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# The Political Morality of Public Sex

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*E. CRAIG – THE POLITICAL MORALITY OF PUBLIC SEX*

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## *Laws of Desire: The Political Morality of Public Sex*

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In deciding cases that involve the intersection of criminal law and sexual mores, the courts are faced with the challenge of determining the appropriate moral framework from which to approach simultaneously private and social concerns. In indecency cases, Canadian courts historically employed a communitarian model of sexual morality based on the community's standard of tolerance. However, the Supreme Court of Canada's recent jurisprudence affirms a harm-based test, which relies upon and protects the fundamental values enshrined in the Canadian constitution. This article analyzes the Court's decisions in *R. v. Labaye* and *R. v. Kouri* and demonstrates that these cases represent a shift in the relationship between law and sexuality. The author illuminates the possibility of a new approach by the Court to the regulation of sex. Such an approach allows for the legal recognition of pleasure behind, beyond, or outside of legal claims regarding identity, anti-subordination, relationship equality, and conventional privacy rights. A new theoretical approach to the legal regulation of sexuality recognizes the importance and benefit of challenging mainstream beliefs about sexuality and subverting certain dominant sexual norms. Such an approach is firmly grounded in the principles of liberalism that *Labaye* reflects.

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## Foreword: A Swinger's Guide to Montreal

The bouncer at Cœur à Corps will not let you in unless you answer in the affirmative when he asks if you and your companion are a “liberated couple”. Once inside, Cœur à Corps offers a modest bar and dance floor. “[E]very half hour a black translucent curtain automatically closes around the dance floor at which time the disc jockey plays—for 8 to 12 minutes—lascivious musical pieces. During these periods ... the dance floor fill[s] up with people ... [who engage] in sexual acts, ranging from caresses to masturbation.”<sup>1</sup> On a busy night you can expect between sixty and one hundred people on the dance floor at any given time.<sup>2</sup> Don't forget the cover charge. It's six dollars per person. Cash only, folks.

For those who like to fly (or rather swing) solo, Cœur à Corps isn't the establishment for you. The rule is “couples only” at Cœur à Corps. So single swingers might consider the club L'Orage instead. L'Orage is a private club with an annual membership fee that accepts both couples and singles. It is open to members and their guests only. What L'Orage lacks in decor (the third floor, where the sexual exchanges take place, consists of “[a] number of mattresses ... scattered about the floor of the apartment”<sup>3</sup>), it makes up for in terms of sexual opportunity. Two doors separate access to the third floor from the rest of the bar, one marked “*Privé*” and the other locked with a numeric key pad which only members can open. This makes a lot of what goes on at L'Orage much more “involved” than what is usually available at Cœur à Corps.<sup>4</sup>

Oh, and one last thing. You need not worry anymore about police raids at either L'Orage or Cœur à Corps.<sup>5</sup> In 2005, the Supreme Court of Canada refined the definition of indecency under the *Criminal Code* and quashed bawdy-house convictions against the proprietors of these establishments.

## Introduction

Both *R. v. Labaye* and *R. v. Kouri* concerned charges against the proprietors of establishments alleged to be bawdy houses. As defined under section 197 of the *Criminal Code*, a common bawdy house is a “place that is kept or occupied, or resorted to ... for the purpose of prostitution or for the practice of acts of indecency.”<sup>6</sup> Counsel for both Mr. Labaye and Mr. Kouri argued that the acts occurring in these establishments were not indecent under the criminal law. As such, both cases turned on the statutory interpretation of the term “indecency.”<sup>7</sup> The cases were differentiated mainly by the extent to which their activities were publicly accessible. In *Labaye*, the issue

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<sup>1</sup> *Kouri v. R.*, [2004] R.J.Q. 2061, 191 C.C.C. (3d) 42 at paras. 10-11, aff'd 2005 SCC 81, [2005] 3 S.C.R. 789, 260 D.L.R. (4th) 643 [*Kouri*].

<sup>2</sup> Taken from the facts as described by Otis J.A. at the Quebec Court of Appeal in *Kouri*, *ibid.*

<sup>3</sup> *R. v. Labaye*, 2005 SCC 80, [2005] 3 S.C.R. 728 at para. 7, 260 D.L.R. (4th) 595 [*Labaye*].

<sup>4</sup> Taken from the facts as described by McLachlin C.J.C. in *Labaye*, *ibid.*

<sup>5</sup> See *Labaye*, *ibid.* and *Kouri*, *supra* note 1.

<sup>6</sup> R.S.C. 1985, c. C-46.

<sup>7</sup> Neither case involved a constitutional challenge to the bawdy house provisions of the *Criminal Code*.

was whether or not the activities of a private members' sex club were indecent under the *Criminal Code*. Similarly, the issue in *Kouri* was whether or not the activities occurring at Cœur à Corps, as a non-members' club, constituted acts of criminal indecency.

In *Kouri*, Justice Otis of the Court of Appeal of Québec quashed the trial court's bawdy house conviction of James Kouri<sup>8</sup> and stated that “[b]etween the aesthetic canons of Alberoni eroticism and the sexual disarray expressed by Houellebecq, in *Les particules élémentaires*, there is a gulf which the State cannot force citizens to cross in the name of moral conformity and behavioural normality.”<sup>9</sup> Justice Otis's comment suggests significant normative implications by juxtaposing Italian author Francesco Alberoni's description of love<sup>10</sup> with the sexual promiscuity of Michel Houellebecq's characters in *The Elementary Particles*.<sup>11</sup> For Alberoni, love is found where two people form the “nascent state of a collective movement,” while Houellebecq's novel is a bleak and cynical take on sexual emptiness. The fact that Justice Otis locates love, and not simply a more positive account of sex, on the other side of the gulf suggests she is making a normative distinction between sex associated with love and loveless sex. However, Justice Otis allowed the appeal and acquitted Mr. Kouri on the basis that “sexual morality is, first and foremost, the result of the responsibility which human beings assume towards [themselves]”<sup>12</sup> and that “... Canadian society, which is pluralist and tolerant, does not condemn sexual modes of expression which—without them being ones which it adheres to—are not a source of social harm and which do not offend it.”<sup>13</sup> Justice Otis's decision was later affirmed by the Supreme Court of Canada.<sup>14</sup>

In *Labaye*, the majority of the Court allowed the appeal of Mr. Labaye's similar bawdy house conviction on the ground that the acts occurring at L'Orage did not constitute indecent acts under the *Criminal Code*.<sup>15</sup> The majority opinion, written by Chief Justice McLachlin, determined that only activities which pose a “significant risk of harm” will be considered indecent.<sup>16</sup> This type of harm must be contrary to the “norms which our society has recognized in its Constitution or similar fundamental laws,” and incompatible with proper societal functioning.<sup>17</sup> The group sex occurring

<sup>8</sup> James Kouri was the owner and operator of Cœur à Corps.

<sup>9</sup> *Kouri*, *supra* note 1 at para. 51.

<sup>10</sup> *Falling in Love*, trans. by Lawrence Venuti (New York: Random House, 1983) at 3.

<sup>11</sup> Trans. by Frank Wynne (New York: Alfred A. Knopf, 2000).

<sup>12</sup> *Kouri*, *supra* note 1 at para. 51. (Editor's note: The English version of the court of appeal's judgment, as reprinted in 191 C.C.C. (3d) 42, translates the original “*envers elles-mêmes*” as “towards each other”. However, “towards themselves” is likely a more accurate translation in this context.)

<sup>13</sup> *Ibid.* Admittedly, it may beg the question somewhat to premise a definition of indecency on what is or is not “offensive”.

<sup>14</sup> *Labaye*, *supra* note 3.

<sup>15</sup> The Court heard *Labaye* and *Kouri* on the same day, and relied upon the revised legal test for indecency established by the majority in *Labaye* to uphold the acquittal in *Kouri*. The Court treated these cases as companion cases. Except where otherwise indicated, references to *Labaye* throughout this paper can be assumed to refer also to the analysis in *Kouri*.

<sup>16</sup> *Labaye*, *supra* note 3 at para. 30.

<sup>17</sup> *Ibid.* at para. 29.

at L'Orage was not found to interfere with society's functioning or to perpetuate serious social harm.

In response to the majority's refinement of the test of indecency under the *Criminal Code*, the dissent in *Labaye* stated, "We are convinced that this new approach strips of all relevance the social values that the Canadian community as a whole believes should be protected."<sup>18</sup> Did the dissent in *Labaye* exaggerate the potential impact of this decision? Has the Court's majority decision in *Labaye* relegated our public sex laws to some sort of normative wasteland in which the state has no recourse to morality-based policies or actions?

In response to the *Labaye* dissent's claim that the majority's reasoning represents a moral void, this paper will demonstrate that Chief Justice McLachlin's decision does invoke an order of morality. The decision is, however, grounded in fundamental social, legal, and political (liberal) values—such as autonomy and tolerance—rather than in sexual morality. The *Labaye* majority rejects the dissent's communitarian approach and instead establishes an understanding of the regulation of public sex based on political morality. Chief Justice McLachlin invokes the fundamental ethical and social considerations enshrined in the constitution in order to protect those very values. Her reliance on the constitution continues to recognize the importance of community and collective interests without subjugating minority desires to majoritarian sexual morality.

The structure of Chief Justice McLachlin's reasoning in *Labaye* is implicitly supported by certain theories of liberalism, such as Ronald Dworkin's theory of liberal equality.<sup>19</sup> While relying on principles of liberalism, the majority decision also responds indirectly to the dissent by emphasizing certain common interests protected by the principles underpinning the constitution. Some of these interests are exclusively founded on individual rights; others, as will be discussed in Part II, are interests that can only be experienced collectively. *Labaye* represents a shift in the relationship between law and sexuality, and it illuminates the possible emergence of a new approach by the Supreme Court of Canada to the regulation of sex. This decision opens the door for the recognition of pleasure in legal claims regarding identity, anti-subordination, relationship equality, and conventional privacy rights. On a theoretical level, this novel approach to the legal regulation of sexuality could recognize the importance of challenging mainstream beliefs about sexuality, and subverting certain dominant sexual norms, while maintaining an analysis grounded in the principles of liberalism that *Labaye* clearly reflects.

## I. The Constitution as *Custos Morum*

The dissent in *Labaye* argues that the majority decision strips the Canadian public of the meaning of those social values that it holds most dear. The following section will demonstrate, however, that the majority's decision can actually be read as a direct

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<sup>18</sup> *Ibid.* at para. 98.

<sup>19</sup> See below for a discussion of Dworkin's theory of liberal equality.

attempt to affirm, give meaning to, and protect (to use the dissent's words) those "social values that the Canadian community as a whole believes should be protected."<sup>20</sup>

### A. A Standard of Tolerance for the Community

In further advancing a long line of jurisprudence which has attempted to develop objective legal criteria to define indecency and obscenity, Chief Justice McLachlin founded her reasoning in *Labaye* on the premise that *harm* is an essential ingredient of indecency. In doing so, she determined that a community's standard of tolerance would no longer be a salient consideration in determining whether a sexual practice causes harm of the sort that ought to be criminalized.<sup>21</sup>

Prior to the mid-twentieth century, the common law test for indecency and obscenity focused on whether the material or activity at issue would tend to deprave and corrupt other members of society.<sup>22</sup> As Chief Justice McLachlin notes in *Labaye*, this test stood unchallenged for almost a century before the Supreme Court of Canada adopted a definition of indecency based on the community's standard of tolerance for sexually explicit material.<sup>23</sup> The community standard of tolerance test, however, was still considered difficult to apply in an objective fashion, so it was eventually revised in *R. v. Towne Cinema Theatres Ltd.* to incorporate a notion of harm.<sup>24</sup>

In *Towne Cinema*, the Court held that there are two ways to establish that material is obscene: (1) by showing that the material violates a norm of what Canadians would tolerate other Canadians viewing or doing, or (2) by showing that the material would have a harmful effect on others in society.<sup>25</sup> Following its decision in *Towne Cinema*, the Court in *R. v. Butler* directly incorporated the notion of harm into the community standard of tolerance test: "The courts must determine as best they can what the community would tolerate others being exposed to on the basis of the degree of harm that may flow from such exposure."<sup>26</sup> In other words, what the community would tolerate others doing or seeing was to be determined based on how much harm an act or sexually explicit depiction posed. In *Labaye*, Chief Justice McLachlin suggests that the *Towne Cinema* decision 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 and Art Emporium v. Canada (Minister of Justice)*.<sup>27</sup>

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<sup>20</sup> *Labaye*, *supra* note 3 at para. 98.

<sup>21</sup> In *R. v. Mara*, the Court affirmed that the test for indecency is the same as the test for obscenity. Unless otherwise indicated, references to obscenity can be assumed to also refer to indecency—and vice versa ([1997] 2 S.C.R. 630, 148 D.L.R. (4th) 75 [*Mara*]).

<sup>22</sup> See *R. v. Hicklin* (1868), L.R. 3 Q.B. 360 (QB).

<sup>23</sup> *R. v. Brodie*, [1962] S.C.R. 681, 32 D.L.R. (2d) 507. The Supreme Court of Canada emphasized the need for more objective criteria which would inhibit adjudicators from relying upon their own subjective sexual morality.

<sup>24</sup> [1985] 1 S.C.R. 494, 61 A.R. 35 [*Towne Cinema*].

<sup>25</sup> *Ibid.*

<sup>26</sup> [1992] 1 S.C.R. 452 at 485, 89 D.L.R. (4th) 449 [*Butler*].

<sup>27</sup> 2000 SCC 69, [2000] 2 S.C.R. 1120, 193 D.L.R. (4th) 193 [*Little Sisters*]; *Labaye*, *supra* note 3 at para. 21. The dissent disagreed.

*Labaye* builds on the *Butler* description of the type of harm targeted by the concept of indecent conduct under the *Criminal Code*.<sup>28</sup> Chief Justice McLachlin determined that harm must be assessed not by community standards of tolerance, but rather by the norms which our society has formally recognized in the constitution or similar fundamental laws:

The inquiry is not based on individual notions of harm, nor on the teachings of a particular ideology, but on what society, through its fundamental laws, has recognized as essential. Views about the harm that the sexual conduct at issue may produce, however widely held, do not suffice to ground a conviction. *This is not to say that social values no longer have a role to play.* On the contrary, to ground a finding that acts are indecent, the harm must be shown to be related to a fundamental value reflected in our society's Constitution or similar fundamental laws ... Unlike the community standard of tolerance test, the requirement of formal recognition inspires confidence that the values upheld by judges and jurors are truly those of Canadian society. Autonomy, liberty, equality and human dignity are among these values.<sup>29</sup>

When considering or upholding social values, Chief Justice McLachlin suggests that the criminal law ought to rely upon those values which the whole of society agrees upon. This is why her theory of harm relies on those values that have been formally recognized by a society in its fundamental laws. Despite the fact that *Labaye* did not involve a constitutional challenge but rather a matter of statutory interpretation, the definition of indecency that Chief Justice McLachlin ultimately adopts turns on constitutional law, marking a significant shift in the Court's approach to indecency.<sup>30</sup>

### **B. McLachlin's Hart of the Community Versus the Devlin Is in the (Sexual) Details**

Responding to Chief Justice McLachlin's reasoning, the dissent in *Labaye* commented that "the existence of harm is not a prerequisite for exercising the state's power to criminalize certain conduct. The existence of fundamental social and ethical considerations is sufficient."<sup>31</sup> Despite this statement, the dispute between the majority and the dissent in *Labaye* is not actually over whether social values ought to play a role in making or enforcing indecency laws—both adopt reasoning that turns on an application of social values. Their disagreement is over *which* social values to rely upon and what role they ought to play in defining indecency.

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<sup>28</sup> *Butler* defined harm in the context of obscenity as something that "predisposes persons to act in an anti-social manner ... Anti-social conduct for this purpose is conduct which society formally recognizes as incompatible with its proper functioning" (*supra* note 25 at 485).

<sup>29</sup> *Labaye*, *supra* note 3 at para. 33 [emphasis added].

<sup>30</sup> McLachlin C.J.C. refers to both the constitution and other similar fundamental laws to inform her definition of indecency. While she does not specify what these sources might be, presumably they would include quasi-constitutional laws such as the *Canadian Bill of Rights*, R.S.C. 1960, c. 44C-12.3, the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, and provincial human rights codes.

<sup>31</sup> *Supra* note 3 at para. 104 [references omitted]. As discussed below, the theoretical foundation for the dissent is consistent with the approach adopted by Lord Devlin regarding the state's right to criminalize consensual sodomy. See Patrick Devlin, *The Enforcement of Morals* (London: Oxford University Press, 1965).

Whereas the majority's reasoning turns on the sexual restrictions and standards a society can legitimately impose on its members without compromising broader ethical convictions as articulated by the constitution, the dissent depends on the justices' perception and interpretation of what sexual mores the majority of Canadians have adopted. This is why the dissent endorses a strikingly quantitative approach to sexual morality. In defining indecency, the dissent suggests that "use can be made of factual evidence, such as surveys, reports or research regarding Canadians' sexual practices and preferences, and their attitudes toward and levels of tolerance of sexual acts in various contexts."<sup>32</sup> The dissent's reliance on Canadians' sexual mores leads them to suggest that, contrary to the majority's opinion, the community's standard of tolerance remains a salient consideration in identifying acts of indecency, and "serious harm is not the sole criterion for determining what the Canadian community will tolerate."<sup>33</sup> The dissenting judges base their argument on two premises. First, they suggest that morality for the sake of morality—and here they are referring to majoritarian sexual mores—should be permitted to play a role in defining the state's power to criminalize conduct, regardless of whether there is an associated harm. Second, and perhaps alternatively, they suggest that activity which is inconsistent with the community's sexual morality in and of itself causes harm to the community's political morality.<sup>34</sup> In other words, they argue that there is always a harm associated with transgressions of those sexual values held by most Canadians. The former argument concerns issues of the criminal law's legitimacy and its theory of harm. The latter combines these concerns over legitimacy and harm with an argument about the significance and role of community in the maintenance of political morality.

In support of their argument that majoritarian sexual mores may serve as a basis for the criminalization of conduct regardless of whether there is an associated harm, the dissent cites examples such as "child pornography, incest, polygamy, and bestiality."<sup>35</sup> Whether or not each of these sexual offences has an associated social harm of the type contemplated by the majority is debatable.

To fully understand the nature of social harm contemplated by the Court, it is useful to turn to *R. v. Malmo-Levine*; *R. v. Caine*, which provides a contextual background to *Labaye* and *Kouri*.<sup>36</sup> *Malmo-Levine* involved a challenge to the criminalization of marijuana based on section 7 of the *Canadian Charter of Rights and Freedoms*.<sup>37</sup> In this case, the Supreme Court of Canada rejected the argument that the

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<sup>32</sup> *Labaye*, *ibid.* at para. 86.

<sup>33</sup> *Ibid.* at para. 97. In this respect, the majority and the dissent are quite far apart. Not only does the dissent argue that harm is not now and should not become the sole criterion for determining the standard of tolerance, they also do not agree with the majority's assertion that *Butler* suggests otherwise.

<sup>34</sup> *Ibid.* at para. 109. The dissent argues that "[t]here is also harm where what is acceptable to the community in terms of public morals is compromised." The term "public morals" refers to sexual morality. In this context, the word "public" refers to a quantitative, not qualitative, view of morality. The concept of harm, or what constitutes harm, is a dilemma the criminal law has always faced. In the context of indecency, the issue becomes what to base assessments of harm on—political morality or sexual morality?

<sup>35</sup> *Ibid.*

<sup>36</sup> 2003 SCC 74, [2003] 3 S.C.R. 571, 233 D.L.R. (4th) 415 [*Malmo-Levine*].

<sup>37</sup> Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

harm principle is a tenet 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 section 7 barrier to criminalization. Two important points on this issue should be noted. First, the harm principle referred to in *Malmo-Levine* had greater similarities to the harm principle conceived by John Stuart Mill than did the harm principle adopted by the *Labaye* majority.<sup>38</sup> Second, the claim that the harm principle is a tenet of fundamental justice and, therefore, a precursor to the use of the criminal law, is related but not identical to the assertion that some version of the harm principle is the right principle of interpretation to establish the legal definition of a socially constructed (and value-laden) concept such as indecency. Indeed, the Court recognized the validity of this assertion in *Butler* by incorporating the notion of harm directly into the community standard of tolerance test.

The judicial debate over social harm in *Malmo-Levine* correlates to the considerable debate in the academic literature over the legitimacy of “morality for the sake of morality” as a foundation for the criminalization of particular sexual acts.<sup>39</sup> The division of the Court in *Labaye* is largely a continuation and evolution of the famous exchange between Lord Devlin and H.L.A. Hart over the role of morality in the criminal law.<sup>40</sup> At first blush, the disagreement between the majority and minority in *Labaye* might be characterized simply as a reiteration (or manifestation) of the Hart/Devlin debate. Closer examination, however, reveals that while the dissenting opinion does mirror Devlin’s position, the analogy is not as accurate when comparing Chief Justice McLachlin’s reasoning with Hart’s position.

Lord Devlin argued that in the interests of self-preservation, a society must be allowed to coercively restrict sexual conduct that threatens valued social institutions and is contrary to the personal sexual morality of most members of society.<sup>41</sup> Society, he argued, has a right to enforce certain moral convictions so as to preserve the particular social environment desired by the majority of its members. Devlin’s concern

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<sup>38</sup> See J.S. Mill, *On Liberty and Considerations on Representative Government*, ed. by R.B. McCallum (Oxford: Basil Blackwell, 1946). Although the dissent in *Labaye* argues that the majority relies on John Stuart Mill’s harm principle (*supra* note 3 at para. 105), the theory of harm put forward by McLachlin C.J.C. in *Labaye* differs from Mill’s original principle. Her theory of harm includes attitudinal harm to others and harm to the participants (*ibid.* at paras. 45-47). It is in this sense much more accommodating to the use of criminal law.

<sup>39</sup> See e.g. Stuart Hampshire, ed., *Public and Private Morality* (Cambridge: Cambridge University Press, 1978); Ronald Dworkin, *Freedom’s Law: The Moral Reading of the American Constitution*, (Cambridge: Harvard University Press, 1996); Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Oxford: Clarendon Press, 1994). For a cultural feminist analysis of gendered sexual harm see Robin West, *Caring For Justice* (New York: New York University Press, 1997); *contra* Janet Halley, “The Politics of Injury: A Review of Robin West’s *Caring for Justice*”, online: (2005) 1 Unbound: Harvard Journal of the Legal Left 65 <<http://www.legalleft.org/wp-content/uploads/2008/04/1unb065-halley.pdf>>.

<sup>40</sup> See Devlin, *supra* note 30; H.L.A. Hart, *Law, Liberty, and Morality* (Stanford: Stanford University Press, 1977). Their debate was over the Wolfenden Report’s recommendation to decriminalize homosexuality (U.K., H.C., “Report of the Committee on Homosexual Offences and Prostitution”, Cmnd 247 in *Sessional Papers*, vol. 14 (1956-57) 85). See also H.L.A. Hart, *The Morality of the Criminal Law: Two Lectures* (Jerusalem: Hebrew University Press, 1965).

<sup>41</sup> Devlin, *supra* note 30.

(shared by the dissent in *Labaye*) was that without the ability to criminalize conduct that transgresses the personal morals held by the majority of citizens, the moral fibre of a society would crumble.<sup>42</sup> This same rationale is the basis for the *Labaye* dissent's suggestion that if the criminal law fails to incorporate the community standard of tolerance test, the values considered worthy of protection by the Canadian community as a whole will be "stripped of any relevance."<sup>43</sup> Upholding personal morals in the criminal law also grounds the connection the dissent makes between community views on sexuality and "social order".<sup>44</sup>

Hart responded to Devlin's argument by suggesting that in the criminal law, a line between private and public conduct must be maintained and that without some associated and provable harm, it would be illiberal for the state to prohibit certain behaviour *simply* on the basis that the majority is against it.<sup>45</sup> He argued that there is no empirical evidence to suggest that the separation of law and morality would lead to social decay. There is a distinction, he suggested, between morally driven decisions regarding the severity of punishment for a certain act (which may be acceptable) and morally driven decisions to punish that act in the first place (which are not acceptable). Ultimately, the enforcement of morality for the sake of morality is illiberal. Moreover, he contended, morality cannot be instantiated through law. According to Hart, legally coerced morality, or legal moralism, is of no value as a foundational principle of the criminal law.<sup>46</sup>

Chief Justice McLachlin's approach differs from Hart's approach in that she does endeavour to instantiate morality—political morality—through law.<sup>47</sup> Hart, relying on utilitarian theory, distinguished between "positive morality" and "critical morality" to question the role of morality in the law. Positive morality referred to "the morality actually accepted and shared by a given social group."<sup>48</sup> Critical morality referred to "the general moral principles used in the criticism of actual social institutions including positive morality."<sup>49</sup> For Hart, therefore, the question "is one of the critical morality about the legal enforcement of positive morality."<sup>50</sup>

In *Labaye*, Chief Justice McLachlin instantiates political morality in the law by interpreting the bawdy house provision of the *Criminal Code* on the basis that principles of critical morality are a positive morality. In other words, for Chief Justice McLachlin, critical morality is a positive morality. The distinction may not be surpris-

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<sup>42</sup> *Ibid.* at 13.

<sup>43</sup> *Labaye*, *supra* note 3 at para. 103.

<sup>44</sup> *Ibid.* at para. 108.

<sup>45</sup> Hart, *Law, Liberty and Morality*, *supra* note 39 at 20-21.

<sup>46</sup> *Ibid.*

<sup>47</sup> Hart noted that he would not unequivocally defend Mill's anti-paternal harm principle. While he did think that there "may be grounds justifying the legal coercion of the individual other than the prevention of harm to others," he strictly limited such interference to either "physical paternalism"—preventing individuals from harming themselves—or provable harm to something beyond morality (*ibid.* at 5). Hart considered any principle requiring a lower standard of harm to be a form of legal moralism.

<sup>48</sup> *Ibid.* at 20.

<sup>49</sup> *Ibid.*

<sup>50</sup> *Ibid.*

ing given the different constitutional traditions in which Hart's work and Chief Justice McLachlin's jurisprudence are situated. The values Chief Justice McLachlin affirms are tolerance and respect for autonomy. She rejects the community standard of tolerance test and replaces it with a new standard of tolerance: a standard required by the constitution (of the community). Chief Justice McLachlin does not jettison "morality for morality's sake" from the criminal law. She acknowledges that harm to values can, in and of itself, constitute the sort of harm that ought to be prohibited by the criminal law. However, she strictly limits the range of values which merit such legal protection to those which are so cherished by Canadian society that they have been constitutionally entrenched.

While Chief Justice McLachlin's approach to the role of morality in criminal law differs in this respect from that suggested by Hart, it does find support in the political theory of one of Hart's students. The structure of her reasoning is very consistent with Ronald Dworkin's theory of liberal equality, as well as Dworkin's own position on the role of morality in the criminal regulation of sex.<sup>51</sup>

Dworkin's theory is premised on the argument that a state is only legitimate if it shows equal concern for the fate of all the citizens over whom it claims dominion.<sup>52</sup> He identifies two principles of human dignity that dominate his notion of equal concern. The "principle of intrinsic value" suggests that it is objectively important that human lives be successful rather than wasted and that this is equally important for each human life.<sup>53</sup> The "principle of personal responsibility" suggests that people are responsible for making their own choices about what type of life to live, and that the state ought not to make ethically-based distinctions between what is or is not a good choice.<sup>54</sup> Dworkin acknowledges, however, that despite these two principles, it is impossible for people to engage in political debate completely outside the realm of their deeply held personal convictions.<sup>55</sup> He suggests that, as a result, we must identify widely shared ethical principles of dignity and personal responsibility and then resolve our conflicting political principles by determining which policies or political structures are more securely grounded in those fundamental ethical convictions that are shared by all or most.<sup>56</sup>

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<sup>51</sup> Ronald Dworkin, "Lord Devlin and the Enforcement of Morals" (1966) 75 Yale L.J. 986; Dworkin, *Freedom's Law*, *supra* note 38 at 221.

<sup>52</sup> Ronald Dworkin, *Is Democracy Possible Here?: Principles for a New Political Debate* (Princeton: Princeton University Press, 2006); Ronald Dworkin, *Sovereign Virtue* (Cambridge: Harvard University Press, 2000).

<sup>53</sup> Dworkin, *Is Democracy Possible Here?*, *ibid.* at 9; Dworkin, *Sovereign Virtue*, *ibid.* at 5.

<sup>54</sup> Dworkin, *Is Democracy Possible Here?*, *ibid.* at 10; see also Ronald Dworkin, "Liberalism" in Stuart Hampshire, ed., *Public and Private Morality*, *supra* note 38, 113 at 127.

<sup>55</sup> *Is Democracy Possible Here?*, *ibid.* at 104. Dworkin departs from the sort of pure political liberalism described by John Rawls. See John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1971). It may be that Rawls has, in his later work, departed somewhat from such a strict separation. See e.g. "The Basic Liberties and Their Priority" in Stephen Darwall, ed., *Equal Freedom: Selected Tanner Lectures on Human Values* (Ann Arbor: University of Michigan Press, 1995) 105.

<sup>56</sup> *Is Democracy Possible Here?*, *ibid.* Dworkin suggests that the tolerance and neutrality demanded by liberalism do not arise simply from the need to separate the right from the good, but from an under-

In knitting together his two principles of human dignity with the ethical conviction that the value of a good life lies in the inherent value of a skillful performance of living, Dworkin's theory of liberal equality attempts to maintain a link between personal ethics and political values. At the same time, Dworkin strives to honour the overriding liberal principle of state neutrality between conceptions of the good. If one ascribes to his challenge model of ethics<sup>57</sup> and accepts Dworkin's principles of human dignity, it follows that "a just society is a condition of a good life for the individuals who live within it."<sup>58</sup> In a nutshell, this is Dworkin's theory of justice. He arrives at this account of justice by privileging the notion of autonomy. Autonomy (more specifically, the equal distribution of autonomy) is both the foundation and structure of Dworkin's theory of liberal equality. His liberal ethical system is not premised on the overarching and assumed value of a particular type of life, but rather, it is premised on a particular way of living: the performance of living autonomously.

In what respect does Dworkin's theory inform the reasoning adopted by Chief Justice McLachlin in *Labaye*? Dworkin recognizes the need to appeal to ethical convictions of a more general nature in an effort to garner broader appeal or greater consensus. Similarly, Chief Justice McLachlin relies on more general convictions to settle a contentious issue. In the same way that, for Dworkin, autonomy serves as both the foundation and the structure of his theory of liberal equality, Chief Justice McLachlin relies upon, in order to protect, the fundamental values enshrined in the constitution.<sup>59</sup> This move is well demonstrated by comparing the reasoning of the majority opinion to the dissent in *Labaye*.

There is a distinction made by Chief Justice McLachlin in her majority opinion that is absent from the dissenting opinion of Justices Bastarache and LeBel. The chief justice distinguishes between societal and private morality, or what Dworkin would describe as third- and first-person ethics. She begins her decision by stating upfront that "Canadian law on indecent acts, from its origins in the English common law, has

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standing of the good—a model of ethics. See also Ronald Dworkin, "Foundations of Liberal Equality" in Darwall, ed., *ibid.*, 190 at 195 [Dworkin, "Foundations of Liberal Equality"].

<sup>57</sup> Dworkin's model—what he describes as the challenge model of ethics—suggests that the value of a good life lies in the inherent value of a skillful performance of living. It is related to the ethical conviction that what individuals perceive as important or valuable to leading their lives *is* what is important or valuable in leading their lives (see Dworkin, "Foundations of Liberal Equality", *ibid.*).

<sup>58</sup> *Ibid.* at 195.

<sup>59</sup> McLachlin C.J.C. engages this same sort of two-step synthesis in other contexts as well. See e.g. Rt. Hon. Beverley McLachlin, "Freedom of Religion and the Rule of Law: A Canadian Perspective" in Douglas Farrow, ed., *Recognizing Religion in a Secular Society* (Montreal: McGill-Queen's University Press, 2004) 12 at 29. The chief justice attempts to reconcile the tension between freedom of religion and the rule of law (what she describes as a "dialectic of normative commitments"—two different, and at times competing, comprehensive systems of belief) by relying upon Charles Taylor's distinction between goods and hyper-goods. According to Taylor, hyper-goods, or core values, are those from which all other normative positions are judged. See *Sources of the Self: The Making of the Modern Identity* (Cambridge: Harvard University Press, 1989) at 63. McLachlin C.J.C. suggests that on a societal level, the constitution articulates these goods and hyper-goods. She suggests that the *Charter* has articulated freedom of religion as one of our society's goods but that we must also look to the values (hyper-goods) that freedom of religion protects, these values being autonomy, human dignity, and respect for the parallel rights of others. This same structure of reasoning is apparent in *Labaye* when the majority refers to religion (*supra* note 3 at para. 34).

been firmly anchored in societal rather than purely private moral concerns.<sup>60</sup> Contrary to the dissent's suggestion, the majority decision *is* based on fundamental social and ethical considerations: the social and ethical considerations applied in the majority decision are so fundamental to the morality of Canadians that they are entrenched in the constitution.

Recall that Dworkin proposes a principle derived from “instincts and convictions about the character and ends of human life that seem particularly congenial to liberal political principles ... [and that] already form the central part of how many of us imagine living well ...”<sup>61</sup> Dworkin seeks an ethical conviction that could serve as common ground for the resolution of other, less agreed-upon principles. Chief Justice McLachlin's decision in *Labaye*, and in particular her reliance on the principles underpinning the constitution, adopts precisely such a methodology.<sup>62</sup>

It seems that Chief Justice McLachlin agrees with the dissent's first argument—that the criminal law should include some measure of protection against moral harm. The discrepancy lies with what type of morality the criminal law ought to enforce. The majority determines that it ought to enforce political morality to prevent harm to fundamental values, not sexual morality. As noted above, however, the dissent argues that activity inconsistent with the community's sexual morality in and of itself causes harm to Canada's fundamental values. This argument is centred on the definition of harm under the criminal law and is akin to Devlin's argument about community. The argument suggests that harm occurs to the community as a whole, even if no individual is directly harmed, when the first-person ethical convictions or personal moralities of most people in the community are transgressed by a minority of people who do not hold such convictions. The dissent argues in favour of the community standard of tolerance test for indecency on the basis that it is a product of the “values characteristic of the entire community.”<sup>63</sup> They contend that indecency may occur even in private where there is no harm to anyone, including the participants; they do so based on the assertion that indecency laws are about “what Canadians would not abide other Canadians *doing* ...”<sup>64</sup> Presumably, the argument is premised on the conviction that a society is more than the sum of its individual parts and that the value in this collectivity—the gestalt of a society—cannot be protected simply by upholding (in whatever form) the rights of a society's individual members.

If harm can be caused by the mere contravention of dominant sexual mores, does the majority's decision overlook or fail to protect us from harm of this sort? One liberal response to this question is to justify such harm as the “cost of freedom”. This is Dworkin's response to the tension between freedom of speech and protection of

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<sup>60</sup> *Labaye*, *ibid.* at para. 15.

<sup>61</sup> Dworkin, “Foundations of Liberal Equality”, *supra* note 55 at 207.

<sup>62</sup> Conversely, the dissent does not resort to the constitution or more general social values to establish their analytical approach. Instead they discuss one particular value at length: public (or majoritarian) morality concerning sex.

<sup>63</sup> *Labaye*, *supra* note 3 at para. 85.

<sup>64</sup> *Ibid.* at para. 101 [emphasis added].

women's equality rights in the pornography debate.<sup>65</sup> He suggests that in the face of such tensions, a difficult political choice has to be made and the American constitution reflects a choice to privilege liberty (to be more specific, negative liberty). However, the Canadian constitutional tradition does not privilege liberty to the same extent.<sup>66</sup> Regardless, this argument does not adequately capture the essence of Chief Justice McLachlin's reasoning in *Labaye*. Her divergence from a purely negative liberty argument is clearly demonstrated by two aspects of her decision. First, the values she identifies include dignity and equality in addition to liberty and autonomy. Second, and more significantly, she identifies three distinct types of harm that threaten these values: harm to the liberty of those involuntarily confronted with and offended by sexual displays, harm to the individual participants, and the harm of predisposing individuals to anti-social behaviour. This last category subsumes the notion of attitudinal harm, which occurs when degrading images diminish the public's respect for certain groups.<sup>67</sup> Protecting against the possibility of attitudinal harm would not fit well within a cost-of-freedom claim.<sup>68</sup>

A liberty claim about the cost of freedom does respond to community-oriented critiques, but it remains a rights-based claim that inevitably privileges the individual. Under such a claim, the value of community is located in the fact that individuals can form a cohesive unit to protect individual autonomy. Therefore, autonomy remains the foundation for human flourishing. This type of liberty claim is in fact a social contract-type claim about the law's legitimacy, under which the individual—through the concept of rights—remains paramount.<sup>69</sup> *Labaye* and *Kouri*, however, do not truly

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<sup>65</sup> See Dworkin, *Freedom's Law*, *supra* note 38. Dworkin responds to both the positive liberty and the equality arguments in favour of censorship made by anti-pornography feminist Catherine MacKinnon. He argues that "[f]reedom of speech, conceived and protected as a fundamental negative liberty, is the core of the choice modern democracies have made, a choice we must now honor in finding our own ways to combat the shaming inequalities women still suffer" (*ibid.* at 221). In a more direct response to communitarian arguments, Dworkin suggests that many of these purported sexual morals are not actually morals at all. They are prejudices, or ill-considered regurgitations of other people's sexual convictions, and it is only the failure to enforce actual ethical convictions that threatens society in the manner envisioned by Lord Devlin ("Lord Devlin and the Enforcement of Morals", *supra* note 50 at 1001).

<sup>66</sup> One example of this distinction between the Canadian and American constitutional traditions is found in their differing approaches to issues such as the criminal regulation of sodomy. In Canada, legal claims regarding sodomy are likely to be framed as (and succeed under) arguments of equality. See e.g. *R. v. M.(C.)* (1995), 23 O.R. (3d) 629, 41 C.R. (4th) 134 (C.A.) (holding that a higher age of consent for anal sex than for vaginal sex violated section 15 of the *Charter*). In the United States, similar issues are more likely to be framed as (and succeed under) arguments of sexual liberty and rights to privacy. See *Lawrence v. Texas*, 539 U.S. 558, 123 S. Ct. 2472 (2003) (striking down state sodomy laws under the due process clause of the Fourteenth Amendment).

<sup>67</sup> *Labaye*, *supra* note 3 at paras. 36-51.

<sup>68</sup> See e.g. Dworkin, *Freedom's Law*, *supra* note 38 at 222. Dworkin dismisses this claim as a legitimate justification for limiting freedom of speech.

<sup>69</sup> Dworkin's "true community of principle" offers a more nuanced liberal response to the communitarian critique. He notes that "the moral environment in which we all live is in good part created by others" and that many of our moral judgments arise within the context of communities (*Freedom's Law*, *ibid.* at 237). He contends that communities, as a result of their social practices, give rise to obligations among and between members. (Ronald Dworkin, *Law's Empire* (Cambridge: Harvard Univer-

concern the protection of individual rights. Unless one drastically expands the concept of sexual privacy, reinterprets the concept of an equality-seeking minority group, or endorses a right to a much broader conception of liberty under section 7 of the *Charter* (which the Supreme Court of Canada refused to do in *Malmo-Levine*), the notion of rights does not really capture the essence of the legal issue at play in these cases.

Both *Labaye* and *Kouri* redefine indecency in a manner that decriminalizes sexual activity by heterosexual couples paying a cover charge or membership fee to gain entrance to a bar or club where they can have semi-public sex in large groups. The ability to legally act on these desires is not based on equality rights, expressive rights, or privacy rights. The patrons of Cœur à Corps were not gathering to celebrate their shared minority identity or to build a sense of community, which might be argued in the case of a gay bar or bathhouse. *Labaye* stipulates that the law ought not to interfere with the exercise of people's desire to engage in these types of semi-public group sexual acts (or to make a bit of cash off of other people's desire to do so) but not because swingers belong to a historically oppressed sexual minority, not because of the sexually expressive content of their activities, and not because the state has no place in the bedrooms of our nation.

Instead of invoking the notion of rights, Chief Justice McLachlin invokes the notion of constitutional democracy.<sup>70</sup> It is not that a consideration of individual rights is irrelevant to her decision, but her reasoning is not accurately characterized as a simple, liberal-rights balancing analysis. Her decision is not communitarian or even perfectionist.<sup>71</sup> Rather, there is a nuance to her reasoning (or perhaps the implications of her reasoning) which may be more responsive to the dissent's concern over protecting

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sity Press, 1986) at 197). While his true community of principle theory does offer a response to communitarian arguments by acknowledging the role of community, it is a response which defines community narrowly and remains grounded in notions of individuality. This theory accommodates notions of community but does so through a focus on obligations—on responsibilities—which are the inextricable correlates to rights. Under a broader account of community there are some social forms and collective goods which cannot be accounted for through the concepts of rights and obligations. Joseph Raz, for example, argues that the pursuit of excellence is a collective good that is needed for autonomy but that is greater than the sum of individual rights (*The Morality of Freedom* (Oxford: Clarendon Press, 1986) at 196). Both Charles Taylor's politics of difference and Will Kymlicka's version of group rights are arguments based in some respect on this recognition of the value of collectivity. Taylor argues that there are certain forms of recognition that cannot be claimed through the vehicle of individual rights. See Charles Taylor, "The Politics of Recognition" in Amy Gutmann, ed., *Multiculturalism and "The Politics of Recognition"* (Princeton: Princeton University Press, 1992) 25. Kymlicka would suggest that there is a collective element to this aspect of individual well-being (*Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford: Clarendon Press, 1995)).

<sup>70</sup> The concept that community is more than just the sum of the individual rights of its members has been given constitutional significance by the Supreme Court of Canada. See e.g. *Reference Re Secession of Quebec*, [1998] 2 S.C.R. 217, 161 D.L.R. (4th) 385. See also *Mahe v. Alberta*, [1990] 1 S.C.R. 342, 106 A.R. 321. I am grateful to Professor Ronald Murphy for this point.

<sup>71</sup> Perfectionism refers to the assertion that the state is entitled to, or ought to, promote some version of the good. Liberal perfectionists such as Joseph Raz can be distinguished from communitarians based on the degree of paternalism they endorse. For a discussion of communitarianism, see e.g. Michael J. Sandel, *Liberalism and the Limits of Justice*, 2d ed. (Cambridge: Cambridge University Press, 1998).

the intangible worth offered by the gestalt of a community. Part II will discuss the manner in which Chief Justice McLachlin's invocation of constitutional principles maintains the importance of community by promoting the community's common interests in both tolerance and sexual desire.

## II. Tolerance, Iconoclastic Sex, and Common Goods

In what respect is *Labaye's* approach to the values of community and collectivity in the definition of indecency distinguishable from straightforward liberal arguments? Joseph Raz suggests an answer to this question in his distinction between public interests and common goods.<sup>72</sup>

Under Raz's approach, the common good is a good that benefits everyone in a given society (albeit to varying degrees), while the public interest entails a resolution of the conflicting interests of various citizens. He uses the examples of pollution-free air and a network of railway tracks to illustrate this distinction. There may be a public interest in a system of railway tracks. This interest is held not only by railway users but also by other members of the public, such as railway employees. Some people may, however, derive no benefit from this good and others may actually be adversely affected by the railway's existence. The railway may, for instance, cause them to endure noise, pollution, or a decline in the value of their properties. This does not mean that there is any less of a public interest in the existence of a viable railway system.<sup>73</sup> Raz contrasts this public interest with an example of a common good, clean air: "Everyone has a health interest which benefits from unpolluted air. The benefit is noncompetitive (one person's enjoyment is not at the expense of anyone else), and it is similar in nature for everyone ..."<sup>74</sup>

Common goods and public interests cannot necessarily be claimed as rights.<sup>75</sup> However, given that common goods benefit everyone in a community in the same way, it would make sense to suggest that the state, if it is to act in the interests of the

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<sup>72</sup> Raz's theory of liberal perfectionism denies that "there is some *single* criterion of the good life which the legislator must uphold," but it does accept that "some ways of life are simply morally worse than others and that the legislator's job is to discourage them" (see Jeremy Waldron, "Autonomy and Perfectionism in Raz's Morality of Freedom" (1989) 62 S. Cal. L. Rev. 1097 at 1102). Given the very different accounts of liberalism provided by Dworkin and Raz, it might seem incoherent to draw on both Dworkin's theories and Raz's theories to support the same decision. The fact is that support for McLachlin C.J.C.'s reasoning is found in aspects of both theories. Certainly the structure of her reasoning resembles Dworkin's theory of liberal equality. However, as the discussion below will demonstrate, support for her decision can also be found on the basis of theories regarding common or collective interests.

<sup>73</sup> Joseph Raz, "Rights and Politics" (1995) 71 Ind. L.J. 27 at 35.

<sup>74</sup> *Ibid.*

<sup>75</sup> For example, think of the common interest in a nuclear bomb-free society. This is a non-competitive benefit that would be similar in nature for everyone (provided that all nuclear bombs were eliminated simultaneously). However, a legal instrument which would allow someone to claim a right to a nuclear bomb-free society does not exist. See e.g. *Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441, 18 D.L.R. (4th) 481. It is not particularly coherent to think of this common interest as an individual right that might be recognized by a legal system.

community, must act in a manner consistent with the community's common goods.<sup>76</sup> So long as the state adopts policies or enacts laws in pursuit of common goods, some notion of community is maintained and the value in collectivity is given formal recognition. Therefore, a definition of indecency and obscenity which serves a common good would recognize the role and importance of community and respond to the dissent's community-based objection to the majority's definition.

There are two interrelated common goods served by the majority's revised definition of indecency in *Labaye*. As outlined below, these common goods are tolerance and the iconoclastic legal recognition of sexual desire.<sup>77</sup>

### A. Tolerating Group Sex

Tolerance is related to shared goods, another type of good which Raz discusses. Raz defines shared goods as "... goods whose benefit for people depends on people enjoying the good together and thereby contributing to each other's good."<sup>78</sup> He uses parties or dances as examples of shared goods; such events are only enjoyable for their participants to the extent that they can be enjoyed together. The sexual activities occurring at L'Orage and Cœur à Corps would be of this shared character. After all, these cases were not about the acts of individuals; at issue was the decency or indecency of "orgies", to use the term employed by Chief Justice McLachlin.<sup>79</sup>

Shared goods, however, are not to be confused with common goods. Common goods serve the same interest of every person in a non-competitive way. The ability to legally engage in group sex in a semi-public setting does not serve the interests of every person in Canada. While it is a shared good among those who desire to engage in semi-public group sex, it is not a common good in itself. But according to Raz, "one particularly important type of common good is the cultivation of a culture and a social ambience which make possible a variety of shared goods, that is, a variety of forms of social association of intrinsic merit."<sup>80</sup> The availability of an adequate range

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<sup>76</sup> This would not be the case with respect to public interests. That is to say, the state may or may not choose to pursue a particular public interest. Regardless of this choice, the state may still act in the interests of, and therefore maintain value in, the community.

<sup>77</sup> It should be noted that liberal theories of state neutrality can also affirm the value of and need for tolerance. For example, tolerance is integral to Dworkin's challenge model of ethics. This role for tolerance, however, does not diminish the argument that the common interest in tolerance affirmed and promoted by *Labaye* can be characterized as an investment in the collective, nor does it diminish the assertion that characterizing tolerance in this fashion makes it more effective as a response to the dissent's communitarian concerns. Moreover, these theories provide different accounts of what tolerance is and what it does. Under a perfectionist approach, tolerance is valuable not only on an individual level, but also for what it provides to a community.

<sup>78</sup> Raz, "Rights and Politics", *supra* note 71 at 35-36.

<sup>79</sup> *Labaye*, *supra* note 3 at para. 69.

<sup>80</sup> Raz, "Rights and Politics", *supra* note 71 at 36. Some reference ought to be made in this context to the distinction between laws that criminalize an activity, laws that decriminalize an activity, and laws that actually promote an activity. In terms of the promotion of social forms, decriminalizing this type of group sexual activity through the redefinition of indecency cannot be equated with, for example, offering tax incentives to swingers clubs or legal recognition of polyamorous relationships. Due to the unique character of the law as a social form or potential good, however, the redefinition of a legal

of shared goods is itself a common good. In the context of indecency and obscenity, a common good is manifested through the ability to choose one's forms of social (and sexual) association.<sup>81</sup> Recognizing the malleable nature of the common good is not a suggestion that "anything goes", "variety is the spice of life", or "the more the merrier". Rather, the value of a diversity of opportunities in terms of sexual interactions can only sustain the majority's definition of indecency against the dissent's "critique of community" if the types of sexual associations the definition decriminalizes are of intrinsic merit.

But how are we to know whether the group sex conducted at L'Orage or Cœur à Corps has intrinsic merit? That is to say, in cultivating diverse social forms and eclectic sexual associations, how does one know which shared goods society ought to make available? I want to leave this question for the moment in order to explore the more general, but related, common good at issue here: the common good of tolerance. To live in a tolerant society is a common good because we all benefit from living in a non-discriminatory society which allows for the pursuit of divergent conceptions of the good.<sup>82</sup> This point becomes clearer "when we think of the failings of societies other than our own."<sup>83</sup> Raz uses the example of an apartheid society and the ways in which such a system detrimentally affects the lives of all of its members.

[An intolerant society] colours the nature of the social relations each can have. It threatens to make each member complicitous with its bigotry through association with bigots, through involvement in projects which involve the display of prejudice and the practice of discrimination. It imposes duties actively to fight prejudice and discrimination in one's own society in order not to be tainted by its failures through membership in it; duties which are burdensome and limit one's ability to pursue other options.<sup>84</sup>

The common good of living in a society not operating under a system of apartheid is obvious. To think of an extreme example analogous to an apartheid society, in the context of sexual intolerance and repression, consider the treatment of women under the Taliban's regime in Afghanistan. Perhaps less controversially, consider the treatment of sexual pleasure in the fictional, futuristic theocracy of Margaret Atwood's repressed Republic of Gilead in *The Handmaid's Tale*:

What's going on in this room ... is not exciting. It has nothing to do with passion or love or romance or any of those other notions we used to titillate ourselves with. It has nothing to do with sexual desire ... Arousal and orgasm are

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concept which regulates sexuality in a manner which makes some sexual association now legally available does increase the range of shared goods available. In terms of the intersection between law and sexuality, the legal options of coercively prohibiting, remaining neutral towards, or promoting and manipulating particular sexual associations do not reside within distinct categories; they lie on a spectrum.

<sup>81</sup> Raz recognizes the importance of sex as a form of social association. See *The Practice of Value* (Oxford: Oxford University Press, 2003) at 153. The issue becomes how to ascertain which sexual associations it is in the common good to have available to a community.

<sup>82</sup> See Raz, "Rights and Politics", *supra* note 71 at 38.

<sup>83</sup> *Ibid.* at 38.

<sup>84</sup> *Ibid.* See also Dworkin, *Law's Empire*, *supra* note 67 at 196. Dworkin's true community of principle theory also acknowledges the obligations which arise out of membership in a community.

no longer thought necessary; they would be a symptom of frivolity merely, like jazz garters or beauty spots: superfluous distractions for the light-minded.<sup>85</sup>

The common good of living in a society that has not relegated the female orgasm to the status of unnecessary trend from a bygone era seems obvious. Less clear is the common good of living in a society that tolerates sexual practices the majority of Canadians find disgusting, depraved, repulsive, and immoral. As Raz notes, tolerance is not the approval of many incompatible forms of life; it is not synonymous with pluralism: “[t]olerance is a distinctive moral virtue only if it curbs desires, inclinations and convictions which are thought by the tolerant person to be in themselves desirable.”<sup>86</sup> According to this theory, sexual tolerance is not demonstrated by people tolerating a particular sexual act even though it is an act which they would never engage in. Sexual tolerance is exercised by people tolerating a sexual act of which they disapprove.

To criminalize sexual conduct purely on the basis that it is immoral from a majoritarian perspective cannot be an act of tolerance. This is what the dissent suggests Canadian law should continue to do. To tolerate sexual conduct and depictions despite considering them to be immoral is to act out of tolerance; it is to protect the common good of a tolerant society. To limit the extension of such tolerance to harmless activities is to act in the public interest (i.e., to strike a balance between the competing interests of various citizens). Chief Justice McLachlin rejects the traditional “community standard of tolerance”, and in doing so, she instead sets a standard of tolerance for the community. The new standard of tolerance is dictated by the principles underpinning the constitution. Her definition demands a standard of tolerance from the community that is in the common good or interest of each of us to pursue. It is a standard that any state dedicated to acting in the interests of the community should seek to maintain.<sup>87</sup>

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<sup>85</sup> Margaret Atwood, *The Handmaid's Tale* (Toronto: Seal Books, 1985) at 116-117.

<sup>86</sup> Raz, *The Morality of Freedom*, *supra* note 67 at 401.

<sup>87</sup> A consideration of the jurisprudential context in which this case was decided provides another way of thinking about the positive obligation to create certain social forms, in this case the promotion of some sexual relationships. Laws are never made and cases are never decided in a contextual vacuum. In considering this case, one ought to recall that the Court was making its determination in the context of a post-*Charter* wealth of jurisprudence defining which sorts of sexual relationships will be recognized, valued, and promoted in Canadian society. See e.g. *Halpern v. Canada (A.G.)*, 65 O.R. (3d) 161, 225 D.L.R. (4th) 529 (C.A.) [*Halpern*]; *Nova Scotia (A.G.) v. Walsh*, 2002 SCC 83, [2002] 4 S.C.R. 325, 221 D.L.R. (4th) 1 [*Walsh*]; *M. v. H.*, [1999] 2 S.C.R. 3, 171 D.L.R. (4th) 577; *A.A. v. B.B.*, 2007 ONCA 2, 83 O.R. (3d) 561, 278 D.L.R. (4th) 519. Both legislative and adjudicative branches of the Canadian state have focused a great deal of attention in the last twenty years on debating, redefining, and (particularly with respect to same-sex and common law relationships) formalizing and privileging through legal recognition, particular types of sexual relationships (*Halpern, ibid.*; *Walsh, ibid.*; *M. v. H., ibid.*). The state has, therefore, recognized the value of certain social forms. The Court decided *Labaye* in an era where some would argue that as a society we have actually increased the role of law and government in the definition, regulation, and control of human relations (albeit through positive mechanisms such as tax incentives and property rights, rather than negative legal mechanisms such as the criminal law). This context may enable the Court (and the community) to withdraw regulation which might have seemed at least desirable, if not outright necessary, in a previous legal era. This is consistent with Raz's assertion that the state ought to encourage, through incen-

### **B. The “Liberated Couple”: An (Anti-)Icon to Come?**

Setting aside the common good of living in a tolerant society, and returning now to the related issue of the intrinsic worth or worthlessness of the sexual activities engaged in at L’Orage and Cœur à Corps, a number of questions arise. Having acknowledged that group sex itself cannot be considered a common good in Canadian society, does Chief Justice McLachlin’s decision identify an intrinsic value beyond the common interest in promoting tolerance?

In fact, there is an evaluation of the “shared goods” produced at L’Orage and Cœur à Corps (and Chief Justice McLachlin’s approach to them) which suggests that they sufficiently possess intrinsic worth and cohere to the common good of cultivating eclectic social (and sexual) associations.<sup>88</sup> The difficulty, however, is in determining what standards can justly evaluate the potential worth of shared goods.

Raz suggests that specific forms of excellence belong to a kind,<sup>89</sup> and he explains that two elements determine how items or activities can be evaluated for intrinsic merit:

First is the definition of the kinds of goods to which they relate, which includes the constitutive standards of excellence for each kind. Second are the ways the item relates to the kinds. It may fall squarely within them. Or it may, for example, relate to them ironically, or iconoclastically, or as a source of allusions ...<sup>90</sup>

In other words, something may be evaluated based not only on how neatly it fits within the standards of excellence for its genre but also based on how it relates to its genre.

As Raz suggests, one way in which an item, activity, or law can relate to its genre is iconoclastically. An iconoclast is one who challenges traditional or popular ideas or institutions on the basis that those beliefs or institutions are wrong. Iconoclasm is not the same as subversion. Unlike subversion, iconoclasm is about the formation of meaning. Iconoclastic transgression takes place *within* a cultural construct, not external to it. Iconoclasm is the intentional destruction, within a culture, of one of the culture’s own icons, symbols, or meanings. Unlike subversion, which aims simply to deconstruct, iconoclasm’s purpose is to attack a cherished belief by relying on a new or different cherished belief. This is why iconoclasm has the capacity to be a shared good; it is about the collective, and it is done often for political (or religious) reasons.

Queer theory provides a helpful example. Unlike iconoclasm, queer theory often relies on the concept of subversion. Distinguishing queer theory from iconoclasm il-

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lative, certain common goods (for example, social forms such as marriage) which promote well-being by increasing individual autonomy, rather than prohibiting undesirable, but harmless, life choices (*The Morality of Freedom*, *supra* note 67).

<sup>88</sup> While it is important to avoid conflating social forms of two different kinds, it is necessary to consider the specific activity, relationship, social phenomenon (and therefore the standards of excellence for that particular genre) to which the law relates. Sexual activity is not synonymous with laws regulating sexual activity. Law, as a kind, is both a part of, and transcendent to, each of the kinds that it touches.

<sup>89</sup> Raz, *The Practice of Value*, *supra* note 79 at 39.

<sup>90</sup> *Ibid.* at 41.

luminates iconoclasm's ability to accommodate new meaning, rather than simply disrupting old meaning.<sup>91</sup> While the postmodern method of deconstruction used by queer theorists is, in certain analytical instances, methodologically helpful, it is somewhat self-destructing.<sup>92</sup> The strong constructionist approach within queer theory makes it an unlikely intellectual tool in the search for the "intrinsic worth" of any shared good. Most importantly, queer theory does not allow for the notion of genre-based evaluation. Judgment in kind necessitates the identification and affirmation of categories and is antithetical to queer theory, and deconstruction generally.

The distinction between an iconoclastic approach and a queer approach is real. An iconoclast dissents against a popular belief or tradition on the grounds that it is in error. To disrupt cherished beliefs about sex, or to dissent against traditional sexual mores on the basis that they are wrong, is not to contest the normative validity of sexual mores, the possibility of meaning, the existence of categories, or the ability to judge—quite the opposite in fact. An iconoclastic approach to the legal regulation of sexuality, unlike a queer approach, acknowledges the inevitability of judgment; it recognizes the social fact that an icon, once shattered, will undoubtedly and expediently be replaced by a new icon. For this reason, an iconoclastic approach is better able to account for, contest, and at times work within the liberal political context in which the legal regulation of sexuality operates in Canada's constitutional democracy.<sup>93</sup>

If the evaluation of the sexual activities engaged in at L'Orage or Cœur à Corps is based on the iconoclastic effect they have on the legal regulation of human sexuality or sexual expression, then it may be possible to give a value to decriminalizing them

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<sup>91</sup> Queer theory contests categorization based on sexuality or gender. It argues that gender and sex categorizations are socially constructed. Sex and gender are constituted through normative practices and beliefs. Simply stated, the aim of queer theory is to subvert these norms in order to disrupt sex and gender categorizations so as to eradicate the exclusions which these categorizations perpetuate. Queer theory would include works such as Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity*, 2d ed. (New York: Routledge, 1999); Judith Butler, *Bodies That Matter: On the Discursive Limits of "Sex"* (New York: Routledge, 1993); Gayle Rubin, "Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality" in Carole S. Vance, ed., *Pleasure and Danger: Exploring Female Sexuality* (Boston: Routledge & Kegan Paul, 1984); Michel Foucault, *The History of Sexuality: An Introduction*, vol. 1, trans. by Robert Hurley (New York: Vintage Books, 1998). For queer legal theorists, see e.g. Brenda Cossman, *Sexual Citizens: The Legal and Cultural Regulation of Sex and Belonging* (Stanford: Stanford University Press, 2007); Janet Halley, *Split Decisions: How and Why to Take a Break from Feminism* (Princeton: Princeton University Press, 2006).

<sup>92</sup> Queer is a positionality in particular relation to a norm, that relation being the deviation from a norm. To identify as queer, or to "queer" a concept, social practice, or law, is to identify with a norm of deviating from the norm.

<sup>93</sup> The legal contest over same-sex marriage provides a good example of this. As most queer theorists will maintain, gays and lesbians fighting for and gaining access to civil marriage does not subvert this dominant hetero-normative institution. Unquestionably, gay and lesbian marriages operate within this particular cultural construct. But this very fact reveals their iconoclastic impact. In Canada, marriage no longer means the legal union of one man and one woman. It is true that gay and lesbian marriages did not deconstruct the institution of marriage in Canada, but they did change, to some degree, its icon. (Some argue that same-sex marriage does not change the meaning of marriage but merely expands the scope of relationships to which it applies. Given that "marriage" is the description of a *particular* type of relationship, this is not a persuasive argument.)

without facing the task of establishing the standards of excellence for sex. That is to say, if the evaluation of a given sexual act is based on whether, and the way in which, it challenges traditional or popular ideas about sex, then the benefit or detriment of the act is its effect. The evaluation is relational; it is dependent on there being a genre and a standard of evaluation for that genre. However, the evaluation is not dependent on what that standard of evaluation is. The benefit or detriment of the act is the process of reconsideration that it perpetuates.

This reasoning entails making two interrelated normative assumptions. First, it entails an assumption that there exist standards of excellence for sex, albeit standards that are constantly evolving and shifting, and due to their relational nature, plural in form.<sup>94</sup> In other words, there need not be one single standard of excellence for sex. In any and all sexual contexts, however, there will be criteria of evaluation for sex.<sup>95</sup> Second, some sexual dissent, some challenges to sexual forms, and some degree of openness are required in any society.<sup>96</sup> Evaluating when and how much dissent would be good can be determined by resorting to an external standard, such as a harm principle or the promotion of community tolerance, rather than relying on a standard of excellence that is internal to the genre itself. It is then possible to assign a value to decriminalizing group sex without attempting to articulate a coherent account of what constitutes excellent sex (or excellent group sex).

### C. Laws of Desire

This final section will examine the reasoning adopted by Chief Justice McLachlin in *Labaye* and ask whether it can be evaluated based on its relation to human sexuality. Also, this section will explore whether her reasoning produces an iconoclastic im-

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<sup>94</sup> I am indebted to Professor Leslie Green for observing that, under the argument I am making, any standards of excellence for sex must be plural in form.

<sup>95</sup> Given that the focus of this discussion is on the potential good of iconoclastic jurisprudence, a standard under this account cannot be static. While it is not possible to assume one standard of excellence for sex, it is possible to assume that in any sexual act there is always a standard. The suggestion that a standard can be objective yet unstable in this way may create a certain degree of unease. The objective element of this assertion stems from Raz's observation that while a given value may not be universal, the act of assigning value to certain genres and activities *is* universal. Raz argues that this universalism suggests that, through reason, pluralism can be accommodated. See "Reason, Reasons and Normativity" (2008) University of Oxford Legal Studies Research Paper No. 11/2007 (SSRN), online: SSRN <<http://ssrn.com/abstract=1008795>>. The normative element at play is an assumption that judgment is both necessary and legitimate. Law needs judgment to be operationalized. Its reforming, preventative, and distributive functions all require judgment. And for law to be just, that judgment must not be arbitrary. To avoid arbitrary judgment requires meaningful criteria; that is to say, it requires standards of excellence.

<sup>96</sup> Dissent is an essential criteria for the progress of any community. This is no less true with respect to sexual dissent than with respect to political dissent. To disaggregate sexual dissent from political dissent is in many respects a false distinction. Provided an ability to judge is maintained (which is what the first normative assumption I articulated achieves), it can be said that sexual dissent is presumptively in the common interest. Both a standard, achieved through practice, argument, and reason, and dissent are necessary to accommodate pluralism.

pact such that it serves the common interest in a way that responds to the critique of community.

Given that an iconoclastic decision challenges and replaces cherished beliefs, the Court's decisions in *Labaye* and *Kouri* represent some of the most iconoclastic jurisprudence to date regarding the legal regulation of sexuality in Canada. In their outcome, these decisions challenge two of the most significant pillars of the regulation of sex in our society. These decisions transgress the heavily fortified sexual boundary between the public and private realms, and they also challenge the taboo against the commodification of sex. Most significantly, they do so without relying on claims of anti-subordination, identity, privacy, or safety.

Jeffrey Weeks suggests that our culture often justifies erotic activity on some basis other than desire, such as reproduction or the consummation of relationships.<sup>97</sup> The same could be said with respect to the law's relationship to sexuality. The law typically adopts an approach to sexual desire and erotic activity that focuses on rights, responsibilities, and personal morality. Legal analyses concerning issues of sexual activity and human sexuality are most frequently framed as either claims to privacy,<sup>98</sup> claims to expressive rights,<sup>99</sup> or claims of identity (or more generally, anti-subordination).<sup>100</sup> In the case of sexual minorities, legal arguments and analyses typically focus on claims of identity or relationship recognition. In the case of sexual liberty, the emphasis is usually on claims that reify the public/private division or claims premised on the expressive rights held by individuals. Legal recognition of the bodily pleasures behind or outside of an identity, relationship, or sanctuary, is infrequently claimed and less frequently, if ever, granted.

As noted earlier, neither privacy rights, expressive rights, nor identity claims aptly characterize the reasoning in *Labaye*. Both *Labaye* and *Kouri* consider sexual activity in a semi-public setting.<sup>101</sup> Neither one involves a group of sexual actors that

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<sup>97</sup> *Sexuality*, 2d ed. (London: Routledge, 2003) at 21.

<sup>98</sup> See e.g. *Bowers v. Hardwick*, 478 U.S. 186, 106 S. Ct. 2841 (1986) (challenging Georgia's anti-sodomy laws on the basis of a liberty interest in sexual privacy); *Lawrence v. Texas*, *supra* note 65 (striking anti-sodomy laws on the basis of a constitutional right to privacy under the due process clause of the American constitution). In the Canadian context, this right to sexual privacy has more frequently been acquired legislatively (as in Parliament's decriminalization of sodomy in 1967) or through equality claims. See e.g. *R. v. M.(C.)*, *supra* note 64. This may be partially due to the comparatively greater emphasis on equality in the Canadian constitutional context than in the American constitutional context.

<sup>99</sup> See e.g. *Butler*, *supra* note 23 and *Little Sisters*, *supra* note 26 (obscenity cases which also included an equality claim).

<sup>100</sup> The two most obvious examples being claims of discrimination based on sexual orientation (e.g. *Egan v. Canada*, [1995] 2 S.C.R. 513, 24 D.L.R. (4th) 609; *Friend v. Alberta*, [1998] 1 S.C.R. 493, 156 D.L.R. (4th) 385) and claims for relationship recognition made by same-sex and common-law couples (e.g. *Halpern*, *supra* note 86; *M. v. H.*, *supra* note 86; *Walsh*, *supra* note 86).

<sup>101</sup> *Kouri* in particular involved sexual activity occurring in a location (a dance floor with seventy or more people engaged in sexual activity at one time) which could hardly be labelled private. The Court found that the procedure at the door—in which the bouncer only admitted couples who declared themselves to be liberated—sufficiently ensured that individuals would not be involuntarily confronted with offensive sexual conduct that would prove harmful in the sense defined under the first branch of harm in *Labaye*. This aspect of the decision related to a consideration of the risk of un-

could reasonably be described as a sexual minority, and neither case involves claims regarding freedom of expression.

The jurisprudential construction of sexuality—what sex means in the context of its relationship to the law—has taken many forms. At different times and in different legal contexts, sex has been about morality, religion, identity, privacy, and class. It has been about health, gender, expression, violence, family, and love. At one point, it has even been about communism.<sup>102</sup> The jurisprudential construction of sexuality has never really been about the recognition of pleasure or desire. *Labaye* therefore changes, at least to some degree, the meaning of the legal regulation of sexuality in Canada.

In *Labaye*, Chief Justice McLachlin states that “[s]exual activity is a positive source of human expression, fulfilment and pleasure.”<sup>103</sup> A review of prior case law defining obscenity demonstrates that legal recognition of the significance of sexual pleasure was not the focus (or even a focus) of analysis prior to *Labaye*. In 1962, when the Supreme Court of Canada first grappled with the British common law definition of obscenity in a case involving the novel *Lady Chatterley’s Lover*, the analysis focused on the merits and demerits of legal censorship.<sup>104</sup> The Court in *Brodie* did not concern itself with the sexual fulfilment and pleasure of Lady Chatterley, her lover, or the book’s readers. In 1985<sup>105</sup> and 1992,<sup>106</sup> when the Court revisited the definition of obscenity, the focus was on incorporating a notion of harm into the Court’s analysis of the community’s attitude toward a particular sexual act or depiction. Desire, pleasure, and fulfilment were not taken into account.

In 1997, claims about pleasure and desire were actually made by the appellant bookstore and certain interveners in *Little Sisters*.<sup>107</sup> These claims, however, were not endorsed by the Court. *Little Sisters* involved a constitutional challenge to obscenity laws based on the discriminatory manner in which they were applied by customs officials to gay and lesbian material imported by Little Sister’s Book and Art Emporium. The challenge was brought on the basis of freedom of expression as well as an equality claim based on sexual orientation. Underpinning the equality argument in *Little Sisters* (which was premised on the assertion that pornography figures differently in

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wanted confrontation. The Court did not really attempt to reconstitute the boundaries between public and private such that large-scale group sex could now be considered a private act. If the decision were read in this light then it would also have to be characterized as a radical revision of the law’s distinction between public and private in which the private sphere is greatly expanded and the public sphere significantly contracted.

<sup>102</sup> In the 1950s and 1960s in Canada, gays and lesbians were perceived by the government to be security risks due to purported close ties to communist groups and vulnerability to blackmail. Hundreds of gays and lesbians were purged from the RCMP and other public service positions. By 1967 the government had a list of over nine thousand suspected homosexuals in the Ottawa area alone. See Gary Kinsman, “Challenging Canadian and Queer Nationalisms” in Terry Goldie, ed., *In a Queer Country: Gay and Lesbian Studies in the Canadian Context* (Vancouver: Arsenal Pulp Press, 2001) 209 at 211.

<sup>103</sup> *Labaye*, *supra* note 3 at para. 48.

<sup>104</sup> *Brodie*, *supra* note 22.

<sup>105</sup> *Towne Cinema*, *supra* note 23.

<sup>106</sup> *Butler*, *supra* note 25.

<sup>107</sup> *Supra* note 26.

gay and lesbian communities than in straight ones) was a claim about desire—same-sex desire specifically. The equality claim was rejected by the Court.<sup>108</sup>

It may be that, for doctrinal reasons, the Court was not well situated in any of these pre-*Labaye* cases to give recognition to the significance of desire and sexual pleasure. Take *Little Sisters* for example. Given the other section 15 jurisprudence regarding sexual orientation that was developing during the time that *Little Sisters* was decided, it is not surprising that the Court was unwilling to accept arguments suggesting that the sexual needs (for pornography or particular sexual depictions) or the sexual acts of gays and lesbians were different than those of heterosexuals. More generally, it may be that until the Court had rejected the community standards of tolerance test there was no conceptual space for considerations of desire. Considerations regarding desire and sexual pleasure are fairly easy to incorporate into a definition of indecency centred on actual, proven harm to sexual participants or other members of society as measured against the values of liberty, dignity, equality, and autonomy. It is not so easy to incorporate desire and sexual pleasure where harm is measured by the community's standard of tolerance.

The Supreme Court of Canada cases defining indecency before *Labaye* and *Kouri* cannot be said to have given rise to a legal recognition of sexual desire. For example, the lap dancing trilogy of the 1990s, *R. v. Tremblay*,<sup>109</sup> *R. v. Mara*,<sup>110</sup> and *R. v. Pelletier*,<sup>111</sup> all involved charges against tavern owners whose performers gave lap dances or private shows of some sexual variety. In *Mara* and *Pelletier*, the Court found, applying the community standard of tolerance test, that the acts were not indecent. In *Tremblay*, the Court found that the lap dances did go beyond the community standard of tolerance. None of these decisions appears to take into consideration, as Chief Justice McLachlin did in *Labaye*, that sexual activity is a source of pleasure. This may, however, be due in part to the factual patterns which gave rise to the indecency charges in these cases: they each involved the explicit exchange of money for sexual contact of some type.<sup>112</sup> It is therefore not surprising to find that in cases involving the exchange of money for sexual contact, where sexual desire is presumably not experienced by both or all of the sexual participants, the Court's reasoning did not suggest a legal recognition of sexual desire.

Although *Labaye* also involves an exchange of money for sex, in the form of cover charges and membership fees, the interrelationship between sex, money, and

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<sup>108</sup> Justice Binnie did not accept the argument that gay and lesbian pornography has less potential to cause harm. Based on this and his determination that the community standards of tolerance test was not about taste and was in fact quite concerned with minority expression, he found that it did not discriminate on the basis of sexual orientation.

<sup>109</sup> [1993] 2 S.C.R. 932, 106 D.L.R. (4th) 413 [*Tremblay*].

<sup>110</sup> *Supra* note 20.

<sup>111</sup> [1999] 3 S.C.R. 863, 30 C.R. (5th) 144 [*Pelletier*].

<sup>112</sup> The only other case in which the Supreme Court of Canada considered the definition of indecency was *R. v. Clark*, 2005 SCC 2, [2005] 1 S.C.R. 6, 249 D.L.R. (4th) 257 [*Clark*]. The decision in *Clark* ultimately turned on the definition of public place. The case involved charges against a man seen by his neighbours masturbating in front of his window. Fish J.'s decision is certainly a recognition of the right to privacy and an admonition to nosy neighbours, but the only sexual desire recognized in the *Clark* case was secondary and not relational.

desire differs from all of these older cases. *Labaye* involves reciprocal rather than unilateral sexual desire. Also, unlike these older cases, the money paid to have a sexual interaction is paid by *all* of the sexual actors to a third party. Money is not the motivating factor for any of the sexual participants; mutual desire to engage in sexual activity is the motivating factor. Due to the mutual desire of the sexual participants, Chief Justice McLachlin concluded that the commercial nature of these activities was irrelevant to considering their potential indecency.<sup>113</sup> What distinguishes the exchange of sex for money in *Labaye* from the exchange of sex for money in the lap dancing trilogy (where the exchange of sex for money was most certainly a determining factor under the community standards of tolerance test) was the role and type of desire.

Even when involving a commercial element, *Labaye* and *Kouri* stipulate that, absent an associated and provable harm, the law ought not to interfere with the exercise of a sexual desire, in particular, a sexual desire that takes place in semi-public settings. The intrinsic worth of the shared goods occurring at L'Orage and Cœur à Corps are manifested through the Court's decisions. The fact that desire lies beyond reason and rationality, and is not susceptible to valuation, does not suggest that the social forms stemming from these drives cannot be evaluated through the standards of excellence for those social forms or their iconoclastic implications. A legal recognition of desire is itself *prima facie* iconoclastic because the law's legitimacy is premised on reason. The iconoclastic effect of these social forms is reflected in the legal recognition of these pleasure-seeking activities by the highest court in the country. Iconoclasm is not found simply in the fact that these forms of human relations transgress dominant sexual norms—many forms of human relations do and may possess intrinsic worth (or be detrimental) for reasons of their own. Their emergence, however, has resulted in a change and shift in the law's relationship to human sexuality. In *Labaye* and *Kouri*, the Supreme Court of Canada shattered a long held and stridently protected legal and social belief that a legitimate exercise of the criminal law power can be premised, either directly or indirectly, on sexual morality. In doing so, the Court recognized (if not for the first time, then in a novel way) the value of desire.

The legal recognition of desire changes the law's relationship to sexuality and provides new meaning to the legal regulation of sex. In other words, it is iconoclastic. But iconoclasm is not presumptively good. Why would this particular iconoclastic jurisprudence be a common interest? Why is changing the relationship between law and sexuality, such that it recognizes the value and significance of sexual pleasure, an iconoclastic benefit and not detriment?

Francisco Valdes identifies the defence of desire as the next strategic move in the pursuit of "sex/gender reform and equality".<sup>114</sup> He notes that "intimacy and desire are 'affirmations of life [and therefore] are diametrically opposed to dogmatic regimes'

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<sup>113</sup> *Kouri*, *supra* note 1 ("On the present set of facts, the commercial aspect of the respondent's operation is hardly relevant to this type of harm. The entrance fee was not paid by some to secure the sexual services of others. It merely enabled all the customers to gain access to the bar and to equally participate in the activities taking place therein" at para. 22).

<sup>114</sup> "Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of 'Sex,' 'Gender,' and 'Sexual Orientation' in Euro-American Law and Society", (1995) 83 Cal. L. Rev. 1 at 368 [Valdes, "Queers, Sissies"].

such as the dominant Euro-American sex/gender system.”<sup>115</sup> As such, he suggests (speaking from a pre-*Lawrence v. Texas*<sup>116</sup> American legal context, and specifically within a claim to the right to sexual privacy) that human intimacy and desire are neither frivolous nor legally insignificant. Whether it is cross-sex or same-sex desire, he argues that the defence of desire may be the most significant contribution queer theory<sup>117</sup> has to offer:

The tactic of defending desire thus commits Queer legal theory to winning respect for the range of yearnings regarding consensual affection and intimacy that are felt by all humans in one form or another. But because desire is not rational in the Western sense, this tactic also commits Queer legal theory to engaging the law beyond the limits of (legal) rationality. This tactic or method calls forth a joy in and for humanity that is distinct, though not separate, from the notions (and the limits) of reason or logic that characterize the very culture of the law. In this sense, this tactic may be the most radical or subversive contribution of Queer legal theory to critical legal thinking; defending desire effectively calls for us to “come out of the closet” with respect to human pleasure and its worth.<sup>118</sup>

What common interest is served when the meaning of sexuality within the context of its legal regulation changes in this way? That is to say, what common interest is served when law “‘come[s] out of the closet’ with respect to human pleasure and its worth”?

A focus on desire and pleasure (in conjunction with harm) affirms well-being and human flourishing as central to the law’s concern in this context. It allows legal analysis to take primary consideration of the quality of people’s lives. Incorporating concepts of pleasure and desire into the law’s conception of sexuality reveals a more nuanced and truthful account of this human activity—an activity which is as ubiquitous as it has been socially and legally regulated.

## Conclusion

The legal recognition that sex has the capacity to be positive, pleasurable, and fun reflects a reality that the courts have previously ignored. This is significant not simply for its celebration of one of the very positive aspects of our humanity. The law’s ca-

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<sup>115</sup> *Ibid.*, citing Reinaldo Arenas, *Before Night Falls*, trans. by Dolores M. Koch (New York: Penguin Books, 1993) at 93 [footnotes omitted].

<sup>116</sup> *Lawrence v. Texas*, *supra* note 65. The Supreme Court of the United States found that Texas’ criminal prohibition on sodomy between consenting members of the same sex violated the due process clause of the Fourteenth Amendment.

<sup>117</sup> Borrowing Valdes’ focus on the regulation of desire ought not to be taken as a reliance on queer theory itself. While Valdes’ project is substantive—it imagines queer theory as the substantive work of subverting sex and gender norms—recent writers argue that queer legal theory is not a substantive project but rather a methodology for critique. See generally Halley, *Split Decisions*, *supra* note 85. As suggested above, queer theory, unlike iconoclasm, is less able to accommodate theories of justice, reflect legal struggles as they actually transpire, or operate within a liberal framework which operationalizes law through judgment.

<sup>118</sup> Valdes, “Queers, Sissies”, *supra* note 112 at 369.

capacity to better recognize, account for, and reflect the good of sex might better account for the bad of sex, including the very real harms related to or caused by certain sexual behaviours (particularly for women, children, and sexual minorities). Most significantly, a legal capacity to better reflect these sexual realities might eventually facilitate a greater ability to handle those complex and difficult legal circumstances in which pain and pleasure, desire and fear, intersect, overlap, and at times blur.<sup>119</sup>

The decisions of the Supreme Court of Canada in *Labaye* and *Kouri* establish an understanding of the regulation of public sex that is based in morality and that acknowledges the value of community. Chief Justice McLachlin's reasoning, far from relegating Canadian values to the private domain, invokes our generally agreed-upon, fundamental ethical convictions for the very purpose of protecting them, and she does so in a manner that continues to recognize the importance of community and collective interests without subjugating minority desires to majoritarian sexual morality. Chief Justice McLachlin relies upon principles reflected in the constitution—principles such as autonomy and equality—to redefine the legal regulation of public sex in a manner that removes it from the community standard of tolerance test. She establishes a standard that regulates sexual activity based on principles considered to be agreeable to all or almost all members of a liberal society. In this way, her reasoning provides a convincing liberal response to the dissent's communitarian-based objection to ridding the law of the community standard of tolerance.

Moreover, her decision also responds to the dissent's critique of community in another manner. *Labaye* and *Kouri* are not premised on claims of identity, privacy, or expression, and therefore they actually represent the potential for a more significant shift in the jurisprudence. This interpretation of her decision identifies the iconoclastic implications of her reasoning and illuminates a shift in the legal regulation of sexuality towards an accommodation of concepts of pleasure and the significance of sexual desire. The reasoning in *Labaye* thus protects our common interests in tolerance and human flourishing, achieved through the recognition and affirmation of sexual pleasure, bounded by both sexual dissent and liberal judgment.

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<sup>119</sup> Issues such as prostitution and sado-masochism for example, reveal circumstances where the law has, to date, failed to develop a coherent theory of sexuality which can account for the infinite complexity which arises when human beings interact sexually. Sexual assault is another example where the law remains unable to properly account for these complexities. (One area of sexual assault law which has developed a more sophisticated and realistic account of the complexities regarding sexual desire is with respect to consent. However, many other aspects of sexual assault law, such as victim credibility and similar fact evidence, continue to demonstrate a legal theory of sexuality that fails to reflect any of the complexities to which I am referring.)