

Communicating for the Purposes of Human Rights: Sex Work and Discursive Justice in Canada

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This article develops a principle of 'discursive justice' that combines Jürgen Habermas' theory of the public sphere, with the understanding of epistemic violence developed by Jean Francois Lyotard and Gayatri Spivak. This concept is considered in relation to Bedford v Canada, a Charter challenge to Canadian prostitution laws. The Bedford hearings provide the setting for lively public debate about the criminalization of prostitution, with interventions by sex worker-led organizations, Christian groups, abolitionist and non-abolitionist feminists, HIV activists, civil libertarians, Indigenous organizations and others. But there also emerged the troubling spectre of epistemic violence when sex work activists' credibility and status as 'knowers' came under question. Discursive justice is proposed as a principle that might help preclude epistemic violence and strengthen participatory democracy in the public sphere.

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Cet article développe un principe de « justice discursive » qui combine la théorie de la sphère publique de Jürgen Habermas avec la compréhension de la violence épistémique formulée par Jean-Francois Lyotard et Gayatri Spivak. Ce concept est examiné en relation avec l'affaire Bedford c Canada, une contestation, fondée sur la Charte, des lois canadiennes en matière de prostitution. Les audiences en appel dans l'affaire Bedford créent un cadre pour un débat public animé sur la criminalisation de la prostitution, avec entre autres des interventions d'organismes dirigés par des travailleuses du sexe, de groupes chrétiens, de féministes abolitionnistes et non abolitionnistes, de militants de la lutte contre le VIH, de groupes de défense des libertés civiles et d'organismes autochtones. Cependant, on y a également vu s'y profiler le spectre troublant de la violence épistémique lorsque la crédibilité et le statut de « connaisseurs » des activistes du travail du sexe ont été remis en question. La justice discursive est proposée ici comme un principe qui pourrait aider à empêcher la violence épistémique et à renforcer la démocratie participative dans la sphère publique.

I. Introduction

Full participation in a democratized public sphere depends on more than the right to speak; it depends on being heard. Even in civic discourses aimed at realizing the human rights of a population at risk, stigma and dehumanization can undermine the voices of marginalized groups. One example is the current debates taking place in Canada about the appropriate legislative response to ensure human rights for sex workers. Sex workers are a significant part of the conversation in *Bedford*, yet sex worker activists are the only group whose credibility with respect to their self-representation came under question during processes of appeal.² Paternalistic, moralistic, and stigmatizing undercurrents were evident in several of the appeal factums. These subtly, and at times overtly, deny that sex workers can critically apprehend their own circumstances and ultimately make meaningful contributions to public discourse about the constitutionality of the laws surrounding prostitution in Canada. These poetics of communication reflect the logic of what is perhaps the strangest, yet most widely applied, of Canada's prostitution laws: while prostitution is itself legal, communicating for the purposes of prostitution is illegal.³ The erasure of sex worker speech, whether in the courts or on the streets, is a form of epistemic violence, and an effect of the very stigmatization and dehumanization that places sex workers at risk of human rights violations in the first place. As a consequence sex workers cannot presume that their knowledge will be granted the same credibility in discursive processes as people coming from more socially sanctioned speaking positions. Indeed, as we see in *Bedford*, sex workers are sometimes not even heard by the very allies who would seek to protect them from harm.

The poetics of communication in *Bedford* point to the need for tools that might aid human rights advocates and the courts in effecting a democratized public sphere: principles that would deter epistemic violence, while at the same time allowing the dissenting viewpoints endemic to healthy civic debate to flourish. This essay proposes a concept of discursive justice as a principle to help establish conditions in which stigmatized groups such as sex workers might be heard in the public sphere, where political participation is enacted through debate and dialogue. The erasure of marginalized voices in the public sphere is a problem of particularly grave concern, even though it can be difficult to perceive. Hannah Arendt contends that conditions which render one's opinions insignificant and actions ineffective constitute a deprivation of human rights even "more fundamental than freedom and justice."⁴ This paper focuses specifically on the phenomena whereby marginalized groups are re-

² *Bedford v Canada*, 2010 ONSC 4264, 102 OR (3d) 321 [*Bedford*].

³ *Criminal Code*, RSC 1985, c C-46 s 213(1).

⁴ Hannah Arendt, *The Origins of Totalitarianism* (San Diego: Harcourt, 1976) at 296.

produced as subaltern through discursive strategies that put their voices under erasure. The form of epistemic violence engaged with here includes subtle and socially sanctioned methods of undermining that are sometimes couched in the language of ‘helping,’ ‘protecting’ and ‘saving.’ Ironically, epistemic violence is sometimes phrased in the language and goals of human rights itself.

The concept of epistemic violence is not new to prostitution research, although it usually makes its appearance as an implicit effect of stigma, which has been understood since Erving Goffman’s work in the 1960s as the social rejection of an individual that in effect “spoils” that person’s normal identity.⁵ The effect of such social labelling is that the stigmatized individual is “discredited” and “discounted” because of some socially undesirable quality that they possess.⁶ As Lesley Anne Jeffrey and Gayle MacDonald point out with respect to the silencing effect of stigma on sex workers, “[i]t is this silencing of their critical consciousness that lies at the base of their greatest oppression. This silencing has denied sex workers full citizenship and full humanity.”⁷ While there is a growing body of research on stigma and prostitution, there is a lack of research that specifically analyzes the epistemic violence that is associated with stigma.⁸ This essay explores the play of epistemic violence in the *Bedford* appeals and develops a concept of discursive justice that may be applied to deter such violence and enhance processes of participatory democracy in the public sphere.

⁵ Erving Goffman, *Stigma: Notes on the Management of Spoiled Identity* (Englewood Cliffs, NJ: Prentice Hall, 1963).

⁶ *Ibid* at 3.

⁷ Leslie Ann Jeffrey & Gayle MacDonald, *Sex Workers in the Maritimes Talk Back* (Vancouver: UBC Press, 2006) at 1.

⁸ Some examples include: Chris Bruckert, “The Mark of ‘Disreputable’ Labour: Workin’ it: Sex Workers Negotiate Stigma” in Stacey Hannem & Chris Bruckert, eds, *Stigma Revisited: Implications of the Mark* (Ottawa: University of Ottawa Press, 2012) 55; Flora Cornish, “Challenging the Stigma of Sex Work in India: Material Context and Symbolic Change” (2006) 16:6 *J Community & App Social Psych* 462; Naifei Ding, “Stigma of Sex and Sex Work” (2006) 7:2 *Inter-Asia Cultural Studies* 326; Helga K Hallgrimsdottir, Rachel Phillips & Cecilia Benoit, “Fallen Women and Rescued Girls: Social Stigma and Media Narratives of the Sex Industry in Victoria B.C., from 1980 to 2005” (2006) 43:3 *Can Rev Soc & Anthro* 265; Yasmin Jiwani & Mary Lynn Young, “Missing and Murdered Women: Reproducing Marginality in News Discourse” (2006) 31:4 *Can J Comm* 895; Juline A Koken, “Independent Female Escort’s Strategies for Coping with Sex Work Related Stigma” (2012) 16:3 *Sex & Culture* 209; Carmen H Logie et al, “HIV, Gender, Race, Sexual Orientation, and Sex Work: A Qualitative Study of Intersectional Stigma Experienced by HIV-Positive Women in Ontario, Canada” (2011) 8:11 *PLoS Medicine* 1; John Lowman, “Violence and the Outlaw Status of (Street) Prostitution in Canada” (2000) 6:9 *Violence Against Women* 987; Gail Phetersen, “The Whore Stigma: Female Dishonor and Male Unworthiness” (1993) 37 *Social Text* 39; William CW Wong, Eleanor Holroyd & Amie Bingham, “Stigma and Sex Work from the Perspective of Female Sex Workers in Hong Kong” (2011) 33 *Soc Health & Illness* 50.

II. Discursive Justice: Participatory Democracy in the Public Sphere

Discursive justice pertains to the operations of participatory democracy and the ways public opinion is tied to political action. It is the operation of justice in what Jürgen Habermas designates the public sphere.⁹ This is a discursive space that mediates between the private sphere and state authority in which individuals and groups meet to discuss and debate issues that concern them. For Habermas, the private sphere is somewhat different than it is usually understood in feminist scholarship: it includes the realm of social labour and commodity exchange where the activities associated with prostitution take place.¹⁰ State authority includes law, policy and law enforcement. The public sphere, as Nancy Fraser puts it, is “a theater in modern societies in which political participation is enacted through the medium of talk.”¹¹ This is the arena in which debates about prostitution take place.

By conceptualizing how the democratization of political participation is related to social discourse, Habermas keeps distinctions between the state, the economy, the workforce and democratic associations in view, while enabling a better understanding and improvement of democratic processes.¹² Such processes might include groups who find themselves excluded from other arenas in the state and private spheres. Fraser points to the parallel operations of what she terms “subaltern counter-publics;” in these alternative discursive arenas, members of subordinated groups develop and circulate critical counter-discourses that widen the field of “discursive contestation.”¹³ A forum for dissent that includes marginalized groups is a critical element of democracy. Fraser’s thesis is that even if it is not possible in our current political and economic systems to fully realize participatory parity, we come much closer to equitable democratization through “arrangements that permit contestation among a plurality of competing publics than by a single, comprehensive public sphere.”¹⁴

Discursive justice keeps with this vision of a plural, democratized public sphere and the equitable participation of subaltern counter-publics within it. The approach differs from Fraser’s, however, in the use of the term ‘subaltern,’ which is here understood as a category of speech act theory, rather than simply a social position. This allows for a nuanced intervention

⁹ Jürgen Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society*, translated by Thomas Burger (Cambridge, Mass: MIT Press, 1989).

¹⁰ Nancy Fraser, “Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy” (1990) 25/26 *Social Text* 56 at 57.

¹¹ *Ibid* at 57.

¹² *Ibid*.

¹³ *Ibid* at 67.

¹⁴ *Ibid* at 68.

into Habermas's concept of the public sphere, since it speaks directly to the discursive processes of public debate rather than simply describing the social position of the actors and situates the discussion in the context of epistemic justice. Fraser's understanding of subalternity, derived from Antonio Gramsci, refers to subordinated groups, that is, those who are excluded from hegemonic power structures. But this traditional understanding of 'subaltern' fails to explore the ways access to this 'theatre of talk' varies between (and even within) such categories of speakers in the public sphere. It allows that some groups experience epistemic violence but it does not illuminate the processes through which epistemic violence is perpetuated. Nor does an identity-based understanding of subalternity allow for complex understandings of situated, intersectional and transforming social relations and relations of power. As shall become clear, speech act theory shifts the solution from the liberal diversity politics typical of the Canadian public sphere, where difference might be erased, appropriated or tokenized, to a social justice approach. Discursive justice demands not only inclusion of different voices in debates, but also that difference remain visible, and the relations of power between these diverse speakers be addressed.

For Spivak, subalternity is produced through a specific mode of subordination, which she refers to as epistemic violence.¹⁵ Derived from the Greek concept of knowledge, *episteme* refers to the condition of possibility of knowledge in a given era.¹⁶ Foucault writes that an *episteme* is a "strategic apparatus" that separates out what is possible and acceptable, and what is true and false, within a field of knowledge.¹⁷ Spivak's work is also contextualized by feminists concerned with the effect of inequitable social relations on what is counted as knowledge and what categories of person are recognized as "credible knowers."¹⁸ This approach is particularly visible in scholarship by feminists of colour such as Patricia Hill Collins, who elaborates how stereotypes about black women in the United States naturalize social norms that discredit and devalue their knowledge and viewpoints.¹⁹ Epistemic violence is also a concern in studies of testimony. Miranda Fricker, for example, discusses the impact of wrongs done to persons in their capacity as knowers in their role in testimony, and Kristie Dotson refers to the phenomenon where audiences do not recognize speakers as knowers as "testimonial quieting."²⁰

¹⁵ Gayatri Spivak, "Can the Subaltern Speak?" in Cary L Nelson & Lawrence Grossberg, eds, *Marxism and the Interpretation of Culture* (Basingstoke: MacMillan Education, 1988) 271 [Spivak, "Subaltern Speak"].

¹⁶ In Greek, knowledge (*episteme*) is distinguished from belief (*doxa*) and craft or skill (*techne*).

¹⁷ Michel Foucault, *Power/Knowledge: Selected Interviews & Other Writings 1972-1977*, translated by Colin Gordon et al (New York: Pantheon, 1980) at 197.

¹⁸ Alison Wylie, "Epistemic Justice, Ignorance, and Procedural Objectivity - Editor's Introduction" (2011) 26:2 *Hypatia* 233 at 233.

¹⁹ Patricia H Collins, *Black Feminist Thought: Knowledge, Consciousness, and the Politics of Empowerment*, 2d ed (New York: Routledge, 2000) at 69.

²⁰ Miranda Fricker, *Epistemic Injustice: Power and the Ethics of Knowing* (New York: Oxford University Press,

In Spivak's approach, epistemic violence is the means by which western hegemony erases non-western, non-dominant ways of knowing. She is responding to the phenomena in which well-meaning western feminists and academics inadvertently silence some women in the global south by romanticizing them, positioning them as victims and speaking for them.²¹ This is a useful approach for understanding the operations of epistemic violence in public debates about sex work because victim narratives frame many of the organizational responses to prostitution in Canada and internationally. Spivak points to the differential balance of power between more privileged hegemonic speakers versus subaltern women, implicating these 'allies' in subaltern women's marginalization, even through their efforts to 'save' them. She shows that their attempts to represent subaltern women succeed instead at erasing their presence, so that "every moment that is noticed as a case of subalternity is undermined."²²

Spivak turns to speech act theory to understand precisely how subjugated knowledge is put under erasure. The thesis of her article is that subaltern persons - whether or not they vocalize resistance - nevertheless "cannot speak."²³ To resolve this apparent contradiction, Spivak points to the presumption in speech act theory that there must be a relation between a speaker and a listener for a speech act to be completed. An utterance is not speech if it is not recognized and understood by another party. She proposes that a subordinated group is rendered subaltern when their speech falls outside of institutional lines of power. As she explains, "'the subaltern cannot speak,' means that even when the subaltern makes an effort to the death to speak, she is not able to be heard... speaking and hearing complete the speech act."²⁴ She thus frames not listening as a violent act that silences certain classes of speakers. By framing subalternity as epistemic violence, Spivak puts the onus on those who possess status in hegemonic discourses, including those who would, with good intention, speak 'for' the Other, to complete the speech acts of marginalized groups through their capacity as listeners. This requirement stands, even (indeed, especially), when those speech acts disrupt preconceived ideas about reality.

Jean Francois Lyotard's concept of a 'wrong' further accentuates the importance of addressing epistemic violence in the discursive terrain of the

2007); Kristie Dotson, "Tracking Epistemic Violence, Tracking Practices of Silencing" (2011) 26:2 *Hypatia* 236 at 242.

²¹ Spivak, "Subaltern Speak", *supra* note 15 at 92 and 97; Gayatri Spivak, "Subaltern Talk: Interview with the Editors" in Donna Landry & Gerald MacLean, eds, *The Spivak Reader: Selected Works of Gayatri Chakravorty Spivak* (New York: Routledge, 1996) at 289 [Spivak, "Subaltern Talk"].

²² Spivak, "Subaltern Talk", *supra* note 21 at 289.

²³ Spivak, "Subaltern Speak", *supra* note 15 at 103.

²⁴ Spivak, "Subaltern Talk", *supra* note 21 at 292.

public sphere.²⁵ Lyotard links the effacement of disenfranchised speakers with formal processes of justice, and thus his work has particular relevance in terms of formal legal proceedings like the *Bedford* hearings. His approach considers the relationship between the legitimacy of certain speech acts and Wittgenstein's language game theory. According to Wittgenstein, the rules of language are contingent. Rather than being universal and directly connected to reality, language is made up of a multiplicity of 'games,' each structured by its own rules. It is the game – that is, the grammar, culture, context, and specific discourse – that gives meaning to the words spoken.²⁶ Considering that the language games of particular discourses (i.e. academia or the legal system) are based on rules that reify their own validity, Lyotard applies language game theory to systems of power and authority. He names as a 'differend' the phenomena whereby disputing parties are operating according to language games that are so different, that they can't agree on principles that might guide a resolution of the dispute.²⁷ The consequence for the wronged party is serious, for it involves the erasure of their testimony. The damage that he is concerned with here is the one that takes place in the court, not the site of initial harm. Lyotard writes that "the 'perfect crime' does not consist in killing the victim or the witnesses... but rather in obtaining the silence of the witnesses, the deafness of the judges, and the inconsistency (insanity) of the testimony."²⁸ Justice depends on precluding this sort of erasure, ensuring that both sides of a claim are heard, and when necessary, developing alternative principles to resolve differences.

Disenfranchised groups are systemically excluded from powerful, hegemonic language games, so that when damage is done to them, there is a risk that a differend might produce a wrong in Lyotard's sense. A wrong [*tort*] is "a damage [*dommage*] accompanied by the loss of the means to prove the damage."²⁹ Lyotard explains:

This is the case if the victim is deprived of life, or of all his or her liberties, or of the freedom to make his or her ideas or opinions public, or simply of the right to testify to the damage, or even more simply if the testifying phrase is itself deprived of authority... to the privation constituted by the damage there is added the impossibility of bringing it to the knowledge of others... Should the victim seek to bypass this impossibility and testify anyway... he or she comes up against the following argumentation: either the damages you complain about never took place, and your testimony is false; or else they took place, and since you are able to testify to them, it is not a wrong that has been done to you, but merely a damage, and your testimony is still false.³⁰

²⁵ Jean-Francois Lyotard, *The Differend: Phrases in Dispute*, translated by Georges Van Den Abbeele (Minneapolis: University of Minnesota Press, 1988).

²⁶ Ludwig Wittgenstein, *Philosophical Investigations* (New York: The Macmillan Company, 1965).

²⁷ Lyotard, *supra* note 25 at xi, 5, 9.

²⁸ *Ibid* at 8.

²⁹ *Ibid* at 5.

³⁰ *Ibid*.

When there are no agreed upon procedures for what is different to be presented in the current domain of discourse it becomes impossible for disenfranchised groups to articulate their reality, including the damages and wrongs that have been done to them. The rules of the game do not allow injustice to be heard, or if it is heard, to be taken seriously. Lyotard is describing epistemic violence, the very space in which the subaltern's speech is effaced. Moreover, because they are playing different language games, those in the discursively privileged position cannot always recognize that a wrong is taking place. In other words, the structure of the language game – an epistemic structure, as well as a linguistic one – frames the issue in a way that renders the problem invisible to the ones who are perpetuating the wrong.

Discursive justice is achieved when subaltern knowledge and self-representation become recognizable within institutional modes of power. By implication, to achieve a democratized public sphere, those speakers/listeners who find themselves in a position of epistemic privilege also have an ethical responsibility to listen, and, when necessary, to change the rules of their own language games. The listening demanded by epistemic justice is not an ordinary kind of listening, but rather one that involves being open to the possibility of being disrupted by difference. This pertains to the speech of allies as well as adversaries. Allies can support securing epistemic justice, not by 'speaking for' the other, but by ensuring that subaltern speech is heard in social discourse. It is the transition from effacement to recognition that marks the possibility of discursive justice. To be clear, this does not require a presumption that the marginalized party is always right; quite the contrary, valorization is another form of not listening, of reifying subaltern speech without doing it justice.

III. Background: *Bedford v Canada*

In *Bedford v Canada*, three sex workers, Terri Jean Bedford, Valerie Scott and Amy Lebovitch, challenged the adult prostitution laws in Canada's *Criminal Code*. They argued that the *Criminal Code* violates section 7 of the *Charter of Rights and Freedoms*. Specifically, section 210 of the *Criminal Code*, which prohibits both keeping and being found in a common bawdyhouse, makes it illegal for prostitutes to work indoors where risk of violence is reduced. Section 212(1)(j) makes it illegal to live on the avails of prostitution, prohibiting prostitutes from enhancing security by hiring managers, drivers, and security personnel. Finally, section 213(1)(c) criminalizes public communication for the purpose of prostitution. As a result, prostitutes working on the street do not have time to properly screen customers, and are compelled to work in dark, isolated areas, thus rendering them more vulnerable to harm. Criminalizing

activities related to prostitution is a disincentive for sex workers to file charges or seek police protection when they are harmed or find themselves in danger. The applicants argued that these laws constitute violations to liberty and security, and contradict the principles of fundamental justice, because they are arbitrary, overbroad and grossly disproportionate. Also at issue is a possible infringement by section 213 on sex workers' freedom of expression. Ontario Superior Court Justice Susan Himel heard the arguments of both sides and considered the testimony of current and former prostitutes, police, crown attorneys, and expert witnesses. After deliberating for a year, she ruled in the applicants favour, finding that the *Criminal Code* does indeed violate sex workers' *Charter* rights to security of the person. She struck down the laws in 2010.³¹

A year later the case was heard in the Ontario Court of Appeal.³² In addition to the respondents³³ and Attorney Generals of Ontario and Canada whom appealed Justice Himel's decision,³⁴ there were seven interveners who appeared as *amicus curiae* (friends of the court). Advocating for the decriminalization of sex work were the Canadian and BC Civil Liberties Associations,³⁵ a joint intervention by two HIV/AIDS organizations,³⁶ and two sex worker-led coalitions: one from Vancouver's Downtown East Side,³⁷ and the other from Toronto and Ottawa-Gatineau.³⁸ These will be referred to throughout this paper as the Downtown East Side Coalition and POWER/Maggie's, respectively. A Christian Coalition³⁹ wanted prostitution to remain criminalized, and a Woman's Coalition⁴⁰ advocated for an asymmetrical model that would criminalize clients and pimps, but not prostitutes. The five Justices of Appeal decided in partial favour of Bedford and her co-applicants

³¹ *Bedford*, *supra* note 2 at para 6.

³² *Canada (AG) v Bedford*, 2012 ONCA 186, 109 OR (3d) 1 [*Bedford* ONCA].

³³ *Canada (AG) v Bedford*, 2012 ONCA 186 (Factum of the Respondents) [*Bedford* ONCA Respondent].

³⁴ *Canada (AG) v Bedford*, 2012 ONCA 186 (Factum of the Appellant, the Attorney General of Ontario) [*Bedford* ONCA AG Ontario]; *Canada (AG) v Bedford*, 2012 ONCA 186 (Factum of Appellant, the Attorney General of Canada) [*Bedford* ONCA AG Canada].

³⁵ *Canada (AG) v Bedford*, 2012 ONCA 186 (Factum of Intervener, Canadian Civil Liberties Association) [*Bedford* ONCA CCLA]; *Canada (AG) v Bedford*, 2012 ONCA 186 (Factum of Intervener, BC Civil Liberties Association) [*Bedford* ONCA BCCLA].

³⁶ *Canada (AG) v Bedford*, 2012 ONCA 186 (Factum of Interveners, Canadian HIV/AIDS Legal Network and BC Centre for Excellence in HIV/AIDS) [*Bedford* ONCA HIV/AIDS].

³⁷ *Canada (AG) v Bedford*, 2012 ONCA 186 (Factum of Interveners, PACE (SUAVE), and Pivot Legal Society) [*Bedford* ONCA DTES Coalition].

³⁸ *Canada (AG) v Bedford*, 2012 ONCA 186 (Factum of Interveners, POWER, and Maggie's) [*Bedford* ONCA POWER/Maggie's].

³⁹ *Canada (AG) v Bedford*, 2012 ONCA 186 (Factum of Interveners, Christian Legal Fellowship, and REAL Women of Canada Catholic Civil Rights League) [*Bedford* ONCA Christian Coalition].

⁴⁰ *Canada (AG) v Bedford*, 2012 ONCA 186 (Factum of Interveners, Canadian Association of Sexual Assault Centres, Native Women's Association of Canada, The Canadian Association of Elizabeth Fry Societies, Action Ontarienne Contra la Violence Faite aux Femmes, La Concertation des Luttes Contre L'Exploitation Sexuelle, Le Regroupement Québécois des Centre d'Aide et de Lute Contre les Agressions à Caractère Sexuel and Vancouver Rape Relief Society) [*Bedford* ONCA Women's Coalition].

in 2012.⁴¹ They determined that bawdy house, and living on the avails laws need to be revised, but let the communication ban stand, although the judges were divided on the latter issue.⁴²

The following year, the Supreme Court of Canada unanimously struck down all three contested sections of the *Criminal Code*, effectively decriminalizing adult prostitution. In the hearing that took place in June 2013,⁴³ five parties supported the criminalization of prostitution, including the federal and two provincial Attorney Generals,⁴⁴ and two Christian groups.⁴⁵ Two Women's abolitionist coalitions supported an asymmetrical model of criminalization.⁴⁶ In favour of decriminalization were Bedford et al,⁴⁷ the sex-worker led Downtown East Side Coalition,⁴⁸ Aboriginal Legal Services of Toronto,⁴⁹ Institut Simone de Beauvoir,⁵⁰ two HIV/AIDS Coalitions,⁵¹ the BC Civil Liberties Association,⁵² and the David Asper Centre for Constitutional Rights.⁵³ Regarding the decision to strike down the laws, Chief Justice McLachlan wrote, "[t]he prohibitions at issue do not merely impose conditions on how prostitutes operate. They go a critical step further, by

⁴¹ *Bedford ONCA*, *supra* note 32.

⁴² *Ibid* at paras 5-7.

⁴³ *Canada (AG) v Bedford*, 2013 SCC 72 (Factum of the Respondents) [*Bedford SCC Respondents*].

⁴⁴ *Canada (AG) v Bedford*, 2013 SCC 72 (Factum of Appellant, the Attorney General of Canada) [*Bedford SCC AG Canada*]; *Canada (AG) v Bedford*, 2013 SCC 72 (Factum of Cross-Respondent, the Attorney General of Canada); *Canada (AG) v Bedford*, 2013 SCC 72 (Factum of Appellant, the Attorney General of Ontario) [*Bedford SCC AG Ontario*]; *Canada (AG) v Bedford*, 2013 SCC 72 (Factum of Cross-Respondent, the Attorney General of Ontario); *Canada (AG) v Bedford*, 2013 SCC 72 (Factum of Intervener, the Attorney General of Québec) [*Bedford SCC AG Québec*].

⁴⁵ *Canada (AG) v Bedford*, 2013 SCC 72 (Factum of Interveners, Christian Legal Fellowship, and REAL Women of Canada Catholic Civil Rights League) [*Bedford SCC Christian Coalition*]; *Canada (AG) v Bedford*, 2013 SCC 72 (Factum of Intervener, Evangelical Fellowship of Canada) [*Bedford SCC Evangelical Fellowship*].

⁴⁶ *Canada (AG) v Bedford*, 2013 SCC 72 (Factum of Interveners, Canadian Association of Sexual Assault Centres, Native Women's Association of Canada, The Canadian Association of Elizabeth Fry Societies, Action Ontarienne Contra la Violence Faite aux Femmes, La Concertation des Luttes Contre L'Exploitation Sexuelle, Le Regroupement Québécoise des Centre d'Aide et de Lute Contre les Agressions à Caractère Sexuel and Vancouver Rape Relief Society) [*Bedford SCC Women's Coalition*]; *Canada (AG) v Bedford*, 2013 SCC 72 (Factum of Intervener, Asian Women For Equality Society, operating as Asian Women's Coalition Ending Prostitution) [*Bedford SCC Asian Women's Coalition*].

⁴⁷ *Bedford SCC Respondents*, *supra* note 43.

⁴⁸ *Canada (AG) v Bedford*, 2013 SCC 72 (Factum of Interveners, Downtown Eastside Sex Workers United Against Violence, PACE Society, and Pivot Legal Society) [*Bedford SCC DTES Coalition*].

⁴⁹ *Canada (AG) v Bedford*, 2013 SCC 72 (Factum of Intervener, Aboriginal Legal Services of Toronto) [*Bedford SCC ALST*].

⁵⁰ *Canada (AG) v Bedford*, 2013 SCC 72 (Factum of Intervener, Institut Simone de Beauvoir) [*Bedford SCC Simone de Beauvoir*].

⁵¹ *Canada (AG) v Bedford*, 2013 SCC 72 (Factum of Interveners, Canadian HIV/AIDS Legal Network, and BC Centre for Excellence in HIV/AIDS) [*Bedford SCC HIV/AIDS*]; *Canada (AG) v Bedford*, 2013 SCC 72 (Factum of Intervener, Secretariat of the Joint United Nations Programme On HIV/AIDS) [*Bedford SCC UN HIV/AIDS*].

⁵² *Canada (AG) v Bedford*, 2013 SCC 72 (Factum of Intervener, BC Civil Liberties Association) [*Bedford SCC BCCLA*].

⁵³ *Canada (AG) v Bedford*, 2013 SCC 72 (Factum of Intervener, David Asper Centre for Constitutional Rights) [*Bedford SCC Asper Centre*].

imposing dangerous conditions on prostitution; they prevent people engaged in a risky – but legal – activity from taking steps to protect themselves from the risk.”⁵⁴ The implications of this decision for sex work law and policy is not yet clear. The declaration of invalidity is suspended for one year, giving the federal government time to deliberate about whether new laws should be designed that comply with the *Charter of Rights of Freedoms*, or whether sex work should remain decriminalized. While this essay does not make policy recommendations with respect to consensual adult sex work, it is pertinent to the democratization of associated debates in the public sphere – debates that will inform policy making in this arena. To this effort, the following section analyses the appeals factums from both the Ontario Court of Appeal and the Supreme Court of Canada.

IV. Speaking and Being Heard: A Discourse Analysis

Discursive justice requires that none of the parties involved in public debates should find their arguments or epistemological viewpoint put under erasure, especially when such an erasure would make it impossible for an aggrieved party to phrase an injustice. My analysis shows that the only interveners that were subjected to epistemic violence during *Bedford* were those who experience stigma and dehumanization related to prostitution: sex workers. Stigma often takes place in relation to an erasure of subaltern knowledge and self-representation. Goffman defines stigma as follows:

While a stranger is present before us, evidence can arise of his possessing an attribute that makes him different from others in the category of persons available for him to be, and of a less desirable kind – in the extreme, a person who is quite thoroughly bad, or dangerous, or weak. He is thus reduced in our minds from a whole and usual person to a tainted, discounted one. Such an attribute is a stigma, especially when its discrediting effect is very extensive.⁵⁵

Epistemic violence is closely connected to stigmatizing judgements in so far as such judgements deny stigmatized persons both legibility (they cannot hear them) and legitimacy (the subaltern’s knowledge lacks credibility as valid knowledge). Chris Bruckert and Stacey Hannem address the impact of *Bedford* in resolving structural stigma in systemic responses to prostitution.⁵⁶ They show that stigma does not only operate in punitive measures but also through interventions perceived to be “‘helping’ or acting in the best interests of those they define as victims.”⁵⁷ Prostitution stigma is embedded in law and policy:

⁵⁴ *Canada (AG) v Bedford*, 2013 SCC 72 at para 60, [2013] 3 SCR 1101 [*Bedford* SCC].

⁵⁵ Goffman, *supra* note 5 at 2.

⁵⁶ Chris Bruckert & Stacey Hannem, “Rethinking the Prostitution Debates: Transcending Structural Stigma in Systemic Responses to Sex Work” (2013) 28 Can J L & Society 43.

⁵⁷ *Ibid* at 49.

for the quasi-criminalization of sex work reinforces moral judgments positing sex workers as a polluting presence that harms communities and as victims who are inherently prone to exploitation.⁵⁸ Stigma has been a particular focus of prostitution research in Canada, in part because policy responses have been tied to stigma through narratives of public nuisance and the aims of section 213 of the *Criminal Code* – the ban on communicating – to clean up the streets. Section 213 was unique in the way that, during the appeals of *Bedford*, it elicited statements that put the sex workers' capacity as knowers under question. Moreover, the law in this case brings epistemic violence to what in Habermas's terms, is the private sphere of sex workers' labour. As a consequence section 213 figures largely in the analysis that follows.

A. Inclusion in the Public Sphere

Discursive justice requires that marginalized groups are included in the public sphere, and *Bedford* signals some success in this arena. The constitutionality of current prostitution law was debated at the highest level of court in Canada, with sex worker activists and their allies achieving their aim too see prostitution law struck down. Moreover, with *Bedford* in the news, diverse views on prostitution, including those of sex workers and former prostitutes, were vigorously debated in the media, on university campuses, at kitchen tables and on street corners across the country. The fact that sex workers were heard in so many avenues of the public sphere signals just how critical the present moment is in terms of sex workers moving out of subalternity. It is a time of potential hegemonic change, as well as revision of the law. Yet at the same time, these debates about prostitution continue to take place under the shadow of epistemic violence.

Despite these successes, the right to launch a constitutional challenge could not be taken for granted by *Bedford* and her co-applicants. In Canada, to have standing to challenge the law the plaintiff must raise a serious issue, be directly affected by the legislation or have a genuine interest in its validity, and there must be no other reasonable and effective way to bring the issue before the court. Because *Bedford* and Scott are not currently working in the sex industry, the Attorney General of Canada questioned their standing with respect to prostitution law.⁵⁹ He submitted that since they themselves could not currently be charged with violating the law, *Bedford* and Scott's interest was only "indirect," and merely in keeping with the general interest off all community members.⁶⁰ The result is a catch-22 for marginalized and criminalized populations; as the Downtown East Side Coalition pointed

⁵⁸ *Ibid* at 49 and 53.

⁵⁹ *Bedford* ONCA AG Canada, *supra* note 34 at para 177.

⁶⁰ *Ibid* at para 178.

out, “in a society that values the rule of law, violation of the law cannot be a precondition of the right to come to court.”⁶¹ The challenge to public interest standing compounds an already compromised speaking position, and the potential perpetration of wrong. The Attorney General is playing a language game that would make it impossible for sex workers to articulate their experience of injustice in the courts. As long as sex workers are criminalized for engaging in prostitution, they cannot speak of it without fear of recourse, but the court would not recognize their right to challenge prostitution law unless they are currently breaking the law.

This double-bind reflects a much larger problem in everyday forms of ongoing epistemic injustice for marginalized and criminalized groups. Those who live in poverty and experience discrimination and other forms of marginalization “are also excluded from the justice system and the privilege of being able to assert their constitutional rights before the courts.”⁶² The Downtown East Side Coalition argued that drawing “narrow and technical distinctions” to exclude the standing of people who are not currently breaking the law “would exacerbate an already extremely limited opportunity to access justice.”⁶³ Sex workers lack the means to assert their rights before the court for numerous reasons. Publicly identifying oneself as a sex worker is dangerous, exposing the person to stigma and other harms. Sex workers also lack resources for legal representation, and public exposure could lead to the loss of social services and income assistance as well as diminished alternative employment opportunities.⁶⁴ In both *Bedford* and *SUAVE*, a similar case in British Columbia, the courts ruled that imposing such limits to accessing a constitutional challenge is unjust.⁶⁵ In *SUAVE* the Supreme Court ruled that public-interest litigation must be interpreted liberally precisely because of the challenges marginalized groups experience in making themselves heard. This makes it easier for prisoners, political activists and others to launch public-interest legal challenges, arguably increasing the access of marginalized groups to discursive justice in the Canadian public sphere.⁶⁶

Justice might also be hampered when some groups are excluded from intervening as *amicus curiae* in a *Charter* challenge. While some exclusions might be justified – for example because a group does not offer a sufficiently different perspective to the issue – appellate courts are not required to specify their reasons for rejecting intervener applications. The exclusion of the sex

⁶¹ *Bedford* ONCA DTES Coalition, *supra* note 37 at para 53.

⁶² *Ibid* at para 52.

⁶³ *Ibid*.

⁶⁴ *Ibid* at para 54.

⁶⁵ *Canada (AG) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, [2012] 2 SCR 524.

⁶⁶ Ian Mulgrew, “BC Sex Workers Can Challenge Sex Trade Laws: Supreme Court”, *Vancouver Sun* (21 September 2012).

worker organization Maggie's from the Ontario Court of Appeal was attributed to the fact that they wanted to introduce new constitutional issues (equality rights under s. 15 of the *Criminal Code*).⁶⁷ However, no reasons were given for the Supreme Court's denial of intervener status to a coalition of sex worker organizations,⁶⁸ an international group of sex worker-led organizations,⁶⁹ a feminist coalition that supports decriminalization⁷⁰ and the Canadian Civil Liberties Association. It is concerning that two of the rejected interveners are sex worker-led, and that all countered the status quo in their support of decriminalization. While in this case these exclusions did not seem to effect the Supreme Court decision, the opportunity for these groups to participate in the debate was lost, their specific concerns and views omitted from the public record, and thus are not available to inform the policy/legal reforms that will follow *Bedford*. A more transparent process might help rule out the disquieting potential for systemic epistemic violence in decision-making regarding intervener status, especially in cases involving stigmatized groups like sex workers.

B. Language Games

All of the participants in the *Bedford* hearings may be committed to protecting the human rights of sex workers, but they have differing views about what this means. Different interpretations of the fundamental nature of prostitution produce language games that are so disconnected they produce a differend, "a case of conflict... that cannot be equitably resolved for lack of a rule of judgment applicable to both arguments."⁷¹ Two basic ideological approaches for conceptualizing prostitution structure the language games at play in *Bedford*: either prostitution itself is fundamentally problematic, or prostitution is neutral and contextual factors like social stigma, repressive sexual and gender norms, cultures of violence and oppressive legal/policy regimes produce the problems faced by sex workers.

The first approach, the 'prostitution eradication' ideology, is shared by interveners that advocate for criminalizing prostitution,⁷² and those that argue for the asymmetrical model that criminalizes the buyers but not the sellers of

⁶⁷ Maggie's participated as an intervener in the Ontario Court of Appeal by joining with POWER.

⁶⁸ POWER, Maggie's and Stella, and *l'anie de Mamie*.

⁶⁹ The Scarlet Alliance-Australian Sex Workers Association, New Zealand Prostitutes Collective Trust and Rosea-Riksorganisationen För Sex & Erotikarbetare (Sweden).

⁷⁰ See Susan Davis, "SPOC intervenor hopefuls denied!!!" *Babble* (1 May 2013), online: Rabble <<http://rabble.ca/babble/sex-worker-rights/spoc-intervenor-hopefuls-denied>>.

⁷¹ Lyotard, *supra* note 25 at xi.

⁷² *Bedford* ONCA AG Ontario, *supra* note 34; *Bedford* SCC AG Ontario, *supra* note 44; *Bedford* SCC AG Québec, *supra* note 44; *Bedford* ONCA AG Canada, *supra* note 34; and *Bedford* SCC AG Canada, *supra* note 44; *Bedford* ONCA Christian Coalition, *supra* note 39; *Bedford* SCC Christian Coalition, *supra* note 45; *Bedford* SCC Evangelical Fellowship, *supra* note 45.

sex.⁷³ The ideology is embedded in the language used by these interveners. They deploy phrases such as “men’s prostitution of women,” and “women who are being prostituted” in order to underscore the passive role of women in prostitution, thus emphasizing the view that prostitution is a form of violence. The second language game hinges on the ideology of ‘sex worker rights’ held by the groups in favour of decriminalizing adult prostitution.⁷⁴ Their preferred term for prostitution is “sex work” in order to accentuate “a greater sense of dignity in, and avoid unwarranted stigmatization of, persons engaged in a lawful occupation.”⁷⁵

i. The Prostitution Eradication Language Game

The language game associated with the goal to eradicate prostitution posits prostitution as inherently demeaning, violent, and harmful to communities in general (and toward women in particular). The Attorney General of Canada contended, “the risks and harms flowing from prostitution are inherent to the nature of the activity itself... regardless of the legal regime in place.”⁷⁶ The Women’s Coalition agreed, stipulating that “physical and sexual violence are not the only relevant harms of prostitution [and that] prostitution is itself harmful to women.”⁷⁷ Adult prostitution is seen as coercive and closely tied to both sex trafficking and child prostitution.⁷⁸ It is viewed as a form of gender discrimination and violence against women, perpetuating women as sex objects and exploiting them. In this ideology, prostitution itself is understood to violate the human rights of prostituted women. The Christian Coalition asserted prostitution is not only demeaning and harmful, but it also “perpetuates a fundamentally offensive and abusive gender imbalance and... degrades the community.”⁷⁹ These proponents of eradicating prostitution argued that prostitutes are at risk whether they work outdoors or indoors, on the high track or low track and whether prostitution is legal or illegal. They would have liked to retain laws that send a clear message to society that prostitution is unacceptable, that would protect women from the threat of prostitution and protect communities from exposure to prostitution.

⁷³ *Bedford ONCA Women’s Coalition*, *supra* note 40; *Bedford SCC Women’s Coalition*, *supra* note 46; *Bedford SCC Asian Women’s Coalition*, *supra* note 46.

⁷⁴ *Bedford ONCA Respondent*, *supra* note 33; *Bedford SCC Respondents*, *supra* note 43; *Bedford ONCA POWER/Maggie’s*, *supra* note 38; *Bedford ONCA DTES Coalition*, *supra* note 37; *Bedford SCC DTES Coalition*, *supra* note 48; *Bedford SCC ALST*, *supra* note 49; *Bedford ONCA HIV/AIDS*, *supra* note 36; *Bedford SCC HIV/AIDS*, *supra* note 51; *Bedford SCC UN HIV/AIDS*, *supra* note 51; *Bedford ONCA BCCLA*, *supra* note 35; *Bedford SCC BCCLA*, *supra* note 52; *Bedford ONCA CCLA*, *supra* note 35; *Bedford SCC Simone de Beauvoir*, *supra* note 50; *Bedford SCC Asper Centre*, *supra* note 53.

⁷⁵ *Bedford ONCA BCCLA*, *supra* note 35 at para 2.

⁷⁶ *Bedford ONCA AG Canada*, *supra* note 34 at para 1.

⁷⁷ *Bedford ONCA Women’s Coalition*, *supra* note 40 at para 15.

⁷⁸ *Bedford SCC Evangelical Fellowship*, *supra* note 45 at para 4.

⁷⁹ *Bedford SCC Christian Coalition*, *supra* note 45 at para 3.

The Christian Coalition viewed the prostitution eradication as the goal of Canadian prostitution legislation, which they outlined is, “to discourage or eradicate prostitution itself because it is immoral and harmful to individuals and to society.”⁸⁰ The Attorney General of Ontario shared this commitment and relied on *R v Mara*, arguing, “Parliament wants to eradicate prostitution. The reason Parliament wants to eradicate prostitution is because it is harmful, a form of violence against women, related to men’s historical dominance over women.”⁸¹

There are two different versions of the prostitution eradication approach as seen in *Bedford*. The Christian Coalition and the Evangelical Fellowship share the first, which is framed by narratives of morality, and faith-driven values. The Evangelical Fellowship specified that Canada is “founded on Judeo-Christian principles,” and added that Canadians from other faith groups such as “Muslims, Buddhists and Sikhs [share] similar historic convictions.”⁸² Based on this, they argued that “decriminalization... would negatively impact and change the culture of Canada; a nation whose tenets of faith decries the corruption and exploitative profiteering inherent in a legalized sex market.”⁸³ This approach embedded their concerns about morality in tradition as well as faith. The Christian Coalition pointed out that “Parliament has held the view that prostitution is immoral since Confederation.”⁸⁴ They contended that morality is a fundamental social value, equivalent to values that are protected by human rights such as human dignity, gender equality, and preventing exploitation of vulnerable persons.⁸⁵ The law is thus seen to serve the purpose of protecting public morality.⁸⁶ According to this logic, criminalizing the parties involved in adult prostitution is justifiable in serving the public good and in deterring both prospective clients and prostitutes from making immoral and unsafe choices. The Christian Coalition was very clear in their analysis that prostitution is a choice, stating, “[i]t is only where the prostitute chooses to practice prostitution that she is exposed to the type of harm alleged in this case.”⁸⁷ Not only do prostitutes put themselves at risk, they are also harming the community, for the choice to engage in prostitution “supports a network of interconnected criminal activity”⁸⁸ and “degrades the community.”⁸⁹

⁸⁰ *Ibid* at para 12.

⁸¹ *R v Mara* (1996), 27 OR (3d) 643 at 651, 133 DLR (4th) 201 as cited by *Bedford* ONCA, *supra* note 32 at para 159. It should be noted that the ONCA majority in *Bedford* does not agree with this application of *Mara*.

⁸² *Bedford* SCC Evangelical Fellowship, *supra* note 45 at para 14.

⁸³ *Ibid*.

⁸⁴ *Bedford* SCC Christian Coalition, *supra* note 45 at para 2.

⁸⁵ *Ibid* at para 2.

⁸⁶ *Bedford* ONCA Christian Coalition, *supra* note 39 at para 6.

⁸⁷ *Bedford* SCC Christian Coalition, *supra* note 45 at para 49; see also *Bedford* ONCA Christian Coalition, *supra* note 39 at para 39.

⁸⁸ *Bedford* SCC Evangelical Fellowship, *supra* note 45 at para 2.

⁸⁹ *Bedford* SCC Christian Coalition, *supra* note 45 at para 3.

It is on the point of prostitute choice and culpability that the abolitionist feminist coalitions differ from the Christian ones in their respective positions on prostitution eradication ideology. Both the Woman's Coalition and the Asian Women's Coalition for Ending Prostitution agree that prostitution is fundamentally a degrading and demeaning form of violence against women. However, these abolitionist feminists do not want to see women – that is, the victims of prostitution – criminalized. This is a view that is also shared by some prostitutes and former prostitutes who testified in *Bedford*, and who are members and clients of some of the women's organizations in the Women's Coalition. The Woman's Coalition asserted that prostitution is a form of gender inequity, stating, "[m]ost of the people being prostituted in Canada are women and girls. Most pimps and almost all buyers are men. The buying and selling of women's bodies in prostitution is a global practice of sexual exploitation and male violence against women that normalizes the subordination of women in a sexualized form."⁹⁰ They see prostitution as the embodiment of patriarchal male privilege, and the ultimate reduction of women to sexual objects. The Women's Coalition argued that "criminalizing prostituted women... punishes women for men's exploitation of them."⁹¹ These arguments are drawn from critiques of prostitution exemplified in the writing of radical feminists such as Andrea Dworkin and Catherine McKinnon, who pose prostitution as a form of violence against women that is, by definition, a violation of rights.⁹² This approach informs international organizations that link prostitution with sex trafficking, such as the Coalition Against Trafficking in Women (CATW) and Canadian organizations led by former prostitutes such as Sex Trade 101, Exploited Voices Now Educating (EVE) and Survivors Connect.

From this perspective, the policy aim is very clear and similar to that of the Ministries of Justice and the Christian organizations in that the goal should be to eradicate prostitution, since all prostitution is fundamentally a violation of women's human rights. The policy solution differs, however, and this difference hinges on the abolitionists' emphasis on male culpability for prostitution, as "[i]t would be illogical and contrary to principles of fundamental justice to decriminalize men's prostitution of women in order to protect women from those same men."⁹³ They propose an asymmetrical approach, based on the model used in Sweden, which criminalizes johns and pimps, but not sex workers. The prostitution problem, in this view, derives from male demand. As long as men constitute a market by buying sex, women will be 'prostituted' by them.⁹⁴ Thus they see criminalizing the purchase of sex as an ideal policy

⁹⁰ *Bedford* ONCA Women's Coalition, *supra* note 40 at para 3.

⁹¹ *Bedford* SCC Women's Coalition, *supra* note 46 at para 4.

⁹² Andrea Dworkin, "Prostitution and Male Supremacy" (1993) 1:1 *Mich J Gender & L* 1 at 2-3; Catharine A MacKinnon, "Prostitution and Civil Rights" (1993) 1 *Mich J Gender & L* 13.

⁹³ *Bedford* ONCA Women's Coalition, *supra* note 40 at para 4.

⁹⁴ The views of Canadian abolitionists reflect an international trend. The European Women's Lobby (EWL)

solution that would deter the demand for sexual services, therefore potentially eradicating prostitution without criminalizing women.

Feminist abolitionists identify a number of systemic forces at play that put women at risk. Multiple forms of oppression such as sexual abuse, poverty, racialization and colonization, coalesce to produce women's vulnerability to prostitution. Because of these systemic factors, women who become prostitutes are not really making free, informed choices.⁹⁵ The Women's Coalition showed how such systemic discrimination produces a vulnerable state that can lead to prostitution, stating, "[m]any women enter prostitution as children, often after being sexually abused and/or placed in state care. Many women are pushed into and remained in prostitution because of poverty, homelessness, low levels of education, and disability, including addictions. Many women in prostitution are racialized or have precarious immigration status."⁹⁶ This analysis was echoed by the Asian Women's Coalition, which added that prostitution involves the commercialization of sexual stereotypes of racialized women such as the "china doll" or the "geisha."⁹⁷ Of special concern for the Woman's Coalition, which includes the Native Women's Association of Canada, is the link between prostitution and colonization, evident in the overrepresentation of Aboriginal women in the sex trade. Aboriginal women and girls become vulnerable to recruitment by pimps because of "the effects of residential schools, including poverty, addiction and cycles of violence and abuse."⁹⁸ According to the Woman's Coalition, the resulting overrepresentation of Aboriginal women in prostitution means they "bear the brunt of meeting male demand for prostitution."⁹⁹ Thus prostitution is posited as a form of colonial violence as well as gendered and racialized violence.

Despite this emphasis on the systemic and intersecting causes of prostitution, the two coalitions do not find that prostitution law itself perpetuates these systemic forms of discrimination. The Women's Coalition argued, "the challenged laws do not cause or materially contribute to men's violence against women."¹⁰⁰ They instead locate the problem in the actions of individual men:

The danger that women in prostitution face is a function of the actions of men – pimps and buyers – who enforce and demand male sexual access to women's bodies in a commercially exploitative industry. There is no nexus between the laws and

for instance, lobbied EU member nations to adopt the Swedish model in November, 2012; see "Paying for sex: Women's groups call for EU-wide ban", *BBC News* (4 December 2012) online: BBC News <<http://www.bbc.co.uk/news/world-europe-20591726>>.

⁹⁵ *Bedford SCC Women's Coalition*, *supra* note 46 at para 2.

⁹⁶ *Ibid* at para 5

⁹⁷ See *Bedford SCC Asian Women's Coalition*, *supra* note 46 at paras 9 and 17.

⁹⁸ *Bedford SCC Women's Coalition*, *supra* note 46 at para 6.

⁹⁹ *Ibid*.

¹⁰⁰ *Bedford ONCA Women's Coalition*, *supra* note 40 at para 38.

this male violence sufficient to establish indirect state responsibility for violating women's security of the person.¹⁰¹

ii. *The Language Game of Sex Worker Rights*

The groups who support decriminalization operate according to the language game of 'sex worker rights.' In *Bedford*, this included the applicants, along with sex worker coalitions, civil libertarians, HIV/AIDS activists, constitutional rights organizations and non-abolitionist feminist and Aboriginal interveners. This language game treats prostitution neutrally – as a form of work. The focus is whether or not the law allows workers in a legal profession (since prostitution is itself legal in Canada) access to the same rights to workplace safety and personal security that other workers enjoy.¹⁰² They see prostitution as no more inherently exploitative than any other form of work under capitalism. Accordingly, sex workers are made vulnerable to violence and degradation through systemic social stigma and legal responses that criminalize their activities related to workplace safety thus infringing on *Charter* values. The sex worker rights arguments heard in *Bedford* are consistent with sex worker and human rights organizations internationally that advocate for decriminalizing sex work, and support policy measures that would deter coerced or unwilling entry into sex work by criminalizing sexual exploitation, and reducing poverty by strengthening the social safety net, abolishing student fees, supporting resources for women fleeing domestic violence, and instituting pay equity.¹⁰³ This view is reflected in the factum of the Joint United Nations Programme on HIV/AIDS, who stated that “[t]o end violence against women and girls, laws and policies that criminalize and stigmatize female sex workers... must be removed.”¹⁰⁴

Proponents of sex worker rights agree with the feminist abolitionists that people who experience multiple forms of oppression are more likely to become involved in street-based sex work because of limited choices. They are also more likely to experience violence and stigma as sex workers because of the intersection between these modes of oppression. However, because prostitution is assigned a neutral meaning, the solution to these compounded inequities does not depend on the eradication of prostitution, but instead on eliminating exploitation, stigma, colonization and other inequitable circumstances that limit peoples' choices with respect to sex work, and their access to safe sex

¹⁰¹ *Ibid.*

¹⁰² *Bedford* SCC Respondents, *supra* note 43.

¹⁰³ See e.g. English Collective of Prostitutes, *Initial response by the English Collective of Prostitutes to European Women's Lobby recommendations* (4 December 2012) online: International Union of Sex Workers <<http://www.iusw.org/2012/12/initial-response-by-the-english-collective-of-prostitutes-to-european-women%E2%80%99s-lobby-recommendations-4-december-2012/>>.

¹⁰⁴ *Bedford* SCC UN HIV/AIDS, *supra* note 51 at para 27, citing UNAIDS, *We can remove punitive laws, policies, practices, stigma and discrimination that block effective responses to HIV, Joint Action for Results. UNAIDS Outcome Framework: Business Case 2009–2011* (Geneva: UNAIDS, 2010) at 6.

work practices. By emphasizing *sex work*, they highlight the socio-economic processes and structures that lead people into prostitution and concern themselves with the quality of work experiences. The Downtown East Side Coalition, for example, balances an acknowledgement of sex worker agency, with the fact that they are making choices within structures of oppression. For this intervener, poverty and other oppressive circumstances, not prostitution per se, marginalize sex workers.¹⁰⁵ It held that decriminalizing prostitution might increase sex worker's security by increasing their safety and control, and alleviating poverty. The Coalition continued, "they could, if permitted, take steps to substantially improve their security when engaging in sex work by working indoors, working with a companion, working in settings with others nearby, and taking time to assess a prospective client."¹⁰⁶ However, current laws do not allow sex workers to implement such workplace safety measures. In a similar vein, the BC Civil Liberties Association compared communicating for the purposes of prostitution to collective bargaining in order to demonstrate how the ban on communication infringes on the labour rights of sex workers. Decriminalizing communication would allow sex workers input into their "workplace rules" and thus allow them more control over their work.¹⁰⁷

Communication is also pertinent to choice and autonomy particularly with regards to sexuality. L'Institut Simone de Beauvoir asserted that "[h]istorically, feminists of all schools (radical, liberal, Marxist or postmodern) argue that rich and honest communication is the heart of a healthy sexuality. In the context of prostitution, there is no doubt that communication is essential to reduce violence against women and protect their autonomy."¹⁰⁸ Indeed, sex worker rights is structured by an ideology of choice that prioritizes bodily integrity and sexual autonomy, which can be traced back to the history of liberal sexual reform and reproductive choice, by such reformers as Havelock Ellis and Margaret Sanger. The following argument presented by POWER/Maggie's, which is informed by this lens, is a stark contrast to the claim that prostitution is inherently violent and abusive:

The decision to engage in sex work is an act of personal autonomy that is protected by [section] 7. The decision to pursue sex work is a choice about one's body, one's sexuality, and specifically who to have sex with and on what terms. For some, sex work can be a form of creative expression... there is evidence that sex work can restore a sense of autonomy to those who have experienced certain forms of oppression. Sex work can empower women not only by providing them with financial security, but

¹⁰⁵ *Bedford ONCA DTES Coalition*, *supra* note 37 at para 2.

¹⁰⁶ *Ibid.*

¹⁰⁷ *Bedford ONCA BCCLA*, *supra* note 35 at para 33, citing *Reference re Public Service Employee Relations Act (Alta)*, [1987] 1 SCR 313 at 368, 38 DLR (4th) 161 and *Wallace v United Grain Growers Ltd*, [1997] 3 SCR 701 at para 93, 152 DLR (4th) 1.

¹⁰⁸ *Bedford SCC Simone de Beauvoir*, *supra* note 50 at para 22.

also by allowing for the “development of alliances between women, bodily integrity and self-determination.” As well, some members of the gay and transgendered communities, whose sexuality and gender expression is frequently marginalized, find that sex work provides acceptance of their sexuality and gender expression that is lacking elsewhere.¹⁰⁹

The emphasis on choice and autonomy with respect to one’s body reflects the tradition of feminist legal activism with respect to sexual and reproductive autonomy, such as gay marriage, abortion and rape shield laws. Counsel for POWER/Maggie’s referenced *R v Morgentaler*, among other case law, to argue that section 7 protects not only liberty and security but also autonomy in making private choice free from state interference in matters that are “fundamentally or inherently personal such that, by their very nature, they implicate basic choices going to the core of what it means to enjoy individual dignity and independence.”¹¹⁰ They argued this includes “the right to make choices concerning one’s own body, control over one’s physical and psychological integrity, and basic human dignity.”¹¹¹ The emphasis on bodily autonomy brings the diverse meanings of sex work into view, as well as the experiences of queer, transsexual, and male sex workers, which are generally rendered invisible in prostitution eradication language games.

Despite this emphasis on autonomy, advocates of sex worker rights also acknowledge the coercive circumstances under which choices to engage in survival sex work can be made. They too would like to see the eradication of appalling practices like sex trafficking and other forms of exploitation such as coercive pimping and child prostitution.¹¹² Aboriginal Legal Services of Toronto pointed out that the ‘free’ choice to engage in survival sex work is limited because the choice is made in the context of social circumstances sex workers do not choose.¹¹³ However, rather than remove this choice by criminalizing either sex workers or their clients, they urge the court to instead address the state’s responsibility in perpetuating the inequitable and oppressive circumstances that produce such restrictions in marginalized peoples’ autonomy. From the perspective of sex worker rights, criminalizing prostitution as a cure for colonial violence is highly problematic. Indeed, it perpetuates and exacerbates

¹⁰⁹ *Bedford ONCA POWER/Maggie’s*, *supra* note 38 at para 5.

¹¹⁰ *Bedford ONCA POWER/Maggie’s*, *supra* note 38 at para 3, citing *Godbout v Longueuil (City of)*, [1997] 3 SCR 844 at para 66, 152 DLR (4th) 577. See also *R v Morgentaler*, [1988] 1 SCR 30 at 166, 63 OR (2d) 281; *R v Malmö-Levine*, 2003 SCC 74 at para 85, [2003] 3 SCR 571; *B(R) v Children’s Aid Society of Metropolitan Toronto*, [1995] 1 SCR 315 at 367-69, 122 DLR (4th) 1; *New Brunswick (Minister of Health and Community Services) v G(J)*, [1999] 3 SCR 46 at para 117, 177 DLR (4th) 124; *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44 at para 49, [2000] 2 SCR 307; *R v DB*, 2008 SCC 25 at para 172, [2008] 2 SCR 3.

¹¹¹ *Bedford ONCA POWER/Maggie’s*, *supra* note 38, citing *Rodriguez v British Columbia (AG)*, [1993] 3 SCR 519 at 587-88, 107 DLR (4th) 342; *Chaoulli v Québec (AG)*, 2005 SCC 35 at para 122, [2005] 1 SCR 791; *Bedford ONCA*, *supra* note 32 at para 284.

¹¹² *Ibid* at paras 34 and 39.

¹¹³ *Bedford SCC ALST*, *supra* note 49 at para 23, citing Missing Women Commission of Inquiry, Hearing Exhibit 3 at 14.

the harms of colonization for Aboriginal sex workers by infringing on their choices and modes of survival in a colonial context they did not choose. It is the colonial context that must be addressed through concrete strategies of reconciliation and reparation that would open up and support an expansion of choices for Aboriginal people, rather than preserving moralistic, stigmatizing and paternalistic laws. Aboriginal Legal Services of Torongo urged the state to “[take] responsibility... for the parlous situation faced by street-based sex workers... To allow the state to shed its responsibility for the marginalization of these Aboriginal people and thus allow the continued violations of the life, liberty and security of those individuals is to further perpetuate the legacy of colonialism.”¹¹⁴ In other words, by treating a symptom of colonization as the fundamental problem, the prostitution eradication position lets the state off the hook for finding a more comprehensive solution.

iii. A Differend in the Language Games of Prostitution

Because the two language games operate according to different rules, the opposing arguments cannot be resolved without introducing a principle applicable to both, or by changing the language games. Sex worker rights seems like an oxymoron and rationalization of sexual violence from a prostitution eradication point of view, and eradicating prostitution seems over-determined and contrary to democratic freedom from the perspective of sex work rights. According to the ideology of prostitution eradication, terms like ‘sex work’ mask the inherent violence of prostitution, and the social inequities that make women vulnerable to prostitution. Framing prostitution as a labour issue seems as absurd as posing slavery as a legitimate form of work. Indeed, the feminist appropriation of the term ‘abolitionist’ from the eighteenth century movement to abolish slavery is no coincidence. This language game firmly situates prostitution as a form of slavery. To advocate for collective bargaining rights or better working conditions for slaves would be pointless without dismantling the institution of slavery itself.

Discourses of choice and autonomy seem equally incongruous, according to both versions of prostitution eradication. The logic of the Christian Coalition and Evangelical Fellowship is that the *Charter’s* reasonable limit clause (section 1) rules out the autonomy argument. For these interveners, prostitution not only harms prostitutes, it is harmful to clients and communities as well. Simply put, the public good would override any infringement to personal freedom and choice that criminal sanctions impose. This view turns the sex worker rights argument for personal autonomy against itself because this very choice signals a prostitute’s immorality and culpability: if it is a prostitute’s choice to break the law then it follows that she only has herself to blame when she finds

¹¹⁴ *Ibid* at para 24.

herself abused, raped or murdered.¹¹⁵ For the abolitionists, the autonomy argument falls apart on an entirely different basis. They reason that it is impossible to autonomously choose or consent to engage in prostitution, since prostitution is definitively violent and coercive: choosing to be a prostitute is as incomprehensible as choosing to be a slave, abused, exploited, and sexually assaulted.

Conversely, in the language game of sex worker rights, the goal to eradicate prostitution by criminalizing sex workers and/or their customers seems over-determined and paternalistic. The approach taken by sex worker rights advocates defines prostitution as complex and multi-faceted with meanings that are shifting and context dependent and thereby makes the eradication approach appear simplistic and totalizing. Referring to prostitution as inherently dehumanizing produces the phenomenon that it names. For instance, when the Evangelical Fellowship proposed that the choice to engage in prostitution “forms societal attitudes that devalue a category of people,” they blame prostitutes for the stigma they experience.¹¹⁶ The BC Civil Liberties Association stated, “[t]here seems to be a presumption by some parties... that sex workers are inherently lacking in dignity by virtue of being sex workers... and so they don’t appear to have a right to dignity for so long as they engage in sex work.”¹¹⁷ Supporting this argument, the Downtown East Side Coalition argued that allowing risks to sex workers to persist in the name of protecting communities from the nuisance associated with sex work is “abhorrent” and “intolerable.”¹¹⁸ Aboriginal Legal Services of Toronto agreed, stating that “[i]t is hard to see how the understandable desire to live in a neighbourhood free from some of the discomforts occasioned by street-based sex work can be balanced against the very lives of those people engaged in that behavior.”¹¹⁹ Moreover, the Christian Coalition’s argument is contradictory and illogical – even according to its own language game. If prostitution is a form of violence against women, how can prostitutes be culpable for being victims of violence?

The abolitionist feminist approach resolves the issue of punishing victims for their own victimization, but their version of the language game is nevertheless just as problematic from a sex worker rights perspective. The approach universally reduces sex workers to the status of victim, and, rather ironically, treats them as sex objects. Compared to a sex worker who is an economic agent, the victim of prostitution is reified as the product of her labour: to the abolitionist and Christian interveners alike, what is being sold in the transaction is not a service; it is the prostitute herself, blurring the distinction between prostitution

¹¹⁵ *Bedford SCC Christian Coalition*, *supra* note 45 at para 4.

¹¹⁶ *Bedford SCC Evangelical Fellowship*, *supra* note 45 at para 2.

¹¹⁷ *Bedford ONCA BCCLA*, *supra* note 35 at para 38.

¹¹⁸ *Bedford SCC DTES Coalition*, *supra* note 48 at para 24.

¹¹⁹ *Bedford SCC ALST*, *supra* note 49 at para 20.

and sexual slavery. It is unclear why providing a sexual service is different in this respect than any other form of work. Moreover, the conceptualization of ‘prostituted women’ as inherent victims of violence not only narrowly denies the agency of those who sell sex; it naturalizes violence as an inevitable and essential aspect of their work. This does not allow for a nuanced understanding of the kinds of violence experienced by sex workers, nor the complex realities in which they make choices to engage in sex work.

To the proponent of sex worker rights, sex workers are not a homogenous group of victims who share a set of circumstances. Some sex workers choose to work in the sex trade and enjoy their work, others participate because of desperate circumstances, some are tricked or coerced by pimps and controlled through addictions and still others are forced to work in captivity. Defining prostitution as inherently violent and coercive puts the difference between high track and low track, pimped and freelance, voluntary and forced sex work under erasure. The prostitution eradication approach is too universalizing. In the name of combating what it views as systemic oppression it does not allow for a view of the particular factors that distinguish coercion from choice and violence from safety. At the same time, this approach fails to combat the systemic oppression that it quite rightly decries. The Women’s Coalition is very clear that “[t]here is no nexus between the laws and this male violence sufficient to establish indirect state responsibility for violating women’s security of the person.”¹²⁰ As Aboriginal Legal Services of Toronto argued with respect to Aboriginal sex workers, “[p]lacing the blame for the violence on these individuals [clients and pimps] mischaracterizes this as random acts of individualized violence, as opposed to violence that reflects and perpetuates the marginalization that has resulted from colonialism.”¹²¹ From a sex worker rights perspective, it does not make sense to claim that prostitution is a form of systemic violence that is patriarchal and colonial yet simultaneously assert that the laws do not perpetuate this violence.

iv. When a Differend Becomes Wrong

The language games of prostitution eradication and sex worker rights are structured by different meanings about what prostitution is, and of what constitutes harm in relation to prostitution. But this differend alone does not necessarily result in a wrong. A wrong requires that the differend be accompanied by a loss of the means to prove that damage has occurred. The only parties in *Bedford* at risk of a wrong are those that are trying to prove that harm has been done to them: the sex workers. This risk is compounded by their stigmatized social status, their location outside of hegemonic

¹²⁰ *Bedford* ONCA Women’s Coalition, *supra* note 40 at para 38.

¹²¹ *Bedford* SCC ALST, *supra* note 49 at para 15.

ideologies, and the totalizing structure of prostitution eradication ideologies. With respect to prostitution law, it is difficult to imagine any group more subaltern than sex workers, whose very communication is criminalized. This is not to suggest that sex workers (or any other group) are categorically subaltern. Such a move would reproduce them as subaltern, which is never to be desired. To the contrary, even in *Bedford*, where the voices of sex worker activists are sometimes undermined, their subalternity takes place in constant contestation. Subalternity is, after all, not an identity category, but rather a relation in speech act theory.

In Marxist thought, hegemony refers to the ideology of the ruling class. It is the widespread belief in hegemonic ideology – including by those that do not benefit from the ideology – that allows the status quo to maintain itself.¹²² It is impossible for those maintaining a hegemonic position to be subaltern – except to the extent that they possess knowledge that is being silenced by the very ideology they appear to subscribe to. By definition, the dominant ideology is always legible even to those that hold an alternative view. In a *Charter* challenge the *Charter* possesses the constitutional force with which the *Criminal Code* must conform. Yet it is the *Criminal Code* that reflects hegemonic power because until a decision is made the *Criminal Code* is in effect and backed by the force of state authority. The criminalization of prostitution reflected the status quo until it was declared unconstitutional by the Supreme Court. The prostitution eradication ideology was therefore the hegemonic ideology in the *Bedford* case for it aimed to preserve the status quo and was held by state representatives as well as the more conservative traditional faction represented by the Christian Coalitions. While the abolitionist feminist adherents to this ideology themselves represent some marginalized groups, adopting a hegemonic position does not require that one be a member of the ruling class, only that one share their ideological position. Sex worker rights, although potentially backed by the constitutional force of the *Charter*, challenge these hegemonic views.

Thus, prostitution eradication has the advantage in terms of hegemonic power, and this dominant position in the competition between irreconcilable language games is further reinforced by the totalizing structure of the language game itself. Prostitution eradication plays a zero-sum game because the definition of prostitution that bears its ideological content makes violence an essential and defining characteristic. Any suggestion that prostitution might involve something other than violence and degradation is rendered incoherent. Violence completely fills horizon of possibilities. The same is not

¹²² See Louis Althusser, “Ideology and Ideological State Apparatuses (Notes Toward an Investigation)” in Louis Althusser, ed, *Lenin and Philosophy, and Other Essays*, translated by Ben Brewster (London: New Left Books, 1971) 127; David Forgacs, ed, *A Gramsci Reader: Selected Writings 1916-1935* (New York: New York University Press, 2000).

the case for sex worker rights. In denying that sex work is inherently violent, this language game nevertheless does not reject any and all association of prostitution with violence. Moreover, defining prostitution as a form of work leaves an open horizon of possibilities with respect to the quality of that work as violent or safe, degrading or empowering. Differing views might be accepted or refuted, but they are not rendered incomprehensible. Added to its already privileged hegemonic force, what this means is that the language games of prostitution eradication are more prone to epistemic violence – of ‘not hearing’ in Spivak’s sense of subalternity.

V. Practices of Not Listening: Putting Difference Under Erasure

Without a doubt, sex work activists spoke loudly and clearly in *Bedford*. Yet there is no guarantee that they were heard – at least not in their own terms. Not only has their speech already been compromised by stigma, marginalization and a competing language game that is not very open to hearing them, some interveners also employed strategies which further put sex worker activists’ testimony under erasure. To this effect, two main tactics are used. The first tactic circulates around legitimacy whereby the credibility of sex workers and their status as ‘knowers’ is undermined. The second constructs a language game in which sex worker activist speech is treated as illegible and space is not made for their reality to be heard and understood. Sex workers are already subjected to discrediting and undermining stereotypes because of their stigmatized social identity. That these should be perpetuated in the very human rights forums through which they seek to protect themselves is extremely troubling.

A. Questioning Legitimacy: Undermining Sex Workers as ‘Knowers’

The legitimacy of sex worker speech was challenged in several different ways by interveners and other participants of the appellate hearings of *Bedford*. The ‘false consciousness’ argument used by the Women’s Coalition is one example of how even well intentioned ‘helping’ discourses can perpetuate epistemic violence. The Women’s Coalition contended that “[m]any prostituted women testified that while they were in prostitution they glamorized it, tried to minimize the violence, and tried to view it as empowering. Some considered enduring violence to be part of the job, or convinced themselves that they could control their johns. Some prostituted women testified that they did not realize that they had been pimped until exiting prostitution.”¹²³ The Attorney

¹²³ *Bedford* ONCA Women’s Coalition, *supra* note 40 at para 16.

General of Ontario elaborated on the theme of false consciousness in his factum by citing the affidavit of former prostitute Natasha Falle:

Ms. Falle also deposed that she justified prostitution as a “job,” as did many prostitutes she encountered: “To do sex work, I had to view it as my ‘choice,’ or else I wouldn’t have been able to live in my skin... Today, however, I know that it was never really a ‘choice’ for me”... She taught other women and children how to prostitute, glamorizing it and minimizing the violence. “The more vulnerable and oppressed the person was, the easier it was to convince them,” especially when they saw the money she was making.¹²⁴

While it is plausible that some prostitutes may suffer from false consciousness, the suggestion that sex workers operating under a sex worker rights ideology universally suffer from false consciousness is an example of a form of epistemic violence referred to as ‘testimonial quieting.’ Testimonial quieting “occurs when an audience fails to identify a speaker as a knower.”¹²⁵ Where a person’s identification of her own experience of false consciousness is a legitimate expression of self-knowledge, refusal to accept the legitimacy of the self-knowledge of sex workers that express a different reality is epistemic violence. There is a difference between showing that another party’s argument is in error, critiquing its logic or providing evidence to counter it, and undermining the credibility of an opponent’s speech because of their identity, membership in a minority group or lifestyle choices. Allegations of false consciousness are accompanied by an attitude that *one knows better* than sex workers themselves what their truth is and what is in their best interest.

Only sex worker-led organizations were put into a position where they had to include a defense of their own self-knowledge and prove the legitimacy of their collective voice as part of the *Bedford* proceedings. For instance, POWER/Maggie’s answered the Women’s Coalition with the following defense:

The Coalition’s arguments perpetuate a stereotypical image of sex workers as inherent victims, defined entirely by their vulnerability, lacking in agency and, to the extent that they express satisfaction with their choice of occupation, labouring under false consciousness. This depiction of sex workers is not only inaccurate and paternalistic, but fails to take into account the extent to which sex workers are victimized by the very kinds of criminalization that the Coalition seeks to preserve.¹²⁶

The requirement to prove one is not suffering from false consciousness is an unfair burden and a distraction from the human rights issues and critique of the laws under question. Moreover it is impossible to prove the absence of false consciousness, for every defense only reinforces doubts about the validity

¹²⁴ *Bedford ONCA AG Ontario*, *supra* note 34 at para 53 citing *Bedford ONCA*, *supra* note 32 (Evidence, Affidavit of Natasha Falle, Vol 33 Tab 67 paras 17-19 and Cross-Examination of Natasha Falle, Vol 33 Tab 68 Questions 268-269).

¹²⁵ Dotson, *supra* note 20 at 242.

¹²⁶ *Bedford ONCA POWER/Maggie’s*, *supra* note 38 at para 40.

of one's knowledge. Thus the false consciousness argument reproduces spaces of subalternity, perpetuating a wrong, for it absorbs and nullifies all protest to the contrary. By framing pro-decriminalization sex workers as self-deluding victims, abolitionists and the Attorney General do not allow a space in which the difference of sex work activists from the prostitution eradication language game can be expressed.

The status of sex workers as knowers who can act autonomously and deploy sound judgement came under particular assault in relation to section 213, the ban on communicating for the purposes of prostitution. The communication ban has been controversial since its inception, yet it comprises more than 90% of the prostitution charges reported by police.¹²⁷ The ban primarily criminalizes street-based sex workers. By implication, certain categories of sex workers were more likely to be the target not only of testimonial quieting, but also epistemic violence in their daily lives, since the law silences their communication pertaining to business and personal safety. Street-based and survival sex workers are the most marginalized sex workers, and the most vulnerable to criminal sanction, exploitation, abuse, assault and murder. Street-based sex workers are also largely comprised of people who are poor, racialized, Aboriginal, transsexual, disabled, homeless and struggling with addiction. Stereotypes abound with respect to street-based sex workers and these stereotypes were overtly deployed in some of the arguments for retaining the communicating ban. For example, the Attorney General of Ontario explicitly questioned the capacity of "street prostitutes" to screen dangerous clients due to the unique social problems they are affected by, such as drug addiction, economic desperation and mental health issues.¹²⁸ Substance abuse and desperation are not the only factors allegedly interfering with the ability of sex workers to use communication to work more safely. As one affiant cited by the Attorney General of Ontario claimed, "[s]ome of these women are operating at the intellectual level of a five or six-year-old, and have been taught the most basic skills so they can work as prostitutes."¹²⁹ These demeaning characterizations of sex workers, especially when deployed as a rationale to deny their constitutionally guaranteed right to freedom of expression, their right to protect themselves by evaluating situations and negotiating terms of service with clients, and to undermine their testimonial credibility is an example of the complex interconnected ways epistemic violence took place during the *Bedford* hearings.

Testimonial quieting was also evident in dismissals of anecdotal evidence

¹²⁷ House of Commons Standing Committee on Justice and Human Rights, *The Challenge of Change: A Study Of Canada's Criminal Prostitution Laws* (Ottawa: Communication Canada, 2006) at 9.

¹²⁸ *Bedford* SCC AG Ontario, *supra* note 44 at paras 5 and 9.

¹²⁹ *Ibid* at para 8, citing *Bedford* ONCA, *supra* note 32 (Evidence, affidavit of J. Paterson Vol 7 Tab 30 p 1835 at para 7).

presented by sex workers who testified that the communication ban interfered with their ability to conduct business safely. Whereas Superior Justice Susan Himel gave careful consideration to this testimony, the majority judges of the Ontario Court of Appeals dismissed it, stating:

There was anecdotal evidence from prostitutes that they often felt rushed in their negotiations with potential customers, and would quickly get into the customers' cars to avoid detection by the police. To the extent that the application judge relied on that evidence, informed by her own common sense, to find that screening customers is essential to enhancing the safety of street prostitutes, we think her conclusion reaches well beyond the limits of the evidence.¹³⁰

Instead of taking the testimony of sex workers seriously, the majority deferred to the same stereotypes the Attorney General of Ontario introduced when he stated, “[i]t is also possible that the prostitute may proceed even in the face of perceived danger, either because her judgment is impaired by drugs or alcohol, or because she is so desperate for money that she feels compelled to take the risk.”¹³¹ For the Downtown Eastside Coalition, the characterization “of evidence from sex workers as merely anecdotal... disregarded direct and expert evidence about the lived experiences of sex workers under the Communication Law.”¹³² It also relied on stereotypes and speculations “of street-based sex workers as desperate addicts who lack ordinary skills of perception and a rational self-interest in safety and survival.”¹³³ The coalition identified this as a strategy of testimonial quieting, deployed to “de-emphasize evidence of the grievous impact of the Communication Law on street-based sex workers.”¹³⁴ In dissent, Justices of Appeal MacPherson and Cronk agreed, specifying that the first hand evidence of people who have worked on the streets provide “critical insight... experience and knowledge” and should “not be set aside lightly.”¹³⁵

Several interveners pointed out the deleterious effects of the epistemic violence of section 213 in the lives of street-based sex workers in addition to the vulnerable position it puts them in with regards to physical violence. L’Institut Simone de Beauvoir pointed out that criminalizing communication puts sex workers in a position in which their opportunity to consent to sex is compromised. The BC Civil Liberties Association very pointedly asserted that banning the communication involved in sex work is a sign that street based sex workers are dehumanized and seen as undeserving of rights:

To the extent that the restriction on expression signals that a sex-worker is not

¹³⁰ *Bedford ONCA, supra* note 32 at para 311.

¹³¹ *Ibid* at para 312.

¹³² *Bedford SCC DTES Coalition, supra* note 48 at para 2.

¹³³ *Ibid* at para 20.

¹³⁴ *Ibid* at para 19.

¹³⁵ *Bedford ONCA, supra* note 32 at para 350.

entitled to discuss these fundamental matters of health, safety and dignity in public before she engages in a sexual activity with a client, the restrictions signal that she is “less than” – less deserving of the right to weigh the elements of the encounter and assess her potential partner, the recognition and assertion of her dignity, the ability to inform her own working conditions, and the right to exercise consent.¹³⁶

They link this explicitly with prostitution stigma and other factors that produce the vulnerability of sex workers to violence. They asserted that “[s]ex workers are not to be given equal standing in society, and are not human beings equally deserving of concern, respect and consideration.”¹³⁷ The HIV Coalition stated that the ban compounds the marginalization experienced by sex workers already facing multiple forms of oppression. The effects, they wrote, will “be disproportionately borne by Aboriginal, trans, and drug dependent sex workers, and sex workers with the least resources,” who already face higher rates of violence, in more extreme forms.¹³⁸ Where the majority was persuaded that the magnified vulnerability of such persons are caused by these other forms of marginalization, rather than the communication ban, the dissent pointed out that this increases, not absolves, the obligation to consider the role of the law in increasing these vulnerabilities. Justice of Appeal MacPherson stated in dissent, “my colleagues have turned the question of pre-existing disadvantage on its head. They reason that because prostitutes’ marginalization contributes to their insecurity, the adverse effects of the law are diluted and should be given less weight.”¹³⁹

B. Becoming Illegible: Practices of Not Hearing

Those modes of epistemic violence that undermine credibility are quite visible. They take overt forms, such as allegations of false consciousness, or the deployment of stereotypes to suggest that a stigmatized group has a limited or impaired capacity for self-knowledge and judgment. They play into negative and dehumanizing attitudes about sex workers. Epistemic violence also takes on a much subtler form that produces points of fadeout for subaltern speech. This silencing operates in prostitution discourses as a mask of caring that is couched in the rhetoric of ‘saving’ sex workers from being prostituted. In this instance, the language games simply do not allow space for the dissenting perspective and knowledge of sex workers to be heard. The language games of prostitution eradication place prostitutes in the passive role of victims leaving no space for a different reality. It is a framework through which only ‘prostituted women’ (victims through and through) but not ‘sex workers’ (agents making choices) can be heard, because the parts they play in

¹³⁶ *Bedford* SCC BCCLA, *supra* note 52 at para 33.

¹³⁷ *Ibid.*

¹³⁸ *Bedford* SCC HIV / AIDS, *supra* note 51 at para 15.

¹³⁹ *Bedford* ONCA, *supra* note 32 at para 357.

the conversation (victim and saviour) are pre-established by the framework of analysis. The language game closes off the legibility of sex worker speech, positioning the advocates of prostitution eradication as experts with greater knowledge of prostitution and its risks than sex workers themselves. This inhibits their capacity to hear sex workers in public discourse.

This is a particularly insidious form of violence, because the people enacting it may very well be unaware of the harm they are causing, instead believing they are working in the best interest of the group they are silencing. Their view is that they are listening to the 'victims' of prostitution because they are able to hear the testimony of former prostitutes who engage in their own language game. Indeed, they may be professional 'listeners' like the organizations that comprise the women's coalition. As violence, abuse and rape crisis counsellors, many have made a career of 'hearing' sex workers and other women disclose the violence they have experienced. Thus they do not absolutely fail to hear sex workers in all circumstances. On the contrary, these organizations provide essential supports and services such as outreach, crisis counselling, advocacy, shelter and exit strategies from sex work. Important as this mode of listening is, it is restricted to 'hearing' prostitutes only under certain conditions and on the terms of these service organizations: as clients of support and counselling services, and as victims. Yet in the realm of public discourse the logic of arguments for the eradication of prostitution depends on silencing sex workers when they represent themselves collectively as political actors concerned with sex worker rights who speak on their own terms. Such selective listening enacts epistemic violence because it takes place on an uneven field in which sex workers have a pronounced disadvantage: they are criminalized and their speech is effaced in judicial and public discourse on a regular basis and their lives and personal safety are at stake.

The problem goes beyond the specific 'intent' of the listener, for the language game does not allow space for difference from itself to emerge. The prostitution eradication ideology is grounded in the assumption that all prostitution is inherently a form of violence against women, thus the law should both suppress prostitution and protect "those who are prostituted."¹⁴⁰ If a person engages in prostitution she is a victim of violence, and any demand she might make to have a right to safely engage in this work is rendered incoherent: there is no safe way to be a victim of violence. Moreover, if she chooses to sell sexual services she must be deluded. How could one choose to be a victim of violence? Such phrasing articulates an ideology that installs and reifies 'lack of agency' as fundamental to the subject position of women involved in prostitution. However, as the *Bedford* applicants pointed out, treating "every sex worker as lacking human agency with no ability to make autonomous choices" is

¹⁴⁰ *Bedford* ONCA Women's Coalition, *supra* note 40 at para 24.

paternalistic.¹⁴¹ Moreover, it leaves no space in which their dissenting voices can be heard since they lack the clarity of consciousness to know what is best for them. Victim narratives are singular and closed to alternatives. As Aboriginal Legal Services of Toronto made clear, the realities of sex workers are far more complex. They wrote that “it is important that we not see Aboriginal people involved in survival sex as simply victims doomed to a life of addiction and early death, whether at the hands of others or due to the inherent consequences of the life that they live.”¹⁴² They point to the strength and resilience of sex workers, and their capacity to act to improve their own lives. Victim narratives do not leave room for these other realities to be articulated.

The universalizing and reductive tendencies of the prostitution eradication language game puts the opposing viewpoints of sex work activists under erasure. The phrase “men’s prostitution of women” employed by advocates of prostitution eradication is linked to the argument that all prostitution is a form of sex trafficking and is inherently exploitative.¹⁴³ This does not allow for any distinction between a pimp – who exploits and coerces women and girls into prostitution – and a person employed by a sex worker as a driver, bodyguard or non-exploitative brothel manager. The Women’s Coalition argued:

There is no clear distinction between pimps, agency/brothel owners, driver/bodyguards and others who live off the income of prostituted women. Women testified about agency owners and drivers who raped prostituted women, got them hooked on drugs or offered them up to groups of other men. Women testified that these men rarely provided protection from johns.¹⁴⁴

It is a sweeping generalization to propose that these are inherent qualities of the relationship between female sex workers and men in the sex industry. However, the language game does not allow any other way to conceptualize these relationships. Nor does it allow the realities and voices of transsexual and male sex workers to appear and be heard since the gendered nature of prostitution is predetermined as being one of male violence against women with the implicit assumption that ‘women’ refers to cisgendered (as opposed to transsexual) women.¹⁴⁵ There is diverse range of men, women and transsexuals in the sex industry in all sorts of roles and circumstances with a wide variety of relationships. Even when one considers that the majority of sex workers are women, and the majority of clients are men, it is essentialist and deeply problematic to propose that when sex is involved (absent of romantic love)

¹⁴¹ *Bedford* SCC Respondents, *supra* note 43 at para 106.

¹⁴² *Bedford* SCC ALST, *supra* note 49 at para 16.

¹⁴³ *Bedford* ONCA Women’s Coalition, *supra* note 40 at para 12; see also *Bedford* ONCA Women’s Coalition, *supra* note 40 at para 18.

¹⁴⁴ *Ibid* at para 11.

¹⁴⁵ Cisgender refers to a person who identifies with the gender he or she was assigned at birth.

women are incapable of entering consensual economic relationships with men and vice versa.

VI. Conclusion: From Subalternity to Discursive Justice

The goal of this paper is to develop a concept of discursive justice and to support processes of participatory democracy in the public sphere, particularly with regards to human rights-based constitutional challenges in Canada. An analysis of the factums from the *Bedford* appeals reveals that there are two language games that structure the debates: one based on an ideology of prostitution eradication and the other centred on sex worker rights. The incompatibility of these language games produces a differend: they cannot resolve their differences because the ideological grounding of their positions is irreconcilable. This differend is not neutral; it is marked by epistemic violence aimed at undermining both the legitimacy and the legibility of sex worker speech. Thus, while discourses about prostitution have a profound influence on sex workers' lives, livelihoods and survival, sex workers do not have the same opportunity to be heard in the public sphere as many of the other stakeholders, because of their particular criminalized and stigmatized status in relation to prostitution. Defining subalternity as an inequitable relation in speech act theory evokes this situated experience of being silenced. The language game of prostitution eradication thus inhibits discursive justice for sex workers, creating a risk that the harms of human rights infringements, stigma and violence might be compounded by damages that take place in the court itself. In *Bedford*, sex workers enjoyed the opportunity to speak in court, but there still persists the possibility of a wrong because as Lyotard put it, "the testifying phrase is itself deprived of authority" through the language games of prostitution eradication.¹⁴⁶ In other words, because of epistemic violence, sex workers are not always able to bring to awareness the damage that is being done to them even though they are testifying about it. The legal challenge brought forth by *Bedford* has come to a close with the Supreme Court decision to decriminalize adult prostitution. However, this is only the beginning as the Canadian government is now debating the options for new prostitution law and policy in Canada. The language games described in this essay continue to structure the debates. Consideration of the principle of discursive justice might help deter epistemic violence as the discussion proceeds.

Discursive justice links justice to possibilities of hegemonic change: in order to right a wrong the status quo is altered by the very difference of those who have been marginalized and excluded. There is comfort in the predictability of things staying the same, especially for those dominant classes

¹⁴⁶ Lyotard, *supra* note 25 at 5.

who are privileged in the current system. However, those who are excluded have much at stake in the possibility of change, not just in law and policy, but also in ideology, that is, in how we think about social issues and about justice. Canadian society is at a juncture where our fundamental views about prostitution and about sexuality in general as well as the political economy of sex, morality, dignity and human rights are under revision. At the same time, in political theory, new conceptualizations of justice are emerging that tie justice to openness to difference and change. Jacques Derrida's concept of the *avenir* (to-come) of justice, in which justice is premised on a constant refounding of law and politics comes to mind.¹⁴⁷ As Derrida explains, the *avenir* of justice is a "horizon of expectation," a deferral that never loses its openness and anticipation of the coming of the Other, as opposed to an understanding of the future in which the present is simply reproduced.¹⁴⁸ In "Force of Law: The Mystical Foundation of Authority" Derrida wrote:

But for this very reason it has perhaps an *avenir*, precisely [*justement*], a to-come [*à-venir*] that one will have to [*qu'il faudra*] rigorously distinguish from the future. The future loses the openness, the coming of the other (who comes), without which there is no justice; and the future can always reproduce the present, announce itself or present itself as a future present in the modified form of the present. Justice remains to come... it deploys the very dimension of events irreducibly to come... Perhaps this is why justice, insofar as it is not only a juridical or political concept, opens up to the *avenir* the transformation, the recasting or refounding [*la fondation*] of law and politics.¹⁴⁹

Justice, while never precisely realized for Derrida, is strived for through the dynamic politics of transformation. This is not to say that change is always good but rather that justice demands openness to the difference of the future rather than a reproduction of the past and present. This requires that those that have status in the present system remain open to differences that come from outside hegemonic lines of power. With respect to the debates on prostitution, the onus lies on those possessing social status and legitimacy to remain open to challenges to their way of thinking about these social issues. At the very least, it is their responsibility to maintain a democratic public sphere in which what is different and excluded can still be heard. With this view of justice in mind along with the goal to deter epistemic violence and move marginalized groups out of subalternity and into a more robust and democratized public sphere, the following sketches out some elements of discursive justice:

Everybody should have a voice in the public sphere without difference being put under erasure.

¹⁴⁷ Jacques Derrida, "Force of Law: The Mystical Foundation of Authority" in Gil Anidjar, ed, *Acts of Religion* (New York: Routledge, 2002) 228 at 256.

¹⁴⁸ *Ibid* at 256-57.

¹⁴⁹ *Ibid*.

In cases of a differend – that is when players of competing language games cannot agree on principles to resolve their dispute – the onus is on the speakers and listeners with hegemonic privilege to avoid perpetuating a wrong.

A wrong occurs when there is no possibility for a disenfranchised group to articulate their reality, make their difference visible, and bring the harms they experience to the attention of others.

A wrong is deterred when those who possess status in hegemonic discourse ‘complete’ the speech acts of marginalized groups by hearing them.

Hearing, in this case, sometimes involves being open to having ones own ideas about reality be disrupted.

The principle of discursive justice that is sketched out here envisions a space of public debate: a democratic public sphere in which participants proactively resist perpetuating a wrong when their language games are at odds with one another. Discursive justice helps negotiate the blurry line between respectful dissent and putting the speech of groups who are oppressed under erasure. The goal is not to conform to the minority view in order to reach consensus, only that, in the case of a differend, arguments be tested against the perpetuation of a wrong, so that disenfranchised groups are not rendered subaltern. Moreover the language games at play in the public sphere should be structured in such a way that socially marginalized participants are enabled to move out of spaces of subalternity even when – *especially when* – their views challenge hegemonic ideologies. If an argument fails to meet these requirements, the speakers might consider revising them for failing the test of discursive justice. Understanding the operation of epistemic violence, being alert to its presence, undoing and precluding it, are crucial to ensuring justice in the public sphere. Doing so requires critical self-reflection and awareness on the part of those possessing relative status and privilege.

Discursive justice speaks to the very heart of democracy, which involves dialogue from a plurality of speaking and listening positions. It seems reasonable to expect that democratic processes be guided by principles that ensure that subordinated groups are heard in all of their complexity– and that allies and adversaries alike work to help move affected subaltern groups out of their subalternity, or at the very least, avoid exacerbating their points of fadeout. The aim is to preclude the creation of subaltern spaces, by ensuring that those who are marginalized and dispossessed become a meaningful part of the dialogue, not by objectifying them as victims, but through the willingness of hegemonic speakers to change themselves, and their capacity to listen, even when it challenges their pre-existing values and beliefs.