# PERFECTLY LEGAL, BUT STILL BAD: LESSONS FOR SEX WORK FROM THE DECRIMINALIZATION OF ABORTION

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**Abstract**

Sex workers' rights advocates and prostitution abolitionists have argued for a causal link between decriminalization and destigmatization while criminal law theory and jurisprudence similarly suggest a close link between criminalization and stigma. Based on social stigma theory and an observational study of abortion laws in the Maritime provinces, this paper argues that this link is overdrawn. Following the complete decriminalization of abortion in 1988, destigmatization did not follow decriminalization. Instead, abortion stigma continued as all three Maritime provinces adopted restrictive regulatory frameworks. Social stigma theory supports the idea that criminal law plays a labelling function for stigma, but contends that rather than creating stigma, it tends to be responsive to pre-existing stereotypes. Experience with abortion law reform supports the view that public stigma is not very sensitive to changes in structural stigma such as criminal legislation and that the interaction between criminal law and social stigma is complex.



## Introduction

Following the Supreme Court of Canada decision in *Bedford*,[1] advocates of both abolition and decriminalization anticipated a legislative outcome that would lessen the stigma of sex work. Abolitionists feared that destigmatization, often referred to as 'normalization', would endanger the project of women's equality and render women's victimization in the context of prostitution invisible.[2] Decriminalization

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[1] *Canada (AG) v Bedford*, 2013 SCC 72, [2013] 3 SCR 1101.

advocates predicted that destigmatization would lead to improved working conditions and occupational health protections for sex workers.[3] Both sides of the debate have tended to assume that decriminalization would necessarily be attended by destigmatization.[4]

This view is contested in the social science literature[5] but is consistent with the criminal law jurisprudence of the Supreme Court of Canada.[6] The first part of this paper summarizes the social science literature on stigma production. Social science theories of stigma generally accept that stigma is produced through the interactions of the identification of difference, stereotyping, labelling and discrimination. The application of stigma tends to be spontaneous and attaches to diffuse targets. It is not typically susceptible to reflection or direct control. The second part considers the doctrinal treatment of stigma by the Supreme Court. The Court has suggested that there is a close relationship between criminal law and stigma.[7] Criminal law is understood as stigmatizing and the production of stigma is controlled by the criminal justice system. This close relationship helps to delineate

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[2] Suzanne Jay, *Submission to the Standing Senate Committee on Legal and Constitutional Affairs regarding Bill C-36 on behalf of the Asian Women Coalition* (1 September 2014), online: <https://sencanada.ca/content/sen/committee/412/lcjc/briefs/c-36/c-36_brief_asianwomencoalitionendingprostitution(suzannejay)_e.pdf>; Educating Exploited Voices, Sextrade 101, London Abused Women's Centre, *The Standing Senate Committee on Legal and Constitutional Affairs Regarding Bill C-36 Protection of Communities and Exploited Persons Act* (29 June 2014), online: <lawc.on.ca/wp-content/uploads/2014/07/Brief-Submitted-to-the-Standing-Committee-on-Justice-Committee-on-Justice-and-Human-Rights-by-EVE-Exploited-Voices-Now-Educating-London-Abused-Women%E2%80%99s-Centre-and-Sextrade-1011.pdf>.

[3] Cactus Montreal, *Brief to the Standing Senate Committee on Legal and Constitutional Affairs regarding its study of Bill C-36, the Protection of Communities and Exploited Persons Act* (5 September 2014), online: <https://sencanada.ca/content/sen/committee/412/lcjc/briefs/c-36/c-36_brief_astt_e.pdf>; Big Susie's Sex Worker Advocacy Organization, *Brief to the Standing Committee on Justice and Human Rights* (30 June 2014), online: <https://sencanada.ca/content/sen/Committee/412/lcjc/Briefs/C-36/SM_C-36_brief_Big_Susies_E.pdf>.

[4] Parliament received some documentation to the contrary. See Department of Justice Canada, "Technical Paper: Bill C-36, An Act to amend the Criminal Code in response to the Supreme Court of Canada decision in Attorney General of Canada v. Bedford and to make consequential amendments to other Acts (*Protection of Communities and Exploited Persons Act*) at note 40.

[5] Bos et al argue that public stigma lies at the root of all forms of stigma including self-stigma, stigma by association and structural stigma and urge more research be conducted to evaluate whether efforts to decrease structural stigma, including changing discriminatory laws, operate to lower public stigma. This chapter is a contribution to this line of inquiry. Arjan ER Bos et al, "Stigma: Advances in Theory and Research" (2013) 35:1 Basic & Applied Social Psychology 1 at 6.

[6] The jurisprudence on this point is discussed in Part 2 of this paper. Important cases include *R v Pierce Fisheries Ltd* (1970), [1971] SCR 5, 3 NSR (2d) 1 [*Pierce Fisheries*]; *R v Sault Ste Marie*, [1978] 2 SCR 1299, 85 DLR (3d) 161 [*Sault Ste Marie*]; *R v Vaillancourt*, [1987] 2 SCR 636, 68 Nfld & PEIR 281 [*Vaillancourt*]; *R v Chaulk*, [1990] 3 SCR 1303, 69 Man R (2d) 161 [*Chaulk*]; *R v Swain*, [1991] 1 SCR 933, 4 OR (3d) 383 [*Swain*]; *R v DeSousa*, [1992] 2 SCR 944, 95 DLR (4th) 595 [*DeSousa*]; *R v Mabior*, [2012] 2 SCR 584, [2012] 2 SCR 584 [*Mabior*].

[7] *Ibid*.

the scope of criminal law.[8] Federal laws seeking to stigmatize certain behaviours as immoral are more likely to be found to be valid exercises of the criminal law power, though this is not an absolute requirement.[9] Conversely, provincial laws that stigmatize conduct by labeling it as immoral are likely to be found *ultra vires* intrusions into the federal sphere.[10]

The relationship of criminal law to stigma also attracts interpretive presumptions and even *Charter*[11] attention. The stigmatizing effect of criminal law helps to explain the interpretive preference for subjective fault[12] and the *Charter* may even require full *mens rea* as a constitutional matter.[13]

The validity of the sociological and legal models of stigma production is then tested in the context of abortion decriminalization. Based on a case study of abortion law in the Maritime provinces, I argue that criminal law and stigma are less directly connected than either decriminalization advocacy or the Supreme Court's doctrine suggests. Drawing on sociological insights on stigma production, I show that while criminal law can certainly play a role in stigmatizing conduct, stigmatization is not limited to criminalized conduct nor is it the case that (non-criminal) regulatory law necessarily avoids stigmatization.

Conversely, decriminalization may be attended by destigmatization, but not necessarily so. For example, the international experience with the decriminalization of sex work has been mixed.[14] Destigmatization may follow decriminalization as was arguably the case in the context of homosexuality,[15] or precede it, as in the case of

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[8] David W Ball, "The Civil Case at the Heart of Criminal Procedure: In re Winship, Stigma, and the Civil-Criminal Distinction" (2010) 38:2 Am J Crim L 117 at 137.

[9] *Reference re Firearms Act (Can)*, 2000 SCC 31 at para 54, [2000] 1 SCR 783. For the connection between morality and stigma see: *R v Creighton*, [1993] 3 SCR 3 at 46 (McLachlin J (as she then was) for the majority and at 19 per Lamer CJ, dissenting), 105 DLR (4th) 632.

[10] *R v Morgentaler*, [1993] 3 SCR 463, 125 NSR (2d) 81 [*Morgentaler* 1993]

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

[12] *R v H(AD)*, 2013 SCC 28, [2013] 2 SCR 269.

[13] *Vaillancourt*, *supra* note 6; *R v Martineau*, [1990] 2 SCR 633, 76 Alta LR (2d); *DeSousa*, *supra* note 6.

[14] Chris Bruckert & Stacey Hannem, "Rethinking the Prostitution Debates: Transcending Structural Stigma in Systemic Responses to Sex Work" (2013) 28:1 CJLS 43, commenting on the continued stigmatization of sex work in New Zealand; Germany, Federal Ministry for Family Affairs, Senior Citizens, Women and Youth, *Report by the Federal Government on the Impact of the Act Regulating the Legal Situation of Prostitutes (Prostitution Act)*, (Berlin: Federal Ministry for Family Affairs, Senior Citizens, Women and Youth, 2007) acknowledging the limited impacts of the *Prostitution Act* on the perceived immorality of sex work in Germany. This report is noteworthy because it shows the very limited overall effects, positive or negative, of the German *Prostitution Act* in any dimension including law enforcement, public perceptions or working conditions. Similarly, in New Zealand decriminalization did not effect normalization. Gillian Abel & Lisa Fitzgerald, "Decriminalisation and stigma: Taking the crime out of sex work. New Zealand sex workers' fight for decriminalization" in Gillian Abel et al, eds, *Taking the crime out of sex work* (Bristol UK: Policy Press, 2010) 239 at 241.

marijuana use.[16] It tends, in any event, to be incomplete.[17] Social stigma theory can assist us in predicting when decriminalization will have destigmatizing effects and when stigma is likely to persist.

In the fourth and final part of the paper, the implications of abortion decriminalization for future decriminalization efforts in the context of sex work are addressed. This is of broader interest in areas of the law targeting conduct that is tied up in public morality discourses, including laws that implicate the sexual and bodily autonomy of women and sexual minorities. It may also require us to rethink the boundaries between criminal and regulatory law. In the next part, the social science literature on the production and maintenance of stigma is discussed.

## Social Stigma

It has been over 50 years since Goffman's seminal monograph conceptualized stigma as a deeply discrediting attribute that tainted or discounted someone's identity.[18] Subsequent literature has continued to support a central role of stigma in the construction of social identity, but has drawn increased attention to the social (rather than individual) location of stigma,[19] emphasized its close relationship to existing power imbalances[20] and refined our understanding of the process of stigma production. Stigma theory has widely accepted two fundamental components:

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[15] Mariana Valverde, "A New Entity in the History of Sexuality: The Respectable Same-Sex Couple" (2006) 32:1 Feminist Studies 155. Note that destigmatization was attended by a change in label. Valverde rightly points out that the respectable same-sex couple is not merely two homosexuals added together (at 156).

[16] Rebecca J Haines-Saah et al, "The privileged normalization of marijuana use – an analysis of Canadian newspaper reporting, 1997–2007" (2014) 24:1 Critical Public Health 47. For the usefulness of media studies as a measure for systemic stigma see Patrick W Corrigan et al, "Newspaper Stories as Measures of Structural Stigma" (2005) 56:5 Psychiatric Services 551.

[17] Haines-Saah et al, *supra* note 16 at 53–54. See also Brenda Cossman, "Lesbians, gay men, and the Canadian Charter of Rights and Freedoms" (2002) 40 Osgoode Hall LJ 223 at 248.

[18] Erving Goffman, *Stigma: Notes on the Management of Spoiled Identity* (London: Penguin, 1990). For a useful overview of the recent theoretical literature on stigma see Bos et al, *supra* note 5.

[19] Gillian Abel & Lisa Fitzgerald, "Decriminalisation and stigma" in Abel et al, eds, *supra* note 14; Catherine Kohler Riessman, "Stigma and Everyday Resistance Practices: Childless Women in South India" (2000) 14:1 Gender & Society 111–35; Richard Parker & Peter Aggleton, "HIV and AIDS-related stigma and discrimination: a conceptual framework and implications for action" (2003) 57:1 Social Science & Medicine 13; Bruce G Link & Jo C Phelan, "Conceptualizing Stigma" (2001) 27 Annual Rev of Sociology 363; Graham Scambler, "Sex Work Stigma: Opportunist Migrants in London" (2007) 41:6 Sociology 1079; Graham Scambler & Frederique Paoli, "Health work, female sex workers and HIV/AIDS: Global and local dimensions of stigma and deviance as barriers to effective interventions" (2008) 66:8 Social Science & Medicine 1848.

[20] Andrea Krüsi et al, "'They won't change it back in their heads that we're trash': the intersection of sex work-related stigma and evolving policing strategies" (2016) 38:7 Sociology of Health & Illness 1137.

recognition of difference and devaluation.[21] In a highly influential paper, Link and Phelan proposed an elaborated definition that understands stigma as a process of social exclusion.[22] They argue that stigma arises in four distinct steps:

1) A labeling of human difference;
2) A dominant cultural beliefs links a labeled person to an undesirable characteristic (negative stereotype);
3) The labeled person is placed into a distinct category marking them as other; and
4) The labeled person experiences a loss of status and discrimination leading to unequal outcome.[23]

For Link and Phelan, all four steps are contingent on access to (differential) social, economic and political power.[24] They critique an individualized notion of stigma and emphasize its essentially social nature. Link and Phelan review a body of social psychology literature that strongly suggests that these beliefs are applied in preconscious and near automatic ways.[25]

This model of stigma production is helpful in the contexts under consideration, abortion and sex work. In the context of abortion, Kumar et al have proposed a definition of abortion stigma

> … as a negative attribute ascribed to women who seek to terminate a pregnancy that marks them, internally or externally, as inferior to ideals of womanhood. While definitions of womanhood vary depending on local cultures and histories, a woman who seeks an abortion is inadvertently challenging widely-held assumptions about the 'essential nature' of women.[26]

A woman who terminates a pregnancy is the cultural target of stigma because she embodies opposition to deeply held cultural beliefs about female sexuality, motherhood and the nurturing nature of women:

> We hypothesise that there are at least three archetypal constructs of the 'feminine' that can be transgressed through an abortion experience: female sexuality solely for procreation, the inevitability of motherhood and instinctual nurturance of the vulnerable.[27]

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[21] John F Dovidio, Brenda Major & Jennifer Crocker, "Stigma: Introduction and overview" in Todd F Heatherton et al, eds, *The Social Psychology of Stigma* (New York: Guilford Press) 1.

[22] Link & Phelan, *supra* note 19.

[23] *Ibid* at 367.

[24] *Ibid*.

[25] *Ibid* at 369.

[26] Anuradha Kumar, Leila Hessini & Ellen MH Mitchell "Conceptualising abortion stigma" (2009) 11:6 Culture, Health & Sexuality 625 at 628.

[27] *Ibid*.

Similarly, sex workers are cultural targets of stigma because they transgress deeply held beliefs about female sexuality, the connection between love and sex, and heterosexual monogamy as the proper (and private) location of sexual relations.[28]

This is not to suggest that the criminalization of abortion is indistinct from the criminalization of sex work. The criminalization of sex work has been justified on the basis of public nuisance, and sometimes the protection of children and/or public morality. By contrast, the criminalization of abortion has its origins in a desire to expand the criminal law generally, in the protection of the professional monopoly of doctors, and religiously motivated concerns about the soul of the unborn child, particularly at later stages of the pregnancy.[29] Interestingly, more recently both abortion restrictions and sex work have been the subject of a women protective discourse.[30] The justification for treating abortion and sex work as analogous cases is not, then, that they are closely related offences. Rather, the comparison is justified because in both cases, the law has sought to control, through criminalization, the sexual conduct and bodily autonomy of women based on similar stereotypical beliefs about female sexuality, and the role of women in families and society. One important implication of this focus on the bodies and lives of women is that in both contexts, non-female bodies and identities have often been ignored.[31]

## Criminal Law and Stigma

What would happen if we applied the sociological insight into the production of stigma to criminal law? I will argue that there are several legally important implications of the sociological perspective. In this next part, I will discuss three propositions: Firstly, criminal law as much responds to preexisting stigmatizing contexts as it acts as a primary producer of stigma. Secondly, criminal law operates to both support and constrain social stigma. Thirdly, there likely exists a complex set of interactions between social stigma and criminal law stigma.[32]

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[28] Helga Kristin Hallgrimsdottir, Rachel Phillips & Cecilia Benoit, "Fallen Women and Rescued Girls: Social Stigma and Media Narratives of the Sex Industry in Victoria, BC, from 1980 to 2005" (2006) 43:3 Can Rev Sociology 265 at 270,

[29] Constance B Backhouse, "Involuntary Motherhood: Abortion, Birth Control and the Law in Nineteenth Century Canada" (1983) 3 Windsor Yearbook of Access to Justice 61 at 66, 71.

[30] Jula Hughes, Vanessa MacDonnell & Karen Pearlston, "Equality & Incrementalism: The Role of Common Law Reasoning in Constitutional Rights Cases after Bedford (ONCA)" (2013) 44:3 Ottawa L Rev 467; Jay Levy & Pye Jakobsson, "Abolitionist feminism as patriarchal control: Swedish understandings of prostitution and trafficking" (2013) 37:2 Dialectical Anthropology 333 at 337.

[31] Trans men have long been absent in abortion discourse, though this may be changing. Michelle Goldberg, "What is a Woman?", *The New Yorker* (4 August 2014) 24 at 28, online: <newyorker.com/magazine/2014/08/04/woman-2>. Trans folk and men are marginal to sex work discourse. See Angela Campbell, *Sister Wives, Surrogates and Sex Workers: Outlaws by Choice?* (London: Routledge, 2016) at 172.

Applying Link and Phelan's process theory of stigma production, the creation of a criminal offence could be understood as generating a label that can be attributed to individuals. Criminalizing labels are applied to people who are thought to be deviant.[33] A person committing an intentional killing is labeled 'murderer', a person committing rape is labeled 'rapist'. These examples implicitly demonstrate that not all criminal offences effectively perform this labeling function. Despite decades of rape law reform, there is no stigmatizing label of 'sexual assailant'. Other examples might include negligence-based offences that would require labels like 'negligent gun-storer'. Decriminalization advocates often seek to detach the previously criminalized conduct from its criminal label. 'Abortionists' seek to become abortion providers,[34] 'prostitutes' become sex workers.[35] Some newly minted stigmatizing labels stick (drunk driver), others do not (street racer).[36]

This is consistent with social stigma theory that in order to produce stigma, the label itself must be associated with negative group characteristics. The offence-creating language of a statute does not produce these group characteristics. Instead, they draw on deeply embedded cultural beliefs. This is borne out by the high variability of stigma associated with offences compared to their seriousness and is true whether we consider maximum or typical punishment or degree or magnitude of harm caused.

For example, environmental crimes, cartel and occupational offences may carry significant punishments and can cause widespread physical or economic harms, but perpetrators are not associated with negative stereotypes and the offences do not carry significant social stigma.[37] By contrast, possession of child pornography may

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[32] Link et al note that there are two distinct sociological literatures on labeling. The first addresses the question who gets labeled. The second considers the effect of labeling on individuals. See Bruce G Link et al, "The Social Rejection of Former Mental Patients: Understanding Why Labels Matter" (1987) 92:6 American Journal of Sociology 1461 at 1462. There is a body of criminological research flowing from this latter literature that inquires into possible criminogenic effects of labeling referred to as "labeling theory". I am not concerned with this literature here. Instead, I consider the implications of the first body of literature. Link et al describe it as involving "questions about whether individuals with varying status characteristics (male vs. female, black vs. white, etc.) are exposed to different societal reactions and thus to very different labeling experience."

[33] In its Greek root, the meaning of stigma was a tattoo, a mark used for criminals, slaves and soldiers to declare them publicly to be under the direction or property of others. In Christian legends, the stigmata were the wounds inflicted on the crucified Christ and replicated in ardent followers as spontaneous bleedings of the hands and feet. Stigma has also been identified with the mark of Cain in the Book of Genesis. See Schlomo Shoham, *The Mark of Cain: The Stigma Theory of Crime and Social Deviation* (Jerusalem: Israel Universities Press, 1970).

[34] Carole Joffe, *Doctors of Conscience: The struggle to provide abortion before and after Roe v. Wade* (Boston: Beacon Press, 1995) at 158.

[35] Noah D Zatz, "Sex Work/Sex Act: Law, Labor, and Desire in Constructions of Prostitution" (1997) 22:2 Signs: J Women in Culture & Society 277 at 300.

[36] Fraser McGuire et al note that drunk driving carries extremely high social stigma in Canada. "Driving under the Influence of Cannabis or Alcohol in a Cohort of High-frequency Cannabis Users: Prevalence and Reflections on Current Interventions" (2011) 53:2 Can J Criminology and Criminal Justice 247 at 252; Andrew Leigh, "Youth and street racing" (1995) 7:3 Current Issues Criminal Justice 388 at 390.

cause only remote harms and may attract only modest punishment, but is associated with extremely negative beliefs and highly stigmatized.[38]

Therefore, the degree of stigma does not merely depend on the severity or label of a criminal offence, but on the nature of the group characteristics with which the label is associated. Criminal offences such as loitering or prostitution are associated with marginalized groups like low-income people, homeless people or people with drug addictions. These offences tend to appear more severe as a result of social stigma. Negative stereotypes about gender, race and other marginalizations operate to amplify or even exaggerate criminal law stigma by bringing social stigma into play.

Kumar et al consider the example of abortion stigma and its relationship to social constructs and negative stereotypes. They note:

> The power dynamics that underline abortion are part of an ideological struggle about the meaning of family, motherhood and sexuality (Petchesky 1990). … Sexual activity, specifically female sexuality, is at the core of abortion stigma because it may amplify transgressions of stated norms about who, when, why and how to have sex (Bleek 1981, Gilmore and Somerville 1994). Similarly, suitability for motherhood and acceptability of pregnancy termination is determined by a host of individual characteristics including socio-economic status, occupation, race or ethnicity and age. [39]

The social control exerted over female sexuality is an important contributor to, and informs the content of, abortion stigma. This is similar to stigmatization related to sexual assault victims. Rape stigma continues to draw on deeply embedded constructs of protecting *good* feminine sexuality related to virginity and procreation, while not protecting *bad* feminine sexuality enacted outside of adulthood, marriage and motherhood.[40] As a result of stigma adhering to these negative stereotypes,

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[37] Girard et al aptly describe the dominant discourse on environmental crimes as constituting "the unfortunate but inevitable 'price of prosperity'" April L Girard, Suzanne Day & Laureen Snider, "Tracking Environmental Crime through CEPA: Canada's Environment Cops or Industry's Best Friend?" (2010) 35:2 Can J Sociology 219 at 237. Interestingly, being a victim of industrial pollution has been documented to be stigmatizing. This is because living in polluted areas is an incident of poverty, a highly stigmatizing context. See Judith Bush, Suzanne Moffatt & Christine Dunn, "'Even the birds round here cough': stigma, air pollution and health in Teesside" (2001) 7:1 Health & Place 47. For similar concerns regarding corporate criminal liability for occupational health and safety and cartel crimes see: Steven Bittle & Laureen Snider, "'Moral Panics' Deflected: The Failed Legislative Response to Canada's Safety Crimes and Markets Fraud Legislation" (2011) 56:4 Crime L & Social Change 373.

[38] Laura J Zilney & Lisa Anne Zilney, *Perverts and Predators: The Making of Sexual Offending Laws* (Lanham, MD: Rowman & Littlefield Publishers, 2009) at 53.

[39] Kumar et al, *supra* note 26 at 628.

sexual assault labeling and criminalization is often ineffective in seeking to extend the protective cloak of the law to *bad* feminine sexuality.

Some stigmatizing labels find their sources in laws outside of the *Criminal Code*[41] and related penal laws. For example, divorce laws used adultery as a legal marker, a label that was effective in producing stigma despite not being located in a penal law. This suggests that as long as the constructs supporting stigmatization are sufficiently negative, strong and pervasive, penal laws are not required to create stigma. Conversely, if there are no such constructs, the use of penal laws, without more, is unlikely to lead to stigmatization.

The third step in the production of stigma, the marking of members of the stigmatized group as 'other' can readily be theorized in law as a commonly desired function of criminal law: the symbolic and bodily separation of offenders from the community. However, as we will see, there is a mismatch between the criminal law theory of a procedurally careful and substantively rational allocation of blame in a criminal trial and the social othering through stigmatization as a preconscious and instantaneous act posited by social stigma theory.

For the final step, the accrual of detriment to stigmatized individuals, criminal law theorizes this as the rational application of sentencing laws and the stigmatization of the convict as a criminal, ultimately controlled by legal and constitutional requirements of proportionality between the severity of the offence, the circumstances of the offender and the quantum of punishment. Again, there is somewhat of a mismatch between the criminal law theory and stigma theory. The criminal law theory contemplates a careful weighing of relevant criteria, stigma theory suggests that stigmatization will not be the result of a careful and rational process but rather driven by snap judgment and stereotypes.

The application of concepts developed outside of law to legal doctrine requires some methodological caution. In this case, it appears justified however because stigma has long played an important role in the criminal law jurisprudence of the Supreme Court of Canada. Stigma is a core concept that performs two related functions: it guides the interpretation of offences; and it determines the scope of true criminal law.

The starting point was a significant expansion in regulatory law. This was driven by the use of the vehicle of criminal or quasi-criminal prohibition for enforcing administrative regimes. These regimes tended to impose fines and occasionally even imprisonment for violations in the absence of any statutory language directing a fault requirement.

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[40] Dominic Abrams et al, "Perceptions of Stranger and Acquaintance Rape: The Role of Benevolent and Hostile Sexism in Victim Blame and Rape Proclivity"(2003) 84:1 J Personality & Social Psychology 111 at 113.

[41] RSC, 1985, c C-46.

In the 1970s, the Court began to explore the role of stigma for the distinction between regulatory and truly criminal prohibitions. From the beginning, stigma was an important criterion for distinguishing between true crimes and regulatory offences. In *Pierce Fisheries*, a case dealing with the offence of possession of undersized lobsters, the Court had to determine whether a company employee had to be aware of the presence of undersized lobsters in order to convict.[42] The Court relied on the 1895 ruling in *Sherras v. De Rutzen* to draw a distinction between quasi-criminal acts (what we might today call regulatory offences) and acts of a truly criminal character.[43] The majority concluded that knowledge was not required for regulatory offences while affirming that proof of knowledge or intention continued to be a requirement for true crimes and that such a requirement would be read into the offence where the language of statute was silent.[44] The key reason for the distinction was that stigma attached to a conviction for a true crime and greater stigma yet to serious crimes.

> But when one comes to acts of a truly criminal character, it appears to me that there are at least two other factors which any reasonable legislator would have in mind. In the first place a stigma still attaches to any person convicted of a truly criminal offence, and the more serious or more disgraceful the offence the greater the stigma.[45]

It turned out that any categorical distinction was difficult to sustain. In the seminal case of *Sault Ste Marie*, the municipality was charged with an environmental offence. Justice Dickson (as he then was) rejected the Crown's argument that the absence of stigma justified the imposition of an absolute liability offence. He noted that not only had the defendant been put to significant expense, but also to the "opprobrium" of a criminal conviction.[46]

With the advent of the *Charter*, stigma took on an even more central role. It became the deciding factor not only in interpreting criminal offences for which Parliament had not identified the requisite mental element, it also gave rise to a series of constitutional demands for fault requirements for some offences that the Court described as exceptionally stigmatizing including murder and theft. In these areas, the Court's theory of stigma first moved from the generic idea that criminal conviction is stigmatizing to a more elaborate theory which particularized some offences as more stigmatizing than others.

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[42] *Pierce Fisheries*, *supra* note 6.

[43] *Ibid*, citing *Sherras v De Rutzen,* [1895] 1 QB 918.

[44] *Ibid* at 15–17.

[45] *Ibid* at 15, citing *Sweet v Parsley*, [1969] 2 WLR 470 at 474.

[46] *Sault Ste Marie*, *supra* note 6 at 1311–1312.

> Such is theft, where, in my view, a conviction requires proof of some dishonesty. Murder is another such offence. The punishment for murder is the most severe in our society and the stigma that attaches to a conviction for murder is similarly extreme.[47]

The Court did not explain why dishonesty and murder were singled out, nor did the Court suggest what other offences would attract this kind of enhanced stigma. What is clear, however is that the Court seems to be of the view that criminal law stigma is finely calibrated. Some offences carry great stigma (and thus require the Crown to prove subjective fault as a matter of constitutional law), while most others carry less stigma and may only require proof of negligence. This point is made succinctly in *DeSousa*, a case involving negligent injury to an innocent bystander:

> As this Court has not indicated that fundamental justice requires fault based on a subjective standard for all offences, the mental element required by s. 269 [unlawfully causing bodily harm] passes constitutional muster unless s. 269 is one of those few offences which due to its stigma and penalty require fault based on a subjective standard. I agree with the respondent and interveners that s. 269 has neither the stigma nor criminal sanction to require a more demanding mental element than it already has.[48]

The stigma associated with conviction will generally reflect the degree of opprobrium attached to the underlying offence. The stigma attached to an offence will in turn influence the minimum fault requirement for that offence.[49] Sometimes, the Court seems to anticipate a careful calibration of stigma. In other cases, the fact of criminal conviction and punishment is a generically stigmatizing event and no resort is made to degrees of offence-specific stigma.[50]

To complicate matters further, the Supreme Court has at times had to contend with intersecting sources of stigma. For example, in *Chaulk*[51] and *Swain*,[52] two cases involving special legal regimes for people who cannot be convicted because they suffered from serious mental illness at the time of the offence, the Court had to confront the intricacies of mental illness stigma and its interaction with criminal conviction stigma. The cases demonstrate the difficulty of integrating criminal law and social forms of stigmatization into a coherent factual and doctrinal scheme.

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[47] *Vaillancourt*, *supra* note 6 at 653–654. Vaillancourt successfully challenged the constitutionality of felony murder. The Court concluded that "stigmatizing the crime as murder unnecessarily impairs the Charter right" under s 7 (at 660).

[48] *DeSousa*, *supra* note 6 at para 962.

[49] *Ibid*.

[50] *Mabior*, *supra* note 6 at para 15.

[51] *Chaulk*, *supra* note 6.

[52] *Swain*, *supra* note 6.

In *Chaulk*, the majority rejected the argument that imposing an onus on the accused to prove his or her own insanity furthered the objective of avoiding "stigmatizing and punishing, as criminals, people who are 'sick' as opposed to 'bad'."[53] Instead, the majority preferred to see the provision as merely responsive to the evidentiary difficulties of proving someone's sanity beyond a reasonable doubt. In so doing, the majority remained focused on the stigma arising from criminal conviction and punishment to the complete exclusion of any consideration of the social stigma of mental illness. Only one year later, a challenge was raised to the automatic detention scheme for not criminally responsible by reasons of mental disorder. This time, the majority stayed focused on the stigma of mental illness, to the complete exclusion of the stigma of criminal conviction and punishment. It is only in the reasons of Justice Wilson, in a concurring opinion, that the two forms of stigma were briefly addressed together. She noted:

> An insane acquittee is detained at the pleasure of the Lieutenant Governor, often for a period exceeding that which would have been possible upon conviction. He must also live with the stigma of being held to be both a criminal and insane and may face conditions worse than those obtaining in prison.[54]

A similar difficulty occurs in cases where the Court has had to acknowledge that stigma can attach to interactions with the criminal justice system prior to or in the absence of 'just desert.' For example, stigmatization is acknowledged in *Kang-Brown* in the context of an investigation,[55] in *Stone* as arising from a charge[56] and arising from being remanded into custody before trial in *Morales*.[57] The right to a speedy trial was supported by the stigma that accrues when a person is subject to criminal proceedings in *Morin*.[58] What is interesting about these cases is that they acknowledge that the aura of stigma resulting from criminalization reaches far beyond the criminal law stigma that results from a valid criminal conviction for wrongful conduct that has been proven beyond a reasonable doubt.

Finally and returning briefly to the distinction between criminal and regulatory offences, the Supreme Court has consistently held that being subject to administrative law mechanisms such as human rights complaints and remedies does not invoke (much) stigma,[59] though it has acknowledged that some of the underlying

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[53] *Chaulk*, *supra* note 6 at 1336.

[54] *Swain*, *supra* note 6 at 1027–1028.

[55] *R v Brown*, 2008 SCC 18, [2008] 1 SCR 456.

[56] *R v Stone*, [1999] 2 SCR 290, 173 DLR (4th) 66.

[57] *R v Morales*, [1992] 3 SCR 711, 17 CR (4th) 74.

[58] *R v Morin*, [1992] 1 SCR 771, 12 CR (4th) 1.

[59] *Canada (Human Rights Commission) v Taylor*, [1990] 3 SCR 892 at 932–933, 75 DLR (4th) 577.

regulated conduct may well be stigmatizing.[60] The Court seems to assume that there is a connection between the underlying conduct and/or its becoming known in the community, and the regulatory or punitive response, while at the same time maintaining a conceptual difference between the two forms of stigmatization.

To summarize, stigma is a core concept in Canadian criminal law. Offences that carry stigma are characterized as being true crimes, while non-stigmatizing offences are held to be merely regulatory in nature. Because of their stigmatizing nature, true crimes require proof of subjective fault such as knowledge of the relevant facts or the intentional commission of the crime even where the language of the statute does not appear to require such proof. Parliament can normally create offences that require mere proof of negligence, but the *Charter* may require subjective fault for high stigma offences regardless of Parliamentary intent. The Court has developed a theory of stigma production that attaches stigma to individuals for particularized conduct through a procedurally controlled and substantively fair process. Despite this central role, criminal law stigma remains undertheorized by the Court. This is particularly apparent in areas of intersectional stigma such as when mental illness stigma intersects with criminal law stigma, in areas where the timing of the stigmatization precedes the conviction and in areas where penal law is not implicated, but the underlying conduct is highly stigmatized. However, even outside these areas, the theoretical foundations for criminal law stigma remain uncertain. It is unclear why some offences such as theft are considered high stigma and others including sexual assault and genocide are not. The Court's theory of stigma production is difficult to reconcile with social stigma theory because it locates stigma in the individual and posits that stigmatization is the result of a carefully calibrated, rational and procedurally controlled process, while social stigma theory emphasizes the diffuseness of stigmatization, its spontaneous and pre-rational elements and its basis in preexisting negative stereotypes.

**Abortion Stigma**

In this part of the paper, I consider stigma production through observation of a natural experiment, viz. the transformation of abortion law in the Maritime provinces following the complete decriminalization of abortion in 1988. Since that time, all three Maritime provinces (i.e. New Brunswick, Nova Scotia, and Prince Edward Island), have adopted more or less restrictive regulatory regimes governing abortion access relying on provincial jurisdiction over health.

If the Supreme Court's distinction between the effects of regulatory and true criminal law is meaningful, it would be reasonable to predict that decriminalization of abortion should have been attended by some degree of destigmatization even if regulatory law continues to constrain previously criminalized conduct.

[60] An example of the latter is *Blencoe* where the Court was urged to analogize delay in human rights proceedings to violations of speedy trial rights because of the stigma attached to allegations of sexual misconduct. *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 SCR 307.

If abolitionists are correct that decriminalization leads to normalization, this should be observable in the abortion context since analogous arguments have animated anti-choice advocacy for a long time. The argument is that by permitting women to choose whether and when to carry a pregnancy to term, the fundamental dignity of all human life is threatened and the taking of a human life is normalized.[61]

And finally, if decriminalization advocates are right to hope that decriminalization will lead to access to protective regulatory regimes like labour relations and workplace health and safety laws, we should be able to see this in abortion access. Medicare is the abortion analogue to occupational health and safety, a state-funded mechanism for the protection of the health and wellbeing of patients and workers respectively.

The issue seems timely. There is an active discussion about decriminalization of sex work and some other criminalized conduct, and neither patients accessing abortion nor abortion providers have been the subject of criminal prosecution since 1988. It is important to take somewhat of a long view because criminalization histories are often long, but the concurrent decriminalization of homosexuality suggests that such a process could have substantially run its course by now. It appears reasonable to assume that enough time has passed to permit even complex social processes such as destigmatization to occur.[62]

In 1988, when the Supreme Court of Canada ruled in *R v Morgentaler*,[63] abortion had been part of New Brunswick criminal law for almost 180 years. In 1810, New Brunswick had been a leader in criminalizing abortion by passing a law modeled on an infamous omnibus bill known as *Lord Ellenborough's Act* of 1803 which prohibited the procurement of a miscarriage, though not by the pregnant woman herself.[64] The offence applied to established pregnancies after foetal movement could be detected by the pregnant woman (quickening).

In 1842, New Brunswick abolished the requirement that quickening had occurred, making the procuring of a miscarriage an offence from the beginning of a pregnancy, including criminalizing attempts when the woman was not in fact pregnant. In another amendment New Brunswick also introduced a minimum sentence of three years for the offence.[65] Until this time, criminalization exclusively targeted the abortion provider. In 1849, however, New Brunswick criminalized abortion by the pregnant woman herself. In 1869, Parliament consolidated the

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[61] Johanna Schoen, *Abortion after Roe* (Chapel Hill: The University of North Carolina Press, 2015) at 89.

[62] A history of Canadian abortion law is recounted by the Supreme Court of Canada in *Tremblay v Daigle*, [1989] 2 SCR 530, 62 DLR (4th) 634 [*Tremblay*] where the Court treats it as the law of fetal rights.

[63] *R v Morgentaler*, [1988] 1 SCR 30, 44 DLR (4th) 385 [*Morgentaler* 1988].

[64] *Tremblay*, *supra* note 62 at 566.

[65] Backhouse, *supra* note 29 at 70.

criminal law applicable to all the provinces and adopted abortion provisions identical to New Brunswick law, with a penalty of life imprisonment.[66]

Upon codification in 1892, s. 272 of the *Criminal Code* made it a crime punishable by life imprisonment to attempt to procure a woman's miscarriage whether or not she was with child. This remained the law until 1969 when the Trudeau government decriminalized abortions approved by a therapeutic abortion committee of at least three doctors.[67] The *Criminal Code* remained the vehicle for this essentially regulatory scheme. As is well known, the 1969 scheme did not survive constitutional review under the *Charter* and in 1988, it was struck down.[68] From there, the stage was set for provincial governments to either treat abortion as a health care service like any other, create special assistive regimes for access,[69] or adopt restrictive laws, regulations and policies. Maritime provinces all went the latter route, but not in an identical manner.

Triggered by Dr. Morgentaler's announcement of a plan to open clinics in Nova Scotia and New Brunswick, the Nova Scotia government promulgated regulations and subsequently passed legislation prohibiting abortions outside of hospitals in March of 1989.[70] This constituted a dual attack on the newly won right of Nova Scotians to access legal abortions without administrative strictures. The *Medical Services Act* prohibited clinic abortions while regulations under the *Act* defunded them. Despite this, Dr. Morgentaler opened the Morgentaler Clinic in Halifax in 1990 and was promptly prosecuted in 14 cases. In defending the prosecutions, Dr. Morgentaler successfully challenged the constitutionality of the *Act* and the regulations and in October of 1990, the *Medical Services Act* provisions and the regulation were struck down by the Nova Scotia Supreme Court.[71] That decision would eventually be upheld by the Supreme Court of Canada in 1993.[72] The Halifax Morgentaler clinic operated for 13 years and closed in 2003. The vast majority of abortions are now provided at a single hospital in Halifax. Stigma continues to

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[66] *Ibid* at 75.

[67] *Tremblay*, *supra* note 62 at 567.

[68] *Morgentaler* 1988, *supra* note 63. For an analysis of Canadian as well as some comparator abortion decisions see: Vanessa MacDonnell & Jula Hughes, "The German Abortion Decisions and the Protective Function in German and Canadian Constitutional Law" (2013) 50 OHLJ 999.

[69] An example is Ontario where the province used to cover travel costs for Northern patients under s. 3 of *Northern Health Travel Grant*, O Reg 20/94, repealed in 2000.

[70] Joanna Erdman noted that this provincial response was by no means restricted to the Maritimes but also reached to BC and Manitoba. She commented that "many of these laws and regulations were challenged on jurisdictional grounds. Some survived scrutiny, while others were defeated. In response to invalidation, some provinces enacted amended versions of laws and regulations to overcome courts' objections." [footnotes omitted] Joanna N Erdman, "In the Back Alleys of Health Care: Abortion, Equality, and Community in Canada" (2006-2007) 56 Emory LJ 1093 at 1094.

[71] *Nova Scotia (AG) v Morgentaler*, [1990] 96 NSR (2d) 54, 253 APR 54 (CA)

[72] *Morgentaler* 1993, *supra* note 10.

surround the procedure and access remains constrained, particularly in rural areas and in Cape Breton.[73]

Despite the legal successes of their Nova Scotia neighbours in the Supreme Court of Canada, New Brunswickers and Prince Edward Islanders did not experience any practical or even discourse effects of either the 1988 or the 1993 Morgentaler cases.[74] Prior to 1988, the difficulty with abortion access in many parts of Canada had been documented by a federal report on the operation of the 1969 law. The 1977 Badgley Report had commented on patchy access following the 1969 amendments:

> Coupled with the personal decisions of obstetricians-gynaecologists, half of whom (48.9 percent) in eight provinces did not do the abortion procedure in 1974-75, the combined effects of the distribution of eligible hospitals, the location of hospitals with therapeutic abortion committees, the use of residency and patient quota requirements, the provincial distribution of obstetricians and gynaecologists, and the fact that the abortion procedure was done primarily by this medical specialty resulted in sharp regional disparities in the accessibility of the abortion procedure. … What this means is that the procedure in the Criminal Code for obtaining abortion is in practice illusory for many Canadian women."[75]

It is noteworthy that the Badgley Report found that at least five hospitals (or maybe more, the Report is not entirely clear on this point) in New Brunswick performed 440 funded hospital abortions in 1974.[76] The situation did not shift appreciably following the 1988 and 1993 Morgentaler cases. In 2011, there were only two hospitals in New Brunswick, which provided 414 funded abortions.[77] The legal treatment of abortion changed significantly between 1974 and 2011, but neither access nor stigma were transformed. The New Brunswick regulatory regime enacted following the 1988 *Morgentaler* decision warrants a closer look. The New Brunswick Liberal government under Premier Frank McKenna promulgated a regulation disentitling abortion from Medicare funding unless performed in a hospital by a specialist after two doctors certified that the procedure was medically

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[73] Cape Breton does not have an abortion clinic. Residents have to travel to the QEII Health Sciences Centre in Halifax to access abortion services. (Action Canada for Sexual Health & Rights, "Service Providers", online: <sexualhealthandrights.ca/find-service-provider/>.

[74] Immediately following the 1988 decision, provincial resistance was more widespread. For similar observations about Alberta, see: Ian Urquhart, "Federalism, Ideology, and Charter Review: Alberta's Response to Morgentaler" (1989) 4 Can JL Soc 157 at 160. However, Alberta liberalized abortion access in the wake of *R v Morgentaler*, [1993] 1 SCR 462, 1993 CanLII 158.

[75] Canada, Department of Justice, "Report of the Committee on the Operation of the Abortion Law (Badgley Report)", (Ottawa: Minister of Supply and Services, 1977) at 140–141.

[76] *Ibid* at 112.

[77] Canadian Institute for Health Information, "Induced Abortions Quick Stats, 2011" (Ottawa: Canadian Institute for Health Information 2014) at 1.

required.[78] A prohibition of clinic abortions was already on the books under a private act, the New Brunswick *Medical Act*, which regulates the medical profession.[79]

When Dr. Morgentaler bought clinic property in Fredericton in 1992 and opened an abortion clinic in 1994, Premier McKenna vowed to give Dr. Morgentaler the fight of his life.[80] Immediately upon opening the clinic on July 5, 1994, Dr. Morgentaler was restrained by Order of the Council of the College of Physicians and Surgeons from performing abortions outside a hospital relying on sections 56(b.1) and 56.2 of the *Medical Act*.[81] On September 14, 1994, a judge of the Court of Queen's Bench declared the legislative provisions upon which the College relied unconstitutional.[82] One week later, the Fredericton Morgentaler Clinic reopened. The exclusion of clinic-based abortions from Medicare continued for the entire time the Fredericton Morgentaler was in operation. In 2014, Liberal Premier Brian Gallant promised to remove all barriers to abortion in New Brunswick by amending Regulation 84-20, and removing the requirement that the procedure be conducted by a specialist after the certification by two doctors that the procedure was medically necessary.[83] As of April 2017, the hospital requirement for funded abortion care continues, excluding the successor Clinic 554 from Medicare funding for abortion care.[84]

The path to abortion access has been even more fraught in Prince Edward Island. In the wake of *Morgentaler* 1988, PEI adopted an unwritten and secret policy "that it will only pay for an abortion deemed to be a medical necessity provided that the abortion is performed at a hospital. The determination of whether an abortion is a medical necessity for payment purposes, is determined by a Medical Advisory Committee of five (5) doctors, provided for under the Health Services Payment Act, and appointed by the… Commission".[85]

The terms of the policy were only disclosed to Dr. Morgentaler after litigation was commenced. On April 22, 1993, Dr. Morgentaler applied for a declaration that the abortion policy of the Government's Agency was *ultra vires.* The application was scheduled for hearing on April 28, 1994. On April 26, 1994, the

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[78] NB Reg 84-20, Schedule 2, (a.1).

[79] SNB 1981, c 87.

[80] *Ottawa Citizen* (18 February 1998) A3.

[81] *Morgentaler v New Brunswick (AG)*, [1994] 152 NBR (2d) 200 at para 25, 117 DLR (4th) 753, aff'd [1995] 156 NBR (2d) 205, 121 DLR (4th) 431, leave to appeal ref'd [1995] 124 DLR (4th) vi (note), 164 NBR (2d) 320 (note).

[82] *Ibid.*

[83] CBC News, "New Brunswick abortion restrictions lifted by Premier Brian Gallant", *CBC News* (26 November 2014), online: <cbc.ca/news/canada/new-brunswick/new-brunswick-abortion-restriction-lifted-by-premier-brian-gallant-1.2850474>.

[84] NB Reg 84-20, Schedule 2, (a.1).

[85] *Morgentaler v Prince Edward Island (Minister of Health & Social Services)*, [1994] 117 Nfld & PEIR 181, 112 DLR (4th) 756 at 756 (PEISC(TD)).

Executive Council issued Order in Council No. EC220/94 regularizing the policy. The Regulation was struck down in 1995,[86] but an appeal was allowed by the PEI Supreme Court Appeal Division in 1996, permitting legal impediments to funded abortions to persist.[87]

In 2014, McQuarrie et al published a report on the experiences of PEI women trying to navigate reproductive health care in the province.[88] Their research documented what abortion rights advocates in the Maritime provinces had known anecdotally for decades: Maritime patients routinely experience insurmountable barriers to accessing reproductive health care, leading to coerced continued pregnancies, at times dangerous attempts at self-managed abortions, and desperate travels on and off the island in search of care. Her report also speaks poignantly to the persistence of abortion stigma.[89]

In all three Maritime provinces, both people accessing abortions and abortion providers remain heavily stigmatized despite over two decades of complete decriminalization.[90] The persistence of social stigma in the wake of decriminalization calls into question the Supreme Court's assumptions about the production of stigma related to criminal behaviour as arising from and being peculiar to criminal law. It also casts doubt on the Court's assertion that regulated behaviour is intrinsically less stigmatized than criminalized behaviour. Focusing on decriminalization and its aftermath renders visible that the interaction between criminal law and stigma is more complex than is suggested by the Supreme Court.

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[86] *Morgentaler v Prince Edward Island (Minister of Health & Social Services)*, [1995] 126 Nfld & PEIR 240 (SC), 122 DLR (4th) 728 (PEISC(TD)).

[87] *PEI (Minister of Health and Social Services) v Morgentaler*, [1996] 144 Nfld & PEIR 263; 139 DLR (4th) 603; 45 Admin LR (2d) 245 (PEISC(AD)).

[88] Colleen MacQuarrie, Cathrine Chambers & Jo-Ann MacDonald, *Trials and Trails of Accessing Abortion in PEI: Reporting on the Impact of PEI's Abortion Policies on Women* (Charlottetown, PEI: University of Prince Edward Island, 2014).

[89] Based on the MacQuarrie report, a group of advocates supported by LEAF filed notice of a constitutional challenge to the policy in January of 2016. Premier MacKay conceded the suit and promised abortion access in PEI by the end of 2016.

[90] My claim for Nova Scotia and New Brunswick is anecdotal and observational. It is based on a decade of working with abortion rights advocates, abortion providers, clinic managers as well as being a visible figure in the struggle for abortion access in New Brunswick. There is a live debate about measuring abortion stigma. Bos et al, *supra* note 5 have recommended continued exploration of qualitative methods in stigma research, and MacQuarrie, *supra* note 88 is a recent example, while others have experimented with quantitative methods including Lisa A Martin et al, "Measuring Stigma Among Abortion Providers: Assessing the Abortion Provider Stigma Survey Instrument" (2014) 54:7 Women & Health 641; Annik M Sorhaindo et al, "Constructing a validated scale to measure community-level abortion stigma in Mexico" (2016) 93:5 Contraception 421.

**Implications for sex work**

The basic premise of abolitionists and decriminalization advocates that decriminalization leads to destigmatization and normalization is doubtful in light of the experience of decriminalization of abortion. This is because both abortion and sex work stigma are tied up in stereotypical beliefs about the role of women and female sexuality. These stereotypical beliefs are likely to sustain stigmatization in a decriminalized legal context. This is not to suggest that decriminalization has no effects, far from it. There were real gains in terms of health outcomes for women following the decriminalization of abortion and at least for a time, there was a considerable amount of public debate. However, we can expect that if sex work were to be decriminalized, at least some provinces and municipalities would use their legislative and regulatory powers to enact or expand existing regimes that seek to replicate criminalization, including the creation or use of provincial offences that threaten imprisonment.[91] These regulatory laws are likely to be effective in performing the labeling function required for continued stigma production.

At the same time, advocacy for improvements would be more difficult as the social movements supporting change will be split into winners and losers.[92] Sex workers living and working in provinces that choose not to regulate or regulate in a protective or supportive manner will be less likely to advocate strongly for sex workers in provinces and municipalities that use their jurisdiction over community safety, zoning or licensing for the purpose of restricting or minimizing prostitution. As the group of advocates shrinks, targets for advocacy will become more diffuse and more difficult to identify. Rather than asking a single federal government to change the law or challenging a *Criminal Code* prohibition in court, sex work advocates would need to tackle various provincial and municipal regimes. This would decrease the ability to mobilize at a national level.

From an abolitionist perspective and drawing on the experience with the decriminalization of abortion, it seems that the concern about normalization is not well founded. Abolitionists should find comfort in the fact that decriminalization does not, without more, cause normalization. That said, the abortion analogue also does support the related claim that asymmetrical criminalization of clients will be effective in redirecting stigma to new targets. In other words, it is unlikely that criminalizing clients will lead to stigmatized clients and destigmatized sex workers. Instead, the abortion experience suggests that stigma targets are both diffuse (anyone

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[91] Provinces already use their jurisdiction over traffic, community safety and child protection to regulate prostitution. See Canada, Library of Parliament, "Prostitution in Canada: International Obligations, Federal Law, and Provincial and Municipal Jurisdiction", by Laura Barnett & Julia Nicol, Legal and Legislative Affairs Division, Parliamentary Information and Research Service (Ottawa: Library of Parliament, 2012), online: <epe.lac-bac.gc.ca/100/201/301/weekly_checklist/2012/internet/w12-21-U-E.html/collections/collection_2012/bdp-lop/bp/2011-119-eng.pdf>. For future impacts see: Elaine Craig, "Sex Work By Law: Bedford's Impact on the Municipal Regulation of Sex Work" (2011) 16:1 Rev Const Stud 97.

[92] Jula Hughes, Vanessa MacDonnell & Karen Pearlston, "Equality & Incrementalism: The Role of Common Law Reasoning in Constitutional Rights Cases after Bedford (ONCA)" (2013) 44:3 Ottawa L Rev 467 at 473–474.

with a connection to the issue is stigmatized) and less than rational. This is supported by social stigma theory where variations of this kind of broad stigmatization of associated identities are known as courtesy stigma,[93] contamination stigma or vicarious stigma.[94]

The abortion experience further supports the view that social stigma is not very sensitive to changes in structural stigma such as criminal legislation. This is because social stigma is produced in a complex process that includes the identification of difference, stereotypical beliefs, labeling and discrimination. In the context of abortion, people experiencing unintended pregnancy are identified as different through community expectations that pregnancy should be planned and occur in the context of monogamous relationships, in which both partners are mature, educated and financially stable.[95] In the context of prostitution, difference is identified in the role of sex (private vs. public, for fun/procreation vs for money).

As discussed above, stereotypical beliefs about people with unintended pregnancy include various transgressions of feminine ideals such as caring, sexual restraint/purity and mothering. Similarly, in the context of sex work, positive ideals of womanhood such as cleanliness, propriety and family orientation collide with perceptions of sex work as dirty, perverse or undermining family values.

Law plays a role in labeling actors and conduct, but it is not apparent in the abortion context that regulatory laws are any less effective in performing labeling functions than criminal legislation. Changes in the criminal law applicable to sex work may lessen stigma associated with prostitution if no special laws are enacted federally or provincially, but even protective and benevolent legislation can have labeling effects as is evident in the context of social benefit legislation.[96] Finally, discriminatory effects of stigmatization may persist even if the stigmatizing law is removed or altered. The 'stickiness' of discriminatory effects is evident in the marginalization of people in contexts where laws specifically limit or prohibit discrimination.

The lesson from abortion law, then, is that stigma production is a complex process that is very imperfectly controlled by law. Decriminalization, without more,

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[93] Goffman, *supra* note 18.

[94] Patrick W Corrigan & Frederick E Miller, "Shame, blame, and contamination: A review of the impact of mental illness stigma on family members" (2009) 13:6 J Mental Health 537.

[95] Whitney Smith et al, "Social Norms and Stigma Regarding Unintended Pregnancy and Pregnancy Decisions: A Qualitative Study of Young Women in Alabama" (2016) 48:2 Perspectives on Sexual & Reproductive Health 73 at 75–76.

[96] Michael Bratton, "Welfare Discourse and the Subjectivity of Social Assistance Recipients: Understanding Classism as a Barrier to Justice" (2015) 17:1 Can Social Work 40 at 44–45.

will not lead to destigmatization. This is important for proponents of decriminalization who should be ready to address all aspects of stigma production rather than relying on law reform as a cure-all. Conversely, abolitionists have less reason to fear decriminalization than abolitionist advocacy suggests. At the same time, abolitionists have likely exaggerated the ability of law to shape and specifically direct social stigma formation. The broader questions of best policy to ensure the safety of sex workers, promote sexual autonomy and general equality rights for women remain the subject of important debate. Appreciating the limited and complex role of criminal law in the production and maintenance of social stigma associated with sex work should assist in advancing rational policy development in this area.