



## Decriminalizing Domestic Violence and Fighting Prostitution Abolition: Lessons Learned From Canada's Anti-Carceral Feminist Struggles

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### Abstract

This article offers a cautionary tale for efforts to decriminalize domestic violence through a retrospective analysis of Canadian feminist legal activism to decriminalize sex work. Both domestic violence and sex work are contested terrains of activism, litigation, and scholarship and have come up against the disparate views of criminalization as necessary to protect women from violence, versus criminalization as compounding women's potential risks for violence. Through the example of Canadian feminist jurisprudence in *R v Bedford*, wherein the Supreme Court of Canada recognized the endangerment of women as resulting from the criminalization of sex work, I explore the liminal space following this decision, and how regressive legislation was introduced to re-entrench carceralism in the breach of a seeming feminist victory. My focus is on how carceral feminism continues to occupy the liminal space as a force of colonial violence, further endangering Indigenous women. I draw linkages between several violent murders of street-involved Indigenous women and the severing of allyship among feminists, sex workers, and Indigenous women over the potential decriminalization of sex work. Finally, I suggest that opposition to the decriminalization of sex work is successfully argued by an emerging force of carceral feminism: neo-abolitionist feminists who have appropriated a politics of abolition and, yet, may have deepened carceralism in the lives of Indigenous women.

### Keywords

Sex work; Canada; abolition; Indigenous women.

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## Introduction

Leigh Goodmark's thesis in her 2017 article, "Should Domestic Violence be Decriminalized?" set out the unintended consequence of decades of compulsory criminalization of domestic violence in the US. Goodmark challenged one of liberal feminism's most politically successful movements of the late 20th century. Along with other feminist legal scholars, Goodmark documented how spiraling prosecution rates in domestic violence cases have failed to indicate any real measure of "success" (Drakopoulou 2007; Gotell 2015; Lewis et al. 2001; Sheehy 2014; Smart 1998). Further, the policing of women who report domestic violence has re-entrenched the patriarchal and racialized shadow state that enacts surveillance through child protection and welfare dependency (Kim 2015). I take up a different dimension of the decades-long impact of the sophisticated liberal feminist-inspired law reforms to address domestic violence: the expansion of carceral regimes that now imprison more women globally than ever before. Nowhere is carceralism felt more deeply than in the lives of racialized and poor women. Mass incarceration—especially in the US—is decried as the new Jim Crow that has reimagined slavery through the prison industry complex (Alexander 2010; Miller 2014; Richie 2012). In Canada, Indigenous women are the fastest growing prisoner population (Zinger 2017).

How does the criminalization of domestic violence to, seemingly, protect women (and children) from male-perpetrated violence intersect with the unprecedented rates of women's incarceration? How are women's lives caught up in the net of the compulsory criminalization of the men in their families and communities? Efforts to untangle the over-policing and punishment of women in the wake of the criminalization of domestic violence have spanned tinkering with (or bettering) these laws to better training of police officers and courtroom professionals regarding the nuances of intimate partner violence. I concur with Goodmark's argument that, to reduce the collateral effects of compulsory criminalization of domestic violence due to the technical errors in the application of law (such as dual charging practices) is an oversimplification of a far more complex problem of how advanced liberal democracies have come to "govern through crime" (Simon 2006). Goodmark suggested that criminal legal system expansion and investment in law enforcement (e.g., the *Violence Against Women Act* in the US and specialized Domestic Violence Courts in Canada) have resulted in structural alignment between feminist anti-violence work and the carceral state. Criminalization and its concomitant penal expansion have become proclaimed as the means to safety from violence and employment security for white frontline workers in anti-violence sectors (Kim 2015). Goodmark asserted the need to disrupt this "governing through crime," and to possibly end the criminalization of domestic violence. She called for the response to gender-based violence to be relocated to the sphere of social policy and human rights. Her policy model includes economic strategies to address the feminization of poverty, housing stability, harm reduction strategies to keep families intact, and enhanced community capacity to respond to trauma through restorative practices. There is strong empirical evidence of the value of gender-focused preventative efforts to address the structural barriers to safety from violence (see World Health Organization and London School of Hygiene and Tropical Medicine 2010).

Despite the breadth of support for a policy-focused model, the criminalization of domestic violence does provide for the protection of some women, some of the time, and it does signal the denunciation of male violence. It is at the nexus of these disparate views — criminalization as necessary to protect women from violence, versus criminalization as compounding the potential risks for violence — that I situate a different feminist fault line: the decriminalization of sex work. I present a brief summary of the Canadian jurisprudence (*Bedford v R* ONSC 2010; *Canada (Attorney General) v Bedford* 2013 SCC 72, herein *Bedford*) that saw the repeal of three provisions of the *Canadian Criminal Code* (herein the *Code*) that pertained to sex work; the subsequent political action in response to *Bedford* (both for and against the decision), and the neoconservative legislative backlash that replaced the impugned sections of the *Code*. A particular focus here is the severing of allyship among feminists, sex workers, and Indigenous women over the potential decriminalization of sex work. I explore the liminal space of *Bedford* in the wake of several violent murders of street-involved Indigenous women as a determining consideration in the breakdown of feminist solidarity. Finally, I suggest that decriminalization of sex work in this liminal space has been

successfully argued by prostitution neo-abolitionists as an abdication by the state of its responsibility to denounce violence against women and the continued degradation of the lives of Indigenous women. This represents a cautionary tale for efforts to decriminalize domestic violence.

### **R v Bedford**

In 2010, Ontario Superior Court Justice Himel released her verdict in *Bedford*, essentially decriminalizing prostitution in Canada. The applicants in this case were three sex workers (Terri Jean Bedford, Amy Lebovitch, and Valerie Scott), represented by civil litigator and self-proclaimed libertarian Allan Young. Young argued that three sections of the *Code* (living off the avails of prostitution, running a common bawdy house, and communicating for the purposes of solicitation) undermined his clients' ability to create and work in safe conditions out of fear of prosecution and constrained their freedom of expression when communicating for purposes of engaging in prostitution. Collectively, these three sections of the *Code* violated his clients' right to life, liberty and security under section 7 of Canada's federal *Charter of Rights and Freedoms* (The Constitution Act, 1982, herein the *Charter*). The Crown counsel (Attorney General of Canada) in this case argued that prostitution laws were deemed necessary by parliament to criminalize the most egregious aspects of prostitution and to prevent further harms such as drug addiction and human trafficking. Further, the Crown argued that sex workers were victims of abuse, addiction, and poverty in need of protection from predators and pimps. Ultimately, Himel found that three sections of the *Code* that criminalized activities pertaining to prostitution did violate section 7 of the *Charter*. The substance of Himel's 130-page decision turned on how the sections of the *Code* contributed to the endangerment of women involved in sex work by disallowing them the freedom to work and live together and to properly determine the level of risk posed by a potential client. In her decision, Himel provided the federal government with 12 months to rewrite the relevant sections of the *Code* to ensure alignment with section 7 of the *Charter*. Unsurprisingly, the Crown appealed the decision to the Supreme Court of Canada.

In 2013, now the respondents in their case, Bedford, Lebovitch and Scott faced the Attorneys General of Ontario and Canada, in addition to 24 intervenors comprised of civil liberties organizations, HIV/AIDS advocacy groups, and neo-abolitionist organizations such as Evangelical Christian groups, rape crisis centers, the Native Women's Association of Canada, and the Canadian Associate Elizabeth Fry Societies. In its decision, the Supreme Court of Canada unanimously held the lower court ruling that the three sections of the *Code* governing various aspects of prostitution were all in violation of section 7 of the *Charter* that recognized the right of each Canadian citizen to security of the person. The Supreme Court Justices wrote that these three sections were found to be arbitrary, overreaching, and disproportionate, given the risk of incarceration associated with these activities. However, the decision was stayed for 12 months, giving the federal government until December 2014 to craft a legislative response (Heighton 2014). In the subsequent months of this apparent progressive legal victory, neoconservative anti-feminist and neo-abolitionist backlash against sex worker rights supporters ensued. The federal conservative government seized on the opportunity granted by the courts to assert the dangerousness of sex work as stemming from a lack of police presence and law enforcement, the need for federally funded programs to enable women to exit sex work, and the rights of property owners to be free from the sight and nuisance of sex work. Through an online national consultation process that called for submissions on how the government should address the harms associated with prostitution, the federal government garnered widespread support for a law-and-order response to prostitution. In addition to these consultations, as part of the legislative process, the House of Commons Committee on Justice and Human Rights held hearings for submissions by advocates and academics, in addition to those with lived experience of sex work. Members of Parliament and Senators described sex workers who called for legalization to ensure women's safety from predatorial violence, as "loud and acting on behalf of the 'pimp lobby', and who choose to buy thousands of dollars of shoes" (Law, Mario, and Bruckert 2020: 200). Ultimately, Bill C36, the "Protection of Communities and Exploited Persons Act" (PCEPA), quickly became law in December 2014 and re-entrenched the criminalization of sex work with the creation of new sections of the *Code*. Under the new legislation, police could more easily arrest victims of prostitution for being in proximity to schools and parks, or those who advertise their services online or in the back pages of newspapers, and third parties

who financially benefit from sex work (e.g., roommates and spouses, in addition to venue operators and security services). Then–Minister of Justice, Peter MacKay proclaimed that Bill C-36 (PCEPA) is rooted in protecting communities from the harms associated with prostitution, addressing the risks of violence posed to those who engage in prostitution, and condemns the objectification of the human body and the commodification of sexual activity (Bruckert 2014: 3).

Critics of the legislation called out the return to a pre-*Bedford* criminal justice response that would likely not withstand another legal challenge under the *Charter* (British Columbia Civil Liberties Association 2014). Others denounced the work of white liberal neo-abolitionist feminists who supported the new legislation as betraying and endangering women who must now work in isolation with a heightened fear of violence and police mistreatment (Law, Mario, and Bruckert 2020). The harmful impacts of this new legislation were to be felt more acutely by racialized and trans women who typically cannot access safer indoor work venues (Bruckert and Law 2018, Van der Meulen, Durisin, and Love 2014). Due to this regressive legislation, Canada would see the revival of a shadow economy of unregulated and unprotected sex work, where 57 percent of sex worker deaths occur as a result of street-level working conditions, and 34 percent of those workers are Indigenous women (Bruckert and Law 2018: 180).

The impact of Bill C-36 (PCEPA) has been far reaching in terms of the fracturing of feminist allyship among sex workers, anti-violence activists, Indigenous women, and academics. The expansion of the criminal legal response to the governance of sex workers as victims of prostitution in many ways mirrored the feminist-inspired compulsory criminalization of domestic violence decades earlier. Whereas those feminists sought to expose and denounce gender-based violence through criminalization and vigorous prosecution, the rise of carceral feminism in the wake of these well-intended reforms has been well documented. However, it is the question of whether we should decriminalize domestic violence that concerns me here, given the Canadian experience of efforts to decriminalize sex work and the subsequent deepening of carceralism that resulted, particularly for Indigenous women. What more must we consider before seeking to decriminalize domestic violence? Is there a risk of a similar re-entrenchment of more punitive laws in the breach that follows successful litigation? My particular concern is that more Indigenous women will be caught up in what emerges in the wake of decriminalization. In the next section, I explore the hard-won allyship among feminists and sex workers that now lies in disarray following the enactment of PCEPA and how we should consider the liminal space of law reform efforts.

### **Forging and Severing of Allyship**

*Bedford* was not the first modern legal challenge to prostitution-related offenses in Canada. Indeed, feminist legal scholarship has exposed the mistreatment of sex workers under the law since the early 20th century and denounced the class and race oppressions that have been compounded by the criminalization of sex work (for a fulsome discussion, see Backhouse 1985, 1991; O’Connell 1988). In this section, I describe the forming of feminist allyship among sex workers and other feminists in the decades prior to *Bedford* and the unraveling of that solidarity in the 12 months that followed the *Bedford* decision in anticipation of the state’s legislative changes. Next, I set out the liminal space that foreshadowed the severing of allyship among feminists and sex workers, notably the re-entrenchment of abolition feminists and the emergence of anti-carceral feminists. I suggest that the liminal space is critical in understanding the implications of profound legal change — such as the decriminalization of domestic violence — and its potential role in reframing progressive social movements into regressive and repressive regimes.

In 1985, the federal government proposed Bill C-49 in response to the findings of the Badgley Commission report (The Report of the Committee on Sexual Offences Against Children and Youth, 1984) and the Fraser Commission Report (The Report of the Special Committee on Pornography and Prostitution, 1985). Together, these reports recommended swift and punitive responses to the exploitation of women and children subjected to the endangerment of prostitution and pornography industries. In the wake of these reports and the proposed legislation, in November of 1985, a fraught and tense conference was planned between sex workers and feminists or, as the proceedings were entitled, *Good Girls Bad Girls* (Bell 1985),

to discuss potential alliances and strategies to reconcile divergent positions regarding the place of law in the realm of sex work. It was at this meeting of self-proclaimed whores, strippers, activists, legal scholars, former sex workers, and academics that an allyship was forged. Concerns over women's safety from violence and how to best protect women from the harms of criminalization remained at the core of this alliance, fully cognizant of the over-policing and endangerment of racialized and queer women. These "good girls and bad girls" recognized a shared commitment to police accountability, the inclusion of sex workers in policy planning, and cautious optimism of the value of law as a tool to demand protection, equality, and dignity of all women.

Bill C-49 was passed in December 1985. The new legislation set out amendments to the *Code*, making it an offense to communicate for the purposes of offering to sell or buy sex in a public place. The revised statute stated:

Any person, who, in a public place or in any place open to public view, stops or attempts to stop any person or in any manner communicates or attempts to communicate with any person for the purposes of engaging in prostitution or of obtaining the services of a prostitute is guilty of an offence punishable on summary conviction. (Criminal Code, S.C. 1985, c. 50, s. 195.1)

Solicitation did not need to be pressing or persistent, and parked cars were deemed public places; thus, it was made illegal to engage in paid sex in a vehicle. Feminist and sex worker advocates alike condemned the perniciousness of the legislation that not only reproduced long-held beliefs that sex workers were nuisances or threats to public decency but also further endangered women who had to hide from police.<sup>1</sup> Bill C-49's communication law foreshadowed a crass neoliberalism that, on the one hand, obfuscated the socio-economic roots of sex work and, on the other hand, privileged the rights of property owners to demand protection from the nuisance and sight of sex work. Indeed, much of the new legislation was a reaction to the private interests of home and business owners who repudiated the presence of sex workers as negatively affecting property values and the safety of children in those gentrified neighborhoods (Hugill 2006; Lowman and Fraser 1989). In the year that followed the new legislation, the criminalization of sex workers increased dramatically: 82 percent of all prostitution-related charges in 1986 were for solicitation (Rotenberg 2016: 4).

In the wake of this increased police power to charge women for soliciting, sex workers argued that they were forced into the shadows to communicate with their clients with limited ability to assess risk of a "bad date" and unable to work indoors or live communally (Bruckert and Hannem 2013). Thus, sex workers closest to the street (versus in-call workers such as escorts) were increasingly isolated and fearful of calling the police in cases of rape or assault by their customers. Statistics Canada reported that, in 1991–2014, there were 294 homicides of sex workers: 34 percent of those were unsolved versus the 20 percent of homicides not involving sex workers. Further, only 30 percent of those homicide cases resulted in a guilty verdict versus 64 percent in other femicide cases (Rotenberg 2016). Despite the state's espoused intention to protect women from sexual exploitation, its legislative response increased the likelihood of women's criminalization and violent victimization. The allyship of "good girls and bad girls" began to question the effectiveness of criminal law to reconcile the complexities of gender equality, security of the person, and protection of deeply marginalized poor and racialized women from misogynistic violence. Allyship began to fray at the edges as some feminists sought greater police protection of women and swifter prosecution of men who purchase sex (Lakeman 2009), whereas other feminists pushed for full legalization of sex work to allow women to organize safe and regulated workplaces (Belak and Bennett 2016).

In efforts to theorize the fractured political alliances among feminists (scholars and activists), sex workers, and Indigenous women that resulted in the wake of *Bedford*, and the re-entrenchment of compulsory criminalization of sex work, I consider the anthropological concept of the liminal space: the boundaries between neo-abolition and carceralism where political, cultural, and legal meaning is made through

knowledge claims of sex work as prostitution and the sex worker as victim prostitute. However, the most significant dimension of this liminal space between the abolition of prostitution and the decriminalization of sex work is carceral feminism's response to domestic violence decades earlier.

### **The Liminal Space of *Bedford***

In the 12 months that followed the Supreme Court of Canada's 2014 decision to allow parliament to devise a statutory framework governing sex work, feminist allyship collapsed as it pitted oppositional views of women's lives and experiences in the sex trade. What emerged from this time of contestation and protest is an epistemology of sex work as prostitution and women as victims of predators and pimps in need of protection by the criminal justice system. In this section, I reflect on how the failure of progressive law reforms such as decriminalization should be considered carefully in the context of the liminal space where legal, political, and cultural meanings of sex work are produced by prostitution abolitionists who effectively frame sex work as dangerous, degrading, racist, and violent. These abolitionist claims silence the voices of sex workers for whom their trade is lucrative and empowering and whose voices *expose the violence of criminalization*. This paradoxical view of criminal law as a site of protection of women from sexual violence and exploitation, and criminal law as a means of endangerment and isolation of women, is the bedrock of this liminal space. This liminal space created in the wake of *Bedford* was preemptively constrained by an already existent carceral feminism that imposed an "epistemic occupation with prisons as necessary for the prevention of violence, where to do otherwise is irresponsible and dangerous" (Heiner and Tyson 2017: 2). In sum, the compulsory criminalization of sex work and domestic violence are intertwined, and the more punitive state response to prostitution following *Bedford* should be carefully considered by those seeking to decriminalize domestic violence.

The liminal space I wish to explore here is the terrain between decriminalization and criminalization, where certain knowledge claims become truth claims that underscore the imperative of a carceral response (Snider 2003), despite empirical evidence of the harms of carceralism to Indigenous women, in particular. Sex work advocates have been unable to frame the violence experienced by street-involved women as being due to criminalization regimes that isolate and endanger women. We remain convinced by the claim that prostitution is to be abolished through criminalization strategies that target customers and reject that some women choose to perform sex work, just as anti-violence feminists have not been able to decenter carceralism as the response to domestic violence and how such a response may further endanger women. The liminal space in which efforts to decriminalize sex work in Canada have been thwarted by carceralism has been shaped by several key events and tragedies. First was the implementation of anti-human trafficking amendments to the *Code* in 2006 that effectively linked prostitution to violence against women. Second were two significant public inquiries into the deaths of Indigenous women: The Missing Women Commission of Inquiry entitled "The Foresaken" (Oppal 2012) and the National Commission of Missing and Murdered Indigenous Women and Girls entitled "Reclaiming Power and Place" (2018). Finally, there was the acquittal of Bradley Barton in 2011 for the horrific death of Cindy Gladue, an Indigenous woman who worked in the sex trade.<sup>2</sup>

In 2006, anti-trafficking amendments to the *Code* were introduced to address the problem of global and domestic sex trafficking, portrayed in the testimonies of young women who were lured and groomed to work as prostitutes. Proponents of the new provisions that framed sex work as sex trafficking argued that all prostitution is forced labor typically involving organized crime; no woman freely consents to being a prostitute. Indigenous women, in particular, were "vulnerable to being trafficked from desolate and abysmal reserves into urban centres (sic) where they are sexually exploited" (Lakeman 2009: 144). These claims later became the basis of the Crown's position in *Bedford*. Anti-trafficking has emerged as a law-and-order priority across most of the Global South in response to the problem of rising rates of migration from war-torn regions adversely affected by deep poverty and instability. In Canada, an expansive government infrastructure has developed linking organized crime to drug trafficking, immigration fraud, migrant labor abuses, and prostitution. The conflation of sex work with human trafficking in every instance is a misuse of carceral power; yet, it has been embedded into neo-abolitionist politics calling for a coercive

response to save young women from the grip of sex trafficking. Writing in the US of the rise of evangelical and feminist anti-trafficking activism, Bernstein first identified their “shared commitment to carceral paradigms of social and gender justice, and to militarize humanitarianism as the preeminent mode of engagement by the state” (2019: 32). As evidence of this similar commitment to carceralism, abolitionist feminist organizations such as the Canadian Association of Sexual Assault Centres and Status of Women Canada paradoxically linked the abolition of sex work through the expansion of the carceral state to economic redistribution and adequate social welfare provisions to address the feminization of poverty. These two forms of statecraft seldom co-exist:

State protection is a crucial element in the elimination of prostitution. Enacting the demands of women for better response to all forms of men’s violence against women requires improving law, policing, prosecution, court processes, sentencing, social programs, and public education ... It requires recognizing prostitution as violence against women. (Lakeman 2009: 157)

It would seem the die was cast years before *Bedford*.

In 2005, Robert Pickton was charged with the killing of 27 women connected to the sex trade of Downtown Eastside of Vancouver, British Columbia. In 2007, he was convicted of six murders committed on his remote pig farm where forensic evidence showed that women’s bodies were rendered in a meat processing facility. Women were first reported missing to police in 1991; however, an investigation was not initiated until 2001. Following Pickton’s conviction, a commission of inquiry was called to examine the role of the police in failing to prevent the women’s deaths or follow through on reports of missing women. Through the testimony of surviving families, advocates, and sex workers who themselves live in fear of predatorial violence, the inquiry members heard of the profound marginalization and invisibility of women who lived and worked on the streets of downtown Vancouver without protection from police and no access to safe housing, mental health supports, and addiction recovery. However, an important counter discursive claim is stated in the final report of the Inquiry, wherein the authors identified the role of the criminalization of prostitution in the endangerment of women:

Marginalization is closely related to the conditions of endangerment and vulnerability to predation, creating the climate in which the missing and murdered women were forsaken. Three overarching social and economic trends contribute to the women’s marginalization: retrenchment of social assistance programs, the ongoing effects of colonialism, and the criminal regulation of prostitution and related law enforcement strategies. (Oppal 2012: 78)

In 2010, in the wake of the Pickton investigation, which revealed the disregard for Indigenous and street-involved women by police, the Native Women’ Association of Canada released a report that documented the cases of more than 500 Indigenous women who had gone missing or were murdered over the previous two decades. They found that half of these women were involved in sex work, often due to limited economic options, and also that police failed to protect women from violence. The authors of that report stated:

The information gathered to date speaks to the urgency of missing reports involving women in prostitution, as well as the broader need for greater protections for women in this area. Prostitution is not a cause of violence; rather, many women experience prostitution in the context of limited options and after experiencing multiple forms of trauma and violence. (Native Women’s Association of Canada 2015)

In 2013, the federal police force (Royal Canadian Mounted Police [RCMP]) was directed to reexamine its own missing persons database in the wake of much higher reported numbers by the Native Women’s Association and academics (Pearce 2013). The RCMP eventually reported that over 1,000 Indigenous women had gone missing or were murdered between 1980 and 2012. In 2015, the newly elected Liberal

government called for a national inquiry into the missing and murdered Indigenous women to make recommendations to address the colonial legacy of sexual violence and femicide. The final report of the Inquiry was published in 2019, after years of gathering stories of trauma and neglect by the criminal justice system. As reported to the Inquiry commissioners by Indigenous women involved in the sex trade, women feared criminalization if they turned to police for safety:

As much previous research and many of the testimonies demonstrated, encounters between Indigenous women and girls involved in the sex industry and the justice system often involve experiences of additional violence at the hands of those with a responsibility to uphold justice. [Women] spoke frankly about the fear and mistrust that stop Indigenous women who experience violence in the context of the sex industry from talking to the police. (National Inquiry into Missing and Murdered Indigenous Women and Girls 2019: 667)

A final and heartbreaking dimension to the liminal space of neo-abolitionist politics to dismantle decriminalization and build up a carceral response to sex work is the brutal death of Cindy Gladue in 2010. Gladue, an Indigenous woman and mother who also worked in the sex trade, was left to bleed to death in a hotel room bathtub after a knife was inserted into her vagina by Bradley Barton. Barton was initially acquitted of the charge of first-degree murder when defense counsel successfully claimed that the injury resulted from consensual rough sex with a “hooker.” Barton was eventually ordered to stand trial again for the charge of manslaughter after Indigenous women’s organizations intervened in the case, challenging the deeply disturbing use of Gladue’s dissected vagina as forensic evidence of Barton’s depravity. In their decision, the Supreme Court stated:

Ms. Gladue’s “life mattered” and that the justice system failed to give her “the law’s full protection.” It encouraged judges when instructing jurors to try to dispel stereotypical assumptions about Indigenous women who do sex work, such as that they are sexual objects for male gratification or that they assume the risk of harm that befalls them. (Fine 2019)

Despite the persistent narratives expressed by street-involved women, especially Indigenous women — of police mistreatment as additional violence and of criminalization as further endangering women by forcing them to work in isolation out of fear of arrest — carceral expansion remains entrenched. Similarly, we see strong empirical evidence of the adverse effects of compulsory criminalization of domestic violence on the lives of Indigenous women. In the final section below, I outline how the compulsory criminalization of domestic violence foreshadowed the neo-abolitionist politics of Canada’s new prostitution laws.

### **Carceral Feminism as Colonial Violence**

Throughout the 1990s — as in other common law jurisdictions — the criminal legal system’s response to domestic violence in Canada embraced a law-and-order regime that expanded to include police charging reforms to require mandatory charging in all cases of reported domestic violence, thereby no longer requiring women to lay charges against their abuser; specialized Domestic Violence Courts in some regions, vigorous prosecution that could compel women to testify against their abuser; preventative remand to ensure the pretrial detention of men accused of domestic violence (Ursel 1992, 2001); and sentencing law reforms that identified aggravating factors of spousal victimization in the determination of sanctions (Balfour and Du Mont 2012). As provincial and federal resources flowed into expansion of the carceral response to domestic violence, it was clear that Indigenous communities were more likely to feel the brunt of compulsory charging practices (Comack, Chopyk, and Wood 2000). The impact of these feminist-inspired reforms on Indigenous women was becoming evident as reported judicial decisions began to reveal the jailing of Indigenous women for administration of justice charges such as contempt for refusing to testify, dual charging by police when women used defensive measures to protect themselves and their children, and refusal to testify against men from their communities out of fear of retaliation (Comack and Balfour 2004; McGillvary and Comaskey 1999). Two recent cases of Indigenous women who were charged by police after being assaulted by a family member act as evidence of the ongoing

mistreatment and risk of criminalization faced by Indigenous women when seeking help for domestic violence. Two Inuit women who called the police to report being assaulted in their homes were themselves charged with breach of their bail conditions to abstain from alcohol and held in custody (AM v R 2020 NUCJ 04). The judge in these cases acquitted both women. In his decisions, the judge referred to the final report of the National Inquiry into Missing and Murdered Indigenous women cited above:

During the Truth-Gathering Process, families and survivors talked frankly about their reasons for not reporting violence to the police or not reaching out to the criminal justice system – even in cases where there had been severe acts of violence against them ... prior negative experiences with police make Indigenous women reluctant to report violence or trafficking: “There is a significant reluctance for Indigenous women, specifically Inuit, to engage with police because of prior experiences of being seen as a criminal, being blamed, being seen as not a victim, causing it on themselves.” (National Inquiry into Missing and Murdered Indigenous Women and Girls 2019 628–629)

In another troubling case, we see the confluence of homelessness, addiction, and intergenerational trauma in the life of an Indigenous woman working on the streets. We also witness the failure of carceral feminism to respond to the profound violence Indigenous women experience as a pathway to their criminalization. Candace Moostoos, a young Indigenous woman — severely addicted to alcohol and crystal meth — was convicted of manslaughter in the death of her uncle, who had sexually assaulted and exploited Moostoos and other members of her family over several years. Moostoos worked on the streets and was raped by the victim two weeks before his death. At the time of the offense, Moostoos was 35 years old, weighed 80 pounds and had been using drugs and alcohol for five days prior to the killing. She was heavily intoxicated, sleep deprived, dehydrated, and malnourished. When she met Burns at his apartment to ask him for money, he demanded oral sex; she refused. He viciously grabbed her by the crotch and told her that he had given her HIV when he raped her; Moostoos stabbed him. In the days that followed, Moostoos said goodbye to her children, then turned herself in to the police to give a statement. She was still heavily impaired by crystal meth, but her confession was accepted by the police. Moostoos was sentenced to seven years of federal custody; no appeal was filed (Moostoos v R 2017 SKQB 12).

In the years since the rise of carceral feminism, Indigenous women are the fastest growing prisoner population, with an increase of 75 percent since 2005. The gross overrepresentation of Indigenous women in prison has been denounced as “the pressing human rights issue in Canada today” (Zinger 2017: 48). The Department of Justice reported in 2016–2017 that Indigenous women accounted for 43 percent of adult women admitted to provincial and territorial custody, whereas Indigenous men accounted for 28 percent of adult men admitted to custody (2018: 4). Regarding provincial and territorial rates of incarceration, 38 percent of women in those prisons are Indigenous (Statistics Canada 2017). The issue of overrepresentation in provincial and territorial prisons is the most troubling; these institutions confine the largest number of prisoners in Canada, and under the most deplorable conditions, often leading to suicides, drug overdoses, staff-perpetrated assaults, and excessive use of segregation (Sapers 2017).

An often under-theorized aspect of Indigenous women’s over-incarceration is how their imprisonment intersects with the staggering rates of gender-based violence and femicide perpetrated against them. The over-incarceration of Indigenous women exposes the ways that criminal justice processes link women’s victimization to how they are policed, how their moral culpability is established, and, ultimately, how their level of risk and degree of securitization are assessed once imprisoned (Balfour 2013; Balfour forthcoming; Kaiser-Derrick 2019). Indigenous women experience three times higher rates of violent victimization than non-Indigenous women. According to Statistics Canada (2017), the rate of violent victimization of Indigenous women is 160 incidents per 1,000; for non-Indigenous women, the rate is 75 incidents per 1,000. In turn, Indigenous women are more likely to be charged with and imprisoned for violent offenses than non-Indigenous women. Murdocca (2009) has suggested that carceral feminism and its resultant penal regime is a form of racial governance that reproduces a particular kind of colonial power.

## Conclusion

In Canada, fault lines have emerged between self-described neo-abolitionist feminists who demand the end of prostitution through its continued criminalization, and sex trade work advocates who position criminalization as further endangering women, especially those most vulnerable to predatorial violence. I have suggested here that the failure of decriminalization following the *Bedford* decision, and the re-trenchment of feminist-inspired carceralism, should be understood relative to the liminal space of how knowledge claims are made and accepted by the state. Sex workers and their allies could not transcend the neo-abolitionist campaign that was already emboldened by a decades-old regime of compulsory criminalization.

My concern with the move toward decriminalization of domestic violence is not because I am a neo-abolitionist seeking to shore up the carceral state. Rather, I am watchful of what happened in the breach of juridical space created in the wake of *Bedford*, and what happened in the wake of that decision — a more punitive state emerged. Spiraling rates of the incarceration of Indigenous women in the decades that have followed the expansive carceral response to domestic violence are compelling evidence of the perils of these reforms. Yet, we do not see a drive toward the abolition of prisons like we do regarding the abolition of prostitution. On the one hand, prison abolitionists call for the release of women prisoners, condemning their imprisonment as colonial violence. On the other hand, some of these same prison abolitionists who have opposed the hyper-incarceration of Indigenous women whose lives are marked by profound violence call for the abolition of prostitution through carceral expansion.

The empirical evidence against the use of carceral regimes in cases of domestic violence is clear; Indigenous women are least likely to be protected by police and, indeed, are at risk for criminalization and incarceration themselves. Would, then, the decriminalization of domestic violence be a necessary first step toward a robust policy-focused response, as identified by Goodmark? What would happen in the liminal space opened up by decriminalization? Would, for example, prisons be abolished to provide more culturally specific care for women and their children? The lessons of *Bedford* and efforts to decriminalize sex work in Canada suggest otherwise.

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<sup>1</sup> Late 19th century sex workers in most British Colonies were surveilled and harassed by police through laws such as the *Contagious Disease Act*, ostensibly to prevent the spread of diseases such as syphilis (Backhouse 1985). In 1927, the *Female Refuges Act* was enacted to set up industrial schools for females aged 15–35 who were deemed to be drunkards, vagrants, or those leading an “idle and dissolute life” (*Female Refuges Act*, RSO 1927, c347).

<sup>2</sup> Since writing, on appeal from the Crown, Barton was re-tried for the death of Cindy Gladue, and was eventually convicted of manslaughter and sentenced to 12.5 years.

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