The (In)Visibility of Sex Workers: A Politics of the Flesh

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Introduction

The British Columbia Supreme Court recently dismissed a unique intersectional and comprehensive approach to a constitutional challenge to the various *Criminal Code* ("*Code*")[1] provisions surrounding sex work in *Downtown Eastside Sex Workers United Against Violence Society v. Canada (Attorney General)* ("*SWUAV*[2]"). This essay will analyze *SWUAV* in the context of the pervasive legal characterization of the dangers caused by the public visibility of sex workers. Borrowing from Maurice Merleau-Ponty's work "The Visible and Invisible[3]" I will argue that the legacy of the courts' unwillingness to strike down these provisions exposes a "politics of the flesh" that relies on representations of sex work as ontologically produced and replicated by the law rather than informed by the lived experiences of sex workers[4]. The patrolled visibility of sex workers also has a literal dimension in *SWUAV* because the Court denies the plaintiffs both public and private standing to bring their claims. This refusal further exposes the Court's tendency to replicate and produce the legal characterization of the (in)visibility of

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[1] *Criminal Code*, R.S.C. 1985, c. C-46, ss210-213.

[2] *Downtown Eastside Sex Workers United Against Violence Society v. Canada (Attorney General).* [2008] BCSC 1726 [*SWUAV*].

[3] Maurice Merleau-Ponty. The Visible and the Invisible. Chicago: Northwest University Press, 1969.

[4] I am intentionally using the term "sex worker" and "sex work" as opposed to "prostitute" and "prostitution" as part of the advocacy for the protection of the rights of sex workers. According to Kamala Kempadoo's book entitled Global Sex Workers: Rights, Resistance, and Redefinition (New York: Routledge, 1998) the term sex worker was coined by the workers themselves to emphasize employment and labour issues as well as their exploitation in the workplace. Prostitution is used to reference the inherent violation of rights attached to the ontology of the legal label. These criminalized terms tend to obscure the awareness of the unique risks and disadvantages of this type of employment because they denote sex workers as victims. The term "prostitution" is understood in *SWUAV* to connote the criminal perspective of the Code.

sex workers.

Equipped with language derived from Merleau-Ponty's understanding of the phenomenology of perception I will argue that not only does *SWUAV* demonstrate the occlusion of the visibility of sex workers by the Court, it also shows that courts maintain this perspective by resisting the reversibility of knowledge acquirable through evidence of lived experience. Also, the concept of the "politics of the flesh" adds a literal dimension to the dangers of court imposed (in)visibility upon the living bodies of sex workers. Legislative intent to eliminate public visibility of sex workers is echoed in jurisprudence both explicitly and through un-interrogated claims to objective reasoning and advance knowledge about the dangers of sex work. Despite the plaintiffs' presentation of lived experience evidence the Court in *SWUAV* stands in resistance to an unprecedented view of the dangers of sex work as *always already* defined by the law and not as the workers define for themselves. The result has been a continued jurisprudential complicity with unconstitutional laws that effectively position sex workers at greater risk of violence with no legal recourse.

Part One will set out the impugned provisions of the *Code* surrounding sex work in *SWUAV* and the application of the *Charter.* Part Two will detail a brief explanation of the case law history of the provisions and the characterization of the dangers of public visibility of sex workers. This section will then be broken down into two subsections: first I will expose the top-down approach to the acquisition of knowledge in case law that replicates and produces the (in)visibility of sex workers. *SWUAV* will be situated within the context of this prevalent historical narrative. Next, the top-down legal characterizations will be compared to the bottom-up findings from the affidavits of sex

workers who live and work in the Downtown Eastside of Vancouver. Part Three will explore how the law's imposed characterizations of sex workers further problematizes the (in)visibility of standing in *SWUAV*. Part Four will detail Merleau-Ponty's "The Visible and Invisible," its contemporary critiques, and its relevance to *SWUAV*; particularly concerning ontology, the subject-object relationship, and field research as exemplary of the reversibility of knowledge. In conclusion, I will argue that the *SWUAV* judgment is demonstrative of a larger political narrative that feigns objectivity by occluding or remodelling the invisible *of* the visible (I illustrate this as (in)visible)). I will end this section with a call to the BCCA to recognize and interrogate the limitations of the case law perspective on sex work.

Part One

Impugned Provisions

The plaintiffs in *SWUAV* are the Downtown Eastside Sex Workers United Against Violence Society and individual Sheryl Kiselbach. According to their statement of claim, the SWUAV Society's objects include "improving working conditions for young women working in the sex trade, and whose members are women, including transgendered women, sex workers primarily in the Downtown Eastside neighbourhood of Vancouver[5]." Kiselbach represents the human face of the Society; she is described by Ehrcke J. as a 58 year old former sex worker and a current support coordinator[6]. Together the plaintiffs argue that the provisions of the *Code*[7] surrounding prostitution are unconstitutional; and are in violation of their rights guaranteed by the *Canadian Charter of Rights and*

[5] *SWUAV*, supra note 2 at para 28.
[6] *ibid.*
[7] *Code*, supra note 1.

Freedoms ("*Charter*[8]") and should be struck down[9]. The impugned provisions are grouped under two main categories; the "Prostitution Laws" including the procuring and the bawdy house provisions, and the 'Communication Law[10]". Included in the list are sections 210, 211, 212(a), (b), (c), (d), (e), (f), (h), and (j) and (3), and 213 of the *Code*[*]. According to the plaintiff's argument, these sections are in violation of sections 2(b), 2(d), 7, and 15 of the *Charter*, and are not justifiable under s. 1.

The Charter Applied

The plaintiffs claim that the Communication Law is in violation of their freedom of expression as guaranteed by s. 2(b) of the *Charter*[11]. They argue that communication for the purposes of engaging in prostitution is a restriction on the content of expression. They also claim that the Prostitution Laws (individually and collectively) infringe the rights of sex workers; particularly by preventing or limiting their ability to associate contrary to 2(d) of the *Charter*[12]. According to the plaintiffs, these laws effectively prevent or limit the ability of sex workers to associate collectively for the purposes of controlling working conditions including safety and security issues.

This consideration also grounds the claims that the Prostitution Laws violate section 7 of the *Charter*[13]. The plaintiffs argue that these laws have subjected sex workers to "increased risk of physical and sexual violence, psychological injury, kidnapping and death and other threats to security, health and safety.[14]" Furthermore, the

[8] *Canadian Charter of Rights and Freedoms*, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K), 1982, c.11, ss. 7, 15, 2(b), 2(d), 1.
[9] *SWUAV*, supra note 2 at para 13(b) The alternative plaintiff claim is that s. 212 should be read down.
[10] ibid. at paras 21-22
[*] See **Appendix**, at page 28.
[11] Charter, supra note 8.
[12] ibid.
[13] ibid.
[14] *SWUAV*, supra note 2 at para 20.

Prostitution Laws also infringe section 15 of the *Charter*[15] because they discriminate against sex workers and have a "severe and disproportionate impact[16]" on their status as sex workers or women. According to the plaintiffs, their human dignity is also violated because the laws have forced sex workers to incur increased personal risk by having to work alone and remote from public view to avoid criminal sanction[17]. Alternatively, they submit that the existence of the Prostitution Laws have made sex work more dangerous and have had a disproportionate impact on sex workers as opposed to other professions who may operate indoors and in relationships with others[18].

Having set out the parameters of the litigation, the next section of this paper will present the pervasive characterization of the dangers of public visibility of sex workers from both top-down and bottom-up perspectives.

Part 2

The traditional constitutional challenge to the provisions surrounding sex work has occurred within a criminal trial that is focused on the specifics of an individual's charges under the *Code*[19]. *SWUAV* brings a unique claim because (unlike other case law) it is a civil litigation attempt to challenge the entire lot of Communication and Prostitution Laws "individually and in combination[20]" as unconstitutional. The foundation of this challenge is an intersectional analysis of the criminalization of sex work that incorporates issues such as poverty, housing, addiction, and the over policing of

[15] *Charter,* supra note 8.
[16] *SWUAV,* supra note 2 at para 38.
[17] ibid.
[18] ibid.
[19] Elin R.S. Sigurdson. Arvay Findlay Barristers. 2010.
[20] *SWUAV,* supra note 2 at para 13.

the Downtown Eastside[21]. This approach is based on ground level research; numerous affidavits were collected from sex workers who live and work under the current legal framework[22]. The B.C. Supreme Court unfortunately did not hear merits of the *SWUAV* case because Ehrcke J. denies the plaintiffs standing to bring the claim. I will critically evaluate this move by the Court in the next section of this essay, however, it is sufficient for the purposes of this section to note that *SWUAV's* intersectional and comprehensive approach differs from other constitutional challenges found in *Reference re ss193 and 195(1)(c) of the Criminal Code ("Prostitution Reference")*[23], *R. v. Stagnitta ("Stagnitta")*[24], *R. v. Skinner ("Skinner")*[25], and *R. v. DiGiuseppe; R. v. Cooper ("Cooper")*[26].

(I) Top Down

In order to avoid detection and criminal sanction sex workers must somehow maintain invisibility from public view. The detection of offences related to ss. 210, 211, and 212 of the Code inheres in the interaction of sex workers with members of the public, and s.213(1) of the *Code* explicitly prohibits communication for the "purposes of engaging in prostitution or obtaining the sexual services of a prostitute[27]" in a "...public place or in any place open to public view[28]." The pervasive narrative in case law is that the provisions surrounding prostitution are appropriately criminalized because of the

[21] Elin R.S. Sigurdson, supra note 18.
[22] Ibid.
[23] *Reference re ss193 and 195(1)(c) of the Criminal Code.* [1990] S.C.J. No 52.
[24] *R. v. Stagnitta* [1990] S.C.J. No. 50
[25] *R. v Skinner* [1990] S.C.J. No. 51,
[26] *R. v. DiGiuseppe; R. v. Cooper* [2002] O.J. No. 86 (On CA).
[27] *Code*, supra note 1
[28] ibid.

"nuisance" and public danger associated with the visibility of sex workers - whether or not the offence actually occurs in public view.

The leading Supreme Court of Canada case that evaluates a constitutional challenge to the sex work provisions of the Code is *Prostitution Reference*[29]. This case, heard alongside *Stagnitta*, and *Skinner* challenges the Communication and Bawdy House Laws with respect to sections 2(b) and 7 of the *Charter*. The majority in *Prostitution Reference*[30] found that the Communication Law is a prima facie infringement of s.2(b) freedom of expression but is justifiable under section one. Central to the majority's reasons is the perceived legislative intent to patrol the (in)visibility of sex workers. The Court found that the criminalization of the laws surrounding sex work is designed to:

> ...minimiz[e] the public exposure of this degradation especially to young runaways who seek refuge in the streets of major urban centres, and to those who are exposed to prostitution as a result of the location of their homes and schools in areas frequented by prostitutes and who may be initially attracted to the "glamorous" lifestyle as it is described to them by the pimps. Further, it is not just the exposure to the potential entrants into the trade that is of concern to the legislators. An additional aspect of the objective of minimizing public exposure of prostitution, is the fact that many persons who are not interested in prostitution are often propositioned either as prostitutes or prospective customers.[31]

The Court also recognizes the oddity of Parliament's criminalization of acts related to prostitution but not of the act itself. It explains that this may be residual of Victorian Age morals that did not want to criminalize the act of prostitution because "the gentleman consumer of a prostitute would have been also guilty as a party to the offence[32]." Dickson C.J. for the majority recounts that the historical evolution of the

[29] *Prostitution Reference*, supra note 22.
[30] ibid.
[31] ibid. at para 96.
[32] ibid. at para 93.

Communication Law between 1869 and 1972 also used to criminalize prostitution as a status offence (now repealed). He points out that the law used to sanction: "...being a common prostitute or night walker...found in a public place and does not, when required, give a good account of herself[33]." The Chief Justice goes on to explain that the current laws now include customers of prostitutes, but that parliament continues to avoid illegalizing the act of prostitution itself. It seems as though the characterization of the dangers of the public visibility of sex workers is so deeply entrenched in legal culture that the criminalization of the actual sex work continues to escape concern.

Despite finding that the Communication Law is in violation of 2(b) of the *Charter*, the pervasive rationale in support of the Communication and Prostitution Laws in both *Prostitution Reference* and *Skinner* is that criminalizing the public visibility of the sex worker will effectively deter the act of prostitution itself. As part of his explanation for why the Charter violation is justifiable under s.1 as "...subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society[34]," Dickson C.J explains:

> ...[t]he logical way to prevent the public display of the sale of sex and any harmful consequences that flow from it is through the twofold step of prohibiting the customer from propositioning the prostitute likewise in places open to public view. If communicating for this purpose are criminalized it must surely be a powerful deterrent to those engaging in such conduct.[35]

Rationales derived from a perceived necessity to protect the public from the visibility of sex workers are also used to justify the violation of a s7 right to life, liberty and security of the person. In reference to a section 7 challenge of the Communication

[33] ibid. at para 94.
[34] *Charter*, supra note 8 at s1.
[35] *Prostitution Reference*, supra note 22 at para 131.

and Prostitution Laws (separately or in combination) the Supreme Court of Canada in both *Prostitution Reference* and later in *Cooper* finds that the impugned provisions are not in violation. The framed arguments in both cases, however, are not (as they are in *SWUAV*) protesting an "increased risk of physical and sexual violence, psychological injury, kidnapping and death and other threats to security, health and safety[36]." Instead, *Cooper and Prostitution Reference* challenge the provisions under s.7 as "impermissibly vague[37]" in the context of potential imprisonment or as interfering with an individual's "economic liberty[38]."

Whereas the Communication Law may indeed be protested in terms of its over breadth, the specific scope of this argument allows the Court to dismiss the challenge based plainly on precedent. Dickson C.J. simply relies on case law to find clarity of the wording of the provisions and also to ascertain that economic liberty is considered to be outside the scope of the principles of fundamental justice. This move, however, begs the question of the nature of the legal representation of sex work. The reliance on precedent as proof of "the existence of an ascertainable standard of conduct, a standard that has been given sensible meaning by courts...[39]" does little to reflect on the Court's role in the ontological replication and production of the (in)visibility of sex workers. Furthermore, the Court's understanding of "economic liberty" hardly addresses an intersectional approach to poverty.

Concern for the wellbeing of women finds expression only in reference to the liberal reform of the laws surrounding sex work. In *Prostitution Reference*, the explicit

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[36] *SWUAV*, supra note 2 at para 20.
[37] *Prostitution Reference*, supra note 21, at para 39; *Cooper*, supra note 22 at para 46.
[38] ibid. at para 49.
[39] ibid. at para 42.

inclusion of the liberal feminist perspective[40] is added to advocate for an understanding of sex workers as victims of male dominance. Dickson C.J. quotes and adopts the perspective of the Ontario Advisory Council on the Status of Women in respect to prostitution. He says:

> ...[t]here is a real victim in prostitution --the prostitute herself. All women, children, and adolescents are harmed for prostitution...Prostitution functions as a form of violence against women and young persons. It is certainly a blatant form of exploitation and abuse of power...Prostitution is related to the traditional dominance of men over women. The various expressions of this dominance include a concept of women as property and the belief that the sexual needs of men are the only sexual desires to be given serious consideration. Prostitution is a symptom of the victimization and subordination of women and of their economic disadvantage[41].

This perspective contradicts the experiences of sex workers themselves. According to *SWUAV*, the plaintiffs are not primarily concerned with identifying themselves as victims of prostitution but rather, as endangered by the effect of criminal sanctions surrounding sex work. The opinion of the Ontario Advisory Council represents only one view among a great diversity within the feminist community. Sex work is an issue of intense controversy among feminists, yet Dickson C.J.'s adoption of the Council's perspective tacitly implies that their view represents the opinion of all feminists. Courts therefore are politically selective of their inclusion of feminist perspectives. Elin R.S. Sigurdson (one of the lawyers who worked on both *SUWAV* and the field research described below) remarked that advocacy for law reform of sex work has been subject to a great deal of feminist backlash from academic and political communities[42]. Excluded from case law narrative is not only an awareness of this

[40] ibid. at para 97.
[41] ibid. at para 95.
[42] Elin R.S. Sigurdsson, supra note 18.

controversy but also an acknowledgment of feminist views that differ from the majority opinion.

Aware of the division between feminist voices, the Westcoast LEAF (Women's Legal Education and Action Fund) explicitly limited their role as interveners in the appeal of *SWUAV* to the "distinct matter" of standing for marginalized women[43]. LEAF's neutrality amid the controversy, however, amounted to a failure to question the traditional narrative of (in)visibility by the feminist legal community. An incomplete view of sex work has permitted courts to maintain the status quo in an insincere allegiance with feminist perspectives. This is further revealed in the 2006 government report entitled "The Challenge of Change: A Study of Canada's Criminal Prostitution Laws[44]." The report shows that language describing prostitution as violence towards women is also used by feminists to advocate for its abolition[45]. The narrative in case law therefore seems to have strategically adopted this language merely to further its own agenda. Views of feminists for the abolition of sex work therefore are only superficially listed in the Court's reasons and all other views are relegated to (in)visibility.

(ii) Bottom Up

The Downtown Eastside of Vancouver is notorious for its "high concentration of social problems, including poverty...addiction...disease, and violence. Within this context...the DTES is also home to a sizeable population of sex workers[46]." In order to

[43] LEAF. "West Coast LEAF Intervened at the BC Court of Appeal on the Issue of "public Interest Standing" in SWUAV v AG Canada." The West Coast Leaf Women's Legal Education and Action Fund. LEAF, Jan. 2010. Web. 2 Apr. 2010.
[44] Art Hanger and John Maloney, M.P. "The Challenge of Change: A Study of Canada's Criminal Prostitution Laws." December 2006.
[45] ibid.
[46] Cristen Gleeson, Katrina Pacey et al. Voices for Dignity: A Call to End the Harms Caused by Canada's Sex Trade Laws. Vancouver., 2005., at 4.

ascertain the necessary legal reforms for a report to the parliamentary committee on sex work, the Pivot Legal Society conducted field research to gain perspectives of sex workers who live and work in the DTES. Their report, entitled Voices for Dignity[47] was published in March 2004 and is a compilation of ninety one affidavits gathered from self-selected participants. Some of the significant demographic details of the intersectional analysis of sex work are that 81 participants identified themselves as female, 38 as Aboriginal or Métis, 52 as having a history of drug use, and all described their financial situation as living in poverty[48]. The report incorporates quotes from the gathered affidavits as well as commentary detailing key findings and themes.

The report points out that the criminalization of the laws surrounding sex work exacerbates and stigmatizes the dangerous social and economic living conditions of sex workers. Nevertheless it maintains that criminal law reform is only one aspect of securing the safety and wellbeing of sex workers. Also surmised from the affidavits are the central intersecting themes of poverty, housing, violence, health, addiction and law enforcement[49]. It explicitly acknowledges that recommendations for law reform are most appropriately derived from the expertise of sex workers who are living and working under the current legal framework.

With respect to the criminal prohibitions of the Prostitution and Communication Laws the perspectives of the affiants are radically different from the Court views. Central to these findings is a concern for personal safety. In particular (according to the affidavits) the procuring and bawdy house provisions criminalize the ability of sex workers to refer [safe] clients, be provided with safe places, use "spotters" to help protect

[47] ibid.
[48] ibid.
[49] ibid. at 13.

them in case of violence, and be able to screen out dangerous clients. Ideas in the affidavits centre on the associated safety of being able to work inside. Affiant 66 remarks:

> ...it would be good to have a front desk person or two people to watch out in case something happened. There could be a panic button in each room. A button that only the girls knew about and the johns didn't so that they could press it if something had gone wrong...[50]

Affiant 32 adds:

> ...if women could work indoors with each other's support, in a clean and organized environment, where johns are screened, the health and safety benefits would [be] great...[51]

Safety is also a main concern with respect to the Communication Law. Whereas the pervasive narrative in case law is the public danger associated with the visibility of sex workers, the criminalization of that visibility is identified by the affiants as conducive to violence. Affiant 37 asserts:

> ...Working girls end up going into hiding places just to stay away from the harassment of the police. That's dangerous; girls are getting killed out there. A lot of girls go with their dates down to beach areas and wooded areas in order to keep away from police and its dangerous because they don't know if the john will bring you back....[52]

Affiant 30 also affirms the fear of working in hazardous conditions:

> I continually move around because when I stand still, I am more likely to get busted by police. I end up working in dark locations, like by the Drake Hotel. These spots are dark and there are less police. I feel more fear when I am working in these dark hidden locations. I am afraid of getting jumped by other girls or weird men[53].

Another problem with the Prostitution and Communication laws is that it forces sex workers to get into vehicles quickly without the opportunity to assess the potential for

[50] ibid. at 9.
[51] ibid.
[52] ibid. at 17.
[53] ibid. at 29.

violence[54]. Affiant 25 declares:

> The communicating law makes me worried because I do not have time to make sure that the car I get into is safe, and that the person is not dangerous. Three years ago I was working between Princess and Raymur Projects. A car drove up…and I got into [the] car. He strangled me, threatened me, and sexually assaulted me, then left me on a corner…If I had more time, I might not have gotten into the car with him.[55]

It is astonishing that there is absolutely no mention of the safety of sex workers in any of the above mentioned case law. The protection of the public clearly does not include the sex workers themselves. The patrol of the (in)visibility of sex workers to the public view is undoubtedly exposed as completely disassociated from the dangerous consequences that criminalization inflicts upon sex workers. The radical differences in perspective help to further expose the incompleteness of the Court's top-down approach to knowledge about sex work. Court resistance to knowledge acquirable from the lived experiences of those are captured in the current legal framework maintains a dangerous legacy of ontological reproduction of the (in)visibility of sex workers.

The legal characterizations of sex workers are further problematized by the (in)visibility of standing in *SWUAV*. This will be discussed in the next section.

Part Three

(In)visible Plaintiffs and the Problem of Standing in *SWUAV*

The main underlying theory of the plaintiff's claim in *SWUAV* is that the Communication and Prostitution laws both separately and together further marginalize

[54] ibid.
[55] ibid. at 11.

and endanger sex workers and are therefore unconstitutional. The bringing of a claim reliant upon an intersectional understanding of the effect of these laws is crucial to the plaintiff's ability to define their position for themselves rather than be assigned a representation that is *always already* (in)visible. As I have demonstrated in the previous section the role of the courts has historically patrolled the boundaries of visibility of sex workers. Their representations are ontologically replicated and produced by their criminalization rather than defined by the lived experiences of the workers themselves. The effect has been an emptying of the substantive aspects of the claims of sex workers whose rights have been violated and whose lives have been endangered by the criminalization of the Communication and Prostitution Laws.

The (in)visibility of sex workers is further frustrated in *SWUAV* because the Court also denies the plaintiffs procedural visibility; it denies both public and private standing to bring their claims. According Sigurdson the SWUAV Society was independently formed by sex workers on the DTES to protect their individual identities during the field research stages of the case[56]. The strategy of the plaintiffs was to launch the claim from a comprehensive procedural basis that included both the perspectives of an individual plaintiff and the SWUAV Society as representative of the larger sex work community[57].

When private standing cannot be granted the court may also consider whether or not the plaintiff has public standing[58]. The current test for public standing requires the plaintiff to demonstrate a "genuine interest" in the legislation that involves a serious

[56] Elin R.S. Sigurdsson, supra note 18.
[57] Elin R.S. Sigurdsson, supra note 18.
[58] *SWUAV*, supra note 2 at para 56

constitutional issue[59]. The Society not only had a clear "genuine interest" to bring the claim but also its representative format allowed for visibility of sex workers who did not or could not risk individual exposure. Because of the risk of social stigma and persecution by police, issues of confidentiality were of massive importance to the majority of sex workers[60]. Furthermore, Kiselbach braved individual exposure by filing a claim alongside of the SWUAV Society to ensure standing before the Court. She intended to humanize the anonymity of a vulnerable group and to detail a personal story of her engaged rights[61].

Ehrcke J. reasons that neither the SWUAV Society nor Kiselbach has private or public standing. This finding further illustrates that the (in)visibility of sex workers is imposed from the top-down and is dismissive if not hostile to bottom-up self definition. He finds that the SWUAV Society cannot achieve private interest standing because it is a representative body and that Kiselbach is not presently "in jeopardy of being charged or convicted, because she is not doing any of the activities that the impugned laws prohibit[62]." Kiselbach admits to having worked for several decades as a sex worker, however, the procedural requirement for contemporaneity cloaks the Court in objectivity and disguises a very political statement about her (in)visible standing to challenge the law. *SWUAV* lawyer Joe Arvay mocked the twisted logic of this procedural routine in light of the uniqueness of the case, musing that it would be "horrible judicial policy[63]" to require that Kiselbach return to the sex trade in order to gain standing. He further

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[59] ibid.
[60] Elin R.S. Sigurdsson, supra note 18.
[61] ibid.
[62] ibid. at para 48.
[63] Hainsworth, Jeremy. "BC Sex Laws Trial Continues: Federal Lawyers Argue Former Sex Worker Should Not Be Permitted to Challenge Prostitution Laws." Xtra: Canada's Gay and Lesbian News. Xtra Vancouver, 25 Jan. 2010. Web. 01 Apr. 2010.

admonished the Court's ignorance in light of the urgent need for reform. Referencing the recent William Pickton trial and the increased public awareness of the dangers faced by sex workers on the DTES, Arvay contends: "[Kiselbach] was threatened, raped, almost killed in the streets…[t]his court must take note…at least…60 or even more women have gone missing and are presumed dead[64]."

Perhaps even more shocking than the finding against private standing is the refusal of public standing as well. Justice Ehrcke reasons that the plaintiffs fail the test for public standing because there exists another reasonable and effective way to bring the issue before the Court[65]. The Court in this move presses the immense weight of its top-down knowledge onto the plaintiffs to completely bury them from view. The refusal of standing denies the plaintiffs the ability to control their own representation; it completely neglects to recognize the uniqueness of the intersectional value of *SWUAV* and seems to intentionally undermine a self defined attempt at visibility. The overly formulistic reasoning of the judge further illustrates that the *SWUAV* judgment is demonstrative of a larger political narrative disguised as objective legal reasoning[66]. Interestingly, the same court in the same year combined the separate claims of a representative non profit society (the Vancouver Area Network of Drug Users) with the individual plaintiffs Dean Wilson and Shelley Tomic because of the "common issues raised by the actions[67]." Not only was there no problem with standing, the Court also heard bottom-up evidence in the form of affidavits. The inconsistency of the Court's treatment of these marginalized groups suggests that the Court is especially unwavering concerning the (in)visibility of sex

[64] ibid.
[65] ibid. at para 70.
[66] Elin R.S. Sigurdson, supra note 18.
[67] *PHS Community Services Society v. Canada (Attorney General).* [2008] B.C.J. No. 951 (BCSC), at para 8.

workers.

An examination of the philosophical roots of the concept of (in)visibility offers insight into the courts' maintenance of a narrative that occludes sex workers . Merleau-Ponty's work entitled "The Visible and Invisible," will be central to the analysis in the next section because it discuses the concept of visibility in the particular context of the ontological production of language. His work seeks to translate the literal experience of sight into a theoretical perspective on social ordering, and the political scope of his theories has been widened by contemporary criticism. These analyses of power will help to deconstruct the legacy of narrative authority found in *SWUAV*, and will also expose the buried assumptions that link the articulation of (in)visibility to sex workers. Future implications for the court treatment of sex workers in light of these exposed power differentials will be discussed in Part Four.

Part Four

Merleau-Ponty's work entitled "The Visible and the Invisible[68]" lends a useful vocabulary to analyse the "politics of the flesh" that is exposed by the courts' unwillingness to strike down these provisions. His phenomenological approach is inspired by the neurobiological function of the "optic chiasm[69]" that creates the sensation of sight only after it "interweaves[70]" our binocular vision into unified and sensible vision.

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[68] Maurice Merleau-Ponty, supra note 3.
[69] Carlo BonuraLuce. "'The Visible and Invisible'" in Comparative Political Theory: epistemological challenges to contemporary theory and the work of Maurice Merleau-Ponty." Washington D.C: American Political Science Association Meeting., 2005.
[70] ibid.

To Merleau-Ponty, the optic chiasm is a valuable metaphor for how communication functions to enable us to see the other. Experience of the world therefore, is gained through communication, and perception involves "the visible of my landscape as well as the invisible of other landscapes 'interwoven' with my own[71]." His unfinished work (summarized by Mauro Carbone) explains that we are "seeing-visibles[72]" that exist in a space and time that are opened to "invisible" dimensions through the visions of others[73]. The dimensions of the invisible are therefore "compossible[74]" with the visible only because there is no such thing as an objective vision. Objectivity, therefore, is a sort of self-inflicted lie. The ethical implication of this (according to Merleau-Ponty) is that we ought to "keep space open for the compossible of the visible and the invisible[75]." He calls our vision "visibility[76]" in order to denote its incompleteness; our visibility is therefore widened by our openness to the simultaneous perspectives of others; the invisibility of our visibility (I have illustrated as (in)visibility).

The flesh is of particular interest to Merleau-Ponty. He believes that it is "the original bond uniting sensing and sensed[77]" that also connotes reversibility. He explains:

> ...He who sees cannot possess the visible unless he is possessed by it, unless he is of it...it is that the thickness of flesh between the seer and the thing is constitutive for the thing of its visibility as for the seer of his corporeity...[78]

This observation about the sameness of the flesh between the subject and object has been of great political interest to contemporary thinkers. Judith Butler and Geraldine Finn

[71] ibid.
[72] ibid.
[73] ibid.
[74] ibid.
[75] ibid.
[76] ibid.
[77] Richard A. Cohen. " Merleau-Ponty, The Flesh and Foucault." Philosophy Today. 28:4 (1984), at 331.
[78] ibid.

have criticized Merleau-Ponty's use of visibility largely for its lack of political awareness[79]. Finn points out that we are inescapably politically engaged with the bodies of others and that we require constant self reflection about our own political entanglement[80]. She also coins the term "politics of flesh" to illustrate the literal meaning of racism and sexism; a social ordering articulated as (in)visibility. The "politics of flesh" between the court and sex workers exposes the pervasive narrative of in(visibility) as a literal negation of the living of bodies of sex workers. This in mind, the Court seems to be either completely occluding the visibility of these bodies or worse; transforming their visibility to invisibility with violent remodelling[81]. The symbolism of the Court's handling of the bodies of sex workers is perhaps also suggestive of the social consumption and disposability of their flesh.

In a recent article entitled "'The Visible and Invisible' in Comparative Political Theory" Carlo BunuroLuce strives to apply this understanding to the political narratives of dominant institutions. He surmises that there are three main conclusions to be derived from Merleau-Ponty's phenomenological theory of visibility; 1) expand politics to include experience of politics itself, 2) rethink the subject-object relationship with

[79] Carlo BonuraLuce, supra note 66.
[80] Geraldine Finn, "The Politics of Contingency: The Contingency of Politics—On the Political Implications of Merleau-Ponty's Ontology of the Flesh" in Merleau-Ponty: Hermeneutics and Postmodernism, ed. Thomas W. Busch and Shaun Gallagher (New York: State University of New York Press, 1992), 176.
[81] Florentien Verhage's essay entitled "The Body as Measurant of All: Dis-covering the World" points out that "in the lecture notes for "The Concept of Nature, 1959–1960: Nature and Logos: The Human Body" 12:2 (2008) ...there the reciprocity of two bodies is no longer captured in terms of a "mutual sculpting," a "giving and a receiving"; instead "bit-ing" turns aggressive: "cannibalism: it is oral incorporation (make the other pass to the inside). Introjection. But to make him pass into my body is also to make a body pass into me which, like mine, bites. Retaliation. This action is thus passion, sadism is masochism." (N 280) In this image of mutual encroachment the intersubjective encounter has become par-ticularly fleshy and violent. I no longer sculpt her with gentleness and re-lease, I no longer hold back to see how she wishes to be sculpted. In re-turn, I am no longer welcomed and received by her. Instead I bite her and she bites back and this mutual biting now hurts. Perception turns violent because the perception of the one breaks through the other's flesh such that the other finds the one within herself. "

ontological elaboration, and 3) recognize that knowledge is reversible.

1) Expand politics to include the experience of politics itself.

Crucial to this understanding is "examining how certain sentiments or acts remain invisible to institutional representation[82]." This is a key strategy for disarming ontologically replicated and produced representations such as the dangerousness of the visibility of sex workers. Thought must grow and blossom out of experience rather than in advance of it. In Merleau-Ponty's words there must be a "divergence" between thought and experience that "forbids thought to project itself in advance in experience and invites it to recommence the description from closer up[83]." BunuroLuce translates this as the recognition that "actual sites of politics are not merely exemplary or secondary in this manner, but generative of theoretical relations…[84]" For example, the top-down approach to the representation of sex workers not only maintains their marginalization, it also dislocates the actual experience from the institutional representation of the problem. The blindness of this approach by Courts is especially destructive because judges are in acute positions of power over the lives of sex workers.

2. Rethink the subject-object relationship with ontological elaboration.

This conclusion is relevant to the representation of the (in)visibility of sex workers as opposed to the representation of the public. Courts have clearly excluded sex workers from the category of the public that it claims to protect. To maintain this exclusive visibility, Merleau-Ponty would elucidate that courts confound narratives of

[82] ibid.
[83] ibid.
[84] ibid.

representations of identity with the historical and political meanings found in precedent. In the last section I pointed out that the justification of the Court for the infringement of the freedom of expression hinges on an assumption about the protection of the public. Dismissal of the section 7 challenges were justified by a reliance on precedent, and the principles of fundamental justice were implicated in a very narrowly framed view. Merleau-Ponty would also be keen to add that the perspectives of the Court should not be considered in *opposition* to the perspectives of the sex workers, but rather, "that the perceived world is beneath or beyond this antinomy[85]."

3) Recognize that knowledge is reversible.

This conclusion is based on the metaphor of the optic chiasm. According to Merleau-Ponty, knowledge of the other assumes reversibility because it is derived from the experience of comparison between "incomplete and contingent" visions of the world. In other words, universal or objective language is indicative of limited visibility. This insight speaks volumes not only with respect to jurisprudential claims to objectivity but also to the importance of field work such as the Voices for Dignity report. BunuroLuce adds that this understanding politicizes an ethical dimension to the phenomenology of visibility that I believe should also occur in courts.

The final section will offer some conclusions about the (in)visibility of sex workers in *SWUAV.*

Conclusion

[85] ibid.

SWUAV exposes an ontological "politics of the flesh" that replicates and produces court representations of sex workers as (in)visible. The work of Merleau-Ponty has provided a vocabulary to help explain that the supposed objective reasoning of courts is actually politically infused with advance knowledge about the dangers of sex work. I have shown that this occlusion is maintained by courts through resistance to the reversibility of knowledge acquirable through evidence of lived experience. The result has been a continued jurisprudential complicity with unconstitutional laws. The Court's incomplete vision continues to endanger the lives of sex workers; the BCSC's finding that the plaintiffs in *SWUAV* are also (in)visible before the Court has further exasperated this marginalization. The BCCA currently has the power to reverse this decision and expand its visibility; it is time to call for change.

Because of the Pickton trial the public has been made increasingly aware of the violence against sex workers[86]. The Voices for Dignity report confirms that sex workers on the DTES live and work in conditions of extreme violence and danger; many describe incidents of sexual assault, violence, and even narrowly escaped murder[87]. The Pivot Legal Society website reminds us that Mahatma Gandhi once said that "the best test of a civilised society is the way in which it treats its most vulnerable and weakest members[88]." Recent cases before the superior courts of BC such as *PHS*[89] and *Victoria (City) v. Adams*[90] have encouragingly helped to expand Court visibility of marginalized groups. The BCCA heard the appeal of *SWUAV* this past January and has temporarily reserved judgment; the upcoming decision of Saunders J.A. will hopefully reflect the Court's

[86] Hainsworth, Jeremy, supra at note 60.
[87] Pivot Legal Society. "Sex Work" *Pivot.* 31 March 2010. Web. 01 April 2010.
[88] ibid.
[89] *PHS*, supra at note 64.
[90] Victoria (City) v. Adams. [2009] B.C.J. No. 815 (BCCA).

powerful responsibility to protect those who need it most.

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Appendix

210.(1) Every one who keeps a common bawdy-house is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

211. Every one who knowingly takes, transports, directs, or offers to take, transport or direct, any other person to a common bawdy-house is guilty of an offence punishable on summary conviction

212.(1) Every one who (a) procures, attempts to procure or solicits a person to have illicit sexual intercourse with another person, whether in or out of Canada, (b) inveigles or entices a person who is not prostitute to a common bawdy-house for the purpose of illicit sexual intercourse or prostitution, (c) knowingly conceals a person in a common bawdy-house, (d) procures or attempts to procure a person to become, whether in or out of Canada, a prostitute, (e) procures or attempts to procure a person to leave the usual place of abode of that person in Canada, if that place is not a common bawdy-house, with intent that the person may become an inmate or frequenter of a common bawdy-house, whether in or out of Canada, (f) on the arrival of a person in Canada, directs or causes that person to be directed or takes or causes that person to be taken, to a common bawdy-house, (h) for the purposes of gain, exercises control, direction or influence over the movements of a person in such manner as to show that he is aiding, abetting or compelling that person to engage in or carry on prostitution with any person or generally,(j) lives wholly or in part on the avails of prostitution of another person, is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years. (2) Every one who (a) is an inmate of a common bawdy-house, (b) is found, without lawful excuse, in a common bawdy-house, or (c) as owner, landlord, lessor, tenant, occupier, agent or otherwise having charge (3) Evidence that a person lives with or is habitually in the company of a prostitute or lives in a common bawdy-house is, in the absence of evidence to the contrary, proof that the person lives on the avails of prostitution, for the purposes of paragraph (1)(j) and subsections (2) and (2.1).

213.(1) Every person who in a public place or in any place open to public view (a) stops or attempts to stop any motor vehicle,(b) impedes the free flow of pedestrian or vehicular traffic or ingress to or egress from premises adjacent to that place, or (c) stops or attempts to stop any person or in any manner communicates or attempts to communicate with any person for the purpose of engaging in prostitution or of obtaining the sexual services of a prostitute is guilty of an offence punishable on summary conviction..