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Re-Interpreting The Criminal Regulation of Sex Work in Light of R c Labaye

Elaine Craig

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In 2005, the Supreme Court of Canada revised the meaning of indecency under the Criminal Code. This was achieved by removing from its definition any reliance on the community standard of tolerance test. In R. c. Labaye the Court reinforced the notion that the focus of laws regulating sexuality should not be based on sexual morality and moral harm to society but rather on political morality and actual harm to individuals. The reasoning in R. c. Labaye should change the way that courts understand the prostitution-related provisions in the Criminal Code. In particular, a proper application of its reasoning suggests that the conception of harm developed in R. c. Labaye should ultimately lead to a reduction of the detrimental impact on sex workers that many have suggested is directly caused by section 210 (the bawdy house law) and section 213 (the general communication provision) of the Criminal Code.

*328 Introduction

In 2005 the Supreme Court of Canada revised the meaning of indecency (and perhaps obscenity) under the Criminal Code. [FN1] This was achieved by removing from its definition any reliance on the community standard of tolerance test, a test which had, in a variety of manifestations, underpinned indecency and obscenity laws for the better part of the last century.

The Court's reasoning in R. c. Labaye reinforces the notion that the focus of laws regulating sexuality should not be on sexual morality and moral harm to society but on political morality and actual harm to individuals. In doing so it leaves more space for consideration of sexual agency, and allows for greater consideration of women's subjectivities, which creates greater opportunity within legal reasoning for more diverse sexual narratives. Ultimately, this is a move towards a more complex, nuanced and (arguably) just approach to sex. In particular Labaye should change the way that courts understand the prostitution-related provisions in the Criminal Code.

The criminal regulation of sex work has been deeply imprinted by the type of sexual moralism rejected by the Supreme Court of Canada in Labaye. The reasoning in Labaye bears specific significance for section 210 of the Criminal Code [FN2] but also for the interpretation and application of section 213. [FN3] Indeed, a proper application of its reasoning suggests that the conception of harm developed in Labaye should ultimately lead to a reduction of the detrimental impact on sex workers that many have suggested is directly caused by the bawdy-house law and the general communication provision. [FN4]

This discussion will be divided into three parts. Part I will briefly describe the Court's reasoning in Labaye, review the development of obscenity and indecency laws in Canada and then demonstrate why the community standard of tolerance test, or any legal test premised on sexual mores, *329 is problematic, particularly for women. Part...
II will examine some of the cases that have followed Labaye and show how, in each, the harm-based approach endorsed in Labaye leads to a richer, more nuanced approach to sexuality. The third and final section will suggest that the harm-based approach embraced by Chief Justice McLachlin, writing for the majority in Labaye, requires an interpretation of the bawdy-house law such that only prostitution which causes harm to the participants or others will continue to be an offence under section 210 of the Criminal Code. It will further argue that the central principle underpinning Chief Justice McLachlin's decision—that the criminal regulation of sex will only be legitimate where it is in furtherance of the political morality that Canada as a whole has endorsed—should be applied to the interpretation of the general communication provision found under section 213(1)(c).

I. R. c. Labaye and Constitutional Standards for Community Tolerance

In Labaye the majority allowed the appeal of Jean-Paul Labaye's common bawdy-house conviction on the ground that the acts occurring at his establishment were not indecent under section 210 of the Criminal Code. [FN5]

Club L'Orage was a private club with an annual membership fee. It was located on the top floor of a building that also housed a nude dancing establishment owned by Mr. Labaye. Club L'Orage was open to members and their guests only. The club served as a meeting place for individuals interested in exchanging sexual partners and participating in group sex. Jean-Paul Labaye was charged under section 210 of the Criminal Code, after undercover detectives observed a group of four or five men having sex with one woman while other members of the club observed. It was agreed that all of the sexual activity occurring at Club L'Orage was consensual.

Under the Criminal Code, a bawdy house is an establishment kept for the purpose of committing acts of prostitution or indecency. [FN6] The issue in Labaye was whether the activities occurring at Club L'Orage were indecent.

The majority of the Supreme Court determined that only activities that pose a significant risk of harm, of the type "grounded in norms which our society has recognized in its Constitution or similar fundamental laws," harm so serious as to be incompatible with proper societal functioning, will be considered indecent. [FN7] According to the majority the type of group sex occurring at Club L'Orage did not constitute harm of that nature.

*330 Before Labaye courts used the community standard of tolerance test to determine whether an act was indecent (or whether written material or images were obscene). The test was adopted in 1962 in an effort to achieve a more objective standard for obscenity and indecency than had been the case at common law. The common-law definition had asked whether the material at issue would tend to deprave and corrupt other members of society. [FN8] In its original form, the community standard of tolerance test did not include any reference to harm. [FN9] In an effort to make it yet more objective and less susceptible to the subjective sexual morality of any given adjudicator the test was eventually revised to incorporate explicitly a notion of harm. [FN10] In Towne Cinema v. R. the Supreme Court of Canada found that obscenity could be established either by showing that the material violated the norm of what Canadians would tolerate other Canadians viewing or doing, or by showing that the material would have a harmful effect on others in society. Then in R. v. Butler, the notion of harm was incorporated directly into the community standard of tolerance. [FN11]

As articulated by the Supreme Court of Canada, the language of the test for obscenity or indecency, as it stood before Labaye, was as follows: “what would the community tolerate others being exposed to on the basis of the degree of harm that might flow from such exposure?” [FN12] As a practical matter the test went something more like this: “indecency laws are about what Canadians would not abide other Canadians doing.” [FN13] As will be discussed below, deciding “what Canadians would not abide other Canadians doing” was often determined based on quasi-quantitative assessments of the sexual practices of most Canadians.

In Labaye, Chief Justice McLachlin suggests that Towne Cinema marked the beginning of a shift from a community-standards test to a harm-based test; a shift which she suggests was completed by the Court's decisions in
Butler and Little Sisters Book & Art Emporium v. Canada (Minister of Justice). [FN14] Building on the Butler description of the type of harm targeted by *331 the concept of indecent conduct under the Criminal Code (that being “conduct which society formally recognizes as incompatible with its proper functioning”), Chief Justice McLachlin determines in Labaye, that the harm must be both grounded in norms that our society has formally recognized in the Constitution or similar fundamental laws and it must be so serious as to be incompatible with proper societal functioning. In other words, instead of measuring harm based on what the community will tolerate, she suggests it ought to be measured against the Constitution. Instead of measuring it against the social sexual values of the community taken as a whole, it ought to be measured against the fundamental values underpinning the Constitution. What Chief Justice McLachlin does in Labaye is dispose of the community standard of tolerance test by relying instead on the political morals reflected in the Constitution to inform the definition of indecency.

The fundamental values Chief Justice McLachlin identifies are autonomy, liberty, dignity and equality. She identifies three types of sexual activity that she suggests would be harmful enough to compromise these fundamental values.

The first is harm to the liberty and autonomy of those whose activities would be restricted if confronted unexpectedly by inappropriate conduct. This, Chief Justice McLachlin is careful to point out, is not about aesthetics. This type of harm refers to citizens being confronted with something seriously and deeply offensive such that it creates an inability to go certain places. For example, an inability to take one's family to the park for fear that they will be unwittingly exposed to people engaged in sexual activity. By definition it refers to sexual activity occurring in public places. This branch of harm, alone, shouldn't cover activity occurring in adult theatres or clubs because these are not places which members of the public frequent unwittingly.

The second type of harm Chief Justice McLachlin identifies arises from sexual activity that pre-disposes others to anti-social conduct. This, she suggests, could extend to include attitudinal harm such as conduct that undermines respect for, and the dignity of, targeted groups. She notes that this must be harm that can actually be proven. She is also careful again to include some public element in the analysis under this branch of harm. “This type of harm can only arise if members of the public may be exposed to the conduct or material in question.” [FN15] So for example, as arose in one post-Labaye decision discussed below, [FN16] sadomasochistic photographs consensually and privately produced and consumed would not be considered obscene if the same legal test established in Labaye were applied to define obscenity. This would be true provided the photographs are not otherwise harmful to the participants.

The third type of harm that Chief Justice McLachlin identifies in Labaye is harm to the individuals participating in the sexual activity at issue. She includes here both physical and psychological harm. While analysis of this sort of harm will generally be dictated by whether the participants consented (leaving considerable space for sexual agency), she acknowledges that sometimes consent is more apparent than real. She notes that in some cases harm may be established even where there is apparent consent. Courts, Chief Justice McLachlin suggests, “must always be on the lookout for the reality of victimization.” [FN17] As would be expected, she notes that the public/private distinction is not as significant under this branch of harm.

Chief Justice McLachlin then defines the degree of any of these three types of harm necessary to find a sexual act indecent. Borrowing from the language in Butler, she adopts the requirement that to be indecent the harm caused by the sexual activity at issue must be significant enough that it is incompatible with the proper functioning of society. [FN18]

Why is this decision important for women? Why does it hold promise for those affected by criminal laws regulating the commodification of sex? The difficulty with much of the jurisprudence where courts are dealing in some regard with sex--whether that be in the context of sexual assault or equality or obscenity and indecency--is that the law often does not seem able to accommodate the nuance, fluidity and complexity of human sexual interaction and sexual identity. It often does not seem to hear women's own sexual narratives, likely because sexual stories are so
often very complicated. So how can the law map onto the complexity of issues such as sexual autonomy, the commodification of sex, sexual victimization, sexual diversity, sexual desire and sexual harm? A legal approach that starts from the premise that women, because of social realities such as economic deprivation or social conditioning and false consciousness, can never truly consent to, for example, loveless sex, or involvement with pornography or sadomasochism or prostitution is dogmatic, paternalistic and silencing for many women. At the same time, a legal approach that relies exclusively on consent will not do all the work necessary to protect and improve the lives of women.

What is needed is an approach that moves the law closer to the truth about the complexity that women engage with in relation to sexuality. The principles of harm and consent are not new concepts, and the reasoning in Labaye is not a panacea for what is an enormously complex social issue. However, by removing the community standard of tolerance test from the definition of indecency, Labaye shifts the criminalization of sex (in terms of indecency) from a purely majoritarian democratic approach to a constitutional democratic approach. The difficulty with assessing harm based on community tolerance was that it allowed for the regulation of certain sexual acts and representations based on dominant sexual morality (as reflected in community levels of tolerance) rather than social or political morality (as reflected in instruments such as the Constitution). Historically, women have not fared well under regimes governed by traditional sexual mores. Traditional sexual mores have been for the protection of men and male sexual propriety. A standard which is about sexual propriety is not a standard about women's interests, neither their interests regarding sexual agency and autonomy nor their interests with respect to sexual harms.

For example, in R. v. Mara Justice Sopinka, declaring lap dances to be indecent under the community standard of tolerance test, stated that "it is unacceptably degrading to women to permit such uses of their bodies in the context of a public performance in a tavern. Insofar as the activities were consensual as the appellant stressed, this does not alter their degrading character." He went on to find that indecency laws do not protect lap dancers, but spectators, from harm. The risk of harm to the performers, Justice Sopinka suggested, is only relevant insofar as that risk exacerbates the social harm resulting from the degradation and objectification of women. Thus under Justice Sopinka's reasoning in Mara neither the safety nor sexual agency of the women participants is relevant to the definition of indecency. Note however, that harm to the spectators is relevant.

Justice Sopinka found that, according to community standards of tolerance, lap dances are indecent because they desensitize sexuality and objectify women. Using the criminal law to protect the decency of sex itself, which is what it means to define acts as indecent on the basis that they might "desensitize" sexuality, is about sexual moralism. It is unsurprising that an analysis underpinned by sexual morality is not an analysis that is particularly interested in harm to the actual women involved in a particular activity.

Justice Sopinka's decision is problematic for a variety of reasons. First of all, it is premised on the decency of some monolithic notion of women as the incapacitated victims of sexual objectification. Conceptualizing women in this way is not progress for women. More importantly, it is not good for the interests of those women involved in the sex trade; that is, those women who are directly affected by the legal and social implications of sex work. Justice Sopinka found that the issue of consent is not even a relevant factor in defining what acts, in this "adults only" establishment, are indecent. By doing so he directly rejected as relevant the interests in sexual agency of the women involved in the activities. By finding that harm to these women is only relevant if harm to them results in greater harm to others, he also rejected their interest in sexual safety. More insidiously, such reasoning inadvertently perpetuates a particular social construction of sex work that is not desirable to anti-prostitution/anti-porn feminists or to sex workers: the idea that a certain class or segment of women be set aside to satisfy male sexual entitlement for the sake of protecting the purity and sanctity of "the fairer sex" as a whole.

Even when courts determined that a particular sexual act was not beyond the community's standard of tolerance, the application of the community standard of tolerance test often produced reasoning which maintained a moralistic, majoritarian and unsophisticated approach to the regulation of sexuality. This is evident in R. c. Tremblay. This case concerned a charge of keeping a common bawdy house against the owner of a bar where nude dancers
performed in individual cubicles for clients who were permitted to masturbate while viewing the dancers; the dancers would also masturbate or simulate masturbation. In restoring the trial judge's acquittal, Justice Cory stated that:

... I am of the view that it was entirely appropriate for the trial judge to take into account the expert testimony of Dr. Campbell in determining the community standard of tolerance. That testimony was relevant and helpful in arriving at an objective appreciation as to what types of sexual behavior would be tolerated by the Canadian public. It was on the basis of the statistics provided by Dr. Campbell, which indicated that most Canadians engage in masturbation, that the trial judge concluded that the average Canadian was more likely to tolerate activities which were similar to those in which they engaged in themselves. Obviously, any perception of what would be tolerated will very properly be influenced by what is perceived as normal. What is normal will, in turn, depend upon the extent to which that same activity is engaged in by others. If the act in question is one that is performed by the majority in the community then it is impossible to say that the act itself would not be tolerated by the community. Thus, once the act itself is found to be tolerated THEN the inquiry must shift to focus on the circumstances surrounding its performance. [FN21] [Emphasis added.]

*335 In Tremblay the trial judge made a finding of fact, based on the testimony of an expert sexologist, that 90% of Canadian men and 50% of Canadian women do masturbate. As a result, provided that it was not occurring in a location that is overtly public, the Supreme Court of Canada found that masturbation was an activity that the community will tolerate and that it therefore was not indecent. This sort of analysis is problematic because it is dictated by the consideration of factors (such as sexual impropriety or what most Canadians are doing sexually and what they think normal) that do not allow for the nuanced and diverse reality of women's sexuality. The community standard of tolerance approach—from a conceptual perspective—is a status quo approach. In the context of human sexuality status quo approaches are often not good for women. Women (one in four of whom, by some accounts, will experience forced sex at least once during the course of her lifetime) [FN22] should not want legal definitions of what is, and what is not, decent dictated by what is, and what is not, prevalent. [FN23]

Chief Justice McLachlin's approach in Labaye eliminates considerations of community tolerance (sexual morality) and relies on the values underpinning the Constitution (political morality) in order to determine whether a particular sexual activity is harmful. Interestingly, a review of the cases that have applied this approach show that focusing on harm more objectively (as dictated by the Constitution rather than a quantitative assessment of the balance of a community's personally-held sexual values) seems to create space for greater subjectivity in individual cases. The result appears to be legal narratives that do not construct a monolithic concept of women and sex but rather demonstrate some recognition of the diversity of women's experiences and perspectives and the complexity of human sexuality.

Part II. Applying Labaye - The Refined Definition of Indecency

One decision that exemplifies this possibility of accommodating women's sexual narratives offered by the reasoning in Labaye is R. v. Ellison. [FN24] Ellison was a high school teacher charged with a number of counts of indecent assault and gross indecency, as a result of sexual contact he admittedly had with a number of female students and former students between 1973 and 1981. (Indecent assault, no longer in the Criminal Code, was an assault accompanied by circumstances of indecency. [FN25] Gross indecency was loosely defined as a marked departure from the decent conduct expected of the average Canadian in the circumstances.) [FN26] The analysis regarding the charges of indecent assault for the most part turned on the issue of consent. He was convicted on three of the four charges of indecent assault. The analysis regarding the charges of gross indecency is of particular interest here.

In Ellison the Crown urged Justice Takahashi to apply the reasoning in Labaye to inform his determination with regard to the gross indecency charges. While Justice Takahashi found that Labaye was not directly applicable on the basis that convictions of gross indecency ought not to be based on the broader implications of the indecent conduct on society, in the end result his analysis followed the harm-based approach to indecency found in Labaye. [FN27] Moreover, he explicitly acknowledged that the approach in Labaye was helpful to an analysis regarding gross indecency given the complexity and nuance involved in human sexual behaviour:
The advantage of a harm-based approach is that it establishes a method by which the boundary between criminal and non-criminal sexual conduct can be objectively ascertained. This benefits the individual in making his choice of behavior and the court in assessing what he chose. Human behavior is infinite in its variation. It is not easily quantifiable or measurable for making comparisons. Labaye... is instructive in directing the need for a principled approach to address criminal matters involving indecency. [FN28] [Emphasis added.]

What was the outcome of Justice Takahashi's approach and why is it a good one? Ellison was charged with twelve counts of gross indecency; he had sexual contact with twelve different young women--some of whom were students, some former students. Some were teenagers, some were in their early twenties. Some were sexually inexperienced, others less so. Some *337 continued a platonic relationship with Ellison for years after the sexual activity had occurred. Some did not. Some reported having enjoyed the sexual interactions they had with Ellison and wishing there had been more; others felt traumatized by what happened; still others reported little if any effect at all. How should a judge, twenty years after the fact, attempt to decipher, interpret and unravel the innumerable and diverse variables involved in every one of the sexual encounters that occurred so as to determine whether what happened was or was not decent? How can a judge do this without either relying on his or her own sexual morality, or his or her assumptions about the sexual morality of the majority regarding sexual relations between a teacher and high school student? A judge can do this by doing what Justice Takahashi appears to have done: by hearing and accommodating the perspectives and sexual narratives of the young women involved. This approach considered factors such as whether the sexual contact caused humiliation, forced secrecy, guilt or the defilement of one's first sexual experience and it acknowledged that the emotional risk at stake for each depended on each young woman's individual vulnerability and degree of maturity, and takes into account each woman's stated desire or lack of desire to engage in sexual contact with the accused, whether they remained friends, and who terminated the relationship. In other words, some of what are the many complex, nuanced and sometimes messy elements that make up human sexuality.

What was the result? Ellison was convicted on four counts of gross indecency and acquitted on the others. Consensual sex that neither participant experienced as harmful was not considered indecent. Consensual sex that a complainant experienced as harmful in some regard was found to be grossly indecent. This reasoning is analogous to that used in the context of assault law, where the Supreme Court of Canada has held that consent is vitiated if adults intentionally apply force that causes serious hurt or non-trivial harm in the course of a fist fight. [FN29] It is not that one cannot consent to a fist fight, or even (in principle rather than effect, at least) consent to a fist fight causing bodily harm; nor does Jobidon require that one must intend to cause bodily harm for consent to be vitiated. It is that, for policy reasons, an otherwise consensual but socially useless and potentially dangerous activity such as fighting becomes non-consensual if, but only if, non-trivial harm is sustained by one of the participants. A similar policy justification could be offered to support Ellison. Where an individual knowingly engages in what is objectively potentially harmful sexual behaviour (for example having sex with one's teenaged student) they are considered to have assumed the consequences arising from any harm caused.

A counter-argument to this approach, based as it was on the third branch of harm under Labaye--sexual activity that causes harm to the participants--is*338 that it sacrifices certainty under the law. One principle central to the criminal law is that it be knowable. The counter-argument to defining indecency based on the harm to the participants involved in the sexual activity is that it makes the law uncertain because whether an offence occurs is contingent upon whether harm is suffered. However, there is nothing to suggest that the approach endorsed in Labaye and adopted in Ellison is any less certain than the community standard of tolerance approach. As is well demonstrated in a case such as Tremblay, ascertaining the community standard of tolerance entailed determining the sexual proclivities of the “normal Canadian.” This meant the somewhat nonsensical (and Alfred Kinseyesque) process of gathering empirical evidence about the sexual practices of “average Canadians” from “expert sexologists” and the like. There is nothing more certain ex ante about such a definition of indecency.

What is more, the blurring of subjectivity and objectivity in laws regarding the criminal regulation of sex is un-
avoidable due to the nature of sex. Sexuality, in its infinite manifestations both in terms of acts and identities, is utterly subjective. Despite its corporeal element (which it typically entails), it is the antithesis of objectivity or pure physical reality. Without understanding how each of the parties involved in a sexual act (any sexual act short of one causing death or serious bodily harm) conceived of the act, it is impossible to know whether what occurred was a crime or an act of passion and pleasure. But it goes further. It is not just that it is impossible to know how to characterize the act without revealing how the parties conceived of it; it is that the act is itself defined by how the parties conceived of it. This is why the courts, in the context of sexual assault law, eventually established that the issue of consent must be dictated by the subjective perspective of the complainant at the time of the alleged offence; that is, the lack of consent is part of the actus reus not the mens rea. It is dictated by “the complainant's subjective internal state of mind towards the touching, at the time it occurred.”

*339 This is not to suggest that this approach is perfect. Indeed, one count of gross indecency on which Ellison was acquitted involved sexual contact with a complainant who was fifteen years old and extremely vulnerable at the time of the incidents. Ellison was acquitted because, while this young woman who had been sexually assaulted as a child while in foster care and did suffer from chronic fatigue syndrome, there was no evidence that she suffered psychological harm as a result of Ellison's actions. So while the harm based approach to the definition of indecency does appear to facilitate the law's ability to map onto the complexity of sex, it may still not be nearly nuanced enough. That is to say, not yet capable of handling a complex theory of harm which can account for and address the situation of a fifteen-year-old such as this in an organic way; in a manner that does not attempt to dissect and disaggregate human conditions that cannot possibly be dissected and disaggregated.

Another example of the manner in which the Labaye approach results in reasoning and outcomes that are better able to accommodate sexual diversity and avoid regulating conduct based on dominant sexual morality is Latreille. [FN32] This was an appeal from a conviction under section 163(1)(a) of the Criminal Code for producing obscene pictures. The photographs, which Latreille had taken to a pharmacy for development included pictures of himself and a woman engaged in oral sex, pictures of that same woman performing fellatio on one other man and pictures of the woman, nude, and depicted in what the Court described as a “sadomasochistic context.” It was this last category of pictures for which he was charged with producing obscene materials. There was no evidence that any of the activities photographed were non-consensual. The “sadomasochistic pictures” portrayed the woman kneeling by a bed with clothespins on her nipples and a bathrobe tie binding her hands behind her back.

The trial judge, whose decision was released before Labaye, determined that the photographs depicted the undue exploitation of sex on the basis that they exceeded the community standard of tolerance in Canada. In addition to disagreeing with the trial judge that such photographs exceed the community standard of tolerance, the Quebec Court of Appeal, applying Labaye, found that such photographs do not create the type or degree of harm necessary to constitute obscenity. The Court emphasized that while the fact that the pictures were consensually and privately produced for private use does not rule out the possibility that they are harmful enough to be considered obscene, it must be a factor which is taken into account.

The final “post-Labaye” case to be discussed here is Ponomarev. [FN33] Valeri Ponomarev, owner of Studio 176, a massage parlor in Vaughan, Ontario, was charged under section 210 of the Criminal Code. The charge was laid after an undercover police operation revealed that the female employees of his establishment, in addition to providing full body massage, would also provide clients with manual ejaculation. [FN34] This service was included in the price of the massage and for an additional twenty dollars the masseuse would conduct the massage naked.

Justice Chisvin, relying on Labaye, found that the activities occurring at Studio 176 were not indecent. This finding was based on the fact that it was clear from the evidence that the sexual acts were not occurring in public but in private rooms, that the fee for a massage was forty dollars whether manual ejaculation occurred or not, and that the women employed at Studio 176 were there of their own volition, had accepted the position knowing what it entailed, and were not in any way coerced into accepting the job. Based on Justice Chisvin's account of the evidence, it is clear that these women were in control of the way in which a massage would proceed. [FN35] In stark contrast to

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the reasoning in Mara or Tremblay the perspective of the women involved in these activities was clearly represented in the decision. Justice Chisvin noted that the more credible of the two employees testified that “she felt she was responsible for her own actions. No one pushed her to do this. Rather, she indicated that she chose to undertake the job. She said she accepted responsibility for her actions.” [FN36] The representation of these sex workers, their autonomy and agency and their own interest in being free from sexual harm is very different from Mara.

In addition to determining that the acts were not indecent, Justice Chisvin found that the activity occurring at Studio 176 did not constitute prostitution. Several courts, including the Supreme Court of Canada, have defined prostitution as the exchange of money for the offering of one’s body for lewd purposes. [FN37] In order to conclude that there was no prostitution occurring at Studio 176, Justice Chisvin relied on the community standard of tolerance test. [FN38] Justice Chisvin found that the community would not consider this to be the exchange of money for sex. She determined that, because the manual ejaculation occurred in private and voluntarily, and because it was included in the price of the massage, it did not constitute prostitution. It may be that the community would not conclude that simply because manual ejaculation was included in the price of the massage, this did not constitute the exchange of sex for money. In any event Chief Justice McLachlin’s decision in Labaye *341 establishes that the community standard of tolerance test is not the proper approach to the bawdy-house law.

The harm-based analysis applied by the majority in Labaye with respect to the bawdy-house law suggests that after Labaye it is only the exchange of money for sex that perpetuates one of the three types of harm contemplated in Labaye that contravenes section 210. Moreover, this same harm-based approach should be applied to the interpretation of the general communication provision.

Part III. Harmful Sex Work and the Criminal Code after Labaye

It has been suggested that the current approach to the criminalization of sex work has harmful implications for the most vulnerable categories of sex workers in Canada; that is, women who are often already marginalized because of race, disability, poverty and issues of addiction. [FN39] There is both political and academic support for the assertion that current laws criminalizing activities related to sex work in Canada require radical reform. All of the major studies on prostitution in Canada conducted over the last twenty-five years have come to this conclusion. [FN40] The dangers to the personal safety of the sex workers most in need of protection, arising as a result of the common bawdy-house law and general communication provision, have been documented by academics and politicians alike. [FN41]

*342 It is this threat to the safety of sex workers that constitutes the basis for the constitutional challenges to the bawdy-house law and the general communication provision filed recently in both Ontario and British Columbia. [FN42] These challenges will not constitute the first time that courts in Canada have considered the constitutionality of sections 210 and 213(1)(c) of the Criminal Code. [FN43] Given the Supreme Court of Canada’s decision in the Prostitution Reference, the likelihood that courts will now strike these same provisions under the same sections of the Charter is questionable. However, it may be that regardless of the outcome of these challenges, the reasoning and principles established in Labaye already dictate approaches to the bawdy-house law and the general communication provision that will result in a reduction of their detrimental impacts on sex workers.

i) Interpreting the Common Bawdy-House Law after Labaye

The exchange of sex for money is not, and has never been, a criminal offence in Canada. However, activities associated with it have been criminalized. This has meant, in effect, that while the criminal law does not prohibit the sale of sex, it does prohibit the sale of it in private and any communication about the sale of it in public. What is the purpose behind *343 indirectly criminalizing prostitution? Purportedly, the rationale for the general communication provision is to deal with the public nuisance assumed to be associated with selling sex on the street. [FN44] But what is the purpose of the bawdy-house law, which criminalizes sex work in the private sphere? Given that a single
woman (or man) working as a sex worker in their own home could be convicted of keeping a common bawdy house under the pre-
Labaye interpretation of the law, public nuisance cannot be the purpose of the bawdy house law. [FN45] The alternatives, it seems, are the prevention of harm or the protection of a particular sexual morality, a sexual morality that disapproves of commercial sex. Labaye adopts the former and rejects outright the latter.

The principle underpinning Chief Justice McLachlin's approach in Labaye is that the criminal regulation of sex will only be legitimate where it is in furtherance of the political morality that Canadians, as a society, have endorsed through the Constitution; it will not be legitimate where it is deployed to sustain, or further, any particular sexual morality. Labaye establishes that an individual will not be guilty under the bawdy-house law unless the sexual activity occurring is of the sort that would cause the types of harm protected against by the values underpinning the Constitution (values such as autonomy, dignity, equality and liberty). While Labaye dealt with the bawdy-house law within the context of indecency, there is nothing to suggest that this principle should not also apply in terms of the exchange of sex for money in a common bawdy house.

To suggest this reasoning, of course, is to suggest that the exchange of sex for money is not inherently harmful. However, this is an assumption that the law has already made. As noted, the exchange of sex for money has itself never been criminalized. There are many other examples, in addition to prostitution, where individuals legally make money by having sex, or paying others to have sex. The actors or producers of pornography provide one example. The owner of a bath house, after Labaye, provides another example. Under the reasoning in Labaye it is no longer a criminal offence to own an establishment where patrons, for an entrance fee, can have sex (provided it is not harmful) with one another. The only difference between this and an establishment used for prostitution concerns how, and between whom, money is exchanged. In the former participants engaged in sexual acts have both (or all) paid money to a third party. It is consideration in exchange for the provision of a particular sexual opportunity and a location in which to carry it out. In the latter the consideration is for the sexual activity itself. Once again, paying for sex is not illegal. Unless one resorts to moralistic assertions about the sanctity of sex, or the immorality of commercializing sexual acts themselves, something the law has to date refused to do, then *344 without some further associated harm, there is nothing to distinguish these two circumstances. [FN46] Protecting a particular sexual morality simply for the sake of itself, for example a sexual morality which disapproves of commercial sex, is not, following Labaye, the type of harm to which the bawdy-house provisions can be directed. [FN47]

If one follows the interpretation and application of the bawdy-house law established in Labaye, what types of commercial sex would continue to contravene section 210 of the Criminal Code?

The exchange of money for sex done in a way which deprives the liberty and autonomy of others, predisposes others to anti-social conduct, or where the sexual activity is harmful to one or both of the participants would continue to violate the bawdy-house law under Labaye. This would include the exchange of money for sex in an establishment with unsafe working conditions, for example. The exchange of money for sex, where the consent is more apparent than real (such as where it is due to coercion, or due to intoxication), would also violate section 210. Obviously, the exchange of money for sexual activity that is otherwise prohibited by law would also violate the bawdy-house provision. This would include, for example, circumstances*345 where there is no consent, where an animal is involved, or where children might observe the sexual acts occurring. In other words, the exchange of money for sex that would cause one of the types of harm identified in Labaye would be a violation of section 210. The exchange of money for harmless sex would not.

ii) Interpreting the General Communication Provision after Labaye

In the Prostitution Reference, the Supreme Court agreed that section 213 of the Criminal Code violates section 2 of the Charter. [FN48] As is typically the case with freedom of expression cases, the main issue was whether the violation could be upheld under section 1. Key to this determination was whether the law's objective was important enough to justify a violation of the right to freedom of expression. The Supreme Court found that it was sufficiently important. However, after Labaye, it is apparent that the objective identified and relied upon in the Prostitution Ref-
ere is not, at least with respect to the general communication provision, sufficient.

Chief Justice Dickson, writing for the majority in the Prostitution Reference, adopted the reasoning of Justice Wilson's dissent with respect to the legislative objective of section 213 of the Criminal Code. [FN49] Both Chief Justice Dickson and Justice Wilson found that the communication provision was “meant to address solicitation in public places and, to that end seeks to eradicate the various forms of social nuisance arising from the public display of the sale of sex.” [FN50] They concluded that the legislation does not attempt to address “the exploitation, degradation and subordination of women that are part of the contemporary reality of prostitution” nor does it seek to prohibit prostitution itself. [FN51] According to the Court the purpose of the law, particularly the general prohibition on any communication in any manner regardless of whether it causes traffic congestions or obstruction of others, is to reduce the social nuisance caused by the sale of sex in public. The legislation is aimed at taking prostitution “out of public view.” [FN52] The Court (with the exception of Justice Lamer) accepted the Attorney-General's suggestion that “Parliament did not seek to suppress solicitation, but only to remove it from the public areas where it was creating the obvious harm.” [FN53]

Labaye modifies the way in which the law is to conceive of harm under criminal laws that regulate sexuality. Concepts of harm in the criminal law context that are premised on sexual propriety and the protection of a particular*346 sexual morality, rather than actual harm, are not consistent with the values underpinning the Constitution. [FN54] Labaye should change the approach to section 213(1)(c) by modifying the notion of harm or social nuisance that can legitimately be targeted by the provision. The social nuisance or harm identified in the Prostitution Reference as the object of the general-communication provision relates to the “public sensitivities ... offended by the sight of prostitutes negotiating openly for the sale of their bodies and customers negotiating perhaps somewhat less openly for their purchase .... Neither prostitution nor solicitation is made illegal. But the high visibility of these activities is offensive and has harmful effects on those compelled to witness it, especially children.” [FN55] The genre of harm referred to here falls under the first branch identified in Labaye: “the harm of public confrontation with unacceptable and inappropriate conduct.” [FN56] However, as Chief Justice McLachlin notes in Labaye in the context of the bawdy house law, to be consistent with the values underpinning the Constitution, the degree of harm contemplated by this genre is not “the aesthetic harm of a less attractive community, but the loss of autonomy and liberty that public indecency may impose on individuals in society, as they seek to avoid confrontation with acts they find offensive and unacceptable .... [T]o live within a zone that is free from conduct that deeply offends them.” [FN57] The disruption to 'public sensitivities' by the mere sight of a sex worker soliciting money in exchange for sex does not constitute the type of harm contemplated in Labaye. Communicating in a manner or location which would pose a deeply offensive affront to others, such as perhaps, persistent and aggressive or overly graphic*347 and sexualized communication or perhaps communication in or near a church or playground, would constitute the type of harm contemplated in R v. Labaye. [FN58]

There are two counter-arguments in response to this suggestion which should be addressed. The first argues that a distinction between public indecency laws and public nuisance laws ought to be made because the standards established in relation to public indecency are not appropriately applied to laws regarding public nuisance. The response to this is as follows. In terms of offences whose purpose relates to the social nuisance of, for instance, communicating in a manner which stops traffic or obstructs a pedestrian (such as are found under section 213(1)(a) and (b)) this counter-argument is likely true. [FN59] These offences are not directed towards protecting a particular sexual morality. [FN60] However, in terms of an offence such as section 213(1)(c), whose purpose is to protect people from the social nuisance of seeing something that offends their own moral sensitivities (such as “the sight of prostitutes negotiating openly for the sale of their bodies”), [FN61] the conception of harm established in Labaye is both valid and desirable. [FN62] Where*348 the purpose of an offence is to prevent a moral affront, especially one related to matters of a sexual nature, it is entirely appropriate to measure harm based on the standards established in Labaye. This is particularly true given both the subjectivity and the tradition of intolerance in this area of human relations. As Chief Justice McLachlin noted, “tolerance requires that only serious and deeply offensive moral assaults can be kept from public view on pain of criminal sanction.” [FN63] Tolerance, after all, is a key ingredient to the healthy functioning of a liberal democracy.
The second counter-argument is that this approach will not address the harm that this provision was meant to protect against. That is to say, to consider the general communication provision as only prohibiting communication that confronts the public in a way that threatens the loss of autonomy and liberty to others, in other words harmful communication, will not adequately address the social nuisance that arises when a number of sex workers tend all to work in the same area. To some extent this objection is correct. However, the reasoning in Labaye suggests that objecting to the fact of a stroll area itself is not a legitimate criminal law purpose. Further, this approach will reduce some of the social nuisance caused by stroll areas by continuing to criminalize the more egregious conduct occurring in these locations. The existence of a stroll area and the aesthetic affront experienced by some, at the mere sight of sex workers plying their trade, like the fact that a particular neighborhood might contain one or more bawdy houses, is without some associated harm of the sort contemplated in Labaye, not something that ought to be targeted by the criminal law. Again, Labaye establishes that only “deeply offensive moral assaults can be kept from public view on pain of criminal sanction.” [FN64] It does so on the basis that, in a liberal democracy the force of the criminal law ought not to be brought down upon any one or group merely to protect some from the thought that other Canadians are having group sex. In the same way, its force should not be deployed merely to sanitize and mask for others the reality that some (perhaps for survival or perhaps due to the systemic, entrenched and gendered disparity in economic opportunity existent in Canada) choose or are forced to sell their bodies for sex.

In terms of arguments about the secondary crime associated with street prostitution, such as increased drug trafficking, with the exception of Justice Lamer, the Court in the Prostitution Reference found that reducing this was not the objective of the communication provision.

*349 iii) Real Life and Real Harm

Why would the reasoning in Labaye ultimately lead to a reduction in the harmful impact on sex workers perpetuated as a result of the common bawdy house law and the general communication provision? Reflecting upon the implications of R v. Labaye for the common bawdy house law and the general communication provision, it quickly becomes evident that most of the activities that would continue to be criminalized involve charges against those who procure, and those who employ, sex workers and not against sex workers themselves. Charges against sex workers would be most likely to arise only where their conduct is actually causing a disturbance.

For example, the owner of an adult-entertainment establishment who coerces employees into performing shows that involve seriously degrading acts, or who fails to provide adequate security for his performers, should still be guilty of keeping a common bawdy house and so should the owner of a brothel who fails to provide security or adequate protection against the spread of sexually-transmitted infections. [FN65] An individual who solicits sex in exchange for money, from an obviously intoxicated street worker whose consent would be more apparent than real, should be guilty of communicating for the purposes of prostitution, as should be the seriously intoxicated street worker who is aggressively propositioning passersby.

However, a woman who runs a sex trade out of her home should no longer be the target of the criminal law; nor should any of her dependants. A sex worker who takes the time to properly interview a potential client so as to ensure her safety before climbing into a vehicle with him would not be committing a criminal offence by doing so. Under Labaye neither the “massage therapist” nor the owner of Studio 176 in Ponomarev [FN66] should be the target of the criminal law and nor should private dancers in adult clubs.

Conclusion

As noted, Chief Justice McLachlin's approach in Labaye suggests that the criminal regulation of sex will only be legitimate where it is in furtherance of the political morality that we, as a society, have endorsed and not where it is deployed to sustain, or further, any particular sexual morality. This distinction, borrowed as it is from Ronald
Dworkin’s theory of political liberalism, [FN67] recognizes the significance of sexual autonomy; in doing so it permits greater space for sexual narratives which have not always been heard by the law. It is an approach that is consistent with Canada’s liberal democracy*350 and the values underpinning the Constitution. In this sense Chief Justice McLachlin’s reasoning in Labaye relies upon, in order to protect, the fundamental ethical and social considerations enshrined in the Constitution.

However, emphasizing the importance of autonomy is not enough. Criminal laws regulating sexuality must acknowledge and accommodate the very significant sexual harms, particularly against women and children, which occur every day in Canada. These laws must account for harm in a very real way. But with this in mind, the challenge will always lie with deciding how harm should be defined. This is why law will never be fully disaggregated from morality. At some point there will always be a measure of judgment; even criminal laws used to regulate sexuality which adopt a harm based approach will always, at some point, demand some moral assessment of harm. Chief Justice McLachlin’s approach in Labaye does not avoid this quagmire. Moral assessments of harm will continue, to some extent, to be subjectively determined by individual adjudicators. Her approach suggests that, when it comes to that point of moral assessment adjudicators should be guided by political morality rather than sexual morality (their own or the community’s). Is this more objective? Perhaps it is; perhaps it is not. But it is certainly less majoritarian and this is positive.

Those responsible for legislating and interpreting prostitution laws have explicitly taken the position that the purposes of the common bawdy-house provisions and the communication for the purposes of prostitution provision are not to prevent the exploitation, degradation and subordination of sex workers. [FN68] In the case of the general communication provision, the purpose has been to prevent affronts to public sensitivities caused by the sight of the sale of sex. This is a thinly veiled sexual moralism that disfavors the commodification of sex. In the case of the bawdy-house provisions there was no veil; its purpose was related (at first directly and then later indirectly) to community sexual morality. Labaye rejects the legitimacy of including sexual moralism—whether at the level of the individual or the community—in the interpretation of the criminal law. In doing so, it offers hope for those whose perhaps already precarious life circumstances have been further jeopardized by the historical interpretation and application of the bawdy-house provisions and the communication provision.

The Standing Committee on Justice recently found that “law enforcement officials and prosecutors do not seem to use general application provisions of the Criminal Code, like kidnapping, extortion, sexual exploitation and assault to address the violence in prostitution.” [FN69] Those concerned with *351 the harm that the exchange of sex for money causes women because of the messages it conveys about women and gender should be more concerned about what it says about women and gender that basic criminal law protection against sexual assault, torture and murder is not afforded to this category of sexualized women in the same way as it is to other citizens. Those concerned with criminal laws that are currently enforced with respect to sex workers— that is laws which criminalize the activities associated with prostitution— should advocate to ensure that the objectives underpinning these provisions and the manner in which they are interpreted, at the very least, attempt not to compound the risk of harms that sex workers already face. All of this, however, will require relinquishing reliance on moralistic assumptions about commercial sex. So long as sexual morality continues to inform the interpretation, application and enforcement of these provisions, the provisions will continue to perpetuate harm to those most affected by them.

[FN1]. JSD candidate and Trudeau Scholar. Thank you to Stephen Coughlan for his valuable insight and feedback. Thank you to the UBC Centre for Feminist Legal Studies and Professor Susan Boyd for the opportunity to present this article as part of their 2008 speaker series. Thank you also to Ronald Murphy, Heather Hennigar and Scott Campbell and to the Trudeau Foundation and SSHRC for the funding received during the writing of this article.


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[FN2]. Criminal Code, R.S.C. 1985, c. C-46, s. 210 allows for the conviction of a person who keeps, is found in, or is an inmate of, a common bawdy house. A common bawdy house is defined in s. 197 of the Criminal Code as a place kept or occupied for the purposes of acts of indecency or prostitution. Section 210 will be referred to throughout this discussion as the “bawdy-house law.”

[FN3]. Section 213 of the Criminal Code creates the offence of “communicating in a public place for the purposes of prostitution.” It was enacted subsequent to R. v. Hutt, 1978 CarswellBC 372, 1978 CarswellBC 555, [1978] 2 S.C.R. 476, 38 C.C.C. (2d) 418 (S.C.C.), which determined that under its predecessor provision, the term solicit required that, to be criminal a sex worker's conduct (it was typically enforced only against sex workers - initially only female sex workers) must be pressing or persistent. While s. 213(1)(a) and (b) address communication that stops traffic or impedes pedestrians, s. 213(1)(c) covers anyone who communicates or attempts to communicate in any manner for the purposes of prostitution. Section 213(1)(c) will be referred to here as the “general communication provision.”

[FN4]. See infra, note 40.

[FN5]. Labaye and Kouri, supra, note 1, were heard by the Supreme Court of Canada on the same day. The refined legal test for indecency established by the majority of the Court in Labaye was relied upon to uphold an acquittal in Kouri. The cases were treated by the Supreme Court of Canada as companion cases. Except where otherwise indicated, throughout this article references to Labaye can be assumed to also refer to the analysis in Kouri.

[FN6]. Criminal Code, s. 197.

[FN7]. Labaye, supra, note 1, at para. 29.


[FN12]. Ibid. at para. 61.

[FN13]. This quote is taken from the dissent of Lebel and Bastarache JJ. in Labaye, supra, note 1 at para. 101. Justices Lebel and Bastarache, who strongly opposed to the majority decision, suggested that indecency should continue to be based on considerations of social morality as influenced by the dominant sexual practices in Canada.

[FN14]. Little Sisters Book & Art Emporium v. Canada (Minister of Justice), 2000 CarswellBC 2442, 2000 CarswellBC 2452, [2000] 2 S.C.R. 1120, 2000 SCC 69, 150 C.C.C. (3d) 1, (S.C.C.). The dissent in Labaye, supra, note 1 at para. 21, disagreed. They suggested that the prior cases did not establish harm as the determining factor. The dissent's argument on this point is compelling. Extracting the harm criterion from the context of a test concerning the community's standard of tolerance, and making it a stand-alone definition, is somewhat of a departure from earlier case law. Indeed, the implications of such a move are precisely what the dissent takes issue with in Labaye.

[FN15]. Labaye, supra, note 1 at para. 47.

[FN17]. Labaye, *supra*, note 1 at para. 49.

[FN18]. There remains an ambiguity, one that is likely inevitable, both in Chief Justice McLachlin’s definition of indecency and in the argument to follow below regarding the interpretation of the bawdy-house law and the general communication provision. It relates to the fact that it is still necessary to measure harm. What is attitudinal harm and how will it be established? How will a court assess harm to the participants? What is the line between sexual autonomy and the law’s obligation to intervene in the face of obvious victimization? Will moralistic reasoning reveal itself once again when it comes time to assess harm? The answer to this, at least in part, is yes. Attempts to argue for the complete disaggregation of law and morality are both futile and outdated. This is no longer necessarily even the site of the debate between positivists and naturalists. (See, for example, Joseph Raz, “About Morality and the Nature of Law” (2003) 48 Am. J. Juris. 1.) The more relevant question is what type of morality ought the law to trade in? The argument suggested here is that inevitably morality will come into play, and that what matters is what order of morality the law relies upon. What Chief Justice McLachlin does in *Labaye* is shift the law’s focus from sexual morality to political morality. It is not a perfect answer but, as argued below, when it comes to the legal regulation of sex, it is much preferable that the law’s moral compass be governed by attempts to balance constitutional values such as autonomy, liberty, equality and dignity rather than by an assessment of what the sexual consensus at any given time in Canada might be.


[FN22]. J. Brickman and J. Briere, “Incidence of Rape and Sexual Assault in an Urban Canadian Population” (1984) 7 Int’l J of Women’s Studies 195 at 201. In addition, they note that between 80% and 85% of all victims of sexual assault are girls and women.

[FN23]. On a similar note, gays and lesbians (who supposedly make up less than 10% of the population) should not want legal definitions of what is and what is not decent dictated by what is and what is not normal.


[FN26]. *R. v. Quesnel* (1979), 1979 CarswellOnt 1345, 51 C.C.C. (2d) 270 (Ont. C.A.). Gross indecency is no longer an offence under the *Criminal Code*. Under its replacement, s. 153, every person who has sexual contact with a 16- to 18 year-old young person with whom they are in a position of trust or authority is guilty of sexual exploitation. The offence does not turn on the impact of the sexual contact on the young person, but rather on the status of their relationship and whether it is one of trust or authority. If it is such a relationship, this element of the offence is met. Whether such a relationship exists will be determined based on the age difference, the evolution of the relationship and the status of the accused in relation to the young person. While the analysis in *Ellison* is not relevant under this law, it is nonetheless demonstrative of the way in which this harm-based approach could be used under other sections of the *Criminal Code* that do continue to use the term indecent (such as ss. 163, 167, 169, 173, 175). Simi-
larly, it might also be used to interpret what constitutes “abuse of trust power or authority” under provisions such as s. 273.1(2)(c), which defines consent in the case of sexual assault.

[FN27]. Justice Takahashi's analysis is somewhat odd. While he seems to have overlooked the third branch of harm in Labaye--harm to the participants--in finding that Labaye is not directly applicable because it concerns the broader implications of the indecent conduct on society, he then states both that Labaye is informative in making determinations of indecency and to apply the Labaye harm-based approach to his analysis--focusing particularly on the third branch in Labaye.

[FN28]. Ellison, supra, note 24 at para. 72.


[FN30]. Alfred Kinsey was a mid-20th century biologist, renowned for conducting the first mass scale quantitative research into the dominant (and not so dominant) sexual practices of men and women. He interviewed thousands of American men and women, recording the types and frequency of sexual activity they had experienced. See Alfred Kinsey, Sexual Behavior in the Human Male (Bloomington, ID: Indiana University Press, 1948); Alfred Kinsey, Sexual Behavior in the Human Female (Bloomington, ID: Indiana: Indiana University Press, 1953).

[FN31]. R. v. Park, 1995 CarswellAlta 221, 1995 CarswellAlta 412, 99 C.C.C. (3d) 1, [1995] 2 S.C.R. 836 (S.C.C.); R. v. Ewanchuk, 1999 CarswellAlta 99, 1999 CarswellAlta 100, 131 C.C.C. (3d) 481, [1999] 1 S.C.R. 330 (S.C.C.). Consent is dictated by the subjective state of the complainant at the time that the sexual contact occurred. While this is different than an analysis like that in Ellison (or Labaye) where the issue is whether harm is suffered as a result of the sexual activity, it is offered more as an example of the need for subjectivity in legal matters of a sexual nature. In addition, it would not, relying upon on the reasoning in Jobidon, supra, note 29, present a significant challenge to this argument anyway.


[FN34]. Ponomarev, supra, note 33 at para.10.


[FN36]. Ibid.

[FN37]. Prostitution Reference, infra, note 43 at para. 45.


[FN40]. The most recent of which being the federal Standing Committee on Justice and Human Rights in 2006: “the social and legal framework pertaining to adult prostitution does not effectively prevent and address prostitution or the exploitation and abuse occurring in prostitution, nor does it prevent or address harms to communities. This framework must therefore be reformed or reinforced. This view reflects the position of the vast majority of witnesses who appeared before the Subcommittee, as well as the conclusions of the major studies on prostitution conducted over the last 20 years.” The Challenge of Change: A Study of Canada’s Criminal Prostitution Laws (Report of the Standing Committee on Justice and Human Rights by Art Hanger and John Maloney) (Communication Canada-Publishing, 2006), chap. 7, 86 [The Challenge of Change]. Pornography and Prostitution in Canada (Ottawa: Department of Supply and Services, 1985) (Chair: Fraser) [The Fraser Report] recommended a partial decriminalization of prostitution. The Fraser Report endorsed the decriminalization and regulation of brothels.

[FN41]. See for example The Challenge of Change, ibid., chapt. 5 at 62 where s. 213 of the Criminal Code is suggested to have increased secrecy and isolation for street workers, forcing them to work in isolated locations where they are more vulnerable to violence; John Lowman, “Reconvening the federal committee of prostitution law reform” (2004) 171 Can. Med. Assoc. J. 113; John Lowman, “Dealing With Prostitution In Canada” (2005) 172 Can. Med. Assoc. J. 109. (Lowman argues that s. 213 played a pivotal role in creating a social and legal milieu that facilitated the large increase in disappearances and homicides of sex workers in the last 20 years); Voices for Dignity: A Call to End the Harms Caused by Canada’s Sex Trade Laws (Pivot Legal Society sex work sub-committee, March 2006) http://www.pivotlegal.org/Publications/reportsvfd.htm (accessed March 27, 2008).

[FN42]. Bedford v. The Queen, Ontario Superior Court of Justice, Notice of Application, Court File No. 07-CV-329807PD1 challenging ss. 210, 212(1)(j) and 213(1)(c) of the Criminal Code and Downtown Eastside Workers United Against Violence v. The Queen, Supreme Court of British Columbia, Writ of Summons, Vancouver Registry No. SO75285 challenging ss. 210, 211, 212 and 213 of the Criminal Code. The challenges have been made under ss. 2, 7 (and in British Columbia also s. 15) of the Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being schedule B to the Canada Act 1982 (U.K.), 1982, c. 11.

[FN43]. Reference re ss. 193 & 195.1(1)(c) of the Criminal Code (Canada), 1990 CarswellMan 378, 1990 CarswellMan 206, (sub nom. Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)) [1990] 1 S.C.R. 1123, 56 C.C.C. (3d) 65 (S.C.C.) [Prostitution Reference] in which the majority of the Court held that the bawdy-house law and the general communication provision do not violate section 7 and that while s. 213, the general communication provision, violates section 2 of the Charter it is saved under s. 1. The majority made the same finding regarding a section 2(b) challenge to the communication provision in R. v. Skinner, 1990 CarswellNS 260, 1990 CarswellNS 24, 56 C.C.C. (3d) 1, [1990] 1 S.C.R. 1235(S.C.C.). In that case they also found that the provision did not violate associational rights under section 2(d) because the section does not directly proscribe an agreement between two individuals for the exchange of sex for money, nor sexual relations between consenting individuals.

[FN44]. The legitimacy of this rationale will be discussed in section ii) below.


[FN46]. As an aside, the approach to the bawdy-house provisions adopted in Labaye is consistent with the recommendations recently issued by the majority of the Parliamentary Standing Committee on Justice and Human Rights; their recommendation to the government was to “engage in a process of law reform that will consider changes to laws pertaining to prostitution, thus allowing criminal sanctions to focus on harmful situations” (The Challenge of
Change, supra, note 40 at 89). It may be that as a result of Labaye this recommendation to Parliament is one which the Court has already, with respect to the bawdy-house laws, adopted.

[FN47]. Given that the definitions of both prostitution and indecency have been open to interpretation under the bawdy-house law, and that it is less than clear whether a given act will be considered one of indecency or prostitution under the provision, it may not make sense to even make distinctions between the two when considering the bawdy-house law. See R. c. Tremblay, 1991 CarswellQue 198, 68 C.C.C. (3d) 439 (Que. C.A.), reversed 1993 CarswellQue 15, 1993 CarswellQue 161, 84 C.C.C. (3d) 97, 23 C.R. (4th) 98, [1993] 2 S.C.R. 932 (S.C.C.) where the Quebec Court of Appeal held that the practice of prostitution does not require actual sexual intercourse or even physical contact between the customer and the performer; see Justice Lamer's minority decision, in the Prostitution Reference, supra, note 43 at para. 45, where speaking “in terms of words and phrases like “prostitution” and “acts of indecency” he suggested that the “appropriate test to apply in this area is the “community standard of tolerance”. Prostitution has frequently been defined as the offering of one's body for lewd purposes in exchange for money (see Prostitution Reference, supra, note 43 at para. 45). But what does “lewd purposes” mean? If prostitution does not require intercourse but rather the offering of one's body for sexual gratification then when, under the bawdy-house law is an act prostitution and when is it indecency? In R. c. Pelletier, 1999 CarswellQue 3674, 1999 CarswellQue 3675, (sub nom. R. v. Pelletier), [1999] 3 S.C.R. 863 (sub nom. R. v. Blais-Pelletier) 142 C.C.C. (3d) 288 (S.C.C.), the Supreme Court of Canada determined that lap dances in a cubicle with a partially closed curtain, where the client is permitted to touch the breasts and buttocks of the dancer, are not indecent. But would they constitute prostitution—the offering of one's body for lewd purposes? (See Alexandre [2007] J.Q. no 11152 (Mun. Ct.) in which it was held that lap dances did constitute prostitution.)

[FN48]. Prostitution Reference, supra, note 43.

[FN49]. Prostitution Reference, supra, note 43 at para. 2. Where Wilson J. and Dickson C.J.C. disagreed was with respect to proportionality. Wilson J. found that the means used to achieve the law's objective were not sufficiently tailored to the objective. She also disagreed with the majority's finding that s. 7 was not violated.

[FN50]. Ibid.

[FN51]. Ibid.

[FN52]. Ibid.

[FN53]. Ibid. at para. 123.

[FN54]. The Supreme Court of Canada addressed the relationship between the principle of harm and the legitimacy of the criminal law in R. v. Malmo-Levine (2003), 2003 CarswellBC 3133, 2003 CarswellBC 3134, 2003 SCC 74, 179 C.C.C. (3d) 417 (S.C.C.). Malmo-Levine involved a s. 7 Charter challenge to the criminalization of marijuana. In that case the Court rejected the argument that the harm principle is a principle of fundamental justice. They determined that while the presence of harm to others may justify legislative action under the criminal law, the absence of proven harm does not create an unqualified s. 7 barrier to legislative action. Is there an incoherency between the Court's approach to harm in Malmo-Levine and the approach in Labaye? Not necessarily. There is an important distinction between suggesting that the harm principle is a principle of fundamental justice and therefore a criteria for constitutionality which binds legislative action (the state often legislates offences- such as most regulatory offences - which wouldn't meet this criteria) and arguing that some version of the harm principle is, in light of our constitutional democracy, a principle or even the right principle, of interpretation for determining where to draw the line between private and political morality when attempting to establish the legal definition of a socially or culturally constructed, and value laden, concept such as indecency.
Prostitution Reference, supra, note 43 at para. 128.

[FN56] Labaye, supra, note 1 at para. 40. That the Court (with the exception of Justice Lamer) agreed in the Prostitution Reference that the provision is not aimed at exploitation, degradation and subordination of women nor the prohibition of prostitution itself establishes that the second and third branches of harm under R v. Labaye -- predisposing others to antisocial conduct and harm to the participants--are not relevant.

Labaye, supra, note 1 at para. 40.

[FN58] Just as “the place in which acts take place and the composition of the audience” will affect whether or not such acts cause the type of harm necessary to be considered indecent” so too will location and audience affect whether communication causes the type of harm necessary to violate s. 213(1)(c).

[FN59] An alternative response to this counter argument would be that the types of harm addressed in ss. 213(1)(a) and (b) - interfering with traffic, obstructing pedestrians - constitute the types of harm incompatible with the proper functioning of society and would be covered under R. v. Labaye.

[FN60] In the Prostitution Reference, supra, note 43 the Court made a distinction between the legislative objective of these provisions and that of the general prohibition against communication under s. 213(1)(c).

[FN61] Prostitution Reference, supra, note 43 at para. 128. This quote is from Justice Wilson's dissent but the majority adopts her reasoning on this point.

[FN62] Even beyond the Court's conclusions in the Prostitution Reference, there are other arguments that reveal the sexual moralism underpinning the general communication provision. Frances Shaver, in reviewing the legislative and social history of prostitution in Canada and its relationship to both Victorian era, and modern day moral crusaders, argues that underpinning the communication provision and the rhetoric of public nuisance are moralistic concerns about decency and propriety (Frances M. Shaver, “The Regulation of Prostitution: Avoiding the Morality Traps” (1994) 9 Can. J.L. & Soc. 123.) She suggests that the gendered nature in which they are enforced reveals the moral impetus behind the law. Pointing to the fact that whether prostitution laws are tailored to be gender-specific and protectionist or adopt gender-neutral objectives, women continue to be disproportionately punished under them. Shaver argues (at 135) that, the modern day moral crusader, less overt than his or her Victorian antecedents, often hides behind the rhetoric of nuisance and that it is not always nuisance but rather a rejection of the acknowledgment by prostitution that “sex is recreation, that sex is entertainment and that it can be had commercially, anonymously and promiscuously.” The history of the criminal regulation of prostitution (it was originally a status offence), the fact that noisome, harassing or disruptive public conduct is already criminally regulated regardless of whether the perpetrator is soliciting sex, votes, drugs, believers or customers (for example under s. 175), the gendered manner in which the communication law is enforced, and the fact that, while subs. (1)(a) and (b) of s. 213 refer to stopping vehicles or impeding traffic, sub. (c) prohibits any public communication in any manner, all evidence the sexual moralism underpinning the general communication prohibition.

[FN63] Labaye, supra, note 1 at para. 41.

Labaye, supra, note 1 at para. 41.

[FN65] In Labaye, supra, note 1 at para. 51 Chief Justice McLachlin found that the risk of spreading sexually transmitted diseases was not a relevant factor in determining whether an act was harmful to the participants. The risk of spreading infectious disease and the provision of condoms are analytically distinct.

[FN66] Ponomarev, supra, note 33.

[FN68]. In the Prostitution Reference, supra, note 43 the majority and the dissent agreed that the communication provision is not concerned with the protection of sex workers (only Justice Lamer suggested that harm to sex workers might also be a legislative objective of the provision.) In Mara Justice Sopinka rejected the notion that the bawdy-house provision, in the context of indecency, was at all directed towards protecting the lap dancers themselves.

[FN69]. The Challenge of Change, supra, note 40 at 88.

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