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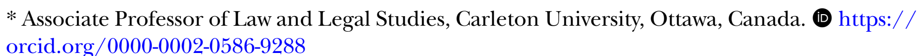
HOMOSEXUALITY AND PROSTITUTION: A TALE OF TWO DEVIANCIES†

Historically, homosexuality and prostitution were both branded immoral vices that required criminalization, despite the fact that they were also considered 'victimless crimes.' Yet, in contemporary Canadian society, gays and lesbians have gained wide social acceptance and legal rights, while the sex trade has become more criminalized, stigmatized, and, for clients or third parties, vilified. This article explores the reasons for this divergence. First, drawing on radical queer critique, I problematize this framing, arguing that the equality and rights-based victories for the lesbian, gay, bisexual, and trans community did not necessarily benefit all of its members. Building on this insight, I argue that those queers who are unable or uninterested in accessing the benefits ushered in by 'gay rights' have identities, proclivities, and vulnerabilities that overlap with those of sex workers and/or their clients. Part I of the article sets the socio-legal and political context, providing succinct overviews of key developments relating to gay and lesbian rights and of key developments relating to sex trade regulation, focusing primarily on the last fifty years. Part II analyses how gay/lesbian mainstream acceptance and the queer/sex trade marginalization occurred through overlapping discourses and laws related to privacy, bawdy houses/indecency, disease, spousal/marital relations, and children. I end with a consideration of the intersectionality between queerness and the sex trade, both in terms of subjectivities and non-normative sexual practices.

Keywords: 1969, homosexuality, legal reform, LGBT rights, prostitution, public/private divide, queer, sex work, spousal/marriage rights

I *Introduction*

Historically, political and legal discourse has treated both 'homosexuality' and 'prostitution' as examples of sin, sexual deviancy, immoral vices, or victimless crimes.[1] Yet the evolution of laws, policies, and social attitudes toward the two issues

* Associate Professor of Law and Legal Studies, Carleton University, Ottawa, Canada.  https://orcid.org/0000-0002-0586-9288

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1 For example, in 1957, the United Kingdom issued the report of the Departmental Committee on Homosexual Offences and Prostitution (often referred to as the Wolfenden report), its dual mandate suggesting an interpretive overlap between the issues at stake. Departmental Committee on Homosexual Offences and Prostitution, *Report of the Committee on Homosexuality and Prostitution*, by John Wolfenden (London: Her Majesty's Stationery Office, 1957) at 247. In Canada, bawdy-house prohibitions have historically been applied against both gay men and sex workers, implying that the harms that flow from each are analogous. See J Stuart Russell, 'The Offence of Keeping a Common Bawdy-House in Canadian Criminal Law' (1982) 14 Ottawa L Rev 270 [Russell, 'Offence of Keeping']. See also Carolyn Strange & Tina Merrill Loo, *Making Good: Law and Moral Regulation in Canada, 1867–1939* (Toronto: University of Toronto Press, 1997).

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in the last fifty years reveals contrasting trajectories.[2] In contemporary Canadian society, gays and lesbians have gained wide social acceptance and legal rights and have been politically celebrated within the terms of sexual citizenship.[3] Meanwhile, in the same time period, the sex trade has become more criminalized, stigmatized, and, for clients or third parties, vilified. If we frame same-sex relations and paid sex relations as consensual adult activity, we might ask: why did the former gain so much ground and the latter so little in a 'free and democratic society'?[4]

To answer this question, we must first problematize what has been achieved by the mainstream 'gay and lesbian,' and, later, the lesbian, gay, bisexual, and transgender (LGBT), rights movement. The celebrated gains include the decriminalization of homosexuality (as defined by anal sex); the inclusion of 'sexual orientation' as a protected ground from discrimination under the Canadian Charter of Rights and Freedoms (Charter) and human rights legislation; access to spousal and marriage rights; and inclusion as an identity protected under hate speech laws.[5] Yet, as with all movements and their socio-legal advances, there are some people who have been left behind.

As radical queer theorists and activists have argued, LGBT rights are most successful for non-heterosexual and cisgender/cissexual people whose preferences and capabilities align with dominant norms.[6] These norms include having or performing a stable and immutable identity ('I was born this way'); upholding the public/private divide (sexual intimacy takes place in private and is non-commercial); forming hegemonic kinship relations (romance, love, monogamy, marriage, reproduction); and being privileged enough to enjoy employment benefits and accumulated wealth (which can be shared and distributed within families). LGBT rights have made less difference for many queers who cannot or will not fit within these mainstream norms, whether due to poverty, Indigeneity, racialization, HIV positive status, childlessness, shifting desires or identities, a penchant for promiscuous, kinky, or public sex, and/or employment in the sex trade.

2 Becki Ross, 'Whorganizers and Gay Activists: Histories of Convergence, Contemporary Currents of Divergence, and the Promise of Non-Normative Futures' in Elya M Durisin, Emily van der Meulen & Chris Bruckert, eds, *Red Light Labour: Sex Work Regulation, Agency, and Resistance* (Vancouver: UBC Press, 2018) 256 [Ross, 'Whorganizers and Gay Activists'; Durisin, van der Meulen & Bruckert, *Red Light Labour*].

3 Brenda Cossman, *Sexual Citizens: The Legal and Cultural Regulation of Sex and Belonging* (Stanford, CA: Stanford University Press, 2007);

4 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

5 Ibid.

6 See e.g. Libby Adler, *Gay Priori: A Queer Critical Legal Studies Approach to Law Reform* (Durham, NC: Duke University Press, 2018) [Adler, *Gay Priori*]; Ryan Conrad, ed, *Against Equality: Queer Revolution, Not Mere Inclusion* (Oakland, CA: AK Press, 2014); Dean Spade, *Normal Life: Administrative Violence, Critical Trans Politics, and the Limits of Law,* rev ed (Durham, NC: Duke University Press, 2015) [Spade, *Normal Life*]. For the purposes of this article, I define cisgender and cissexual as non-trans – that is, people whose gender or sex identity matches the sex they were assigned at birth. For the rest of the article, I use the term 'cis' to stand in for both terms. For a genealogy of the terms cisgender and cissexual, see Peter Cava, 'Cisgender and Cissexual' in *Wiley Blackwell Encyclopedia of Gender and Sexuality Studies* (Hoboken, NJ: John Wiley & Sons, 2016) 1.

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Turning our attention to the sex trade in general, I argue that sex workers, clients, and third parties (regardless of sexual orientation) continue to be stigmatized, stereotyped, and mostly criminalized for the same sorts of reasons that some queers have been underserved by the LGBT rights movement. Though the justification for regulating the sex trade has officially evolved from nuisance to exploitation, the sex trade is consistently rendered abject because the activity is associated with poverty, disease, promiscuity, and transactional and/or public sex. Sex trade participants have also been constructed in opposition to society, community, family, and, most especially, the welfare of children. The association of Indigeneity and racialization with sex work may attract sympathy, but it is also accompanied with White settler rescue fantasies and an erasure of agency.[7] Finally, while some participants have occupied relatively stable identities, they are usually viewed as deviant. For example, the identities of whore/prostitute, john/trick, and pimp/madame/trafficker are deeply stigmatized by the mainstream.[8]

My primary goal is to explore how queers who are unable or uninterested in accessing the benefits ushered in by 'gay rights' have identities, proclivities, and vulnerabilities that overlap with those of sex workers and/or their clients. Part I of this article sets the socio-legal and political context, providing succinct overviews of key developments relating to gay and lesbian rights and of key developments relating to sex trade regulation, focusing primarily on the last fifty years. Part II analyses how mainstream gay rights were packaged within acceptable terms and how some queers and sex trade participants were effectively marginalized in comparable or overlapping ways. Specifically, I analyse how gay/lesbian mainstream acceptance and the queer/sex trade marginalization occurred through discourses and laws related to privacy, bawdy houses/indecency, disease, spousal/marital relations, and children. This part ends with a consideration of the intersectionality between queerness and the sex trade, both in terms of subjectivities and stigmatized sexual practices. I conclude with a review and the suggestion that more research should be done on sex trade clients, alongside sex workers, as queer subjects.

II *An overview of legal reform initiatives for gays, lesbians, and sex trade participants*

A GAY AND LESBIAN REFORM

To understand the context of LGBT reforms in relation to queers and sex trade participants, a time line is provided of the key cases, legislative reforms, and

7 See e.g. Sarah Hunt, 'Decolonizing Sex Work: Developing and Intersectional Indigenous Approach' in Victoria Love, Elya M Durisin & Emily Van der Meulen, eds, *Selling Sex: Experience, Advocacy, and Research on Sex Work in Canada* (Vancouver: UBC Press, 2013); Kamala Kempadoo, 'The Modern-Day White (Wo)Man's Burden: Trends in Anti-Trafficking and Anti-Slavery Campaigns' (2015) 1:1 Journal of Human Trafficking 8; Robyn Maynard, 'Fighting Wrongs with Wrongs? How Canadian Anti-Trafficking Crusades Have Failed Sex Workers, Migrants, and Indigenous Communities' (2015) 37:2 Atlantis: Critical Studies in Gender, Culture & Social Justice 40.

8 See e.g. Cecilia Benoit et al, 'Prostitution Stigma and Its Effect on the Working Conditions, Personal Lives, and Health of Sex Workers' (2018) 55:4–5 Journal of Sex Research 457; 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.

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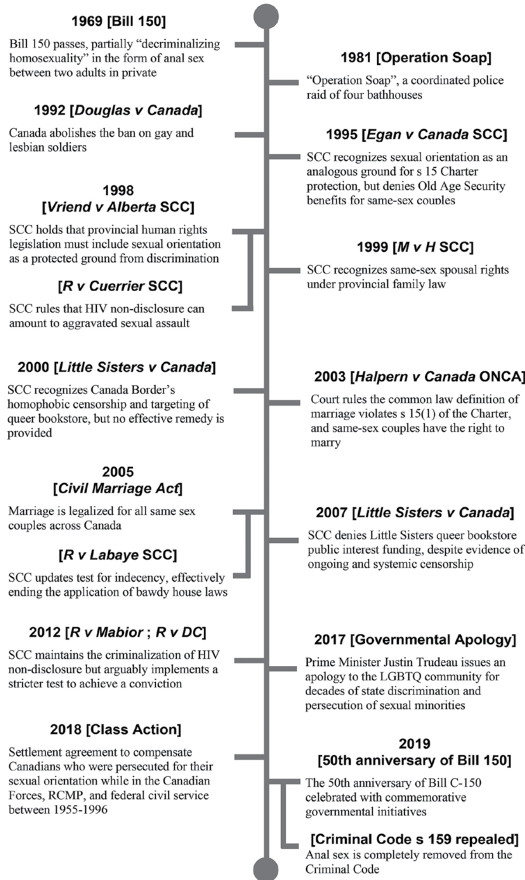

FIGURE 1. A time line of key dates in the legal history of the gay and lesbian and LGBTQ movements in Canada. Credit: *Criminal Law Amendment Act*, SC 1968–9, c 38; for information on 'Operation Soap,' see Thomas Hooper, '"More Than Two Is a Crowd": Mononormativity and Gross Indecency in the Criminal Code, 1981–82' (2014) 48:1 Journal of Canadian Studies 53; *Douglas v Canada*, [1993] 1 FC 264 (TD); *Egan v Canada*, [1995] 2 SCR 513; *Vriend v Alberta*, [1998] 1 SCR 493; *M v H*, [1999] 2 SCR 3; *R v Cuerrier*, [1998] 2 SCR 371; *Little Sisters Book and Art Emporium v Canada (Minister of Justice)*, 2000 SCC 69, [2000] 2 SCR 1120; *Halpern v Canada (Attorney General)* (2003), 65 OR (3d) 161 (CA); *Civil Marriage Act*, SC 2005, c 33; *R v Labaye*, 2005 SCC 80, [2005] 3 SCR 728; *Little Sisters Book and Art Emporium v Canada (Commissioner of Customs and Revenue)*, 2007 SCC 2, [2007] 1 SCR 38; *R v Mabior*, 2012 SCC 47, [2012] 2 SCR 584; 'Remarks by Prime Minister Justin Trudeau to Apologize to LGBTQ2 Canadians' (28 November 2017), online: *Justin Trudeau, Prime Minister of Canada* <https://pm.gc.ca/en/news/speeches/2017/11/28/remarks-prime-minister-justin-trudeau-apologize-lgbtq2-canadians>; *Ross, Roy & Satalic v R* (22 June 2018), Montreal T-370-17 (FC); Deloitte, 'LGBT Purge Settlement Class Action,' online: <www.classaction.deloitte.ca/en-ca/Pages/LGBTpurgeSettlementClassAction.aspx>; *Criminal Code*, RSC 1985, c C-46, s 159, as repealed by *An Act to Amend the Criminal Code, the Youth Criminal Justice Act and Other Acts and to Make Consequential Amendments to Other Acts*, SC 2019, c 25.

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political initiatives in the last fifty years (see Figure 1). As the time line demonstrates, most of the landmark cases or political gestures in the last fifty years have been victories. For gays and lesbians, there has been a steady progress from decriminalization, to full marriage equality, to government-sponsored celebrations. However, a few cases noted above can be interpreted as legal defeats – in particular, the legitimation of censorship of LGBT pornography and the continued criminalization of HIV non-disclosure.[9] Alongside these defeats, there are queer critiques of 'gay reform' legal victories which are attentive to intersectional analyses, conservative and neo-liberal discourses, punitive impulses, and distributive effects. I will elaborate on some of them in Part II of this article, which considers the overlapping marginalization that some queers and sex trade participants face. Notwithstanding these critiques, however, at the level of formal equality and political discourse, there is clear symbolic inclusion of the LGBT community in the ideology of national belonging.[10] A contrasting story of expulsion could be said to characterize how participants in the sex trade have been regulated, otherized, and essentialized in the last fifty years.

B SEX TRADE REFORM

The legal response to the sex trade since Confederation has gone through significant changes. Figure 2 provides a time line of relevant legal cases and statutory updates. As the time line indicates, the justification for regulating the sex trade shifted radically from Confederation to the present day. In 1867, the acts of purchasing or selling sexual services were not themselves criminal. However, vagrancy-related law viewed the presence of sex workers as a nuisance to be evicted from public spaces. Sex trade participants could also be caught by laws prohibiting 'bawdy houses' (that is, indoor spaces open to the public where sexual services were provided). These were viewed as causing neighbourhood disturbance. In the 1970s and 1980s, vagrancy laws were replaced with laws targeting the act of soliciting and then communicating for the purposes of prostitution, with statutory updates confirming that such laws could be applied to both sex workers and their clients. While a majority of the Supreme Court of Canada upheld the existing communication and bawdy-house laws in a 1990 reference decision, the Court changed its position twenty-three years later.[11]

In the paradigm-shifting case *Canada (Attorney General) v Bedford*, a unanimous Court found that the laws violated section 7 of the Charter by endangering sex workers' health and safety.[12] A year later, the Conservative government passed Bill C-36, the Protection of Communities and Exploited Persons Act

9 *Little Sisters Book and Art Emporium v Canada (Minister of Justice)*, 2000 SCC 69, [2000] 2 SCR 1120; *R v Mabior*, 2012 SCC 47, [2012] 2 SCR 584 [*Mabior*].

10 E.g., the inclusion of Jim Egan's case in the Heritage Minute collection gestures toward the way lesbian, gay, bisexual, transgender, and queer (LGBTQ) stories are increasingly figured as part of a national identity. 'Jim Egan,' *Historica Canada* (2018), online: <www.historicacanada.ca/content/heritage-minutes/jim-egan>.

11 *Reference re ss 193 and 195.1(1)(c) of the Criminal Code (Man)*, [1990] 1 SCR 1123 [*Prostitution Reference*].

12 *Canada (Attorney General) v Bedford*, 2013 SCC 72, [2013] 3 SCR 1101 [*Bedford*].

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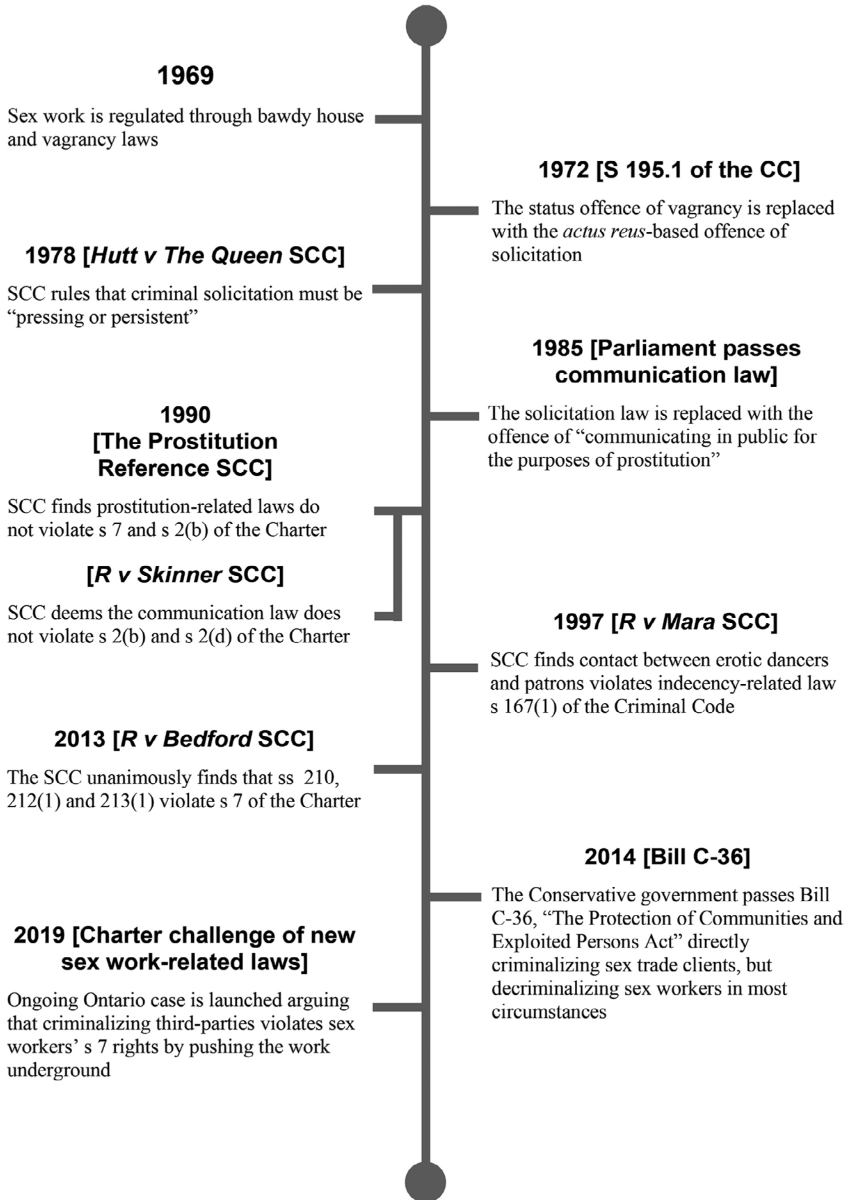

FIGURE 2. A time line of key dates in the legal history of sex work in Canada. Credit: *Hutt v The Queen*, [1978] 2 SCR 476; *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man)*, [1990] 1 SCR 1123; *R v Skinner*, [1990] 1 SCR 1235; *R v Mara*, [1997] 2 SCR 630; *Canada (Attorney General) v Bedford*, 2013 SCC 72, [2013] 3 SCR 1101; *Protection of Communities and Exploited Persons Act*, SC 2014, c 25; Kate Dubinski, 'Lawyers Argue Canada's Prostitution Laws Violate Sex Workers' Charter Rights,' *CBC News* (23 April 2019), online: <www.cbc.ca/news/canada/london/london-ontario-charter-challenge-prostitution-laws-c-36-1.5103551>.

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(PCEPA).[13] The new laws apply an asymmetrical model, where purchasing sexual services is itself criminalized in all circumstances but selling the services is decriminalized in most. The exception is if a sex worker is soliciting near a place where children may be present (next to a school, for example) or if the solicitation impedes traffic. Ideologically, the construction of the sex worker has shifted from deviant to victim of circumstance and exploitation. Meanwhile, sex trade clients have undergone a role reversal from average men with sex drives, to participants in causing nuisance, to deviant abusers who should be punished. Third-party workers have remained consistently demonized but have taken on different labels, including as procurers, pimps, and traffickers.

III *The divergent paths of prostitution and homosexuality in the last fifty years?*

Comparing legislative and judicial trends relating to prostitution and gay and lesbian rights over the last fifty years shows, on the one hand, a radical divergence. Homosexuality went from being pathologized and criminalized to being honoured in commemorative artefacts. Meanwhile, prostitution has not only remained consistently pathologized and stigmatized, but its former status as technically legal has also now been reversed, such that it is expressly criminalized. However, from a more radical perspective, if we take the queer critique of liberal LGBT rights reform into account, the evolution of the legal-political logics around homosexuality and prostitution are, in fact, quite compatible. In the next subpart, I consider how some of the key advances in gay and lesbian equality rights have effectively provided more material benefits to those whose desires, identities, and privileges are compatible with mainstream norms.

A THE PUBLIC/PRIVATE DIVIDE

Let us begin with what is considered the first milestone of gay rights in Canada: Bill 150, which purportedly 'decriminalized homosexuality' in 1969. Before this time, prohibitions on 'buggery' and 'gross indecency' criminalized anal sex and any sexual contact between men.[14] After the reforms, an exception was created in the Criminal Code if such act(s) took place in private between two adults.[15] In other words, the criminal law would no longer capture sexual contact between two adult gay lovers in the privacy of their own homes. While many scholars, activists, and lawyers have contended that the change had little immediate impact in terms of enforcement and practice – as most private sexual contact would not come to the attention of the police anyway – the reformed laws had important psychological and symbolic meaning.[16] They further created a foundation

13 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,* 41st Parl, 2nd Session (2014) [Bill C-36]; *Protection of Communities and Exploited Persons Act,* SC 2014, c 25.

14 *Criminal Code,* SC 1953–4, c 51, ss 147, 149.

15 Ibid.

16 'Lawyer Reflects on Canada's LGBTQ Rights Journey since 1969 Decriminalization,' *CBC News* (15 May 2019), online: <www.cbc.ca/news/canada/british-columbia/lawyer-

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for subsequent efforts to address other explicitly homophobic aspects of the Canadian legal system.

The queer critique of this legal reform highlights its limitations.[17] As anal sex and 'gross indecency' remained in the Criminal Code, they continued to be stigmatized and rhetorically linked to criminal behaviour. In addition, more stringent rules applied than those addressing vaginal sex (which had a lower age of consent and no restrictions on the number of individuals allowed to participate). Furthermore, in relation to the crime of 'gross indecency,' the statutory provision originally only referenced contact between men. Although the Criminal Code was updated in 1953 to be gender neutral, in practice, it was almost always used to police and criminalize gay men.[18] Thus, homosexual intimacy was only tolerated if it stayed out of public view. In this way, the law further sanctified the marital 'bedrooms of the nation' and naturalized monogamy as the privileged arrangement for intimacy.[19] The public/private divide was upheld, leaving public and promiscuous erotic expression and contact as less protected and more suspect. Indeed, Tom Hooper has argued that arrests for queer conduct actually increased after the 1969 reforms, as a variety of indecency and vagrancy laws were used to prosecute queer conduct in parks and other public spaces.[20] As recently as 2016, the Toronto Police Service conducted a six-week operation, dubbed 'Project Marie,' to crack down on gay male sexual activity in Marie Curtis Park in Etobicoke.[21]

The public/private divide that left many queers outside the scope of the 1969 reforms is also at play in the ideological justifications used to criminalize the sex trade. Turning to the most patent example, public communication for the purposes of prostitution was criminalized, in part, because it was perceived to contaminate public space, thereby causing a 'nuisance' in the form of noise, street congestion, harassment of non-participants, decreased property values, and the corrupting influence on children. Yet, even if one accepts these issues as sufficiently detrimental to justify criminalization, as Justice Bertha Wilson pointed out in her dissent in the *Prostitution Reference*, such laws are disproportionate and not sufficiently tailored to their objective: 'The prohibition is not confined to places where there will necessarily be lots of people to be offended or inconvenienced by it, and no nuisance or adverse impact of any kind on other people

reflects-on-canada-s-lgbtq-rights-journey-since-1969-decriminalization-1.5136146>; Thomas E Warner, *Never Going Back: A History of Queer Activism in Canada* (Toronto: University of Toronto Press, 2002) [Warner, *Never Going Back*].

17 Miriam Smith, 'Homophobia and Homonationalism: LGBTQ Law Reform in Canada' (2020) 29:1 Social and Legal Studies 65.

18 Warner, *Never Going Back*, supra note 16 at 19.

19 Suzanne Lenon, 'Monogamy, Marriage and the Making of Nation' in Suzanne Lenon & OmiSoore H Dryden, eds, *Disrupting Queer Inclusion: Canadian Homonationalisms and the Politics of Belonging* (Vancouver: UBC Press, 2015) 82.

20 Tom Hooper, 'Queering '69: The Recriminalization of Homosexuality in Canada' (2019) 100:2 Canadian Historical Review 257 [Hooper, 'Queering '69']. I note that Hooper does not provide statistics regarding arrests pre- and post-1969, so I am unable to verify the claim.

21 Bronwyn Clement, *Geographies of Enforced Heteronormativity in Public Parks: A Case Study of Project Marie* (MA thesis, University of Toronto, 2018) [unpublished].

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need be shown, or even be shown to be a possibility, in order that the offence be complete.'[22]

Aside from such concerns over the practical utility of the law in addressing material problems, one can see that the branding of sex trade communication as 'nuisance' has several impacts. It empowers police to harass sex workers and clients (or those they perceive as such) or ensnare them through sting operations.[23] Angela Campbell has further pointed out that the laws that treat sex trade-related communication as criminal 'nuisance' may not be justifiable in a liberal democracy: 'Such communications raise the specter of moral corruption and trigger social discomfort; but whether they amount to harm is unclear.'[24] The social discomfort, in fact, may arise because the image of sex trade negotiations brings home the fact that sexual desire and activities are frequently not long term, relational, romantic, emotive, monogamous, or 'faithful.' It may also remind non-sex working people of the ways that sexuality sometimes works as an unspoken bargaining tool in romantic relationships.[25] Thus, one thread that weaves through homosexuality acceptance and queer/prostitution abhorrence is the denial of erotic diversity and unruly passions, along with the attempt to domesticate sexuality.

B BAWDY-HOUSE AND INDECENCY-RELATED LAWS

Another important overlap in the historical treatment of homosexuality and prostitution is the way in which bawdy-house laws have been interpreted to criminalize both activities.[26] Before the PCEPA came into effect in 2014, a bawdy house was defined as a place kept or occupied 'for the purpose of prostitution or the practice of acts of indecency.'[27] It was a criminal offence to either keep, or be found in, a bawdy house.[28] Historically, the law has applied to places where sex work takes place (including brothels, hotels, or apartments) and/or where queer sex takes place (including gay bathhouses, spas, or clubs). Bawdy houses thus are not considered to be public spaces in the way that streets and parks have been. Rather, they are places that are accessible to the public or in view of the public, either without condition or with memberships.

The Bill 150 reforms did not address these provisions, and criminalization of queer sex continued and intensified not just for public sex but also for sex that takes place in these bawdy-house-type spaces. The most emblematic example

22 *Prostitution Reference*, supra note 11 at 1214.

23 To be clear, the Supreme Court of Canada has ruled that for 'consensual crimes' like prostitution, undercover stings do not constitute legal entrapment. See *Kirzner v R*, [1978] 2 SCR 487; Cristine Rotenberg, 'Prostitution Offences in Canada: Statistical Trends,' *Statistics Canada Reporting* (2016) at 24; Jason Brown et al, 'Challenges Faced by Women Working in the Inner City Sex Trade' (2006) 15:1 Canadian Journal of Urban Research 36; Erin Gibbs Van Brunschot, 'Community Policing and "John Schools"' (2003) 40:2 Canadian Review of Sociology 215.

24 Angela Campbell, 'Sex Work's Governance: Stuff and Nuisance' (2015) 23:1 Feminist Legal Studies 27 at 36 [Campbell, 'Sex Work's Governance'].

25 Viviana A Zelizer, 'The Purchase of Intimacy' (2000) 25:3 Law & Social Inquiry 817.

26 Russell, 'Offence of Keeping,' supra note 1 at 270.

27 *Criminal Code*, RSC 1985, c C-46, s 197(1).

28 Russell, 'Offence of Keeping,' supra note 1 at 270.

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of this persecution happened in 1981 when Toronto police initiated 'Operation Soap,' a coordinated raid of four bathhouses that resulted in twenty people being charged for keeping a common bawdy house and 286 people being charged for being found in one.[29] Of course, for those gays, lesbians, and bisexuals who preferred to keep their sexuality private and in their own homes, the bawdy-house provisions did not have any real day-to-day impact. But, for queers who enjoyed sex in these shared spaces or who were unable to connect with like-minded lovers in any other way, the bawdy-house laws continued to render them vulnerable to criminalization, humiliation, forced outing, and reputational damage.

The 2005 Supreme Court of Canada decision in *R v Labaye* seems to have effectively ended the application of bawdy-house laws against gay bathhouses.[30] However, it should be noted that police can still investigate venues where sexual activity occurs based on health and liquor licence by-laws. Indeed, this is what took place during the infamous 'Pussy Palace' raid, where five male Toronto police officers entered a women's sexual bathhouse, interrogated its guests, and later charged two organizers for provincial liquor licence violations.[31] Ultimately, the case was dismissed because the judge found that the police violated the Charter rights of the accused. Nonetheless, the case demonstrates the indirect means through which police can still target conduct once deemed indecent under the justificatory cloak of apparently neutral by-laws.

In relation to prostitution, bawdy-house laws have been used to criminalize the indoor sex trade. Although the PCEPA has altered the definition of bawdy house and removed the word 'prostitution' from its legislation (section 197(1)), clients and third parties are still criminalized through blanket prohibitions on purchasing sexual services or receiving a material or financial benefit from another's sexual services. While it may not be illegal for sex workers to sell their own services in private, the criminalization of their clients, managers, or employees perpetuates the stigmatization of their work and compromises their safety and livelihoods. On a symbolic level, the laws convey the message that sex workers are degraded and contaminating to non-sex working women and children. On a pragmatic level, the laws prevent sex workers and third-party managers from setting up fixed locations to conduct their business and clients from easily finding services to suit their needs and desires. As has been demonstrated by extensive empirical evidence, indoor sex work addresses many of the occupational risks associated with the sex trade, including being able to control the space for sexual services, verifying client identity, requiring condom use, ensuring full payment, and having security present.[32]

29 Hooper, 'Queering '69,' supra note 20.

30 *R v Labaye*, 2005 SCC 80, [2005] 3 SCR 728.

31 *R v Hornick*, [2002] OJ No 1170 (Ct J) (QL), Hryn J; Sarah Lamble, 'Unknowable Bodies, Unthinkable Sexualities: Lesbian and Transgender Legal Invisibility in the Toronto Women's Bathhouse Raid' (2009) 18:1 Social and Legal Studies 111.

32 Scott Cunningham & Manisha Shah, 'Decriminalizing Indoor Prostitution: Implications for Sexual Violence and Public Health' (2017) 85:3 Review of Economic Studies 1683; Jacqueline Lewis et al, 'Managing Risk and Safety on the Job: The Experiences of Canadian Sex Workers' (2005) 17:1–2 Journal of Psychology and Human Sexuality 147; Teela Sanders & Rosie Campbell, 'Designing out Vulnerability, Building in Respect: Violence, Safety and Sex Work Policy' (2007) 58:1 British Journal of Sociology 1.

Reflecting on the history of bawdy-house laws in relation to queer sex and paid sex thus points to some interesting convergences. Both types of illicit activity promote non-domesticated, non-monogamous, short-term, no-strings-attached sexuality. Both seem to privilege carnal desire over emotional commitment. The fact that the law historically used one section in the Criminal Code to criminalize both activities suggests that there is an overlapping sex panic that is being assuaged through the law. And even when queer or paid sex is out of public view, the laws still endow the activities with the power to endanger and morally corrupt.

C HEALTH DISCOURSES AND DISEASE VECTORS

Since the Victorian era, disease discourses have been used to explain same-sex desire and justify homophobic laws, polices, and attitudes.[33] Most early sexologists viewed queer tendencies as mental illness, whether due to biological defect or 'arrested' psychosexual development.[34] David Kimmel and Daniel J. Robinson point out that the pathologizing gaze was not challenged but, rather, reinforced by advocates of Bill 150 who were attempting to reframe homosexuality as sickness rather than criminal activity.[35] Prominent queer rights lawyer barbara findlay adds to this argument, explaining that, for queer women and teenagers after 1969, their sexuality was still evidence of mental illness, which could lead to forced custody in psychiatric hospitals.[36] The ban on gays and lesbians in the military was justified, in part, by the understanding that they were mentally unfit.[37] These etiological explanations of same-sex desire led to many queers being ostracized, institutionalized, fired, and forced to undergo 'conversion therapies.'[38] However, subsequent queer activism and cultural production, legal cases, medical updates, and legislative and social policy reforms, along with the inclusion of gays, lesbians, and bisexuals in mainstream media, have worked to depathologize many queer folks in the socio-legal imaginary.

Trans people also have a long history of being cast as mentally ill in dominant discourse.[39] Like gays, lesbians, and bisexuals, trans- and gender-variant people have been institutionalized and forced into 'conversion therapy' sessions in order to align their presentation and identity with their assigned sex at birth.[40] The

33 Charles Silverstein, 'The Implications of Removing Homosexuality from the DSM as a Mental Disorder' (2009) 38:2 Archives of Sexual Behavior 161.

34 Jack Drescher, 'Out of DSM: Depathologizing Homosexuality' (2015) 5:4 Behavioral Sciences 565.

35 David Kimmel & Daniel J Robinson, 'Sex, Crime, Pathology: Homosexuality and Criminal Code Reform in Canada, 1949–1969' (2001) 16:1 CJLS 147.

36 Quoted in Stuart Chambers, 'Pierre Elliott Trudeau and Bill C-150: A Rational Approach to Homosexual Acts, 1968–69' (2010) 57:2 Journal of Homosexuality 249. Please note that barbara findlay chooses to have her name in lowercase.

37 Gary William Kinsman & Patrizia Gentile, *The Canadian War on Queers: National Security as Sexual Regulation* (Vancouver: UBC Press, 2010).

38 For a history of 'conversion therapies,' see Jack Drescher, 'I'm Your Handyman: A History of Reparative Therapies' (2002) 5:3–4 Journal of Gay and Lesbian Psychotherapy 5.

39 See Maria Elisa Castro-Peraza et al, 'Gender Identity: The Human Right of Depathologization' (2019) 16:6 International Journal of Environmental Research and Public Health 978.

40 Susan Stryker, *Transgender History: The Roots of Today's Revolution* (New York: Seal Press, 2017).

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Diagnostic and Statistical Manual of Mental Disorders (*DSM*) has pathologized gender diversity in many of its editions, with diagnoses ranging from 'transsexualism' in volume 3 of the *DSM* in 1980 to the current 'gender identity disorder' in volume 5 of the *DSM*.[41] Yet, while still associated with pathology, the current diagnosis only applies if an individual is experiencing clinically significant distress or impairment. In other words, in theory at least, the mere facts of gender diversity or trans-identity are no longer considered to be disorders on their own. As with LGBT individuals, social, legal, and political activism, medical updates, and increasing inclusion of trans individuals in mainstream media have worked – to a lesser extent but still to some extent – to depathologize trans-identity in the socio-legal imaginary.[42]

If we turn to the sex trade, there are some interesting similarities in the way in which health has been used to marginalize and regulate sex trade participants. For example, in the Victorian era, sex workers were cast as vectors of disease, as is evidenced by the passage of the discriminatory Contagious Diseases Act in Canada in 1865.[43] Under the Act, sex workers – but not clients – were subject to detention and forced treatment if authorities believed they were carrying sexually transmitted infections. While rarely enforced in its five-year duration, the legislation reflects the ways in which sex workers were scapegoated and objectified as contaminants in the socio-legal imaginary. With such initiatives, clients were cast as potential dupes of sex worker wiles and the victims of the diseases they purportedly spread.

Today, of course, no legislation explicitly links sex workers with disease. Nonetheless, as sociologists, ethnographers, and media scholars have demonstrated, sex workers are still arguably treated as sources of danger and contagion that must be managed, as are some gay men, particularly in relation to HIV/AIDS.[44] This represents another significant overlap between the regulation and stigmatization of sex workers and some queers. As Becki Ross explains, '[i]n the mid-1980s a

41 American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (Arlington, VA: American Psychiatric Publishers, 2013).

42 Jamie C Capuzza & Leland G Spencer, 'Regressing, Progressing, or Transgressing on the Small Screen? Transgender Characters on U.S. Scripted Television Series' (2017) 65:2 Communication Quarterly 214; Sarah MacCarthy et al, 'The Time Is Now: Attention Increases to Transgender Health in the United States but Scientific Knowledge Gaps Remain' (2015) 2:4 LGBT Health 287; Katy Steinmetz, 'The Transgender Tipping Point' (2014) 183:22 Time Magazine 38.

43 Constance Backhouse, 'Nineteenth-Century Canadian Prostitution Law: Reflection of a Discriminatory Society' (1985) 18:36 Social History/Histoire Sociale 387. It should be noted that this statute was modelled on the more extensive UK law (1864–86). See Judith R Walkowitz, *Prostitution and Victorian Society: Women, Class, and the State* (Cambridge, UK: Cambridge University Press, 1982). Canada's version only lasted five years and was rarely enforced (1865–70). *Contagious Diseases Act*, 27 & 28 Vict, c 85.

44 Laura María Agustín, *Sex at the Margins: Migration, Labour Markets and the Rescue Industry* (London: Zed Books, 2007); Lisa Lazarus et al, 'Occupational Stigma as a Primary Barrier to Health Care for Street-Based Sex Workers in Canada' (2012) 14:2 Culture, Health and Sexuality 139; Richard Parker & Peter Aggleton, 'HIV and AIDS-Related Stigma and Discrimination: A Conceptual Framework and Implications for Action' (2003) 57:1 Social Science and Medicine 13; Janet S St Lawrence et al, 'The Stigma of AIDS: Fear of Disease and Prejudice toward Gay Men' (1990) 19:3 Journal of Homosexuality 85.

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new moral panic – AIDS – targeted "hookers" and "faggots" as sexually spoiled and fatally promiscuous.'[45] In the last few decades, clients have also been blamed as potential infection spreaders, specifically for the wives and girlfriends on which they are potentially 'cheating.'[46]

In the current moment, the AIDS panic has not yet subsided, as is evidenced by the criminalization of the non-disclosure of HIV in sexual relations.[47] Although the Criminal Code does not expressly criminalize failure to disclose one's HIV status, the Supreme Court of Canada has found that such a failure may constitute fraud-vitiating consent, amounting to an aggravated sexual assault. In its HIV-related decisions, the Supreme Court has ruled that a person living with HIV must provide advance notice to their partner in certain circumstances. In 1998, the Court found such a duty if there is a 'significant risk of serious bodily harm.' In 2012, the Court updated the requirement to capture circumstances where there is 'a realistic possibility of transmission of HIV.'[48] The criminalization of HIV non-disclosure has been widely condemned by human rights and health experts in Canada and internationally.[49] Such laws cause anxiety and confusion, discourage testing, and interfere with prevention efforts and early intervention, all the while perpetuating HIV-related stigma and discrimination.[50] Research has further demonstrated that the laws have a particularly negative impact on queers, sex workers, newcomers, and people of colour.[51] AIDS activists have both challenged the conflation of HIV with gay men and sex workers and campaigned for more funding, evidence-based research, and better resources to address the impact of HIV and AIDS.[52] In this way, as queer critics have pointed out, the

45 Ross, 'Whorganizers and Gay Activists,' supra note 2 at 258.

46 Ummni Khan, 'From Average Joe to Deviant John' in Durisin, van der Meulen & Bruckert, *Red Light Labour,* supra note 2, 67.

47 Erin Dej & Jennifer M Kilty, '"Criminalization Creep": A Brief Discussion of the Criminalization of HIV/AIDS Non-Disclosure in Canada' (2012) 27:1 CJLS 55; Kyle Kirkup, 'Releasing Stigma: Police, Journalists and Crimes of HIV Non-Disclosure' (2014) 46 Ottawa L Rev 127.

48 *R v Cuerrier,* 1998 SCC 796, [1998] 2 SCR 371 [*Cuerrier*]; *Little Sisters Book and Art Emporium v Canada (Minister of Justice),* 2000 SCC 69, [2000] 2 SCR 1120; *Mabior,* supra note 9.

49 See e.g. Françoise Barré-Sinoussi et al, 'Expert Consensus Statement on the Science of HIV in the Context of Criminal Law' (2018) 21:7 Journal of International AIDS Society e25161; Canadian HIV/AIDS Legal Network, *The Criminalization of HIV Non-Disclosure in Canada: Current Status and the Need for Change* (2019).

50 Eric Mykhalovskiy & Glenn Betteridge, 'Who? What? Where? When? And with What Consequences? An Analysis of Criminal Cases of HIV Non-Disclosure in Canada 1' (2012) 27:1 CJLS 31; Patrick O'Byrne, Alyssa Bryan & Cory Woodyatt, 'Nondisclosure Prosecutions and HIV Prevention: Results from an Ottawa-based Gay Men's Sex Survey' (2013) 24:1 Journal of the Association of Nurses in AIDS Care 81.

51 John Paul Catungal, 'Ethno-Specific Safe Houses in the Liberal Contact Zone: Race Politics, Place-Making and the Genealogies of the AIDS Sector in Global-Multicultural Toronto' (2013) 12:2 ACME: An International E-Journal for Critical Geographies 250.

52 Canadian HIV/AIDS Legal Network, 'Investing in Community Advocacy and Services to End the AIDS Epidemic,' *UN Aids,* online: <www.unaids.org/en/resources/presscentre/featurestories/2016/april/20160404_community_advocacy>; Andrew Green, 'HIV Prevention Advocates Push Global Fund for More Expenditure Data,' *Aidspan,* online: <www.aidspan.org/gfo_article/hiv-prevention-advocates-push-global-fund-more-expenditure-data>.

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rhetoric that 2019 marks fifty years since the 'decriminalization of homosexuality' fails to consider how 'homosexuality' continues to be indirectly policed through the criminalization of HIV non-disclosure.

As noted, this criminalization also negatively affects sex workers. Yet, ironically, other health discourses have at times been used to drum up some measure of backhanded tolerance for this group. Like the mental health discourse leading up to the 1969 reforms, which represented homosexuals as mentally ill but not criminally culpable, partial decriminalization rests in large part on sex worker pathologization. Under this model, sex workers are cast as psychologically damaged people who should not be held criminally accountable for their choices but, rather, should be compelled to leave the trade through the criminalization of their work, their clients, and any third parties involved. In contrast, with respect to sex trade clients, there is usually no saving recourse to health discourse, save for the sex addiction framework addressed below.

Disease association can also impact politics through a (misguided) harm-reduction argument that the legalization of the sex trade will allow the government to require regular testing of sexually transmitted infections. This approach appears to accept the truism that prostitution will always exist and posits that it must therefore be regulated and controlled to protect public health. But, as sex worker rights organizations have argued, forced medical testing violates the bodily integrity and, arguably, the human rights of sex workers. Moreover, any licensing system would likely lead to a two-tiered system of legal sex workers (who comply with testing and other requirements) and illegal sex workers (who do not comply) – with the latter continuing to face all of the risks that currently accompany the full criminalization legal scheme.[53]

A further health-related overlap of note relates to conversion therapy. In this regard, efforts to eradicate sex work are increasingly relying not only on the threat of criminal punishment but also on therapeutic interventions for sex workers and sex trade clients that can be read as a form of conversion therapy. We see this in certain kinds of 'exit programs' that seek to assist (or force) sex workers out of the trade, in part by rectifying the trauma and distorted thinking that sex workers are presumed to experience.[54] For example, the exit program organized by the Elizabeth Fry Society centres its approach on 'counselling and social work; cognitive behavioural therapy; service referral; skills training; support groups; and psycho-education.'[55] A substantial component thus appears to be dedicated to psychological interventions to modify sex workers' thoughts, beliefs, feelings, and attitudes. For sex trade clients, trial diversion programs are set up to teach them about the harms that allegedly flow from paying for sexual services. Empirical

53 Elaine Mossman, *International Approaches to Decriminalising or Legalising Prostitution* (Wellington: Crime and Justice Research Centre, Victoria University of Wellington, 2007).

54 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 Canadian Review of Sociology 429.

55 'Exit Doors Here: Helping Sex Workers Leave Prostitution,' *Public Safety Canada* (21 December 2018), online: <www.publicsafety.gc.ca/cnt/cntrng-crm/crm-prvntn/nvntr/dtls-en.aspx?i=10184>.

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work on these 'john school' programs suggests their goal is indoctrination using a wide gambit of persuasive tools, including shaming the men for harming the 'prostituted women,' communities, and their own families; frightening them with graphic images of genital infections (which ironically return to the sex worker as disease-vector discourse); threatening them with a criminal record; and absolving them if they agree to be diagnosed as sex addicts.[56] Thus, with some exit programs and all john schools, there are echoes of LGBT conversion therapy, which attempts to reprogram people's relationship to their bodies and sexuality in order to align with dominant understandings of morality, gender, and intimacy.

D THE FAMILY

1 *Spousal rights and marriage*

Returning to the time line of legal victories and legislative reforms for LGBT equality, we have gone from decriminalization, to protection under Charter equality and human rights provisions, to inclusion in the military – throughout which time, depathologization was incrementally progressing. This brings us to the most recent turning point in LGBT equality: family rights. To analyse how family-related reforms privilege some members of the LGBT community, while effectively overlooking or further marginalizing some queers and most sex trade participants, I will begin with same-sex relationship rights, including in relation to property rights, and then turn specifically to the issue of children.

For many mainstream LGBT advocates, access to spousal, parental, and marriage rights is the touchstone of full acceptance, inclusion, and equality.[57] On a practical level, recognition of same-sex marriages or common law relationships means equal access to important rights related to things like immigration, employment benefits, social security, taxation, inheritance, adoption, parental status, child custody, hospital visitation, separation, and divorce. On a symbolic level, marriage equality combats pathologizing and deviantizing stereotypes and recognizes the dignity of same-sex couples. For many, being able to get married is the ultimate way to express their love and commitment to one another and to the world. When the state denies this right, it imposes second-class citizenship on its LGBT members.[58] Equal marriage thus signifies unqualified membership into the embrace of sexual citizenship.

Many radical queer activists and scholars problematize this positive spin on spousal rights and especially on marriage equality. Broadly speaking, the radical critique argues that the campaign for marriage equality is single-issued, assimilationist, and homo-normative, such that queers are rendered acceptable only if

56 Ummni Khan, '"Johns" in the Spotlight: Anti-prostitution Efforts and the Surveillance of Clients' (2015) 30:1 CJLS 9; Scot Wortley, Benedikt Fischer & Cheryl Webster, 'Vice Lessons: A Survey of Prostitution Offenders Enrolled in the Toronto John School Diversion Program' (2002) 44 Canadian Journal of Criminology 369.

57 'Why It Matters,' *Freedom to Marry* (January 2016), online: <www.freedomtomarry.org/pages/why-it-matters>; 'Our Victories at HRC,' *Human Rights Campaign*, online: <www.hrc.org/hrc-story/our-victories/>.

58 Michael C Dorf, 'Same-Sex Marriage, Second-Class Citizenship, and Law's Social Meanings' (2011), online: SSRN <www.ssrn.com/abstract=1750354>.

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they reproduce heterosexual norms and kinship formations.[59] For example, the mono-normativity of marriage excludes those who are in polyamorous relationships.[60] The campaign is further seen as a neo-liberal initiative that entrenches and naturalizes the inequitable distribution of resources on a societal level.[61] The critics argue that queers who are socio-economically marginalized due to things like poverty, racialization, disability, gender, street involvement, criminalization, incarceration, or undocumented immigration status may reap few, if any, material benefits from marriage equality.[62] Another objection is that marriage equality campaigns have appropriated struggles for racial equality as analogous, when the mainstream LGBT movement is actually dominated by privileged middle-class Whites.[63] Indeed, the analogy may erase the intersectional issues faced by racialized queers.[64] 'Homonationalist' arguments suggest that mainstream LGBT activism and rhetoric are tied to ethnocentric ideologies, which construct countries with gay marriage as progressive and civilized, in contradistinction to barbaric Other nations with homophobic laws.[65] Further, the construction of Canada as LGBT inclusive ignores the history of colonial gender/sexuality norms being violently imposed onto Indigenous peoples.[66] On a pragmatic level, the fight for marriage equality in many ways absorbed political energy and fundraising efforts as the quintessential LGBT cause, leaving other arguably more urgent issues unable to garner the same political support or donation dollars. Violence against trans people and the disproportionate number of queer homeless youth have been identified as two such issues.[67] For those who espouse some or all of these critiques, it follows that they are unwilling or unable to get on the marriage bandwagon.

59 Lisa Duggan & Richard R Flores, 'The New Homonormativity: The Sexual Politics of Neoliberalism' in Donald E Castronovo & Joan Dayan, eds, *Materializing Democracy: Toward a Revitalized Cultural Politics* (Durham, NC: Duke University Press, 2002) 175; Michael Warner, *The Trouble with Normal: Sex, Politics, and the Ethics of Queer Life* (Cambridge, MA: Harvard University Press, 2000).

60 Elizabeth F Emens, 'Manogamy's Law: Compulsory Monogamy and Polyamorous Existence' (2004) 29 NYU Rev L & Soc Change 277.

61 Spade, *Normal Life*, supra note 6. See also Adler, *Gay Priori*, supra note 6; Yasmin Nair, 'Gay Marriage Hurts My Breasts,' online: <www.yasminnair.net/content/gay-marriage-hurts-my-breasts>.

62 Amber Hollibaugh & Margot Weiss, 'Queer Precarity and the Myth of Gay Affluence' (2015) 24:3 New Labor Forum 18.

63 Darren Lenard Hutchinson, 'Gay Rights for Gay Whites: Race, Sexual Identity, and Equal Protection Discourse' (1999) 85 Cornell L Rev 1358.

64 Spade, *Normal Life*, supra note 6; Michael Warner, 'Normal and Normaller: Beyond Gay Marriage' (1999) 5:2 GLQ: A Journal of Lesbian and Gay Studies 119.

65 Jasbir K Puar, '"I Would Rather Be a Cyborg Than a Goddess": Becoming-Intersectional in Assemblage Theory' (2012) 2:1 PhiloSOPHIA 49.

66 Marlon M Bailey, Priya Kandaswamy & Mattie Udora Richardson, 'Is Gay Marriage Racist?' in Mattilda Bernstein Sycamore, ed, *That's Revolting!: Queer Strategies for Resisting Assimilation* (New York: Soft Skull Press, 2004) 87.

67 Yuvraj Joshi, 'Respectable Queerness' (2011) 43 Colum HR L Rev 415; Verta A Taylor & Mary Bernstein, 'Marital Discord: Understanding the Contested Place of Marriage in the Lesbian and Gay Movement' in Mary Bernstein & Verta Taylor, eds, *The Marrying Kind? Debating Same-Sex Marriage Within the Lesbian and Gay Movement* (Minneapolis: University of

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Let us now consider how the privileging of marriage as the ideal relationship, and a source of rights and entitlements, can undermine sex worker rights, health, and safety. We have already seen how early gay rights reforms perpetuated the public/private divide, privileged couple sexuality, and implicitly reinforced the deviant status of sex workers and clients. Many sex trade participants transgress these ideological imperatives by engaging in promiscuous and short-term sex – sometimes in public and sometimes in bawdy houses. Sex work is often also set up in opposition to marriage or as a threat to marriage.[68] Historically, husbands were represented as vulnerable to the temptations offered by the sex trade and as bridges of disease between sex workers and wives.[69] In the case of queers, there is evidence from male sex workers that a certain number of their clientele are closeted gay men who are married to women.[70] From a homo-normative perspective then, marriage equality should hopefully help to normalize same-sex desire, which should theoretically mean that there would be fewer gay men who will seek out male sex workers. In both hetero- and homo-normative contexts, sex work is thus rendered abject. In the hetero context, sex work is a threat to marriage. In the homo context, it is a safety valve or coping mechanism that is no longer needed, now that gay couplehood is acceptable and gay marriage is available.

Alongside its disruption of monogamy and fidelity, sex work is also seen to disrupt the white-picket-fence fantasy of heteronormative/homo-normative families living in 'good neighborhoods.' As noted above, one of the 'nuisance' issues associated with sex work is its perceived detrimental impact on a community's property values. Such a stance, of course, symbolically excludes sex workers from being a part of the community. In terms of distributive effects, it also privileges the interests of property owners and capitalist investment over the health, safety, and very lives of sex workers. Thus, to the extent that marriage incentivizes and privileges property ownership, it can be said to buttress laws that treat sex work as inimical to property owners. Becki Ross's analysis of the failure of gay activism to support sex workers shows that, in some cases, sex workers were not just

Minnesota Press, 2013) 1; Colin Walmsley, 'The Queers Left Behind: How LGBT Assimilation Is Hurting Our Community's Most Vulnerable, *Huffington Post* (21 July 2016), online: <www.huffpost.com/entry/the-queers-left-behind-ho_b_7825158>.

68 Phil Hubbard & Teela Sanders, 'Making Space for Sex Work: Female Street Prostitution and the Production of Urban Space' (2003) 27:1 International Journal of Urban and Regional Research 75.

69 See e.g. World War II poster campaigns that warned potential sex trade clients that if they visited a sex worker, they may spread venereal disease to their wives and children: *He 'Picked Up' More Than a Girl: Sensitive Campaign against Venereal Disease* (1939); *Careful You Can't Tell Who Has It!: Sensitivity Campaign against Veneral Disease* (n.d.); both posters are available online: <https://cvltnation.com/crazy-venereal-disease-posters-from-wwii/>; MacRae Meghan, 'Crazy Venereal Disease Posters from WWII,' *Cult Nation* (2015), online: <https://cvltnation.com/crazy-venereal-disease-posters-from-wwii/>.

70 Jan Browne & Victor Minichiello, 'The Social Meanings behind Male Sex Work: Implications for Sexual Interactions' (1995) 46 British Journal of Sociology 598; Estep R Waldorf & T Marotta, 'Sexual Behavior of Male Prostitutes' in Joan Huber & Beth Schneider, eds, *The Social Context of AIDS* (Newbury Park, CA: Sage Publications, 1992); Niklas Eriksson et al, eds, *Hidden Stories: Male Prostitution in Sweden and Northern Europe* (Stockholm: Swedish Federation for Lesbian, Gay, Bisexual, Transgender, Queer and Intersex Rights, 2004).

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ignored by the gay and lesbian rights movement – they were actively marginalized by some members: 'Indeed, a number of white, upwardly mobile gay men who organized against the "nuisance" of prostitution consistently put their own needs above those of "hos and hustlers" in shared neighbourhoods.'[71] Thus, there is an 'interest convergence' between celebration and promotion of 'gay marriage' and campaigns to 'clean up the streets' and expunge visible sex work.[72] Both effectively prioritize the interests of the already privileged.

2 *But what about the children?*

Historically, a particularly salient overlapping discourse was that both homosexuality and prostitution were seen to threaten the physical, emotional, and moral health of children (and, in relation to sex work, women infantilized as children). This is powerful rhetoric. As Lee Edelman argues, appealing to the welfare of the child is presented as an apolitical, self-evident, and uncontroversial stance: '[T]he fantasy subtending the image of the Child invariably shapes the logic within which the political itself must be thought.'[73] In relation to homosexuality, gay men, in particular, were caricatured as monstrous predators who threatened children in multiple ways.[74] There was a persistent belief that gay men are more likely to be pedophiles than heterosexual men, which initially justified anti-sodomy provisions and other discriminatory laws and policies.[75] Another concern suggests that gay men have some seductive power to recruit young people into a 'gay lifestyle.'[76] Indeed, the historical higher age of consent for anal sex may suggest this concern in the Criminal Code, although this section has now been repealed.[77] Finally, one of the main reasons that marriage and related benefits were historically denied to same-sex couples was that they could not have children (through heterosexual intercourse) and, thus, could not fulfil the procreative purpose that was said to underlay traditional marriage.[78] Other arguments suggest that same-sex couples would be unfit parents or at least could not provide the ideal family structure to raise children.[79]

71 Becki Ross & Rachael Sullivan, 'Tracing Lines of Horizontal Hostility: How Sex Workers and Gay Activists Battled for Space, Voice, and Belonging in Vancouver, 1975–1985' (2012) 15:5–6 Sexualities 604.

72 See Anthony Michael Kreis, 'Gay Gentrification: Whitewashed Fictions of LGBT Privilege and the New Interest-Convergence Dilemma' (2012) 31 Law and Inequality 117.

73 Lee Edelman, *No Future: Queer Theory and the Death Drive* (Durham, NC: Duke University Press, 2004) at 2. For a recent example that justifies the marginalization of sex workers in the name of protecting children, see e.g. Rick Ouston, 'Opinion: Protecting Children Was Aim of "Shame the Johns,"' *Vancouver Sun* (7 January 2014), online: <www.vancouversun.com/opinion/op-ed/opinion+protecting+children+shame+johns/9990846/story.html>.

74 Larry Cata Backer, 'Constructing a Homosexual for Constitutional Theory: Sodomy Narrative, Jurisprudence, and Antipathy in United States and British Courts' (1996) 71 Tul L Rev 529.

75 Anthony Niedwiecki, 'Save Our Children: Overcoming the Narrative that Gays and Lesbians Are Harmful to Children' (2013) 21 Duke J Gender L & Pol'y 125.

76 Carl F Stychin, 'Unmanly Diversions: The Construction of the Homosexual Body (Politic) in English Law' (1994) 32 Osgoode Hall LJ 503.

77 *Criminal Code*, RSC 1985, c C-46, s 159 (repealed 2019, c 25, s 54).

78 *Egan v Canada*, 1995 SCC 98, [1995] 2 SCR 513.

79 Lynn D Wardle, 'Multiply and Replenish: Considering Same-Sex Marriage in Light of State Interests in Marital Procreation' (2000) 24 Harv JL & Pub Pol'y 771.

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In a similar fashion, children have been used as discursive props to justify criminalizing sex work. First, there is the idea that children are inherently harmed if they come into contact with, or even just witness, sex workers, clients, or 'pimps/traffickers.'[80] Recall that, under the new laws, sex workers are constructed as victims unless they are communicating for the purposes of offering sexual services in areas where children are expected to be found (or impeding traffic). But if the sex worker is truly a victim, why would this victimization cease depending on where they are soliciting? This hypocritical approach demonstrates that nuisance concerns persist. Despite all of the rescue rhetoric found in the governmental report for the PCEPA, sex workers' official victim status is converted to criminal and contaminant if children are around. This seems illogical as the factors that render a sex worker vulnerable to coercion, exploitation, and violence do not disappear if they are communicating in a public area where children may be present. As Angela Campbell explains, the bill tries to play it both ways: '[S]ex workers are at once menacing and victimized.'[81]

Anti-prostitution advocates further undermine sex worker agency by perpetuating the unsubstantiated claim that the average age that a sex worker begins in the trade is fourteen and that the majority have been abused as children.[82] As John Lowman argues, 'treating prostitutes as if they are children makes it much easier for prohibitionists to argue that they should be saved from themselves.'[83] Additionally, perpetuating the myth that the majority of adult sex workers were abused as children suggests that their morality, sexuality, psyche, and/or judgment must have been warped and, therefore, that their choices are less valid. This viewpoint is stigmatizing to sex workers and treats sexual abuse survivors as permanently damaged. Finally, mainstream rhetoric demeans sex-working mothers, assuming that they will be incompetent or negligent or that their occupation will necessarily attract client or 'pimp' violence toward their children.[84] In this way, homophobia and whorephobia have both been justified by invoking the innocence of the child.

The homophobic claims that gay men are a danger to children and that gay couples are suboptimal parents have largely been abolished in law. Mainstream gay rights and popular culture have managed to reverse this association by representing queer couples as monogamous and repro-normative parents who love and raise their kids just like anyone else.[85] Decades of research has shown that

80 Ummni Khan, 'Prostituted Girls and the Grown-up Gaze' (2011) 1:4 Global Studies of Childhood 302; Ronald Weitzer, 'The Social Construction of Sex Trafficking: Ideology and Institutionalization of a Moral Crusade' (2007) 35:3 Politics and Society 447.

81 Campbell, 'Sex Work's Governance,' supra note 24 at 33.

82 John Lowman, 'Crown Expert-Witness Testimony in Bedford v. Canada: Evidence Based Argument or Victim-Paradigm Hyperbole?' in Victoria Love, Elya M Durisin & Emily Van der Meulen, eds, *Selling Sex: Experience, Advocacy, and Research on Sex Work in Canada* (Vancouver: UBC Press, 2013) 230.

83 Ibid at 230.

84 Rebecca Bromwich & Monique Marie DeJong, *Mothers, Mothering and Sex Work* (Bradford, ON: Demeter Press, 2015).

85 Although there is still some concern about protecting children from knowledge of queer lives, see Scott Jaschik, 'University of Central Arkansas President Orders Removal of Lady

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children raised by same-sex parents fare as well as those of heterosexual parents.[86] In addition, there are studies showing that children brought up by married same-sex parents benefit from the privileges and legal recognition that civil marriage bestows on their family.[87] Indeed, in *M v H*, Justice Frank Iacobucci states that recognizing and supporting the children of same-sex couples is clearly in the best interests of children.[88] In this way, the mainstream LGBT rights movement normalizes same-sex desire, in part, by aligning it with the 'normal' desire to marry and have children.

Unfortunately, the same strategy of appealing to the best interests of the child and the dignity of parenthood has not been as successful with sex workers. For example, in 2011, an Irish sex worker organization called Turn Off the Blue Light launched a poster campaign that tried to destigmatize sex workers by showing them as parents who are providing for their kids. One such poster depicted a nicely dressed woman with a title that reads: 'I chose the job that suits my needs.'[89] The text then provides a familiar narrative of a parent juggling domestic chores and financial responsibilities: 'I've got to drop my son at football practice; pick my daughter up from Irish dancing; pay my mortgage and bills; and I'm a sex worker.' The image and text thus try to undo the insidious messaging that sex workers are inimical to family, property values, and economic citizenship. Unfortunately, such campaigns do not seem to have made much of a dent in the socio-legal imaginary.[90] In Ireland, the sex trade has become more stigmatized in recent years with the enactment of a legal scheme that directly criminalizes sex trade clients.[91] Thus, attempts at normalization through parenthood and domesticity seem more challenging for sex workers and clients than for gays or lesbians, perhaps because a core principle of heteronormativity – that sex should be contained in the domestic sphere – is by definition violated by the sex trade.

Gaga Quote from Library Sign,' *Inside Higher Ed* (20 June 2019), online: <www.insidehighered.com/news/2019/06/20/university-central-arkansas-president-orders-removal-lady-gaga-quote-library-sign>.

86 Wendy D Manning, Marshal Neal Fettro & Esther Lamidi, 'Child Well-Being in Same-Sex Parent Families: Review of Research Prepared for American Sociological Association Amicus Brief' (2014) 33:4 Population Research and Policy Review 485.

87 James G Pawelski et al, 'The Effects of Marriage, Civil Union, and Domestic Partnership Laws on the Health and Well-being of Children' (2006) 118:1 Pediatrics 349.

88 As Iacobucci J states, 'it seems to me that the goal of protecting children cannot be but incompletely achieved by denying some children the benefits that flow from a spousal support award merely because their parents were in a same sex relationship.' *M v H*, [1999] 2 SCR 3.

89 'Not So Different to Me,' *Blue Milk*, online: <https://bluemilk.wordpress.com/2011/11/27/not-so-different-to-me/>.

90 'Prostitutes Are People Too, Ads Remind,' *National Post* (12 July 2011), online: <https://news.nationalpost.com/news/canada/sex-work-advocacy-group-tries-to-remind-that-prostitues-are-people-too>. See also '"Someone You Know Is a Sex Worker": A St James Infirmary Media Campaign to Raise Public Awareness about Sex Workers' Rights,' *St James Infirmary*, online: <https://stjamesinfirmary.org/wordpress/?page_id=1673>.

91 Emma Batha, 'Ireland Passes Law Making it a Crime to Buy Sex,' *Reuters* (23 February 2017), online: <www.reuters.com/article/us-ireland-prostitution-law-idUSKBN1621UB>; Sharron FitzGerald & Kathryn McGarry, 'Problematizing Prostitution in Law and Policy in the

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E INTERSECTIONALITY

Throughout this part of the article, I have been treating issues, laws, and stigma associated with homosexuality/queerness and prostitution/sex work as if they are separate entities for comparative purposes and because the mainstream discourse often categorizes them as such. But, of course, there are important ways in which the two realms intersect. On an identity level, there are LGBT people who work in all aspects of the sex trade.[92] For this demographic, an urgent political issue is the fact that trans women in the sex trade face intersecting stigma and heightened risks for violence but rarely feature in anti-prostitution rhetoric or governmental documents.[93] Male sex workers are also often ignored or treated as irrelevant, despite research indicating that they are a sizeable minority in the sex-working population.[94] Recent studies and popular media also indicate a growing number of female clients as well, who have tended to be overlooked in political-legal discourse.[95] All of these issues are erased, for example, in the technical paper for the PCEPA. The empirically flawed paper takes a radical feminist/social conservative outlook by essentializing the sex trade as male-perpetrated violence against women.[96]

Aside from the fact that people with queer and trans identities engage in sex work, the activity itself may be understood as queerly disrupting identity. For example, a number of male sex workers who service male clients identify as straight, as do a number of male clients who seek male or gender-variant sex workers.[97] There are also numerous activists, sex workers, and scholars who argue that sex work itself queers labour, along with heteronormativity.[98] Regardless of the gender identity and orientations of the participants, sexual services are rendered queer because

Republic of Ireland: A Case for Reframing' (2016) 25:3 Social & Legal Studies 289; Frankie Mullin, 'A Change in Irish Law Was Meant to Help Sex Workers. So Why Are They Being Jailed?,' *The Guardian* (12 June 2019), online: <www.theguardian.com/commentisfree/2019/jun/12/change-law-sex-workers-jailed>.

92 Mary Laing, Katy Pilcher & Nicola Smith, *Queer Sex Work* (London: Routledge, Taylor & Francis, 2015) [Laing, Pilcher & Smith, *Queer Sex Work*].

93 Tor Fletcher, 'Trans Sex Workers: Negotiating Sex, Gender, and Non-Normative Desire' in Victoria Love, Elya M Durisin & Emily Van der Meulen, eds, *Selling Sex: Experience, Advocacy, and Research on Sex Work in Canada* (Vancouver: UBC Press, 2013).

94 Thomas Crofts, 'Regulation of the Male Sex Industry' in Victor Minichiello & John Scott, eds, *Male Sex Work and Society* (New York: Columbia University Press, 2014) 178.

95 Rose Troup Buchanan, 'Women Are Buying More Sex Than Ever Before,' *The Independent* (23 May 2015), online: <www.independent.co.uk/life-style/love-sex/women-are-buying-more-sex-than-ever-before-new-research-claims-10272103.html>; Hilary J Caldwell, *Women Who Buy Sex in Australia: From Social Representations to Lived Experiences* (PhD dissertation, University of New South Wales, 2018) [unpublished]; Catherine MacPhail, John Scott & Victor Minichiello, 'Technology, Normalisation and Male Sex Work' (2015) 17:4 Culture, Health and Sexuality 483.

96 Government of Canada, Department of Justice and Research and Statistics Division, 'Technical Paper: Bill C-36, Protection of Communities and Exploited Persons Act' (1 December 2014), online: <www.justice.gc.ca/Eng/Rp-Pr/Other-Autre/Protect/P1.Html>.

97 Victor Minichiello & John Scott, *Male Sex Work and Society* (New York: Columbia University Press, 2014).

98 Laing, Katy Pilcher & Nicola Smith, *Queer Sex Work*, supra note 92.

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they monetize that which is considered sacred, exceptional, and 'priceless'; disrupt gender roles, monogamy, and, sometimes, marital vows; and, perhaps most tellingly, are acutely subject to stereotypes, fears, anxieties, and criminalization.

However, despite overlapping histories of persecution, shared discursive experiences of marginalization and demonization, the queerness of sex work, and the queers who work as sex workers or who purchase sexual services, the rights, freedom, and dignity of sex workers do not appear to have been a concern of the mainstream LGBT movement for a long time.[99] Fortunately, there have been some recent promising gestures of solidarity. In 2015, five LGBT rights organizations in the United States, including Lambda Legal, released a joint statement endorsing Amnesty International's resolution to support sex worker rights and advocate for decriminalization.[100] In Canada, Egale has also taken a public stand to support sex workers' call for decriminalization. In its submission to the Standing Senate Committee on Legal and Constitutional Affairs for Bill 36, Egale recognized the overlapping sexual morality that was used to criminalize gays and lesbians in the past and that is currently used to target sex workers today. A substantial section of the document is also dedicated to the unique marginalized position of trans sex workers and how criminalization exacerbates the problem.[101] In March 2019, the International Lesbian, Gay, Bisexual, Trans and Intersex Association, which represents more than fifteen hundred LGBTQ organizations across the globe, approved a resolution which 'opposes all forms of criminalisation and legal oppression of sex work.'[102] Given the health, safety, and stigma issues, the queer intersectionality of participants in the trade, the policing of consensual sex, and the values of sexual freedom, autonomy, and corporeal sovereignty, we can hope that more LGBT groups will consider including sex workers as important members of the broader sexual diversity community.

IV *Conclusion*

Let us return to the question that began this article: why have LGBT rights made such progress in the last fifty years when the sex worker rights movement has had such a hard time getting traction? As I have argued, the question is misleading. A careful consideration of the case law and statutory regimes suggests that both LGBT advocacy and sex worker advocacy have had wins and losses. Importantly, some of the wins for LGBT rights have had only neutral or perhaps even negative implications for others. In particular, we have considered how queers who have been unable or unwilling to access the benefits bestowed by the mainstream

99 Ross, 'Whorganizers and Gay Activists,' supra note 2.

100 Lambda Legal, 'LGBT Rights Organizations Join Amnesty International in Call to Decriminalize Sex Work, *Lambda Legal*' (20 August 2015), online: <www.lambdalegal.org/blog/20150820_decriminalize-sex-work>.

101 Egale Canada, *Submission to the Standing Senate Committee on Legal and Constitutional Affairs* (2014).

102 'LGBTI Organisations from around the World Call for Decriminalisation of Sex Work,' *ILGA World* (23 March 2019), online: <https://ilga.org/sex-work-lgbti-organisations-call-for-decriminalisation>.

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LGBT movement disrupt dominant understandings of sex, gender, and intimacy in overlapping ways with sex trade participants, while being subject to comparable stigmas, stereotypes, and criminal laws.

It is heartening to find that LGBT movements like Egale are beginning to include sex worker rights within their advocacy agendas. What is interesting to note, however, is that these public interventions focus almost exclusively on sex workers and mostly ignore the specific challenges, criminalization, and stereotypes faced by sex trade clients. Yet, as journalist Alice Klein has argued, the demonization and regulation of clients bears a striking resemblance to the plight of gays and lesbians in the past. She writes that, under Bill 36, 'johns will become the new "fags" – the people fed into the fear factory of career-ending public exposure and the criminal underground because of their personal sexual choices.'[103] While the health and safety issues are much more urgent for sex workers than their clients, this may nonetheless be an area that requires further critical and queer investigation.[104]

103 Alice Klein, 'Will Johns Become the New "Fags"?,' *NOW Magazine* (26 June 2014), online: <https://nowtoronto.com/news/story.cfm%3Fcontent%3D198657>.

104 Preliminary work in this area includes: Bernadette Barton, 'Queer Desire in the Sex Industry' (2001) 5:4 Sexuality and Culture 3; Ummni Khan, 'Chester Brown and the Queerness of Johns' (2019) 6:1 Critical Analysis of Law 24.

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