Book Review (forthcoming in *Canadian Journal of Women and the Law*)
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Angela Campbell, *Sister Wives, Surrogates and Sex Workers: Outlaws by Choice?* (Ashgate Publishing Limited, 2013)

At the hearing of *Bedford v. Canada*,[1] the case that resulted in the striking down of Canada's criminal laws on prostitution, an important exchange took place between counsel for the Attorney General of Canada and a Supreme Court justice. The government's main argument was that the criminalization of activities associated with prostitution does not engage constitutional protection because sex workers exercise *choice* when they engage in the sex trade. A constitutional violation cannot arise from such a voluntary situation, the government submitted. Sex workers did not need a constitutional remedy – all they needed was to choose differently. Justice Rothstein interjected from the bench, countering that some women "don't have choice" for reasons stemming from social background and their manner of entry into the sex trade. The government added nuance to its position in response, admitting that prostitution takes place on a spectrum and that some points on that spectrum represent "profoundly constrained" choice. The criminalization of prostitution was still justified, the government argued, so as to prevent sex workers from engaging in a harmful activity that was contrary to their best interests.

Choice talk is often at the core of state responses to women engaged in controversial work and activities, and it often appears in a form that neglects both the complexities of individual agency and the effects of repressive state responses. This is the central claim in Angela Campbell's very fine book, *Sister Wives, Surrogates and Sex Workers.* Campbell takes on a central, entrenched problem in both feminism and legal regulation: how to understand and respond to women living socially contested lifestyles. Feminist theory has long debated how to respect female agency while acknowledging the burdens that constrain choice.[2] Campbell analyzes that question in the specific contexts of polygamy, paid surrogacy and prostitution in each of Canada, the United Kingdom and Australia. As the book reveals, those who advocate criminalization in these areas are often concerned with how coercion and patriarchy force women into these practices. Voices favouring criminalization often argue that prohibition serves an important expressive function, though any realistic view accepts that full abolition is unlikely to follow from prohibition.

Campbell's contribution is twofold: she generates a more nuanced portrait of the factors that govern choice in these domains, and she reports concrete empirical data on the effects of specific models of criminalization. In many instances, state interventions officially aimed at protecting women from perceived failures of self-interest do more harm than good. Marginalization, to the extent it exists, is often deepened by penal regulation.

The book was published before the final appeal in *Bedford* was argued and decided, but it does a great deal to deepen our understanding of both the arguments advanced in the litigation and the

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[1] 2013 SCC 72.

[2] The crux of the problem is described by Kathryn Abrams in her depiction of the rise of dominance feminism in the late 1970s and 1980s. Prominent scholars like Andrea Dworkin, Catharine MacKinnon and Susan Brownmiller unveiled the unrecognized pervasiveness of sexualized domination across multiple domains in women's lives. A wave of popular and feminist responses pointed to how women make choices, resist coercion, and exercise agency in their own lives. See Kathryn Abrams, "Sex Wars Redux: Agency and Coercion in Feminist Legal Theory" *Columbia Law Review* 95(2) (1995) 304–376.

legislative response to the Court's decision. In sex work and beyond, Campbell shows how state approaches to socially contested practices often set up an "incoherent binary"[3] with respect to women's choices, and then proceed to legislate on the basis of that false portrait.

Victim or Agent

Campbell chronicles how women engaged in socially contested lifestyles are often constructed *either* as passive victims (in need of state protection) *or* as fully independent agents (worthy of state punishment). The result is legal regulation that fails to recognize and respond adequately to the messy lives of actual legal subjects. Campbell writes:

> Women are at once understood as weakened and victimized by the oppressive and sometimes violent forces that surround them, while also morally depraved and indifferent, and worthy of punishment. Capacity for choice is either denied, or potentially recriminatory.[4]

Exactly this conundrum explains the recent history of prostitution in Canada. During the courtroom exchange described above, and indeed during much of the *Bedford* hearing, sounds of discontent spread through the gallery where I was seated among sex workers and their allies. Sex workers knew, of course, that the specter of the 'choiceless' prostitute signaled the possibility of victory, because it undermined the central position of the government that protections in the *Charter of Rights and Freedoms* do not extend to the right to pursue income however one likes. If Justice Rothstein doubted that 'economic choice' was a satisfactory explanatory paradigm for participation in sex work, success was on the horizon. But many sex workers did not want to win that way. Exchanging one simplistic narrative (that sex work is a purely voluntary pursuit) for another (that prostitution is inherently coercive or always a desperate measure of last resort) was both a false move and a high-risk strategy.

Indeed, that risk has now come to pass in terms of the legislative response to the *Bedford* decision. The Court unanimously struck down three of the *Criminal Code* provisions relating to prostitution, emphasizing that the laws enhanced the risks of harm that sex workers face. The opinion did not, however, contain a rich or varied perspective as to the range of reasons that women (not to mention men and transgender people) might engage in the exchange of sex for money.[5] Rather, the decision emphasized the physical vulnerability of sex workers and insisted that state law cannot stand in the way of measures that would mitigate risk.[6] Approximately one year after the *Bedford* decision, Parliament passed the *Protection of Communities and Exploited Persons*

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[3] Campbell at 2.

[4] Campbell at 2.

[5] Notably, the trial judge in *Bedford* found that the evidence indicated that no one person is representative of all sex workers in Canada. That perception of diversity likely figured into her decision to strike down laws that construe sex workers as proper, culpable targets of criminal law and state punishment. For discussion, see Sonia Lawrence, "Expert-Tease: Advocacy, Ideology and Experience in *Bedford* and Bill C-36" 30:1 *Canadian Journal of Law and Society* 5 (2015).

[6] See *Bedford* at para. 86, discussing how at least some sex workers have made "no meaningful choice" to engage in prostitution: "Whether because of financial desperation, drug addictions, mental illness, or compulsion from pimps, they often have little choice but to sell their bodies for money." At para. 88, the Court notes that the claim seeks to strike legislative provisions that "aggravate the risk of disease, violence and death." At para. 89, the issue is presented as the role of the state in making a prostitute "more vulnerable to violence."

Act (*PCEPA*) in December 2014. The new Act cites "grave concerns" with the "exploitation that is inherent in prostitution" and the "risks of violence posed to those who engage in it." Activities associated with prostitution are criminalized once again, now under a narrative of saving those who are presumed coerced into the sex trade. The upshot is that the working lives of sex workers continue to be marked by police surveillance, underground economies, stigmatization, and unstable workspaces.

Campbell's depiction of the agent-victim binary helps to highlight how the legislative scheme that applied prior to *Bedford* treated women engaged in prostitution as worthy of punishment. Acts of public communication and keeping a "bawdy house" were considered a public nuisance, and sex workers were potential targets of criminal law and could be investigated, prosecuted and imprisoned. In the post-*Bedford* era, the new legislation marks a shift to the opposite pole of the binary: the law is now premised on a view that prostitutes are victims who lack capacity and agency, picking up on the thread of the *Bedford* opinion that emphasizes their vulnerability. Under both legislative paradigms, the consequences of such flat and monolithic representations are real and practically identical, as sex workers find their working lives caught in the criminal law.

These unstable binaries lead to policy choices and legal rules that produce specific winners and losers. As Campbell discusses, if the constraints on women's options are hidden from sight, then the state can ascribe responsibility to them for what should be viewed legally as morally involuntary outcomes. The best example of this comes from the time when women could not access self-defence claims that recognized the realities of domestic violence.[7] On the inverse side, as the *PCEPA* example embodies, assigning women an uncomplicated victimhood can lead to state interventions that increase dangers for sex workers. These insights flow from Campbell's careful theoretical structure and research design, which I turn to now.

Feminist Theory and Legal Pluralism

The heart of the book and its original contribution is connected to Campbell's two-pronged remedial methodology. In order to generate a more nuanced and accurate portrait of women's choices made in what she calls "morally fraught"[8] contexts, Campbell grounds her work in, first, the methodologies of feminist legal theory and, second, critical legal pluralist approaches. Under the first approach, Campbell builds upon feminist scholarship, which has done so much to insist that social and legal debates should draw from the experiential knowledge of those who are the actual targets of legal regulation.[9] In asking what kind of evidence should inform the juridical treatment of women's choices, Campbell points to and utilizes empirical, qualitative, narrative-based research.

The importance of Campbell's approach is underscored if we consider how the legal system can deny the weight and reliability of the lived experiences of legal subjects. Here again the *Bedford* litigation is illustrative. A striking part of the majority decision at the Ontario Court of Appeal criticized the trial judge for relying on the testimony of sex workers and their explanations of how the criminal law constrained their ability to work safely when outdoors. Witnesses described how they felt rushed in their negotiations with potential customers and would quickly get into

[7] Campbell at 15–17.
[8] Campbell at 5.
[9] Campbell at 44–47.

the customers' cars so as to avoid police detection. They explained how the criminal law caused them to neglect safety-enhancing techniques like a lengthy conversation with a client or taking time to review printed circulars about violent clients. The trial judge made no mention that these witnesses lacked credibility in any way. Moreover, the evidence was not challenged in cross-examination and nothing on the record contradicted these accounts. And yet, the majority of the appellate court said that the trial judge accorded too much weight to the evidence of sex workers about their outdoor safety strategies. As a result, the majority of the Ontario Court of Appeal decided to overturn the trial judge in order to uphold the criminal provision that affected street-based sex workers.

The majority characterized sex worker accounts as "anecdotal" and held that the trial judge erred when she relied on this evidence along with "her own common sense" to conclude that screening customers enhances the safety of street prostitutes.[10] The Supreme Court of Canada made clear that this entire analysis was in error.[11] But it remains noteworthy that a majority of the Ontario Court of Appeal felt inclined to dismiss the value of lay evidence on a topic central to the appeal. Individual lay testimony is, by its nature, always "anecdotal"; these jurists simply had doubts about uncontradicted evidence that emanated from sex workers about their everyday experience. Campbell's research suggests that the issue may be systemic: work done by many philosophers, feminists, and policymakers alike share a bad habit of neglecting the evidence offered by women engaged in practices being analyzed and regulated.

Campbell also makes use of critical legal pluralism as a means to explore the ways that varied legal orders, both state-based and non-state-based, influence human behaviours and decisions.[12] Campbell traces how state law co-exists and collides with non-state rules and expectations. For example, women asked to explain their desire to participate in polygamous marriage often cite religious norms, solidarity among sister wives, and greater financial security.[13] Those performing surrogacy services cite social and psychological benefits in connection with both pregnancy and a sense of community contribution, along with commitment to a traditional idea of genetic parenthood.[14] Neglecting the multiple non-state norms that govern women's choices is a mode of legal formalism that can obscure relevant sites of power for women engaged in facially controversial practices. In other words, women may opt for experiences and lifestyles for reasons that legislators and theorists fail to see. Plus, legal norms are only one source of influence in the lives of women. In the case of sex workers, who rely on a wide range of non-state norms and safety strategies to govern their working lives, criminal law has actively stood in the way of harm-reducing systems that sex workers have developed and wish to deploy without state interference.[15]

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[10] *Canada (Attorney General) v. Bedford*, 2012 ONCA 186 at para. 311.

[11] *Bedford* at para. 154: "First, the majority of the Court of Appeal erroneously substituted its assessment of the evidence for that of the application judge. It found that the application judge's conclusion that face-to-face communication is essential to enhancing prostitutes' safety was based only on "anecdotal evidence . . . informed by her own common sense" (para. 311). This was linked to its error, discussed above, in according too little deference to the application judge on findings of social and legislative facts. MacPherson J.A. for the minority, correctly countered that the evidence on this point came from both prostitutes' own accounts and from expert assessments, and provided a firm basis for the application judge's conclusion (paras. 348-50)."

[12] Campbell at 6–7.

[13] Campbell at 53–56.

[14] Campbell at 100–101.

[15] See, e.g, research indicating that work environment and social cohesion among sex workers are related to improved condom use, pointing to the critical need for new institutional arrangements to support safer sex

Law in Action

As I have described, Campbell calls for the voices of legal subjects to generate the metric by which theoretical and legislative projects are advanced and critiqued. Remarkably, this is not the approach that currently prevails, whether in academic work or the legal system. Fields like political philosophy, for example, emphasize autonomy and freedom but tend not to engage with either experiential accounts or fine-grained analysis of specific settings to see how these principles might be realized or frustrated. For that reason, Campbell argues, the field "does not yield normative or precise insight into pertinent legal rules" useful for assessing and regulating controversial choices by women.[16] As another remedial method, Campbell focuses on the actual content and workings of state law: on how state law can "foster, facilitate or complicate difficult choices."[17]

To study the law in action, Campbell brings attention close to the ground and to the specifics of legislative design. By pairing a detailed examination of state law in each of three jurisdictions with the experiential accounts of women engaged in these practices, Campbell's book brims with insights into the risk of backlash and unintended consequences that can follow when a crude choice/coercion binary underpins legislation. It turns out that when we legislate on the basis of under-informed stereotypes – when theoretical and political views of women's behavior are abstract, ideological or empirically unfounded – then the regulatory outcomes can fail in many respects to fulfill the law's stated goals. Campbell argues that crude versions of 'choice talk' fail to perceive the complex reality of how women draw meaning, ascribe value and navigate risk even as they engage in practices that may not align with self-interest in an obvious way. Criminal law in particular is a mode of state response that can enhance levels of disempowerment, as women struggle to manage in both a socially ambiguous and now legally prohibited field.

The classic example of negative consequences to legal responses designed to protect women is the history of mandatory arrest and protection orders for battered women. These measures had good intentions and were a welcome relief from a long history of police refusal to intervene in the "private" domestic sphere.[18] Over time, mandatory initiatives backfired against some of the women they were meant to assist, because they neglected the social, economic and familial context of women who experienced "de facto divorce" from male partners under the new policies. [19] Significant costs were imposed on women who lost access to the prospect of financial support and fatherly contact for their children.

Campbell's research reveals an analogous point about the surrogacy context. In each of Canada, the United Kingdom and Australia, there is a legal distinction drawn between gratuitous surrogacy, which is allowed, and paid surrogacy, which is prohibited. Premised on concerns

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workplaces: Duff P, Dobrer S, Montaner J, Chettiar J, Shannon K, Shoveller J, Ogilvie G "The relationship between social, policy and physical venue features and social cohesion on condom use for pregnancy prevention among sex workers: a safer indoor work environment scale" (2015) *J Epidemiol Community Health* Jul:69(7) 666-72.

[16] Campbell at 39.

[17] Campbell at 41.

[18] For discussion see, e.g., Elizabeth M. Schneider, "The Violence of Privacy" 23 *Connecticut Law Review* 973 (1991); Stephen J. Schulhofer, "The Feminist Challenge in Criminal Law" 143 *University Pennsylvania Law Review* 2151 (1998).

[19] Jeanie Suk, "When Criminal Law Comes Home" *Yale Law Journal*, 116(1) (2006) 2–70 (focusing on protection orders that exclude a person accused of domestic violence from the home).

about exploitation, these regimes fail to address the potentially deeper forms of exploitation that can occur in the gratuitous, typically familial setting. The prohibition on payment has the effect of creating ambiguity in contractual relationships and, further, punting the issue to those foreign settings where regulation is non-existent, thereby ensuring that both surrogates and intending parents are more vulnerable.[20] When the law is exclusively motivated by an aversion to commercialization – just as when it focuses exclusively on the need to punish domestic abusers – it may fail to perceive and protect the full range of vulnerabilities at stake.

The Missing Counterfactual

The central shortcoming of this study arises from a fact beyond Campbell's control. The final sex work chapter is the richest illustration of Campbell's binary, where legal narratives have vacillated between the sex worker as depraved social nuisance in need of correction or "prey of lewd men" in need of state protection.[21] In this chapter, as in the other case studies, Campbell turns first to empirical evidence on the range of reasons that women engage in sex work, placing that material alongside the legal narratives that underpin and motivate particular state responses and the consequences of those responses. We learn, for example, that some sex workers cite substance dependence as the main factor motivating their work. We see how state responses often construct the sex worker as limited in her ability to withstand pressures operating to her detriment.

The problem is that much of the data is taken from a context where sex work has long been at least partially criminalized and where, at least partly for that reason, sex workers are exposed to high levels of social exclusion and the dysfunctions of an underground existence. Campbell's evidence is drawn from environments where sex workers have no access to employment protection regimes and where they must cope with adversarial relationships with police due to the prohibition of their work. Criminalization of both sex workers and third parties ensures a problematic client base and dubious options for sex workers to arrange personal security. Under prohibition, sex workers must navigate the stigma of criminal law, police surveillance, the risk and reality of prosecution and imprisonment, the loss of child custody, and the alienation of friends and family. When Campbell describes the difficulties that sex workers face in ensuring things like condom use, along with the violence that they often experience, the larger context of criminalization looms as highly determinative of these destructive experiences. Drug use, for example, may occur in order to endure the working conditions of criminalized labour.[22]

In this light, it is not surprising that Campbell's research uncovered relatively few accounts of sex workers who experience sexual curiosity and enjoyment in their work. It may be that these accounts are simply not prevalent, but it may also be that those who find value in participation in the sex trade have found effective ways to navigate the criminal law, and for that reason are invisible to researchers searching for empirical accounts. In addition, one wonders what sex worker accounts would elicit absent centuries of repression and marginalization imposed through state laws that presume their status as both "fallen women" and shameful threats to

[20] Campbell at 138–141.
[21] Campbell at 143.
[22] Campbell cites research that suggests drugs might be a "coping mechanism" for sex work's stresses (Boyle et al. *The Sex Industry: A Survey of Sex Workers in Queensland, Australia* (Brookfield, VT: Ashgate Publishing, 1997) at 100, which will be driven at least partly by criminalization.

orthodox notions of sexuality and family.[23] The empirical portrait of sex work, and the prospect that sex workers could find meaning and even pleasure in their experiences – along with reduced physical risks – is inevitably shaped by the vulnerability and violence that flows from life in the shadows.

Criminal law plays far less of a role in Campbell's other topics. She reports that only two convictions have been entered under Canada's polygamy law: both were against Aboriginal men at the turn of the twentieth century.[24] Polygamists' wives may experience moments of ostracization from mainstream society, and criminalization may serve to insulate their domestic sphere from various forms of state protection. But the actual machinery of criminal justice – investigation, detention, prosecution and punishment – is not part of their daily lives. The main effect of legal resistance to paid surrogacy is to generate doubt about the formal legality of certain surrogacy arrangements, but the surrogate herself is not the target of criminal scorn and police investigation. Across these legal contexts, but particularly in the sex work case, there is a missing counterfactual: evidence drawn from a society where sex work is not subject to repressive, stigmatizing laws and the values that those laws endorse and sustain. Absent the effects of criminalization, we may be less likely and less able to locate desperation in the mind of anyone willing to navigate its harms.

To close by returning to the post-*Bedford* Canadian context, there is little doubt that the new *PCEPA* legislation is vulnerable to legal challenge. The *Bedford* court upheld exhaustive findings of fact that indoor work was a "basic safety precaution" for sex workers[25] and that street based sex work is the most vulnerable form of prostitution.[26] Notwithstanding these findings, which will be binding in an imminent legal challenge to *PCEPA*, the new bill continues to make safer, more secure indoor work difficult to conduct.[27] How does the Government justify this legislative response to the *Bedford* decision? By seizing on the discourse of victimhood – the seeds of which can be heard in Justice Rothstein's question – and proclaiming a new legislative purpose of ending the exploitation that prostitution invariably entails. While every criminal law provision in history has pursued a goal of ending prostitution, the savior fantasies at the heart of the new law appear undeterred by a record of chronic failure and distressing unintended consequences, not to mention the reasoning of the Supreme Court.

As Jennifer Nedelsky has pointed out, our legal tradition is influenced by liberal political theory and its view of autonomy as a "static human characteristic to be posited as a presupposition."[28] But autonomy is not a fixed, static characteristic. It is, rather, a capacity that sits on a spectrum and changes over time; "it can flourish or it can become moribund."[29] Relatedly, state responses must do more than seek to outlaw choices that appear self-victimizing. We must investigate the deeper facts of the situation, as Campbell's book both instructs and models, and we must design legal regimes in ways that are likely to enhance autonomy. We must also develop more mature

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[23] Campbell at 172–177.
[24] Campbell at 65.
[25] *Bedford* at para. 135.
[26] *Bedford* at para. 18.
[27] By, *inter alia*, criminalizing the purchase of sex and thereby ensuring that clients or 'johns' will refuse to attend regular, secure indoor spaces.
[28] Jennifer Nedelsky, "Reconceiving Autonomy: Sources, Thought and Possibilities" *Yale Journal of Law and Feminism* 1 (Spring 1989) 7–36.
[29] Jennifer Nedelsky "Law, Boundaries and the Bounded Self" 30 *Representations* 162–189 (1990) at 168.

views of criminal law. Criminal prohibition is not a straightforward vehicle for the expression and delivery of moral preferences or uncomplicated visions of a good life. Rather, criminal law is a coercive machinery of the state with a primary mission of social control and a range of additional, often unintended, consequences. Efforts to meaningfully enhance women's lives will have to come from some other place.