *Osgoode Hall LJ* 1. . For a critique of the sex work position see Sheila Jeffreys, *The Industrial Vagina: The Political Economy of the Global Sex Trade* (Oxon, UK: Routledge, 2009) at 15.

argued that polygamy itself is not invariably problematic for women and may offer some benefits.¹⁴

In this article, I begin with a consideration of the decision of the Supreme Court of Canada in the sexual assault case of *R v JA*,¹⁵ to assess whether it reflects the commitment developed over the past three decades to understanding sexual assault as a practice of sex inequality.¹⁶ I argue that two related forces, in particular, seem to have eroded this understanding. The first is the elision of women's equality with individual autonomy, and the concomitant impoverishment of the concept of autonomy by equating it with "choice." This shift allows sexual assault to be de-gendered and its harms understood as individual wrongs rather than a practice of sex discrimination against women as a class. The second factor is the disappearance of gendered violence through its normalization. Taken together, these features of *JA* mean that violence against women is not necessarily considered harmful so long as a woman is prepared to claim that she chose it as an expression of her individual agency. Finally, I contend that these arguments rely implicitly on the invisibility of the man who is the source of the violence.

I then apply this analysis to two recent cases in which laws that criminalize other gendered harms — polygamy and prostitution — have been challenged as violating the *Charter*. I argue that a shift in focus away from equality and towards autonomy, equated with choice, is evident in the arguments made in these cases as well. This shift allows for the normalization of practices harmful to women, focusing the attention only on how to minimize ancillary harms, while leaving the core of the practice intact. This tendency was resisted in the *Polygamy Reference*, but has so far been accepted in respect of the prostitution laws in *R. v. Bedford*. I conclude by arguing that when the focus is kept on sex inequality, legal interventions against the men who are the source of both polygamy and prostitution's harms are justifiable, while criminalization of the women harmed is not.

14 See, for example, the four reports commissioned by Status of Women Canada on the legal and policy implications of polygamous marriages: Angela Campbell et al, *Polygamy in Canada : Legal and Social Implications for Women and Children : A Collection of Policy Research Reports* (Ottawa : Status of Women Canada, 2005).

15 *R v JA*, 2011 SCC 28, [2011] 2 SCR 440 [*JA* SCC].

16 Emma Cunliffe has undertaken a similar inquiry with respect to recent SCC decisions, see: "Sexual Assault Cases in the Supreme Court of Canada: Losing Sight of Substantive Equality?" (2012) 57 *Sup Ct L Rev* (2d) 295.

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There can be no doubt that crimes of sexual violence are gendered. In Canada in 2011, women were eleven times more likely than men to be sexually victimized, and 8 in 10 victims of police-reported intimate partner violence were women. In 2009, 92% of victims aged 15 years and older of sexual offences (including sexual assault, sexual exploitation, and incest) were women. In 99% of incidents of sexual violence against women, the accused perpetrator was male.¹⁷

These numbers play a role in shaping what it means to live as a woman. The threat of sexual assault constrains women's lives in a way that it does not for most men. Women are warned not to do things that make them targets: walk alone, walk at night, wear the wrong clothes, get drunk.¹⁸ Women modify their behaviour to avoid sexual assault; they are sometimes blamed (and blame themselves) when they fail to behave responsibly.¹⁹ This advice is mostly futile because, most of the time, the assailant is someone that the woman knows and often someone that she trusts.²⁰ This disconnect between sexual assault as socially imagined (the predatory stranger) and sexual assault as it mostly actually happens (the friend, family member or spouse) has still not been bridged despite decades of feminist advocacy.²¹

17 Statistics Canada, *Measuring Violence Against Women: Statistical Trends* by Maire Sinha (Ottawa: Minister of Industry, 2013), online: Statistics Canada <<http://www.statcan.gc.ca/pub/85-002-x/2013001/article/11766-eng.htm>> at 11, 20, 29, 31 [Statistics Canada, *Measuring Violence Against Women*]. A very good, if dated summary of the statistics and their limitations can be found online from the Canadian Research Institute for the Advancement of Women at <<http://www.criaw-icref.ca/ViolenceagainstWomenandGirls>> (accessed September 11, 2012). . The most recent Statistics Canada data specific to sexual assault is collected in Statistics Canada, *Sexual Assault in Canada 2004 and 2007* by Shannon Brennan & Andrea Taylor Butts (Ottawa: Minister of Industry, 2008), online: Statistics Canada <<http://www.statcan.gc.ca/pub/85f0033m/85f0033m2008019-eng.pdf>>. This pattern recurs worldwide: Charlotte Watts & Cathy Zimmerman, "Violence Against Women: Global Scope and Magnitude" (2002) 359 *The Lancet* 1232; United Nations, *Violence Against Women: The Situation*, (United Nations: 2011), online: United Nations <<http://www.un.org/en/women/endviolence/press.shtml>>.

18 Andrea Dworkin, *Letters From a War Zone* (Brooklyn, New York: Lawrence Hill Books, 1993) at 163 [Dworkin]; Rachel Hall, "It Can Happen to You: Rape Prevention in the Age of Risk Management" (2004) 19 *Hypatia* 1; Ariana Barer, *The Usual Suspects: A Feminist Critical Discourse Analysis of Media Representations of Responsibility for Sexual Assault Prevention* (MA Thesis, University of British Columbia, 2013) [unpublished].

19 Lise Gotell, "Rethinking Affirmative Consent in Canadian Sexual Assault Law: Neoliberal Sexual Subjects and Risky Women" (2008) 41 *Akron L Rev* 865.

20 In 2011, 25% of reported sexual assaults were committed by a stranger to the victim: Statistics Canada, *Measuring Violence Against Women*, *supra* note 17 at 30. Note that this number likely overstates the percentage of stranger sexual assaults since they are more likely to be reported to police than those committed by known assailants.

21 Jody Raphael, *Rape is Rape* (Chicago: Lawrence Hill Books, 2013).

Few Canadian women report sexual assaults to the police.²² In the cost-benefit analysis of whether it is worth it to make such a complaint, women appear to be quite aware of the rigours awaiting them in the criminal justice system and the degree of skepticism that will meet their allegations. Women know that the judge and the jury will scrutinize their words, their actions, their behaviours, and sometimes their sexual histories.²³ The application of the burden of proof to questions of credibility in sexual assault cases makes conviction without corroboration extremely difficult, despite the fact that the corroboration requirement was abolished by statute 30 years ago.²⁴ Stays of proceedings and acquittals are more common for sexual assaults than for other offences.²⁵ Holly Johnson has estimated that the ultimate accountability for sexual assaults in Canada is around 0.3%.²⁶ Where offenders are convicted, sentences have tended to be lower if the offender is known to the victim and/or there was no penetration. Such distinctions track closely the old definition of rape and were meant to be rejected by the 1983 reforms that combined rape and indecent assault into a single offence of sexual assault. Almost sexual assaults are prosecuted as level one sexual assault, even where there is evidence of multiple perpetrators, bodily harm or other aggravating features.²⁷

Sexual assault both reflects and reinforces women's social inequality to men. The act of committing sexual assault is not simply a crime that has been ascribed randomly to men as a sex. It reflects the normalization of male sexual aggression — the idea that sex is something that men should seek out and impose on women, a sexuality that is aroused by conquest rather than mutuality. The pattern is at once horrible and banal: if 3-4% of Canadian women report being sexually assaulted in the past year,²⁸ the lifetime prevalence of sexual

22 Statistics Canada, *Measuring Violence Against Women*, *supra* note 17 at 10, 29, 95-96 (estimating 53% of spousal sexual assaults and 10% of non-spousal sexual assaults reported to police).

23 For examples of recent cases in which evidence of sexual activity of the complainant with persons other than the accused was admitted, see e.g. *R v TS*, 2012 ONSC 6244, [2012] OJ No 5341; *RO (Re)*, 2011 ONCJ 464, [2011] OJ No 4154; and *R v Butts*, 2012 ONCA 24, [2012] OJ No 108.

24 Christine Boyle, "Reasonable Doubt in Credibility Contests: Sexual Assault and Sexual Equality" (2009) 13 *International Journal of Evidence and Proof* 269 at 284.

25 Statistics Canada, *Measuring Violence Against Women*, *supra* note 17.

26 Holly Johnson, "Limits of a Criminal Justice Response: Trends in Police and Court Processing of Sexual Assault" in Elizabeth Sheehy, ed, *Sexual Assault in Canada: Law, Legal Practice and Women's Activism* (Ottawa: University of Ottawa Press, 2012) at 632.

27 Statistics Canada, *Measuring Violence Against Women*, *supra* note 17 (noting that over 90% of sexual assaults are prosecuted as level one).

28 Mary Koss et al, "The Scope of Rape: Incidence and Prevalence of Sexual Aggression and Victimization in a National Sample of Higher Education Students" (1987) 55 *Journal of Consulting and Clinical Psychology* 162 at 166 (reporting 15% of college-aged women having experienced attempted rape; 25% having given in to unwanted sex after continual arguments and pressure). Although recent lifetime prevalence data are not available in Canada, in 2009, 3.4% of women

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assault is high and the number of offenders is not small either. This state of affairs is not to men's benefit — the accepted gender roles for men can be stultifying; the pornography peddled to boys and young men generates enormous profits for corporate interests while encouraging men to find pleasure in the objectification of women.²⁹

It is in this social and historical context that the Supreme Court of Canada decided *R. v. JA*, a case involving a complaint of sexual assault by a woman against her common law husband and the father of her son. By the time *JA* reached the Supreme Court of Canada, the issue in the case was reduced to whether a person could “consent in advance” to *sexual touching* that occurred when *he or she* was asleep or unconscious [my emphasis].³⁰ This formulation of the question at issue, when juxtaposed against the actual history and facts of the case, provides a powerful example of how acts of male violence against women can be stripped of their social context and privatized into matters of individual choice.

The victim in *JA*, referred to as “K.,” was a woman who first reported to police that her spouse had sexually assaulted her during their relationship. K. told police in her videotaped interview that J.A. had strangled her into unconsciousness by squeezing her throat, and then anally penetrated her with a dildo while she was unconscious. J.A. was charged with several offences arising from this complaint, including sexual assault causing bodily harm.³¹

K. changed her story completely when she testified at trial. She testified that this was not the first time that J.A. had choked her in this fashion and then had sexual contact with her. She claimed that all of these incidents of strangling, including the one giving rise to the complaint, were consensual. She said that they had discussed in a general way the kinds of acts that might be done to her after she passed out. When pressed as to whether she had specifically agreed to be anally penetrated with an object while unconscious, she

reported having been sexually assaulted in the preceding year: Statistics Canada, *Measuring Violence Against Women*, *supra* note 17 at 42.

29 Robert Jensen, *Getting Off: Pornography and the End of Masculinity* (Cambridge, Massachusetts: South End Press, 2007) at 79. See also “I Want a Twenty Four Hour Truce in Which there is No Rape” in Dworkin, *supra* note 18 at 166.

30 *JA* SCC, *supra* note 15 at paras 1-3. The majority describes the issue as whether “consent for the purposes of sexual assault requires the complainant to be conscious throughout...” (at para 21). This has the advantage of describing consent as an ongoing state of mind and also broadens the inquiry to other kinds of unconsciousness, but it removes entirely the fact that the complainant was choked.

31 *Ibid* at para 9. J.A. had recently been released from jail and was on probation at the time of the alleged assault, although it is not clear what offence he had been incarcerated for.

at one point said no, but later claimed that she had consented to the specific sexual activity.³²

K. explained the motive for her accusation to police was that her relationship was in trouble and that, after an argument, J.A. had threatened to seek sole custody of their two year old son.³³ Of course, after this testimony was offered, it would not have seemed necessary for J.A. to take the stand to offer his version of events. His counsel argued that the Crown had failed to prove the absence of consent because the complainant's own evidence was that she had consented.

The trial judge described the cross-examination of the complainant as a "typical... of a recanting complainant in a domestic matter." She therefore disbelieved the complainant's evidence that she did in fact consent to the anal penetration with a dildo, noting that she was a witness who was "on side with the defence." Yet the trial judge did seem to accept that the complainant could have consented to being strangled into unconsciousness "to heighten their sexual experience," noting that her evidence "was completely unchallenged on this point".³⁴ However, the trial judge noted that even if the complainant had offered consent to all of the acts that took place, the events she described did not amount to consent in law. Once unconscious, the complainant was incapable of consenting to sex and so any sexual touching that took place was a sexual assault.³⁵

Some context for why K.'s story may have changed can be gleaned from the reasons for sentence where the history of her relationship with J.A. is revealed.³⁶ J.A. was violent to K. throughout their seven-year relationship. He had twice been convicted of assaulting her; one of the assaults took place in public in a doctor's office.³⁷ He was on probation at the time of the events before the court.³⁸ The trial judge noted that J.A. had no gainful employment, supporting himself through drug dealing and other unsavoury means.³⁹ He showed little insight into, or remorse for, his actions. K. hoped that J.A. would continue to have a relationship with their son, a plan with which the judge

32 *Ibid* at paras 5-8.

33 *Ibid* at para 9.

34 *R v JA*, 2008 ONCJ 195, [2008] OJ No 1583 at paras 4-8, 44, Nicholas J.

35 *Ibid* at paras 42-43.

36 *R v JA*, 2008 ONCJ 624, [2008] OJ No 4814.

37 *Ibid* at para 2. . He also had a conviction for assault against another girlfriend as well as numerous other drug and assault convictions.

38 *Ibid* at para 1.

39 *Ibid* at para 3.

strongly disagreed.⁴⁰ She found there to be a high risk of further violence. Not a single piece of credible evidence of any weight seems to have been adduced in J.A.'s favour at the sentencing. He had numerous other convictions for crimes of violence and the trial judge was clearly foreshadowing the prospect of a dangerous offender application.⁴¹

Those familiar with the patterns of coercive control exhibited by batterers might see these events as part of a well-worn cycle.⁴² K. attempts to break free of her abusive spouse; the conflict between them escalates. He tightens his grip on her through threats, including threats to try and take away her son. After yet another assault, she responds by summoning the courage to report to police the worst of what has transpired in their relationship. She may have been right that this was not the only incident — strangling is a common tactic of batterers.⁴³ J.A. responds with a combination of further threats, promises, and pressures. K. recants and tells a false story that paints her as sexually masochistic and manipulating the justice system to thwart a father's access to his child. I am not suggesting that the above sequence of facts was proven on the evidence. But for those with any experience with the facts of domestic violence cases, it is much more plausible than K.'s second story.

Yet it was K.'s version on the stand, which called on classic myths and stereotypes about women and sexual violence that became the accepted factual context for the appeal as it moved forward through the appellate courts. On appeal to the Ontario Court of Appeal,⁴⁴ the question at issue was reduced to one of "general principle" such that K.'s relationship with J.A. disappeared entirely. Justice Simmons, for the majority, sums up her position by stating: "I can see no basis for holding that, as a matter of general principle, a person

40 *Ibid* at para 2.

41 *Ibid* at paras 7, 12.

42 Evan Stark, *Coercive Control: How Men Entrap Women in Personal Life* (Cary, North Carolina: Oxford University Press, 2007).

43 Lee Wilbur et al, "Survey Results of Women Who Have Been Strangled While in an Abusive Relationship" (2001) 21 *Journal of Emergency Medicine* 297 (68% of participants in a study of women at shelters and a violence prevention centre reported a history of strangulation, with 5.3 strangulation assaults on average); Jacqueline C Campbell et al, "Risk Factors for Femicide in Abusive Relationships: Results from a Multisite Case Control Study" (2003) 93 *American Journal of Public Health* 1089 (9.9% of abused women control group and 56.4% of femicide victims had been strangled by their partners); Daniel C Barrios & Deborah Grady, "Domestic Violence: Risk Factors and Outcomes" (1991)155 *Western Journal of Medicine* 133 (23% of women seeking medical treatment for domestic violence were choked); Neal Gully, "New York law now makes choking a crime, results in 2,000 arrests", *Reuters* (7 April 2011) online: <<http://www.reuters.com/article/2011/04/07/us-strangulation-newyork-idUSTRE7367H020110407>>.

44 *R v JA*, 2010 ONCA 226, [2010] OR (3d) 676 [JA CA].

cannot legally consent in advance to sexual activity expected to occur while the person is unconscious or asleep”.⁴⁵

By this point, the bodily harm part of the charge had been eliminated by the trial judge’s finding that the unconsciousness had not been proven to be more than transient, downgrading the offence at issue to a simple sexual assault. This seems to misplace the emphasis on the length of time the victim was unconscious rather than on the act of being strangled to that point; as Karen Busby points out, courts would not hesitate to characterize strangling someone until they pass out as an assault causing bodily harm in a non-sexual context.⁴⁶

The trial judge’s characterization of the complainant as a recanting domestic violence complainant is also stripped away by the Court of Appeal’s analysis, since that is seen as relevant only to the question of consent to anal penetration, an issue on which the Court of Appeal finds insufficient evidence of non-consent. Thus in stating the issue on appeal, Justice Simmons, with Justice Juriensz concurring, offers up a gender neutral proposition that is oblivious to either the nature of the “sexual activity” or how the “unconsciousness” comes about. The sexual activity “occurs” as if it is a natural phenomenon rather than the wilful act of someone else. Analogies are made to advance consent to surgical interventions, removing the facts even further from a gendered or a sexual context. The majority goes so far as to find that rejecting advance consent would “deprive individuals of a significant aspect of their personal autonomy by limiting their ability to make choices about who can touch their body and in what circumstances”.⁴⁷

The majority of the Court of Appeal fails to consider whether an understanding of “personal autonomy” grounded in sex equality rather than choice might point to a different conclusion. Such an analysis would recognize the extreme risks for women that endorsing such a rule would pose, particularly for women who lack capacity to consent because of mental disability, intoxication, age-related dementia, and other factors.⁴⁸ It would recognize that Aboriginal women have been identified as particular targets for sexual assaults

⁴⁵ *Ibid* at para 69.

⁴⁶ Karen Busby, “Erotic Asphyxiation, Vengeful Wives, and Other Enduring Myths in Spousal Sexual Assault Prosecutions” (2012) 24 CJWL 328 at 343.

⁴⁷ *Ibid* at para 87.

⁴⁸ For a discussion of incapacity to consent in the context of intoxication and mental disability see: Janine Benedet, “The Sexual Assault of Intoxicated Women” (2010) 22 CJWL 435; and Janine Benedet & Isabel Grant “A Situational Approach to Incapacity and Mental Disability in Sexual Assault Law” (2013) 43 Ottawa L Rev 447.

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while unconscious.⁴⁹ It would recognize the realities of wife assault and reject the notion that different standards of consent ought to apply in the marital context.⁵⁰ It would be alive to the dangers of reviving through the back door a doctrine of implied consent.⁵¹ It would also recognize the simple truth that sexual contact while unconscious is experienced only by the conscious party, who is usually male, and that male arousal by an unresponsive woman is an extreme expression of male dominance in which sex is done to a woman rather than with her.

Justice LaForme dissented. He would have found that consent must exist at the time the sexual activity takes place. Where a person lacks the ability to consent during the sexual activity, no consent exists. Justice LaForme points out that the only way to find that consent exists at the time of the touching in such circumstances is to imply it from past statements or behaviour. He notes that *R v Ewanchuk* clearly rejected the availability of implied consent for the purposes of sexual assault.

In considering the question of dignity and autonomy, he notes, “at first blush there is a superficial appeal to my colleague’s assertion....At the heart of this matter are individual autonomy and individual choice to protect the dignity of the individual and the security of the individual’s person. Autonomy is the capacity to exercise choice free of restraint unfettered by control and absent interference. It belongs to the individual and cannot be... delegated to another. The autonomous operating will of the individual is negated by unconsciousness...”⁵²

This is a welcome attempt to put some real meat on the bones of autonomy. But it is still gender neutral and considered outside the context of sexual assault. One might consider what sexual autonomy means for women in particular in a social context where sexual assault and domestic violence remain real threats and where marital rape has only been criminalized at all since 1983. Perhaps in these circumstances women’s autonomy includes and

49 Elizabeth Sheehy, “Judges and the Reasonable Steps Requirement: The Judicial Stance on Perpetration Against Unconscious Women” in Sheehy, *supra* note 26. For a recent example, see *R v Jesse*, 2012 SCC 21, [2012] 1 SCR 716.

50 Jennifer Koshan, “The Legal Treatment of Marital Rape and Women’s Equality: An Analysis of the Canadian Experience” (September 2010), online: The Equality Effect. <<http://theequalityeffect.org/pdfs/maritalrapecanadexperience.pdf>>.

51 The author participated in the sub-committee for the intervention of the Women’s Legal Education and Action Fund (LEAF) before the Supreme Court of Canada. . LEAF included this context in its factum: Factum of the Intervener, Women’s Legal Education and Action Fund (LEAF), *R v JA*, SCC File No 33684, October 29, 2010.

52 *JA CA*, *supra* note 44 at paras 135-137.

requires the security of a life free from violence. Certainly it should encompass being recognized and valued as a human being rather than an object and being an active participant in one's own sexual experiences.

In *R v Ashlee*, decided before the Ontario Court of Appeal decision in *JA*, the Alberta Court of Appeal considered a case in which bystanders observed two men touching the bared breasts of an unconscious, highly intoxicated Aboriginal woman on a public street.⁵³ Little was known about the complainant; she disappeared after being discharged from the hospital and did not testify. The defence argued that the Crown had to prove, as part of its burden to prove non-consent, that the complainant had not given advance consent to be touched when she was unconscious. This would obviously have been difficult for the Crown without the complainant's testimony. Two members of the court rejected this argument, noting that capacity to consent was to be measured at the time the sexual touching took place. Justice Conrad dissented, cloaking her reasons in the language of choice and autonomy:

Just as everyone has the right to be free from unwanted sexual activity, everyone has the right to consent to sexual activity. An individual, while competent, can grant permission to another to touch his or her body in a sexual way, including the permission to touch while the individual is sleeping or unconscious. This legislation is not aimed at controlling the consensual, sexual choices of competent adults. This is an offence against the person — not the state.⁵⁴

The majority reasons in *Ashlee*, like the minority reasons in *JA*, did not directly enrich the autonomy and choice narrative with any discussion of sex equality. Rather, each set of reasons responded with a choice-based narrative of its own, one that was about timing (the right to change your mind) rather than about sexually violent behaviour. A focus on sex equality might have noted the troubling assumptions about sexuality that underlie the use of unconscious women as objects for male sexual pleasure. In the interactions in *JA*, who is really having sex, when the woman cannot feel or remember any of the sexual activity and the accused is using an object to penetrate her?

By the time *JA* reached the Supreme Court of Canada, the gender-neutral, hypothetical nature of the question before the Court was firmly established. Questions of actual consent in fact, whether unconsciousness is bodily harm vitiating consent, and the context of the parties' relationship, had disappeared as not properly before the Court. The Chief Justice, writing for a six-mem-

⁵³ *R v Ashlee*, 2006 ABCA 244, [2006] 40 CR (6th) 125, leave to appeal to SCC refused, 31688 (December 14, 2006).

⁵⁴ *Ibid* at para 76.

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ber majority, adopted the approach of the minority in the Ontario Court of Appeal and the majority in *Ashlee*. The gender-neutral question was posed anew: “whether a person can perform sexual acts on an unconscious person if the person consented to those acts in advance...”.⁵⁵ The majority answered this question in the negative, on the basis of past case law, the wording of the *Code* and the need to ensure that “*women and men* are not the victims of sexual exploitation...”.⁵⁶

Like Justice LaForme in the court below, the Chief Justice rejected analogies to surgical treatment or carrying an intoxicated friend home from a party. She pointed out that sexual activity is a different context in which waivers are not signed and implied consent is not recognized. She also rejected arguments trying to carve out recognition of advance consent for the caress of a “sleeping spouse” as unworkable in terms of proof and open to abuse. Parliament had clearly declined to enact defences to sexual assault based on the nature of the relationship between the parties. The Chief Justice noted that this produces “just results in the vast majority of cases”⁵⁷ and has “proven of great value in combating the stereotypes that have historically surrounded consent to sexual relations...”.⁵⁸ She concluded by noting that absent a constitutional challenge, it is the role of Parliament to carve out exceptions to the law on consent should that be necessary.

While *JA* reaches the right result, it should leave those concerned with equality rights dissatisfied. The only reference to the equality rights of women is an oblique nod to combating stereotypes about consent in the marital context. These stereotypes are not identified, nor are the problematic results that they produce. What the majority seems to say is that because people (including women) have the right to change their mind and revoke their consent at any time, people (including women) have the right to be left alone sexually when they are unconscious. The right is a temporal one.

The three dissenting Justices, in reasons written by Justice Fish, characterize the majority’s approach as finding that a “yes” in fact means “no” in law.⁵⁹ Interestingly, Justice Fish’s reasons are written in gendered terms, accusing the majority of “depriving women of their freedom to engage in sexual adventures that involve no proven harm to themselves or others” and

⁵⁵ *JA* SCC, *supra* note 15 at para 1.

⁵⁶ *Ibid* at para 3 [emphasis added].

⁵⁷ *Ibid* at para 65.

⁵⁸ *Ibid*.

⁵⁹ *Ibid* at para 71.

interpreting the *Code* as “protecting women against themselves by limiting their freedom”.⁶⁰ He rejects the absurdity of criminalizing the conduct of cohabiting partners who “even with express prior consent, kis[s] or cares[s] the other while the latter is asleep”.⁶¹ These reasons draw on the language of what has been termed “choice feminism” effectively accusing the majority of paternalism and moralism.

What no one says in *JA* is that when a man uses a woman sexually when she is incapacitated, this is an aggravated act of sexual violence that reifies male supremacy. Women are selected for their incapacity or perceived incapacity due to disability, age, intoxication, anaesthesia and other causes. The fact that sexual arousal for the man is heightened by the victim’s vulnerability is disturbing. Far from being “adventurous,” it is dangerous for women and plays out old patterns of gender relations, taken to an extreme. Yet the only recognized “danger” for the dissent is seen to come from the “sleeping spouse” question. This imagines the rather odd scenario in which one spouse gives the other “explicit” advance consent to caress them while asleep. Of course, for such an assault to come to the attention of police, we need to assume a vindictive woman who uses her husband’s nighttime caress as a weapon to store for future use. Presumably this same risk of a spiteful complaint exists any time that a couple has any form of consensual sex while both are awake; the only difference is that the first is a truthful vindictive complainant, while the second is a lying one. Recognition of male privilege is entirely absent; instead it calls on the pornographic narrative of the powerful woman who is a threat to men.

The majority decision of the Supreme Court in *JA* reaches the right result and is an important one in the law of sexual assault. But it disappoints in its disinclination to see sexual assault as more than people making decisions to start or stop sexual activity. The understanding of sexual assault as sex inequality is never directly affirmed.⁶² The failure to recognize the context of strangulation in domestic violence allows us to see the case as being about the boundaries of acceptable sexual activity rather than a clear example of life-threatening assault. Busby notes that the mainstream media’s coverage of *JA* adopt these accounts in relation to the facts of *JA* itself, repeating the account

⁶⁰ *Ibid* at para 73.

⁶¹ *Ibid* at para 74.

⁶² Richard Jochelson & Kirsten Kramar, “Essentialism Makes for Strange Bedmates: The Supreme Court Case of *J.A.* and the Intervention of LEAF” (2012) 30 *Windsor YB Access Just* 77 at 85 (arguing that the liberty and equality of women were not an overt concern in the Supreme Court’s decision).

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of “a vengeful woman crying rape” and “kinky” sexual proclivities and ignoring “the serial abuser narrative”.⁶³

In her comment on *JA*, Lise Gotell argues that the dissenting reasons of the Supreme Court show the limits of an individualized approach to consent, even when measured affirmatively:

... the decontextualizing effects of affirmative consent are certainly apparent in the embrace of advance consent by the majority of the Ontario Court of Appeal and by the Supreme Court of Canada’s dissent. These opinions transform what might plausibly be seen as K.D.’s submission into consent, and this “consent,” in turn, is constructed as signifying sexual autonomy. This is a governmental move that responsabilizes, transforming submission into empowerment and thereby provoking us all to live with the consequences of our “choices”.⁶⁴

She notes, however, that the majority judgment is also largely silent on the gendered context in which choices are made, and should be understood as:

...a normalizing project that makes explicit the requirement of active consent within marriage and marriage-like relationships, reformulating normative heterosexuality based upon the transactional logics of affirmative consent, while actively occluding the gendered power relations that limit and constrain women’s agency.⁶⁵

In the following sections of this article, I consider how and why the “gendered powered relations that limit and constrain women’s agency” were made visible in the constitutional reference on polygamy but have not been recognized in the context of prostitution.

Reference re s. 293 of the *Criminal Code* (*The Polygamy Reference*)

In December 2011, just a couple of months after *JA*, the British Columbia Supreme Court released its decision upholding the constitutionality of the *Criminal Code* prohibition on polygamy.⁶⁶ In a lengthy decision, Chief Justice Bauman gave a variety of reasons for upholding the provision as a reasonable limit on religious freedom under s 2(a) of the *Charter*, and for rejecting the

63 Busby, *supra* note 46 at 336-337.

64 Lise Gotell, “Governing Heterosexuality through Specific Consent: Interrogating the Governmental Effects of *R. v J.A.*” (2012) 24 *CJWL* 359 at 361.

65 *Ibid* at page 362.

66 *Reference re: Section 293 of the Criminal Code of Canada*, 2011 BCSC 1588, [2011] BCLR (5th) 96 [*Reference re: Criminal Code*].

argument that the offence violated individual liberty under s. 7 in a manner inconsistent with the principles of fundamental justice.

The *Polygamy Reference* arose after attempts to prosecute the leaders of the Bountiful polygamous sect fell apart over allegations that the Attorney-General had interfered with the appointment of a series of special prosecutors, most of whom had declined to proceed with the prosecution on the ground that the offence was likely unconstitutional.⁶⁷ All but one of these prosecutors determined that concerns about sex inequality were insufficient to answer claims of religious freedom.⁶⁸ The special prosecutors appointed to review the case were not alone in their views. Many scholars argued that polygamy should be decriminalized, in part because its criminalization could amplify the risk to women trapped in polygamous marriages, but also because it was important to respect women's agency in choosing to live as one of many "sister wives".⁶⁹ For example, Angela Campbell, who testified as an expert in the case, has argued of the women in Bountiful: "their choices about marriage, reproduction, residence, work and education might be characterized as active, deliberated, and in the service of their own interests".⁷⁰

Many of those opposing the polygamy law argued that the harms associated with polygamy in Bountiful (child marriage, sexual abuse of girls, sex trafficking, poor education) were separate wrongs that could be prosecuted independently.⁷¹ It was argued that polygamy itself was not the problem, since these abuses could arise in non-polygamous settings as well. Those seeking to have the provision struck down adopted this associated harms approach.⁷²

Justice Bauman rejected these arguments for two main reasons. First, he considered the importance of monogamous marriage to society. He found that monogamous marriage offered society great benefits as compared to polygamy as a practice.⁷³ This portion of the decision is, in my view, less than convincing and sits somewhat at odds with the analysis of gendered harms that follows. The celebration of the benefits of monogamous marriage as the bedrock of society glosses over the lengthy history of women's inferiority, so-

⁶⁷ *Blackmore v BC (AG)*, 2009 BCSC 1299, (2009) 70 CR (6th) 318 [*Blackmore*].

⁶⁸ All of them were also men: Janine Benedet, Annotation to *Blackmore*, *ibid* at page 319.

⁶⁹ See e.g. Angela Campbell, "Bountiful Voices" (2009) 47 Osgoode Hall L J 183.

⁷⁰ *Ibid* at 227.

⁷¹ See e.g. Susan Drummond, "Polygamy's Inscrutable Criminal Mischief" (2009) 47 Osgoode Hall L J 317; Michelle Chan, "Towards an Intersectional and Postcolonial Feminist Intervention in the British Columbia Polygamy Reference" (2011) 16 Appeal 15.

⁷² *Reference re: Criminal Code*, *supra* note 66 at para 132.

⁷³ *Ibid* at paras 882-885.

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cially and legally in such marriages. Bauman J. based his conclusion in part on evidence about human mating practices from evolutionary biologists whose work has been criticized by feminists for emphasizing biological determinism over the social construction of male dominance.⁷⁴ While monogamous marriage no doubt offers benefits to many individuals of both sexes, it is less plausible to characterize monogamous marriage as an institution as equal or positive for women. Polygamous marriage is not harmful to women because it impedes them from enjoying monogamous marriages.

More compelling is Bauman J.'s consideration of the harms both to women in polygamous communities and to young men from those same communities who were left without spouses. These included increased risks of psychological harm, physical and sexual abuse, child mortality, and poverty.⁷⁵ On this second point, his analysis was explicitly focused on the gendered reality that worldwide and throughout history, polygamy has almost always been practiced as polygyny (one man, multiple women).⁷⁶ He found the evidence supported a "reasoned view that the harms associated with the practice [of polygamy] are endemic; they are inherent".⁷⁷

By the time this list of harms was catalogued and accepted, the evidence of some women that they chose polygamy and benefited from it either spiritually or personally was not sufficient to dislodge the valid public interest in prohibiting polygamy as a practice. This testimony came from both women in Bountiful but also women who lived in "polyamorous" households involving various combinations of adults. For example, one witness testified that she lived in a "V" in which she had intimate relationships with two men, although the two men were not sexually involved with one another.⁷⁸ Some of these witnesses linked their living arrangements to Wiccan spirituality, while others expressed no religious affiliation.⁷⁹

The court noted that the law did not prohibit individuals from forming intimate relationships with many people at the same time, it just forbid multiple marriages.⁸⁰ The harsh realities of life in communities such as Bountiful

⁷⁴ See e.g. Randy Thornhill & Craig T Palmer, *A natural history of rape: biological bases of sexual coercion* (Cambridge, Massachusetts: MIT Press, 2000); Katharine K Baker, "Gender, Genes, and Choice: A Comparative Look at Feminism, Evolution, and Economics" (2002) 80 NCL Rev 465. .

⁷⁵ *Ibid* at paras 8-15 (summarizing harms).

⁷⁶ *Ibid* at para 136.

⁷⁷ *Ibid* at para 1045.

⁷⁸ *Ibid* at para 460.

⁷⁹ *Ibid* at paras 466, 430.

⁸⁰ *Ibid* at para 975.

should be seen not as harms associated with polygamy when practised in a closed religious society but as the predictable or inevitable manifestations of the harm of polygamy itself.

How this evidence plays out in the section 7 analysis is not always very clear in Bauman J.'s reasons. Bauman J. may be saying that the harms catalogued are the inherent harms of polygamy, rather than associated harms. He may also be holding that claims of agency and choice on the part of some witnesses were insufficient to outweigh these more systemic harms of polygamy in the balancing required by the principles of fundamental justice, or in the s. 1 analysis under the s.2(a) freedom of religion claim.

If this analysis is correct, this part of the *Polygamy Reference* may be the most important for future cases that pit claims of individual choice against evidence of gendered harms. Polygamy as practiced is an extreme expression of sex inequality that devalues women and girls by treating them like commodities and that endorses a patriarchal hierarchy that provides women with very limited life choices. It is important to see sex inequality as its own harm, and as part of the conclusion that polygamy is “inherently” harmful. In other words, the harms of polygamy are not just inevitable (as opposed to associated): the sex inequality that polygamy reflects and reinforces is itself a harm that can and should be the subject of legal and public policy responses.

How can it be said that polygamy is inherently harmful in the face of claims from some witnesses that they benefited from it, or at least that they were not harmed by it? One possibility is to argue that evaluations of harm need to involve more than just the views of the wife-witness. We may find her assertions lacking credibility in the face of other evidence or conclude that she is harmed even if she cannot see it. I am not advocating such an analysis, which is fraught with recriminations for not listening or believing women's accounts of their lives, because there is a better and simpler approach. Anti-discrimination law makes clear that not every woman needs to be targeted by a sex-based practice for it to amount to harmful and unlawful sex discrimination.⁸¹ For example, harassment by a man towards only one woman in a particular workplace is still a sex-based practice. That only some women become pregnant does not prevent discrimination against pregnant women from being sex discrimination. It can fairly be argued that such practices harm women *as a class*, by conditioning their economic advancement on the tolera-

⁸¹ *Janzen v Platy Enterprises Ltd.*, [1989] 1 SCR 1252, 59 DLR (4th).

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tion of sexual advances or by requiring them to bear a disproportionate cost of the socially necessary act of reproduction.

Furthermore, complete agreement should not be required by one-hundred percent of women who are targeted by a practice of sex discrimination in order for that practice to be declared harmful. It might seem that polygamy (and prostitution) are different from the examples I have just given because no woman would support, for example, sexual harassment, even if she is not the target. In fact, there are many examples of women endorsing such practices for themselves. Some women say they enjoy a work atmosphere in which sexual joking and pranks are permitted or that they are not bothered by the presence of pornography in the workplace. Some women are willing to work for less pay than a male colleague in order to get much-needed experience. We can still understand these practices, in their social context, as sex discrimination, without trying to figure out whether these women are genuinely unharmed, whether they are free riders on the women's movement, or whether they will change their minds next week or next year. Where the harms to women as a class are widespread and structural, there should be no constitutional impediment in principle to using the law to provide a remedy or a response.

While I applaud the *Polygamy Reference*'s willingness to see polygamy a practice of sex inequality, the decision struggles unsuccessfully with the offence's apparent application to both the multiple wives who are harmed by polygamy and the men who benefit from and promote it. As the provision is written, all of them could be charged and convicted. West Coast LEAF argued that the provision could be read down to apply only to exploitative polygamy (thus decriminalizing the Bountiful "wives" and possibly also some egalitarian polyamorous marriages), but this limitation was not adopted.⁸² Chief Justice Baumann declines to read down the offence, except as it applies to spouses between the ages of 12 and 17, saying only that defences such as duress may need to be invoked by adult women should police decide to charge everyone. So far, the issue has not arisen since the leaders of Bountiful have still not been charged under s. 293, despite what would appear to be clear evidence that the law has been violated. The decision in the *Polygamy Reference* was not appealed, so it remains only a trial level opinion limited to British Columbia.⁸³

82 Again there is a parallel here with the *Bedford* prostitution challenge (*infra* note 86) where the Ontario Court of Appeal read down the living on the avails offence to require proof of circumstances of exploitation in the belief that some third party profiteers might offer protection to prostituted women.

83 See Craig Jones, *A Cruel Arithmetic: Inside the Case Against Polygamy* (Toronto: Irwin Law, 2012) at 882; Charles Lewis, "Polygamy ban upheld, but prosecutors still face difficult legal terrain",

Finally, it is worth noting that almost all of the witnesses who testified about their experiences with polygamy were women.⁸⁴ Like in *JA*, the men at the centre of the reference, Bountiful leaders Winston Blackmore and James Oler, are not made visible in this case. The focus is on the women, their assertions of choice, and how those ought to be evaluated and credited. Unless the men's choices to dominate and control women are uncovered and named it appears that it is women are "being polygamous" against an otherwise egalitarian backdrop. This may seem on the surface to recognize women's "agency," but it misses the point that a hierarchy has both a bottom and a top, and those at the top often have a considerable investment in seeing their dominance understood as natural, just, and inevitable. The invisibility of the men who were the source of polygamy's harm reflects and reinforces male privilege and is one of several parallels between this case and the *Charter* challenges to the prostitution laws.

Bedford et al. v Canada (A.G.)

The decision in the *Polygamy Reference* makes an interesting comparison to the recent constitutional challenge to the prostitution offences in the *Criminal Code*.⁸⁵ In *Bedford*, the three applicants challenged the provisions of the *Criminal Code* that prohibit living on the avails of someone else's prostitution (s. 212(1)(j) — the pimping law); communicating in a public place for the purpose of prostitution (s. 213(1)(c) — the street prostitution law); and keeping or being in a bawdy house (s. 210 — the brothel law). The applicants argued that the laws violated their rights on a number of grounds, but the focus of the challenge was on s. 7. The applicants alleged violations of both their rights to liberty and their rights to security of the person.

The three applicants testified that they had earned income from prostitution for many years. All three of the applicants entered prostitution as adolescents, at ages 15, 16, and 18. Two of the applicants were no longer in prostitution but wanted to open or re-open brothels or, in the case of Bedford, a domination "dungeon". The third woman testified that she was still in prostitution on her own and expressed an intention to continue out of her

National Post (24 November 2011) A1; Marc Ellison, "Polygamy ruling won't be appealed; Federal and provincial justice officials left with only two days to decide what to do next", *The Globe and Mail* (22 December 2011) S2; Jeff Lee, "Prosecuting polygamists to begin: B.C.; Must 'protect' victims; No need for a high court ruling, province says", *National Post* (27 March 2012) A4.

⁸⁴ Truman Oler, who grew up in Bountiful but left the community, testified. . A more detailed account of the evidentiary record and how it was assembled can be found in Jones, *ibid*.

⁸⁵ *Bedford v Canada (Attorney General)*, 2012 ONCA 186, [2012] OR (3d) 1 [*Bedford CA*].

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apart ment. All of these activities would leave them open to prosecution under the bawdy house and living on the avails provisions.

A number of other women testified about their experiences in various kinds of prostitution, some on behalf of the government and others on behalf of the applicants. The evidence of these women varied as to their assessments as to whether certain kinds of prostitution were safer and as to whether they considered prostitution in itself to be harmful. Large quantities of social science and comparative evidence were also tendered about the legal regimes in other countries and the effects of those regimes on women in prostitution.⁸⁶

At first instance, Justice Himel accepted most of the applicants' arguments and invalidated all three laws.⁸⁷ She found that the street prostitution/communicating law violated the applicants' security of the person because the risk of criminalization pushed them into unsafe areas and did not give them adequate time to screen customers. She found that the bawdy house/brothel laws violated the right to security of the person because they prevented women from choosing the least dangerous forms of prostitution in indoor settings, which she considered to be prostitution out of one's home or in a supervised brothel. Finally, she found that the living on the avails/pimping law restricted women's security of the person by preventing them from hiring employees who might act as bodyguards or otherwise increase their safety. She found that these violations of security of the person did not meet the principles of fundamental justice, being either arbitrary, overbroad, or grossly disproportionate to the laws' objectives.⁸⁸

This decision was appealed to a five-member panel of the Ontario Court of Appeal. All five Justices agreed that the living on the avails law should be restored, but held that it should be read down to require proof that the person living on the avails is doing so in a manner that is exploitative.⁸⁹ A three-member majority (Doherty, Rosenberg, and Feldman JJA) also allowed the appeal with respect to the communicating offence prohibiting street prostitution and held the offence to be constitutional.⁹⁰ They found that criminalization was at most a modest factor in the very high risks of violence faced by women in street prostitution and that the government's objectives supported its criminalization. The minority (MacPherson and Cronk JJA) would have upheld the

⁸⁶ The facts and evidence are reviewed in the decision at first instance, *infra* note 88.

⁸⁷ *Bedford v Canada (Attorney General)*, 2010 ONSC 4264, [2010] 102 OR (3d) 321 [*Bedford* ONSC].

⁸⁸ *Bedford* CA, *supra* note 85 at para 4.

⁸⁹ *Ibid* at para 6.

⁹⁰ *Ibid* at para 7.

application judge's finding of unconstitutionality with respect to the communicating offence.⁹¹ All five Justices agreed that the bawdy house law was unconstitutional and should be struck down because it prevented women from moving to a less dangerous locale indoors.⁹² The parties were granted leave to appeal and to cross-appeal these various rulings to the Supreme Court of Canada, which heard the appeal in June 2013.⁹³

This is the briefest of summaries of no more than the key holdings of two lengthy and complex decisions; a fuller account of the evidence and the arguments in the case is beyond the scope of this article. My argument here is a simple one, consistent with the themes discussed above in relation to *JA* and the *Polygamy Reference*: first, the decisions of the courts in *Bedford* have been deeply influenced by claims of individual choice and agency, while largely turning away from evidence of inequality as anything other than examples of individual misfortune to be guarded against through privatized self-help. Second, the men who stand to profit from the striking down of these laws have not been made visible and have been able to assert a constitutional right to buy sex, unimpeded by the criminal law, hidden behind these assertions of women's choices and agency.

The inequality produced and reinforced by prostitution is inequality on the ground of sex, intersecting with inequality on other grounds such as Aboriginality, race, disability, and age. These inequalities were certainly present in the evidence of the women who testified in the case for both sides. Justice Himel noted only that their experiences of prostitution (and their opinions as to the effect of the laws) differed and thus did not find their evidence useful for reaching her conclusions.⁹⁴ What is striking about the women's evidence, however, are the common experiences of inequality that shaped their entry into prostitution and constrained their exit.

It was clear from this evidence that prostitution is a gendered practice. Most prostitutes are women and girls (all of the prostitutes who testified were women); almost all of the buyers and most of the pimps are men. Many of the women who testified were poor, had low levels of formal education, and had limited job prospects. There was evidence that for Aboriginal women, the effects of racism and colonization contributed to their entry into prostitu-

⁹¹ *Ibid* at para 333.

⁹² *Ibid* at para 5.

⁹³ *Canada (Attorney General) v Bedford*, 2012 SCCA No 159 (available on CanLII).

⁹⁴ *Bedford* ONSC, *supra* note 87 at para 88.

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tion.⁹⁵ Several of the witnesses entered prostitution as teenagers, often after a period in state care that sometimes followed sexual and physical abuse in the home. Others entered as adults in response to pressure from boyfriend/pimps or found their exit from prostitution constrained by drug addiction.⁹⁶

While not all women in prostitution have all of these characteristics, there are not many who have none of them, especially women who remain in prostitution for any length of time. If an approach similar to that applied in the *Polygamy Reference* was adopted here, it could lead to the conclusion that prostitution as practiced worldwide is inherently unequal and harmful to women and therefore to society as a whole, and that the harms to women from prostitution are inherent to its practice, not associated harms to be targeted separately from the practice itself. Applying such an analysis in a way that makes visible the men who buy and profit from prostitution would also recognize that the inequality of women stems from the exercise of male privilege and power on the part of men who buy and profit from that inequality.

Proponents of the decriminalization of prostitution argued that a system of regulated and managed indoor prostitution would reduce the risk of violence to prostitutes at the hands of male buyers.⁹⁷ They endorsed a system in which the violence of male buyers is seen as something to be screened for, guarded against, and reduced for some women, but never tackled at its root by questioning the inherent inequality and exploitation of male demand. Instead the demand for paid sex by “sex industry consumers” is normalized, treated as inevitable, and generally rendered invisible.

Under this analysis the responsibility for preventing male violence is not located in the state. Instead, it is downloaded onto individual women, who are expected to hire their own security guards,⁹⁸ providing pimps with a useful front. They must also screen buyers in advance, whom they will then service

95 Sarah Deer, “Relocation Revisited: Sex Trafficking of Native Women in the United States” (2009-2010) 36 *Wm Mitchell L Rev* 621.

96 The author acted as co-counsel for the intervener Women’s Coalition for Abolition of Prostitution in *Bedford* before the Ontario Court of Appeal and the Supreme Court of Canada. The evidence on the record in support of these assertions can be found in the Factum of the Intervener Women’s Coalition for the Abolition of Prostitution, *Bedford v Canada (Attorney General)*, 2012 ONCA 186, [2012 OR (3d) 1 (Factum of the Intervener)] *Factum of the Intervener*. This evidence is also collected in Catharine A MacKinnon, “Trafficking, Prostitution, and Inequality” (2011) 46 *Harv CR-CLL Rev* 271 [MacKinnon, “Trafficking”].

97 Pivot Legal Society, *Beyond Decriminalization: Sex Work, Human Rights and a New Framework for Law Reform* (Vancouver: Pivot Legal Society, 2006).

98 A result predicted by Catharine MacKinnon in an earlier article: “Prostitution and Civil Rights” (1993) 1 *Mich J Gender & L* 13.

in their own homes,⁹⁹ ignoring both the inability of women to identify violent men in advance and the evidence that the home has never been the safest place for women.¹⁰⁰ Missing from this analysis is the fact that even if a woman is able to reject a man she considers potentially harmful, the risk is simply displaced onto another woman whose lived inequalities are greater. That happened in *R v Pickton*, where the court heard evidence that Pickton was prepared to bribe the women he killed with money and drugs so that they would go with him to his farm, a location they considered to be especially risky.¹⁰¹

Under this formulation, the asserted choice of some women to engage in prostitution, whatever their histories and whatever their current options, becomes sufficient for the purposes of the *Charter* claim to overcome the profound structural inequalities of prostitution and to ensure that prostitution is made legally available to men somewhere. The only relevant harm for the *Charter* analysis is harm additional to prostitution, like physical assaults or murder, and does not extend to the harms to women of prostitution itself, nor to recognition that prostitution contributes to the inequality of all women and that inequality is itself harmful.

Contrary to the approach taken in the *Polygamy Reference*, Justice Himel seemed to be of the view that if some women in prostitution were not harmed by it then there was no need to consider whether it was a discriminatory practice against women as a class. The relationship between male demand for prostitution and other harms, like child prostitution and trafficking, could be disregarded as “incidental” to the analysis because laws against those related harms remained intact. A similar individualizing tendency is evident in the majority reasons of the Court of Appeal, which justifies the continued criminalization of women in street prostitution, notwithstanding evidence that women in street prostitution were not there by any definition of choice, on the ground that the decriminalization of brothels would at least give them “the option” to move indoors.¹⁰²

A coalition of Anglophone, francophone, and Aboriginal women’s groups intervened in the *Bedford* case at both the Court of Appeal and the Supreme

99 The Ontario Court of Appeal speaks of the advantages of the “home field” as “obvious”, *supra* note 85 at para 134.

100 See e.g. *R v Lavallee*, [1990] 1 SCR 852, [1990] SCJ No 36 at para 58, in which Wilson J noted “A man’s home may be his castle but it is also the woman’s home even if it seems to her more like a prison in the circumstances.”

101 *R v Pickton*, 2009 BCCA 300, 260 CCC (3d) 132 at para 29.

102 *Bedford CA*, *supra* note 85 at paras 317-318. .

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Court of Canada.¹⁰³ They argued that prostitution is a practice of sex discrimination and a form of violence against women. They argued that protecting women from male violence requires that the male buyers be criminalized, regardless of the locations in which they prostitute women, and that profiteers who live on the avails of a woman's prostitution are inherently exploitative and not a source of protection.¹⁰⁴ Thus the relevant distinction for the purposes of the *Charter* analysis is not one based on where the prostitution takes place, but rather on the relative power and privilege of the various parties to whom the laws apply. This analysis points to a legal model that criminalizes buyers and pimps/profiteers and decriminalizes prostitutes. Such a model has been implemented in Sweden, Norway and Iceland.¹⁰⁵ It is designed to be accompanied by strategies to discourage male demand and programs for women in prostitution to exit and acquire alternate sources of income.

The Ontario Court of Appeal rejected the submission that the objectives of the prostitution laws, and the bawdy house laws in particular, had anything to do with women's equality. If the legislature did identify equality as one of the laws' objectives, the Court noted, the balance under s. 7 might be different.¹⁰⁶ But equality is much more than an "objective" that the legislature can choose to promote or disregard. Since 1985, it has been a constitutional imperative that ought to shape the way that s. 7 of the *Charter* is interpreted, a point that the court has recognized since its decision in *Andrews v Law Society of British Columbia*.¹⁰⁷ The fact that some of the laws at issue pre-date the *Charter* does not alter this fact.¹⁰⁸ Without this approach, a litigant could challenge a law that targets discriminatory practices using an individual rights claim under s. 7 and, by not formally raising s. 15(1), use the *Charter* as a means of reinforcing inequality by excluding questions of inequality from the court's consideration. While it is true that the limits of equality rights must

103 Intervening as the Women's Coalition for the Abolition of Prostitution, the member organizations were: Canadian Association of Sexual Assault Centres, Native Women's Association of Canada, Canadian Association of Elizabeth Fry Societies, Action Ontarienne Contre la Violence Faite Aux Femmes, La Concertation des Luttes Contre L'Exploitation Sexuelle, Le Regroupement Quebecois des Centre d'Aide et de Lutte Contre les Agressions a Caractere Sexuel and Vancouver Rape Relief Society.

104 *Factum of the Intervener*, *supra* note 96.

105 MacKinnon, "Trafficking", *supra* note 96.

106 *Bedford CA*, *supra* note 85 at para 183.

107 *Law Society British Columbia v Andrews* [1989] 1 SCR 143 at 185, [1989] SCJ No 6.

108 In fact, the discriminatory and gendered nature of prostitution and the prostitution laws has long been recognized in the public discourse around prostitution, as Constance Backhouse so clearly documents: "Nineteenth Century Prostitution Law: Reflection of A Discriminatory Society" (1985) 18 *Social History/Histoire Sociale* 387 at 423.

be defined in accordance with other *Charter* rights, in *Bedford* equality was excluded altogether.

Anchoring the argument for striking down the prostitution laws in the choice of women to prostitute reveals itself to be something of a tautology. It cannot be true that solely because someone chooses to do something, however “choice” is defined, its decriminalization of that act is now a constitutional (or even a logical) imperative. The fact that an activity is chosen voluntarily tends to support the fairness of its criminalization because it suggests that the *actus reus* is the product of a conscious mind and that the act is intentional, proving *mens rea*. The argument has to be that what is chosen should be permitted. In the case of prostitution, the applicants had the analytical advantage that prostitution, unlike polygamy, is widely understood as being not criminalized directly but only indirectly.¹⁰⁹

The flaws in choice-based arguments around prostitution become visible when we consider the position of the male buyers rather than focusing solely on women in prostitution. The criminalization of prostitution’s buyers in Canada has actually increased over time rather than decreased. It is hard to argue that the choice of men to buy women in prostitution means that this purchase must be decriminalized. Decriminalizing the buyers normalizes their actions, increasing the pool of buyers and creating a corresponding pressure to increase the supply of women in prostitution. Male buyers’ security of the person is not at risk in prostitution. Instead, men’s privilege is shielded by arguments that their decriminalization reflects women’s choices, or helps women stay safe from the harms that men inflict by not driving the transaction underground. Physical violence becomes a harm ancillary to prostitution and the only harm that matters. Prostitution is not seen as inherently harmful.

Conclusion

The civil libertarian argument, adopted by some who also identify it as feminist, is that those who choose prostitution should be free to engage in it, while those who choose to avoid it can do so. The same rationale is applied to polygamy and choking for sexual excitement. Everyone gets to do what they want and people can judge for themselves whether the personal benefits outweigh the harms. An anti-discrimination or equality analysis looks at the problem differently. Starting from the premise that unquestioned adherence to the value of choice in a society that is structurally unequal merely replicates

¹⁰⁹ For a response to this claim, see Benedet, *supra* note 10.

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inequality, it does not expect those most harmed by discrimination to bear the responsibility of resistance to it. Consent is not a defence to discrimination because the value of individual choice or agency does not override the need to address collective harms. Male supremacy constructs a supply of women to be the targets of male violence through marital rape, polygamy, and prostitution, among other practices.

In all three of the cases examined in this article, male privilege combined with the focus on individual women's asserted choices allowed abusive men to remain invisible. Under this approach the male batterer in *JA*, the divinely ruling husbands in *Bountiful*, and the johns and pimps in *Bedford*, to the extent they were visible at all, were apparently just giving women what they asked for and wanted all along. I am doubtful if any of that can fairly be labelled "autonomy"; I am certain that it should not be allowed to pass for equality.

Marital Rape, Polygamy, and Prostitution: Trading Sex Equality for Agency and Choice?