There Is No Sex in the Champagne Room(?): Critically Reconsidering Canada's *De Facto* Prostitution Prohibition after *R. v. Labaye*

by

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A thesis submitted to
the Faculty of Graduate Studies and Research
in partial fulfillment of
the requirements for the degree of

Master of Arts
in
Legal Studies

Department of Law
Carleton University
Ottawa, Ontario
June 10th, 2008

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ISBN: 978-0-494-43461-1

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ISBN: 978-0-494-43461-1

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Abstract

The legal regulation of prostitution in Canada has historically been guided by moral regulation. According to classical liberals such as J.S. Mill, criminalization on moral grounds alone is insufficient and unjustifiable. The social construction of prostitution as deviant and therefore criminal has exhibited such a moralistic approach and has resulted in a set of laws governing prostitution that, although they are not clear in what they are trying to accomplish (full legalization or criminalization), they have socially and legally marginalized sex workers. Given the harm that Canada's prostitution laws contribute to, a new approach is warranted. A recent Supreme Court of Canada case dealing with a 'swingers' club operator being charged under the bawdy-house law, *R. v. Labaye*, provides an ideal opportunity to rethink prostitution regulation and break the cycle of victimization and deprivation of individual liberty. The majority's reasoning in *Labaye* was implicitly guided by Mill's harm principle which states that it is more prudent to criminalize toward a goal of preventing tangible harm to others than to regulate on the basis of morality or legal paternalism. A harm-reduction solution can then be utilized to ameliorate the difficulties in trying to legally suppress something that remains in great demand. In so doing, an issue of public importance can be addressed with a clear, 'amoral' and principled approach- something that is necessary to end both the harms flowing from the current law and also the hypocrisy displayed by a Conservative government unwilling to undertake the challenge of legal reform in this area.

Acknowledgements

This thesis would not have been possible without the direction and support of Ron Saunders. I would also like to thank Peter Swan and my colleagues in the Department of Law for their helpful and insightful input, for which my work undoubtedly profited.

Dedicated to my P and M, who have helped and encouraged me to realize all my goals to date, and without whom I would not be where I am today.

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Chapter 1: INTRODUCTION

Prostitution is a controversial and contentious social problem, with opinions on it tending to polarize along the political spectrum. Part of my interest in this social problem stems from the way in which right-wingers and moralists so uncritically disgorge hyperbole and condemnation directed at ‘the great social evil’. Intuitively, prostitution is not something desirable or socially redeeming, but this alone is not sufficient to summarily criminalize it. An in-depth look into the realm of prostitution reveals that it is a complex phenomenon- one that does not lend itself to ‘easy answers’ as to how to approach it legally. In some cases, such as when minors are involved or individuals are coerced into sex work, legal regulation is necessary; in other situations involving fully consenting adults in private contexts, legal regulation may not be warranted. These conflicting interpretations make sex work a rich academic subject from a socio-legal perspective.

My main purpose in pursuing the issue of prostitution academically involves promoting human rights and individual liberty. As will be demonstrated, the violation of the previous basic rights and values is a daily reality for sex workers in Canada who are victimized on the streets and in other dangerous venues, and simultaneously targeted by law enforcement. In a Chapters store recently, the work took on a deeper importance for me as I thumbed through a book on serial killers and read over and over that the victims almost always included prostitutes. Coupled with the Pickton case (a reminder of this constant victimization), this made me wonder why the Conservative government felt that ‘no move was the best move’ upon considering the recent Standing Committee on Justice and Human Rights’ (SCJHR) report on prostitution, *The Challenge of Change* (2006). I am an individual who is thus deeply concerned with the amelioration of the harms

associated with this social problem through practical legal reform. However, this thesis could not simply be confined to discussion of ‘legalization vs. decriminalization’; this has been done and over-done in the literature. Rather, I wanted to provide a new take on this social issue by using a recent case involving the effective legalization of swingers clubs, which addressed many issues common to prostitution. This case, *R. v. Labaye* (2005) provided a new angle to pursue based on a few main factors: since the club involved an admission/membership fee it was legally treated as a venue for prostitution and the owner was thus charged with the *Criminal Code* offence of keeping a common bawdy-house; the eventual ruling was very libertarian and employed a principle for legislating such activities based on John Stuart Mill’s libertarian philosophy; and the case has the potential to impact prostitution legal reform.

This thesis therefore provides an updated look at the ‘problem’ of prostitution in Canada; it seeks to challenge the ideology and conservative rhetoric that have prevented progressive legal reform within this realm. Rather than dealing with normative notions of ‘good’ or ‘bad’ and what is and is not desirable, the approach in this thesis is to explore the socio-legal genealogy of this ‘problem’ and to arrive at a pragmatic solution given the social realities in Canada. As noted, the particular focus of this work is the Supreme Court case *R. v. Labaye*, which sets a possible legal precedent for preventing the very real problems endemic to the street sex trade. Moreover, it provides an ideal point of departure for critically reconsidering laws that do more harm than they prevent.

The application of *Labaye* to prostitution regulation is the central point of analysis in this thesis. However, this task requires considerable introductory and contextual discussion. The analysis of the application of *Labaye* to prostitution regulation naturally

ties together the concepts of moral regulation and J.S. Mill's principle of harm, which lend themselves to analysis through the theoretical frameworks of social constructionism and classical liberalism/libertarianism. Thus, the discussion of the prostitution problem differs notably from the perennial public debate on prostitution, concerned primarily with its place in contemporary society. By employing different theoretical precepts as well as a recent court case dealing with a swingers club, I address the legal regulation of sex work from a non-traditional and 'fresh' perspective.

In addition to my role as an academic, as a Canadian citizen, my orientation toward this topic is concerned yet unbiased; I do however approach this area principally concerned with fundamental individual liberty and human rights. This liberal/libertarian stance explains the narrow focus in this thesis on consent-based, uncoerced sex work. Within the vast range of sex work, there are many manifestations that are undesirable such as child labour, human trafficking, as well as 'partially' coerced work, that is, sex work as means of survival due to poverty or debt. To clarify this taxonomy of sex work, Lowman distinguishes three forms of commercial sex as sexual slavery, survival sex (most often driven by drug addiction or abuse) and, quite simply, *prostitution*, "which is a choice made by a person who has other choices" (2004: 147). The focus in this thesis is on the latter category because it comports with the overall focus on liberal concepts of choice and autonomy. Other manifestations of commercial sex such as debt bondage (*Ibid.*), indentured labour (Macklin 2004), human trafficking (Altink 1995; Malarek 2003; Kempadoo, ed. 2005; Raaflaub 2006) and child labour (Badgley Committee 1985) do not involve individuals who have freely and fully consented to such work. As such, lack of choice and coercion are facets that are not included in the theoretical liberal

framework of ‘harmless’ activity whose prohibition is arguably unwarranted, and do not lend themselves to my focus.

One problem is that the current Conservative government espouses a decidedly illiberal stance when it claims that sex work can never be a freely-made choice (SCJHR 2006: 90). In so doing, it refuses to take on the challenge of reforming the prostitution laws. My response to this problem is therefore to use the reasoning in *Labaye* as a platform for prostitution legal reform. Since the majority in the ruling supported the idea of a harm principle in evaluating impugned legislation, an ‘amoral’ approach is merited on the basis of preventing harm. *Labaye*’s libertarian ruling, as I interpret it, prevents prostitution from being constructed as a ‘social evil’ and encourages legitimate legal reform. This, I will argue, is necessary because of the significant harms sex workers endure in the form of violence and victimization, as well as criminalization and the inability to exercise bodily choice, as a result of prostitution prohibition.

Before the thesis problem is outlined, a few terms must be clarified in order to avoid any confusion. Throughout the paper, the term “prostitution and its related activities” is used. ‘And its related activities’ refers to acts and behaviours that Canadian criminal law would consider ‘indecent’ by the statutes of the *Criminal Code*. As an example, a stripper who allows an individual to touch her in any way would be guilty of an indecent act, and the venue could be considered a bawdy-house, both of which are prostitution-related offences. Prostitution is thus not defined as merely the way that one might intuit as an act of intercourse for money, but as the way that Canadian law conceptualizes it as a range of acts and behaviours. In *R. v. Pelletier* (1997) the majority cited a prior definition of prostitution (*Reference re ss.193 and s.195(1)(c) of the*

Criminal Code (Man.) [1990]) as “the offering of one’s body for lewdness”, in order to broaden the criminal definition of prostitution. The use of the term “sex work” is meant to reflect this widened notion of prostitution by encompassing the range of sex-for-money, massage/body rub parlours, escort services and stripping (and in some cases, pornography). All of these acts are or can be considered illegal in one context or another, and thus it is logical to put them all together.

Within the issues that have been outlined, the manner in which I have framed the problem deals with the question of what a liberal harm principle, as developed in *Labaye*, entails for prostitution regulation. Since prostitution regulation has historically based on presumptive moral regulation, the response that I develop hinges on the supposition that notions of harm for justifiable criminalization must *not* be based solely on the im/morality of a given act or behaviour. Rather, criminalization should be based on the prevention of tangible harm. The aim is to argue that the criminal law is causing and contributing to a significant amount of tangible harm, which itself must be prevented. This does not carry the implication that prostitution is a desirable line of work that should be promoted or encouraged, but that its prohibition on moral grounds is both illegitimate and harm-generative. *Labaye* promotes a harm-reduction approach which, even if individuals remain morally uncomfortable with the notion of legalization, discrete facilitations of prostitution can marginalize the problem without marginalizing the women in the industry.

My interest in pursuing such a problem is that there are real lives and issues at stake. Criminological discourse suggests that the legal suppression of something that will inevitably be sought after- such as sex and drugs- will only result in dangerous black

markets. Because prostitution has been socially constructed as ‘bad’ and ‘criminal’ based on its perceived immorality, legitimate attempts to address the problem by any means other than increased regulation have failed in Canada. As such, the perils of a black market system continue to contribute to women’s victimization. By viewing the problem through a theoretical lens using the *de jure* harm principle in *Labaye*, a ‘solution’ can be reached by not simply denouncing sex work on moral grounds. By doing this, the issues at hand can be addressed directly, which is something that a Canadian government has never done, preferring instead to defer the issues to subcommittees and avoid making difficult political decisions.

The thesis is divided into five main chapters, beginning with an examination of classical liberalism/libertarianism in order to situate J.S. Mill’s harm principle. Tenets of liberalism help draw the point that restriction of liberty through criminalization is only warranted where another individual’s liberty may be deprived through certain crimes. Prostitution would not ‘fit this bill’, so to speak, because when it involves liberal subjects as fully consenting adults, it is a victimless crime. The authority of criminal justice to restrict its occurrence is therefore questionable. A further theoretical discussion of crime and morality illustrates that it is prudent to legislate on the basis of harm rather than immorality, even if something is both harmful and immoral such as murder and rape, because morality can be too fickle and fleeting a notion upon which to base criminal prohibitions. Thus, the harm principle emerges as a tool to evaluate the current prostitution prohibition before it is specifically located in *Labaye* in the fourth chapter.

The third chapter serves as a contrast to the first by outlining how the social construction of a prostitution problem has formed the sex worker’s pariah identity and

consequently made prostitution an area resistant to legal reform. Prostitution in this chapter is framed as something that is not inherently bad, but constructed as such to justify moral regulation under the guise of purity laws. Dominant religious and social purist moralities were imposed upon traditionally powerless and outcast sex workers to initiate the 'deviantization' of prostitutes in Canada. This practice continued throughout Canadian history and has culminated in today's ambivalent, unclear and even schizophrenic prostitution law, which is fully committed to a model of neither full criminalization nor legalization. As will be seen in the fifth chapter, this law is responsible for the myriad human rights violations that take place within the venue of street prostitution. Conceived of as an inflated social problem, prostitution laws that seek to regulate morality will be argued to be an improper use of the criminal law.

The interpretation of prostitution laws is examined in the fourth chapter in and through the relevant case law. While s. 1 of the Charter has been invoked to justify prostitution laws that infringe upon constitutional rights, it is difficult for the courts to 'prove' the harm that threatens society. As a result, the judicial reasoning varies greatly in the cases, often conflating harm with moral judgements, further demonstrating the inherent difficulty in legislating sexual morality in general. An in-depth look at *Labaye* reveals that if a 'true' harm principle is utilized, it is impossible to justify the criminalization of a private sexual activity involving consenting adults. Though this case has yet to affect the prostitution prohibition on precedent, its impact in emphasizing the importance of harm-based, and not morality-driven, legislation is important, I argue, for the future of prostitution regulation.

An in-depth look at the concept of harm is undertaken in the fifth chapter in order to substantiate the claim that the prostitution law is harm-generative. This chapter includes an exploration of the subsidiary problem of whether continuing prohibition will ever achieve the stated aim of reducing harm. I argue that harm can only be reduced by *preventing* legal prohibition, not prostitution itself. Calls for legal reform in the U.K. as well as Canada were ineffectual because the implementation of liberal philosophies met with conservative and moralistic punitive legal approaches. The high rates of victimization and heightened criminal justice attention street sex workers endure can be attributed to the law's 'double effect' of prostitution criminalization: it is illegal on the street as well as indoors. When the law's paternalism is united with anti-choice feminism's protective efforts, it is difficult to claim that the harm that results from human rights violations and individual liberty deprivation is outweighed by the improvable harm that the law attempts to prevent. Such a contrast serves to entrench the point that *Labaye's* harm principle must be employed in the prostitution realm in order to mitigate the serious harms that flow from a black market, caused by prohibition. If this argument achieves its purpose it should leave the reader hopeful for a 'solution' in the final chapter.

Labaye's potential impact upon prostitution regulation raises the issue of a harm-reduction strategy, whereby the morality of a given act or behaviour is disregarded in favour of the greater goal of reducing tangible harm. A regulated system of prostitution would facilitate an inexorable sex trade, and consequently positively affect human rights and individual liberty. The social reality in Canada displays a thriving indoor trade that is only legally encroached upon when there are, as Mill would claim, matters that belong to the domain of social morality. Such matters would include the protection of minors and

coerced persons or when prostitution becomes a matter of public nuisance (e.g., through its visibility). The fact that enforcement for the most part targets the visible aspects of the trade and largely ignores the ‘invisible’ sphere reveals a legal hypocrisy that too would be avoided by fully formalizing a harm-reduction strategy.

The scope of this thesis is narrow; the focus is on arguing for a realization of the use of the harm principle with respect to prostitution regulation in order to discontinue the dubious practice of moral regulation insofar as *liberal subjects* are concerned. When sex work is not a freely-made choice, Mill’s admonition to protect the vulnerable logically takes hold. The use of *Labaye* is thus appropriate because the case deals with the prototypical liberal subject who is of adult age, consenting and whose ‘self-regarding conduct’ takes place within a private setting. This argument therefore cannot speak to problematic issues of trafficking, coerced labour, ‘harvesting’ youth or survival work. While it only addresses a part of the experience of those who sell sexual services, it is a very important aspect nonetheless. There are doubtless many aspects that would not be prudent to legitimize with the harm-reduction solution that *Labaye* suggests, but the overall approach should be guided by pragmatism. Putting an end to the harms that result from a perpetually sought-after yet criminalized commodity necessarily begins with abandoning moral sentiments and instead pursuing what may actually produce positive change.

Chapter 2: J.S. Mill and the Harm Principle

Introduction

In these first two chapters the aim is to frame how deviant sexuality is, and has been, both demonized and also conceived of as harmless. This contrasting portrayal will aid in demonstrating the questionable approach the law takes in regulating sexuality that is socially constructed as harmful, and therefore criminal. The place of this deviant sexuality within the ambit of criminal law and historically how it has been socially condemned provide a glimpse into the ongoing struggle with a complex social issue, which is evidenced further in the evolution of Canadian case law to be examined in the fourth chapter. Moreover, the various approaches to regulating individuals who sell ‘pleasures of the flesh’ through, e.g., “sumptuary laws” (Hunt 1996), illuminate the genesis of a dubious regulatory tradition. In setting up the forthcoming discussion it is useful to look at how prostitution and its related sexual activities have been and are constructed and defined in order to make its participants ‘suitable targets’ for regulation. This involves a critical look at the history of laws proscribing prostitution and related acts of sexual deviance. Of course, when participants are referred to, the focus is on the sellers of the services, not the consumers, because they are the ones who have been historically demonized more often than the participants (Young 2003; Lowman 2005; Bruckert 2002; Brock 1998; Meier and Geis 2006).¹ In the following chapter, some additional consideration of the sociology of deviance will complement the argument related to creating criminals, rather than capturing them.

¹ For an opposing discussion on the demonization of the consumers of, or participants in, sexual services see Wortley and Fischer (2001).

With respect to the social construction of deviance, classical liberalism and its philosophies serve as a theoretical counterpoint to criminalization arguments, which are based upon the conceptualization of sex work, broadly defined, as a “social evil” (McLaren 1996; Brock 1998). The work of the father of modern liberalism, John Stuart Mill, encourages a discourse of rights, particularly constitutional and civil liberties, when evaluating the justification of morally ambiguous criminalized behaviours. Examining these perspectives in relation to regulating sexuality will help to explain how many scholars begin to conceive of the relevant prostitution laws as an illegitimate use of state power, or at the very least, an area needful of some sort of legal reform. This, in turn, shall support the view that ‘fringe’ moral matters perhaps are not best dealt with when left in the hands of the law; moral regulation is, to be sure, a dubious practice. When the very laws that are supposed to be harm-preventive are harm-*generative*, it is perhaps appropriate to devote *bona fide* consideration to the ‘inconvenient truth’ of law reform (decriminalization, regulation, etc.). This discussion also sets up the examination of the harm principle and its application to the regulation of sexuality as is observed in the *piece de resistance* case (as far as this thesis is concerned), *R. v. Labaye* (2005), where progressive judicial reasoning casts doubt upon continuing a prostitution prohibition.

Conceptualizing Crime: All Bad or All Relative?

While it is arguably true that legal regulation of all crimes amounts to the regulation of morality, some crimes’ criminality is not inherent in the act *per se*. For instance, in proscribing murder, property theft and even tax evasion, there is more than merely the traditional ‘rule’ component of the law (Hunt 1993); in addition to being punished for

transgressions of a given law, there is the moral regulatory aspect, which serves as an incitement to act morally- not to kill, not to steal others' property and not to avoid paying the taxes that everyone else in society must. However, the business of moral regulation becomes problematic when the law regulates behaviour or acts whose criminality is not agreed upon, or is, perhaps more appropriately, morally ambiguous. Some crimes may indeed be immoral acts, but not necessarily cause for criminalization (Packer 1968). There are in fact probably very few crimes in the *Criminal Code* where society uniformly agrees upon their criminality, in large part because context will always play a role in the phenomenology of crime, even in extreme cases such as homicide, e.g., mercy killing with euthanatic practices, "righteous slaughter" (Katz 1989) involving the vengeful killing of a paedophile and sanctioned killing such as police work. Hollywood films frequently bear out morality plays involving 'just murder' such as in the film *Gone Baby Gone* (2007). In this film, one character, after executing a child molester and being troubled over this decision, claims that murder is always wrong, to which a police officer replies, "depends on who you kill". Nevertheless, at a fundamental level there are likely behaviours that society at large deems inherently criminal. Among these behaviours are unprovoked assault, capricious property destruction and rape. This makes the endeavour of regulating morality, where there is a considerable lack of consensus as to the im/morality of the given acts, a precarious proposition.

The common element among acts whose status is regarded as something close to *inherently* criminal is that there is an impingement upon others' liberty- to live, avoid injury and personal/physical violation. This infringement is one that is unjustifiable and is therefore sufficiently harmful to instantiate use of the criminal law apparatus. Acts

such as prostitution and its related activities, where there is no infringement upon others' liberty, the parties display unqualified consent and there is no discernible victim,² are thus criminalized presumably on the ground that they are immoral behaviours that society does not want to sanction.³ This view is reflected in the belief that "acts such as... prostitution erode the moral fabric of society and therefore should be punished by law, because 'one of the functions of the criminal law [is] to give expression to the collective feeling of revulsion toward certain acts, even when they are not very dangerous'" (Cohen 1940: 1017, quoted in Siegel and McCormick 2003: 365). The difficult enterprise of determining exactly what sort of conduct necessitates use of the criminal justice apparatus, which is an underlying theme of this project, is predicated upon many dichotomies that will be explored throughout this discussion, e.g., private/public, harmful/harmless and victim/victimless. It is precisely these dichotomies that render regulating sex such a morally problematic undertaking. However, prostitution and its related activities' *de facto* status of criminalization expresses the moral sentiment that these are ways in which citizens ought not to be acting. Thus, when conceptualizing such acts and behaviours as victimless crimes, it becomes difficult, from a legalistic and governmental standpoint, to justify criminalization through the traditional explanatory frames of protection of others, discouragement of antisocial behaviour and prevention of harm (strictly defined), to name a few.⁴

² Although, of course, the victim discourse could apply here within the realm of radical feminism, which would posit sex workers' choices as ones that are not freely made because they are made within a world characterized by systemic patriarchy, cf. MacKinnon, *Only Words* (1993), Dworkin, *Pornography: Men Possessing Women* (1989), and Pateman, *The Sexual Contract* (1982). The goal here is not to engage the feminist debate because this shall be taken up in greater detail in the fifth chapter in relation to the limitation of individual choice in a liberal democratic society.

³ An authority in this regard is Lord Patrick Devlin and his work, *The Enforcement of Morals* (1965).

⁴ This point derives from the discussion of liberalism and harm, social morality and criminalization, e.g., Mill (1978); Baum (1999); Husak (1987), to be expanded upon in the forthcoming.

Prostitution, indecent theatrical performances and acts, and private displays of obscenity or indecency are *Criminal Code* offences that involve no complainants, and therefore, no victims. The victimless crimes literature in general is extensive; its coverage ranges from drugs to abortion to pornography to gambling to ticket scalping (Feinberg 1990). Conceived of as such, prostitution and other forms of sexual deviance are *mala prohibita*, that is, acts and behaviours made criminal by statutory law, as opposed to *mala in se*, Latin for literally “evil in itself” (Vago & Nelson 2004: 172), acts or behaviours that are criminal because of their ontological or inherent ‘badness’. In keeping with the foregoing discussion, crimes that are *mala in se* generally garner something close to societal consensus with respect to the justification of criminalization. As was noted, there are exceptions to all supposed absolutes when they are contextualized, but probably no reasonable individual is comfortable with recidivist sex offenders and murderers not being subject to some form of moral condemnation.

Durkheim and the ‘Conscience Collective’

The two types of crime characterized in the preceding discussion conform closely to French sociologist Emile Durkheim’s taxonomy of primitive, agrarian societies and the existence of a *conscience collective* or common consciousness (1964: 21). According to Durkheim, behaviours that constitute *mala in se* crimes contravene the collective sentiments of primitive societies that are closely knit, share a common, everyday psychical experience and differ little among each other. They thus have a strong sense of collective moral authority and react repressively to behaviours that are deemed to offend this collective conscience. Although, historically, this collective conscience diminishes

over time as societies become more diversified and culturally heterogeneous, a very telling contemporary example of this hypothetical society does indeed exist.⁵ For instance, cases where there is a missing child involved who is presumed to be hurt or molested typically engender an authoritative society-wide response that involves the greater community banding together, regardless of social, political or cultural differences.

A case-in-point example is the Holly Jones murder in Canada involving a kidnapped seven year-old who was sexually assaulted and found dead in Lake Ontario. The culturally diverse Toronto neighbourhood of Roncesvailles where the kidnapping first took place became united and determined in their approach to hunt down Holly's assailant (http://www.cbc.ca/news/background/jones_holly/). Community members who banded together for this case can be conceived of as displaying something close to 'collective moral authority' in their collective public outcry and call for punitive retribution. It seems as though there is a strong moral reaction that is automatically triggered in such cases. This is probably due to the fact that a crime such as this is as close as possible to *mala in se*, where there is evidence that most members of society condemn strongly the given acts.

Perhaps the more interesting counterpoint for our purposes here is that Durkheim claims that morality is far from universal, but instead, socio-historically contingent and conditioned. In *Two Laws of Penal Evolution*, Durkheim draws out this point by reinforcing the notion that as societies become more diverse, morality will evolve accordingly due to the increase in the division of labour and the greater level of migration and travel that advancing technology permits. Giddens encapsulates these sentiments

⁵ cf. Durkheim, "Two Laws of Penal Evolution" (1973), to be discussed in the following.

succinctly when he notes that social differentiation is directly and proportionately correlative to moral differentiation (1978: 61). In such a socially differentiated society, collective moral authority will be weakened considerably, and as such, this should pose difficulty for legislation and law-making because “legal codes are the formal expression of moral prescriptions” (*Ibid.* at 22). This being the case, it is presumably an arduous task to create laws that appeal to all the varied ‘moral prescriptions’ that exist along the strata of a culturally heterogeneous society. The upshot is that more and more prohibited acts or behaviours may thus be considered to be *mala prohibita*.

In line with Durkheim and the above reasoning, behaviours or acts that are *mala prohibita* appear not to display any sort of societal consensus (strictly speaking) as to their inherent criminality, as is the case with crimes without victims. By extension, it is reasonable to assume that not everyone in society agrees upon the criminality of prostitution and its related activities. Because there are such vociferous contemporary groups and individuals on both ends of the political spectrum with respect to prostitution and its related activities, it at least warrants a critical examination of the theoretical basis of the applicable laws. Who is harmed by these ‘crimes’? What is the government protecting with its legislation? And, as Packer (1968: 262) asks, “whose morality are we talking about”? Furthermore, as Giddens argues, “[w]e cannot legislate moral activity without studying the variability of moral codes and determining the social conditions to which they are related” (1978: 63). At a fundamental level, this statement and the previous contentions pose a problem for laws that are premised upon *presumptive prevention*. Very closely tied to the victimless crimes debates, this sort of ideology prohibits on the basis of reasonable apprehension of harm, to borrow from the language

of the *Criminal Code*.⁶ And thus to infringe upon and restrict an individual's liberty through both punishment and prevention requires sound justification, especially where there is no adducible *harm* (because by definition alone, no victim translates to no *tangible harm*). Classical liberal theory shall now be outlined in order to tie together the ideas of harm, legal proscription and individual liberty.

John Stuart Mill and the Principle of Harm

After the primary necessities of food and raiment, freedom is the first and strongest want of human nature.

- J.S. Mill, *The Subjection of Women* (1869)

In order to criminally proscribe a given act or behaviour the law must provide sufficient and necessary reasoning for why it ought to be socially impermissible. The legal justification is of paramount importance from a classical liberal and civil libertarian theoretical framework because individual liberty, personal freedom and autonomy are cornerstone values. This position has been most notably asserted by the figurehead of classical liberalism, John Stuart Mill. Mill was largely influenced by Jeremy Bentham and his utilitarian philosophy, which is, at least theoretically, an ode to the doctrine of relativism because of its reliance on the idea of the 'greatest good for the greatest number'. Some scholars (Husak 1987; Wasserstrom, ed. 1971) feel that Mill's utilitarianism was clouded by consequentialism, but this is a matter that exceeds the scope of this project. To provide some insight into this utilitarian stance, Mill states, "I regard utility as the ultimate appeal on all ethical questions" (quoted in Husak 1987: 236). This contention indicates a mixture of both utilitarianism and consequentialism in Mill's liberalistic philosophies. This orientation can be found in Mill's works with his

⁶ This reasoning is based on section 1 of the *Canadian Charter of Rights and Freedoms*, further judicially constructed through the 'Oakes Test'.

omission of universal moral principles guiding and informing social control mechanisms.⁷ Mill prefers instead a rational, context-dependent doctrine of harm prevention, which lies at the heart of his conception of the proper use of social control mechanisms.

Liberalism/Libertarianism

If classical liberalism can in fact be accused of promoting any absolutes, it would be the absolute rights of the individual, the right to self-determination and the right to self-governance. These conditions presuppose, in turn, the limited role of government in regulating an individual's affairs. The statement, "[l]iberalism wagers that a state... can be strong but constrained- strong because constrained" (Starr 2007), buttresses the idea of limited government and moreover implies that less social control is more desirable. Therefore, all the precepts related to individual rights and the limited role of government undergird the classical liberal tradition and consequently impact the way criminal law is conceived insofar as it is an impediment to achieving and maintaining such liberty.

Interrelated with classical liberalism is the civil libertarian position, which is similarly oriented toward *laissez-faire* government with the fewest number of state limitations upon one's liberty. For libertarianism, it is central to

[l]imit the size, and more importantly, the scope of government. So long as the state provides a basic rule of law that steers people away from destructive or parasitic ways of life and in the direction of productive ways of life, society runs itself. If you want people to flourish, let them run their own lives. (Rosenblum and Post, eds. 2001: 26)

⁷ This gives rise to the classic utilitarian problem posed by moral philosophers of whether it is justified to stray from absolute moral principles that perhaps even Mill himself would agree with (e.g., the protection of the vulnerable) in sacrificing one individual (hypothetically) for the good of many, to which deontologists such as Kant would respond that this is never acceptable, thereby emphasizing the absoluteness of moral precepts as opposed to consequentialist moralities.

Thus, with minimal, reasonable governmental protections and safeguards in place, there is no need to over-regulate, and as was mentioned, to *presumptively prevent*, according to a libertarian/ liberal doctrine. It is consequently prudent to ask, from a liberal/libertarian perspective, what sort of minimally sufficient rationale there can be in order to fulfill a government's role of legally regulating behaviour and limiting liberty.

The Harm Principle

Mill theorizes this above rationale to be the notion of harm, the fundamentally vital component to his idea of justifiable legal and social authority over an individual's actions. In his seminal libertarian essay, *On Liberty*, Mill states:

The object of this Essay is to assert one very simple principle, as entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control, whether the means used be physical force in the form of legal penalties, or the moral coercion of public opinion. That principle is, that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty or action of any other of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a community, against his will, is to prevent harm to others. His own good, either *physical* or *moral*, is not a sufficient warrant. (1991:15, emphasis added)

This principle of harm would theoretically dictate vehement opposition to the legislation of morality through statutory law, which prohibits certain acts or behaviours based *only* on moral codes. The reasoning for this is that, according to Mill, the legally encoded morality of a given law must have a harm component for it to be justifiable. If it were even the case that laws were proportionate to, and reflections of, dominant moralities, what is acceptable for one person may not be for another. To circumvent this conundrum, if preventing *tangible* harm is the basis of criminal law, there can at least be much greater agreement over criminality instead of morality. Mill thus appropriately cautions us about the “tyranny of the majority” (quoted in Baum 1999: 95) when it comes to enforcing the dominant set of rules.

Similarly, sociologist Howard Becker (1963: 15) appositely poses the question, “*whose rules*”, when outlining the process by which deviants become ‘outsiders’. This question accurately reflects the questionable manner in which deviant groups, such as strippers or prostitutes, are at the mercy of (for them) unjust and unfair rules or laws. They might wonder, since there is no one being harmed in the course of their interpersonal sexual relations, why there is a need to criminalize. They may also think that, as Becker argues, they are not doing anything deviant, let alone wrong. He reasons:

[T]he person who is thus labeled an outsider may have a different view on the matter. He may not accept the rule by which he is being judged and may not regard those who judge him as either competent or legitimately entitled to do so. Hence... the rule-breaker may feel his judges are *outsiders*. (*Ibid.* at 11)

A sex worker who is not harming anyone, and is of ‘adult age’ to be fully in charge of their own life choices may have sufficient warrant to feel this way and to question the application of criminal law to their autonomous behaviour. However, Canadian legislators, judges and politicians would respond by saying they, the willing workers, are the ones being harmed.⁸ Telling someone that they are harming themselves in the ‘commission’ of a victimless crime and consequently legally proscribing such acts brings us to the realm of presumptive prevention. Moreover, this is a practice tantamount to moral regulation because now the object of regulation becomes the ‘unsanitary morality’ of the sex worker who thinks it normal to be in the business of selling sexual services.

Mill reinforces the point that presumptive prevention is unwarranted in a classical liberal/libertarian scheme when he argues that

[an individual] cannot rightfully be compelled to do or forebear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise or even right. These are good reasons for remonstrating with him, or reasoning with him, or

⁸ As is seen in the Government Response to *The Challenge of Change: A Study of Canada’s Criminal Prostitution Laws* (2006), which articulated very simply that prostitution is still an exploitive activity that needs to be outlawed.

persuading him, or entreating him, *but not for compelling him*, or visiting him with any evil in case he do otherwise. To justify that, the conduct from which it is desired to deter him, must be calculated to produce evil to *someone else*. The only part of the conduct of any one, for which he is amenable to society, is that which concerns others. (1991: 15, emphasis added)

Under Mill's classical liberal taxonomy, then, the differences that may exist among individuals' vastly different moral codes must not give rise to criminalization (compulsion) when some perceived immoralities do not affect anyone other than those individuals. Much like a sex worker who chooses to prostitute herself, either as a result of individual choice or out of economic necessity, the only measures that are appropriate to urge them away from such conduct are reasoning, dissuasion or discouragement.

If we analogize the criminal law to parental control, we might think of a teenager of legal age who wishes to get a tattoo, flying in the face of the parents' wishes. Again, assuming the teen is of legal age and requires nothing additional from the parents, a prohibitive response would be demonstrably unreasonable. While the parents may abhor the decision and even provide sound, rational arguments to discourage it, the teen's choice is their own, and it ultimately affects only them. By libertarian logic, individuals whose conduct may be undesirable but certainly not harmful to others must be afforded the opportunity to make these choices and live with them, or learn from them and modify their behaviours and actions accordingly in the future. The hypothetical tattoo, if visible, may preclude the teen from future career options, but even this is not sufficient warrant for the parents to prohibit it, or to impose sanctions on the teen for going through with their decision. To recapitulate Mill's argument, "harm *rather* than morality is used to establish the constraints on state authority to create law" (Thomas, no date given, quoted in Husak 1987: 231). Thus, even if immoral conduct such as murder justifies prohibition or criminalization, classical liberalism prefers to utilize the underlying harm as the basis

for any ensuing legal constraint. This, in turn, attempts to expunge the notion of moral regulation as a whole, casting doubt on its assumptions of uniform moral codes and societal normative harmony. This line of reasoning typifies the tradition of classical liberalism and civil libertarianism, and is directly applicable to the case of prostitution and related forms of sexual conduct.

'Reasonable' Limits on Self-Regarding Conduct

There is obviously a figurative 'other side' to the coin in the classical liberalism debate, which considers the 'reasonable limits' for proscribing some conduct, even where harm to others may not be initially or easily perceived. In the "struggle between liberty and authority" (Baum 1999: 95), there is an understandable need to curtail and restrict certain individual behaviour that may have negative *secondary* social consequences, for public and private do not simply correspond with two distinct spheres of conduct (*Ibid.* at 66).

To this end, Mill asks:

What, then, is the rightful limit to the sovereignty of the individual over himself? Where does the authority of society begin? How much of human life should be assigned to individuality, and how much to society? (1991: 83)

A difficult and broad question to be sure, but the guidelines of Mill's harm principle offer some clear-cut answers to the questions. Prefacing his comments by claiming that there is much more to consider, Mill nonetheless answers the questions by claiming: "To individuality should belong the part of life in which it is chiefly the individual that is interested; to society, the part which chiefly interests society" (*Ibid.*). Once again, it is clearly not this simple; some individual interests will, intended or not, affect society and thus be a matter for legal intervention. Baum supports this assertion when he argues that the 'harm to others' precept, which underlies the foregoing questions, involves greater,

more profound implications for the debate encircling the legal restraint on individual sovereignty. He notes that “it [the harm principle] is a sophisticated response to the threat to individual freedom posed by two forms of power in modern, democratizing societies: legal interference, and ‘the moral coercion of public opinion’” (Baum 1999: 135). More importantly, it is the overlaps and interconnections between individual and social life, and therefore, the applicability of the harm principle, that are particularly important for unfolding the present discussion.

In attempting to provide coherent responses to these questions, it may be useful to delineate three categories for reasonable regulation of individual sovereignty (aside from the central characteristic of preventing harm to others): protection of the vulnerable, contextual/situational consideration and the domain of justifiable social morality. In the first case, Mill (1991: 15) refers to the ‘vulnerable’ as those human beings who are not “in the maturity of their faculties”, such as young children; “persons below the age which law may fix as that of manhood or womanhood”; those who rely upon the care of others; and those who must be protected against their own actions or external injury. It may be inferred what types of individuals would be included within these classifications, e.g., infants, young adults who are below the age of majority for certain privileges or acts, mentally disordered individuals and ‘dangerous offenders’. Even so, contemporary debates are rampant concerning the intricacies and complexities between such groups and their individual rights. We must look no further than the debate concerning so-called, ‘fetal rights’, or that of involuntary civil commitment, or the Terry Schiavo case, or the

notorious *Latimer*⁹ case in Canada to see how integral the contextual or situational considerations are to ascribing an individual's actions as criminal, and therefore, amenable to the domain of social control as *per* Mill's argument. These examples all illustrate the notion that even the highlighted groups Mill describes as vulnerable, and therefore needful of protection which may involve restriction of individual liberty, will not always necessarily invoke such restrictions because the implications of 'vulnerable' are certainly not clear and are subject to historical, temporal and geographical variation.

In considering the situational and contextual nature of reasonable limitation upon individual sovereignty, there is a critical need to distinguish acts alone from those with aggravating circumstances. For example, Husak (1987) provides the example of homosexuality and the secondary harm it may pose to some individuals. The situation involves two scenarios: one in which someone is offended because he learns that his new neighbours are homosexuals, and the other in which the same individual witnesses a public act of homosexual intercourse (Husak 1987: 234). Under a general application of the harm principle, the former circumstance is not likely to instantiate legal regulation based on the goal of harm prevention because it involves merely the moral presupposition that homosexuality is wrong. Leaving aside the obvious problems with this anachronistic sentiment, to legislate based on these grounds alone would be wholly inappropriate for the libertarian. Conversely, "[f]ew authorities [would] invoke the harm principle to call for the decriminalization of all *public* acts between consenting adults" (*Ibid.*), and thus, the latter situation is one likely to garner limitations upon the actors' liberty because of the potential psychological distress and harm (Feinberg 1988) that the witness may

⁹ *R. v. Latimer* S.C.C. (1998) S.J. No. 731. The question raised here, for example, would be, "Would society, collectively, want to curtail Latimer's actions in the first place or punish him *ex post facto* because of the doctrine of the protection of the vulnerable?"

experience.¹⁰ The basic notion here is that determining harmfulness requires thoughtful, prudent, context-based analysis so as not to legislate morality presumptively. For the question of whether, by analogy, fire itself is harmful is irrational; “[i]t is both good and bad according to time, place, and circumstance” (quoted in Wasserstrom, ed. 1971: 2).

Justifiable Social Morality

In the same vein, justifiably appealing to ‘social morality’ for limitations upon individual liberty involves taking into account conditions that aggravate the consequences of individual behaviour, which on its own would not generate the same legal response. According to Mill, the fundamental tenet underlying justifiable social morality concerns is *duty*; he believes that “conduct becomes eligible for censure when ‘a person is led to violate a distinct and assignable obligation to another other person’” (quoted in Husak 1987: 236). Moreover, this domain of social morality predicated upon duty to others is distinct from the “discreet province of self-regarding conduct” (Baum 1999: 60) inasmuch as individuals may be *legitimately* “subjected either to social or to legal punishment, if society is of the opinion that the one or the other is requisite for its protection” (*Ibid.* at 61). In this sense, the use of the term (social) morality is appropriate to the discussion because it is premised on harm. Violations of duty matter for social morality because they are likely to produce harmful consequences, and as such, this comports with Mill’s argument to legislate on the basis of harm, not morality *per se*.

A case-in-point example of this social morality trumping individual rights involves illicit drug use. As the libertarian tradition would have it, drug use on its own is

¹⁰ For example, the behavioural and attitudinal harm discussed in *R. v. Butler* (1992) 70 C.C.C. (3d) 129 (S.C.C.); and *R. v. Labaye* (2005) 3 S.C.R. 728, 2005 S.C.C. 80.

not an inherently harmful activity. Although the individual may be damaging their own health, as we may recall, Mill claims the most society can do is remonstrate or discourage the drug user. But, once again, the sophistication of Mill's harm principle is highlighted because it is not merely a matter of whether an individual's substance abuse harms them; there are plausible scenarios in which an individual's strictly self-regarding conduct may interfere with the lives and liberty of others, thus necessitating the need for social and legal regulation. Since we are pursuing the issue of duty and its role for social morality, a suitable illustration would be the vitiation of the substance abuser's familial and professional responsibilities. Once the individual's self-regarding conduct spills over, albeit indirectly or unintentionally, into the social realm there is just cause for regulation. When the father's amphetamine addiction causes him to abandon his young children for days on end, therefore failing to provide the necessities of life¹¹ or the young attorney's clients are not receiving competent legal defense because of Vicodin abuse, there are conspicuous violations of duty to others that are prompted by self-regarding behaviour.

To further highlight the intricacies of social morality, a pop culture example involves drug abusers on the television program, *Intervention*. Here, addicts are confronted by family members with the aid of case workers to "remonstrate" with the user and offer them a treatment option. Addiction on the show is often referred to as "family addiction" to underscore how the user's self-regarding behaviour affects not only them. The interesting thing to note is that the families do not simply proclaim that they do not approve of the behaviour, or that the user is harming him or herself, but they cite precisely how the addiction causes tangible secondary social harm. This can take the form of property damage, a heightened, and certainly plausible, level of probable harm to

¹¹ Found in the current *Criminal Code* under section 215(1) Duty of persons to provide necessities.

others (through drug-induced violence, impaired driving, etc.), theft or interpersonal violence. This type of secondary social harm is the kind that may arise from so-called victimless crimes, which evidences the role of social morality in restricting liberty.

Since conduct that poses “a definite damage, or a definite risk of damage, either to an individual or to the public *in this sense* properly falls within... what [Mill] calls the domain of social morality” (Baum 1999: 141), *both* primary and secondary harm prevention are the conduits by which social and legal control can be exercised over an individual. For our purposes, secondary harm has been more fruitful to the discussion because of its intimate connection with seemingly harmless activities, or more specifically, victimless crimes. This has also aided in developing the contention that the harm principle is necessarily context-contingent, and is not a static rule or set of rules that can be used within the legal system. Neither is it a principle that ignores the well-being of one’s fellow man, for Mill argues that “[i]t would be a great misunderstanding of this doctrine, to suppose that it is one of selfish indifference, which pretends that human beings have no business with each other’s conduct in life, and that they would not concern themselves about the well-doing or well-being of one another, unless their own interest is involved” (Mill, *On Liberty*, quoted in Wasserstrom, ed. 1971: 10). Indeed, this is far from the case. Rather, Mill’s doctrine attempts to champion individual rights and freedoms to as great an extent as possible, while simultaneously arguing for solid justification by which to restrict such rights and freedoms. By this logic, a morally repulsive behaviour (to some), such as public drunkenness, is not by itself a matter subsumed under social morality because the individual is not harming anyone else by simply being drunk, and there is no moral obligation not to be drunk in public (Baum

1999: 141). However, to claim that public drunkenness is never a matter of social morality would be over-reaching. On the contrary, a police officer should certainly be punished for being drunk while on public duty because this type of conduct expressly violates the officer's duties to others such that it is "taken out of the province of liberty, and place in that of morality or law" (*Ibid.*).

Regulating Sexuality and the Harm Principle

With such an understanding of Mill and the specificity of the harm principle, we can proceed in applying analysis of the principle to the issue of sex trade regulation. Much like harmless drug use and drunkenness, prostitution and its related activities should not necessarily activate a criminal justice response, assuming that the participants have freely and consensually acquiesced to the negotiated acts/behaviours. However, this assertion, like the public drunkenness example, is not without its caveat(s). Illicit, and therefore outlawed, sexuality, sex-for-money, sadomasochistic activity and various non-violent paraphilias (the subject matter of which is for another project) are behaviours where the determination of any harm is heavily context-contingent. For instance, an individual who pays for a sexual act to be performed within a private hotel room or private residence, where both parties are uncoerced, differs from an individual who solicits and carries out a sexual act in broad daylight on a crowded metropolitan street. This comparison, although extreme for illustrative purposes, underscores the difference in reliance upon the law in criminalizing certain forms of sexual conduct. By the logic of the harm principle, public acts of prostitution would indeed lend themselves to the domain of social morality

because the conduct is no longer self-regarding and therefore impinges upon the moral duties to others not to subject them to unwanted displays of sex (Baum 1999: 142).¹²

Rejecting the 'Victim' Rhetoric

This project has a very particular scope, which is focused upon the willing women participants in the industry because there are too many issues and caveats with an all-encompassing conception of prostitution and its related activities. One such 'roadblock' would be the radical/anti-choice feminist view that prostitution and its related activities are in fact a matter for the domain of social morality because it involves a *vulnerable* group of individuals.¹³ If this view is adopted, then the rest of this work cannot logically proceed. However, because this project relies on the notion of individual liberty and uncoerced adult subjects (thereby not including child or human trafficking discourses), the vulnerability arguments lose their voice. It is thus not an omission to avoid the paternalism debate at this juncture. Although this issue will be taken up at greater length in the later chapters, it is the intent of this project to argue against the depiction of sex trade workers as helpless, totally vulnerable victims. This informs the argument that the sex worker's acts are not an appropriate matter for the domain of social morality, because they are free to make their own unguided choices. Even when drugs or debts are involved, which may encourage the move toward prostitution or other quasi-sexual acts for hire, there may be more justification in discouraging or remonstrating with the

¹² This reasoning is generally similar to public nudity laws, and furthermore has been extended to the solicitation aspect of prostitution, 'the communicating law' (s. 213[1]), which constitutes Canada's *de facto* prostitution prohibition. It is also explained further in Feinberg's *Offense to Others* (1988), where his argument proceeds by attempting to justify reasonable use of the criminal law in preventing "shock, disgust and offense to others".

¹³ This is, of course, the dominant view of MacKinnon and Dworkin, who, although American, have exerted an influence upon Canadian legislation (Strossen 2003).

individual (as Mill outlined it), rather than restricting individual liberty. This existing and persisting attitude represents women as vulnerable victims unable to make choices in their best interest, and therefore *non-agentic* (cf. Morissey 2003).

In a previous work (unpublished), I drew the same distinction that society ought not to append the victim label so indiscriminately because of how disempowering and harmful it can be. The point was drawn by contrasting victims of human trafficking, who are often deceived, coerced and treated inhumanely (Malarek 2003; Altink 1995; Kempadoo, ed., 2005; Macklin 2004) and those who consent to be trafficked,¹⁴ who are not unlike willing sex workers in the illegal, legal and quasi-legal sex trades in Canada.¹⁵ One of the larger components of Mill's domain of social morality is a version of 'justifiable paternalism' to legislate when the protection of the *vulnerable* is at stake. After cautioning against over-application of the vulnerable term, it is understandable when Mill outlines who comprises this group, as was described at an earlier point. To clarify matters further, Mill states that individual liberty involves the "freedom to unite, for any purpose not involving harm to others: the persons... being supposed to be of full age, and not forced or deceived" (Mill, *On Liberty*, pp. 225-6, quoted in Baum 1999: 142). Therefore, analogous to the case of persons who consent to be trafficked, in the absence of coercion, deceit, trickery (such as indentured labour) or any other type of slavery-like practice, we ought not to talk about prostitutes as victims who need the assistance of 'Johnny Law' or 'Officer Friendly' to extricate them from their miserable existence. According to classical liberalism an individual is, and should be, their own

¹⁴ Much like Feinberg's (1989) idea of "consent to self-exploitation", although I am uncomfortable with this term insofar as I am uncertain as to whether one can truly be 'exploited' if one freely consents to something without coercion, pressure or duress.

¹⁵ Respectively, these would include, but are not limited to soliciting prostitution, bawdy-houses; swingers parties/clubs, burlesque shows and strip clubs; and massage parlours and escort services.

sovereign, which carries the implication that in the absence of greater social morality concerns, individual liberty needs to be heralded. Perhaps individuals who engage in prostitutional acts to fund a drug addiction or gambling problem or parasitic spouse are not truly ‘freely’ pursuing the act, but this does not mean that others should be legally precluded from doing so.

When we discuss prostitution’s antagonistic relationship with individual liberty (as it has been socially constructed), we are primarily discussing the deprivation of liberty to do what one chooses with one’s body (autonomy); the ability to make money however one chooses (economic freedom); and the deprivation of liberty that results from the acts being criminalized (criminal justice involvement, incarceration or other penal measures). For these reasons, from the libertarian’s perspective, there is a need to critically examine and reconsider the laws criminalizing consensual sexual activity. This collective deprivation of liberty itself is, to be sure, harmful. Therefore, when laws and tactics of criminalization are directly responsible for observable harm, by the logic of the harm principle itself, they should be proscribed or subject to limitation. In essence, with such a conception of the harm principle used in judicial decision-making, the directive of the principle to prevent harm would translate to *preventing prevention*. As it stands, this statement is only coherent theoretically from the classical liberal/libertarian position that has been traced out. The substantive merit of this assertion lies in the chapters ahead.

Conclusion

This chapter began with a discussion of most crimes’ lack of an objective or ontological ‘badness’. Doing so allowed the point to be drawn that ‘inherently’ bad behaviours

negatively impact others' liberty, which is sufficient justification for a criminal justice response, which itself infringes liberty. This criminal justice response may be unreasonable, however, when the behaviour it seeks to curtail or prevent does not harm anyone, such as in the case of victimless crimes. As Durkheim points out, the process of moral differentiation is proportionate to social differentiation, which entails that in a modern heterogeneous society there will be even fewer uniformly held views on just what constitutes crime. A solution to this 'problem' can be found within the philosophies of classical liberalism and libertarianism, which focus on maximizing individual liberty.

J.S. Mill's harm principle emerges as a strategy of regulation that is not based upon legislating morality as such. In cases where legal regulation of primarily "self-regarding conduct" is appropriate, there must be some violation of duty or possible secondary harm to make such conduct a matter for justifiable social morality. This analysis of the harm principle provides the theoretical backdrop in which the regulation of 'deviant' sexuality can be further explored. It is also very important to qualify the following discussion by claiming that liberal subjects who make 'bad choices' are not automatically victims. Such an uncritical portrayal would prevent this discussion from unfolding because sex workers would be portrayed as vulnerable enough to warrant 'protection' by the state. The aim, instead, is to explore the question of whether sex workers- in most cases- have a right not to be subject to the domain of social morality.

Chapter 3: Deviantizing Prostitution

Introduction

In this chapter, the focus is on sexual deviance- namely prostitution and its related activities- as a social construction. The crux of the analysis relies on the assumption that outlawed sexual practices do not have any *ontological* deviance¹ or criminality, but rather are constructed as deviant by society and subsequently codified by law. As was noted in the previous chapter, it is difficult to ascribe inherent deviance or criminality to *any* criminally prohibited act because of the way socio-historical context destabilizes absolutes (again, save for some possible extremes such as rape, child molestation and murder), not simply morally ambiguous acts such as prostitution and its related activities. Thus, the genealogy, or the how and the why, become pertinent investigatory questions in tracing out the historical criminalization of prostitution and its related activities.

The chapter will proceed by examining the work of prominent sociologists to thoroughly explicate the term *social constructionism*, and apply it to the way prostitution and its related activities are framed as crimes. Such an examination will aid in the depiction of prostitution (and other) laws as *mala prohibita* and morally ambiguous (as to who, in fact, agrees with these laws), which thus merits further discussion regarding the applicable laws' legitimacy. The fact that women largely occupy these criminal roles earns them a status of being needful of continuous legal regulation because of their socially constructed dangerous sexuality. The criminal identity that resulted from sex workers being socially constructed as criminals is an important aspect of how prostitution

¹ There is a semantical point of clarification here: deviance is meant in the context in which there is a negative association with the term, *viz.*, it is deviant, therefore it must be socially undesirable. Conversely, deviance as it is used here does not simply cohere with its literal definition of something that strays or is different from the norm, cf. Becker 1963).

laws have been constructed and why they have evolved the way they have. The historical antecedents to the current law criminalizing prostitutes and other sex workers reveal much about the attitudes toward deviant sexuality, which are rooted firmly in a combination of Victorian social purity and religious tradition. From the vagrancy law to the communicating law, 'deviant' sexuality has historically exhibited a trend of indirect moralistic criminalization. This is an important observation as it is in keeping with my contention that the current law espouses an ambivalent or cognitively dissonant approach.

Legal regulation of socially constructed deviant sexuality, though indirect, has resulted in the construction of sex workers as general social pariahs by a process of discursive identity formation. Clearly not adhering to Mill's harm principle, the regulatory tradition has been, and continues to be, tantamount to moral regulation. The potential dangers of legislating morality are directly rooted in the sociologist's fundamental question of whose morality we are enforcing. Packer reminds us, "[i]t is easy to slide into the assumption that somewhere in society there is an authoritative body of moral sentiment to which the law should look. That assumption becomes particularly dangerous, as we shall see, when it is used to buttress the assertion that the immorality of a given form of conduct is a *sufficient* condition for declaring that conduct criminal" (1968: 262). Therefore, even if there were an appreciable majority finding that sex work was wholly immoral, this alone would not be sufficient cause for criminalization. This assertion underscores the notion of criminal sexual conduct as a social construction.

Manufacturing Crime

[More] crime laws, by definition, create [more] criminals.
- Edwin M. Schur (1974)

The criminological debate concerning males' versus females' rates of offending provides an interesting glimpse into the impact of the social construction of deviance, especially the construction of prostitution as a criminal act. Statistics Canada reports indicate that simply being male predicts victimization and offending rates that are significantly higher than females in almost every criminal category (Fedorowycz 1996). What, then, are the categories, if any, that women dominate? Traditionally, women have higher or like rates for shoplifting (non-confrontational crime), and more importantly, prostitution. Scholars Barash and Lipton encapsulate these findings aptly as they fashion an argument from evolutionary psychology to account for gender disparity in offending rates. They reason:

Studies of prosecution and imprisonment records in Europe going back several centuries, as well as examinations of modern crime statistics from the United States and around the world, show that men consistently outstrip women when it comes to violent crime by a ratio of at least three or four to one. The same applies to crime against property... The only areas in which women commit more crimes than men are prostitution (*which some say is not a criminal activity but an act between consenting adults*) and shoplifting... (Barash and Lipton 2001 at para 26-7, emphasis added)

The parenthetical comment made by the authors essentially *is* the point. Aside from the lone property crime of shoplifting (where women offend only slightly more), the only category where women statistically dominate men is not one that has a place among crimes that are *mala in se*, such as serious violent crime or capricious property crime. Rather, it is a crime that has been socially constructed to make women 'offenders'.

To return to the Durkheimian notion of socio-historically conditioned morality, it is logical to presume that as history unfolds, evolving morality is consonant with evolving penalty. The extent to which this is true is a matter for further consideration, but generally the point is well-drawn. "The range of sexual conduct that has historically been covered by the law is so great and extensive that these laws, if re-enacted, would undoubtedly make criminals of most Canadian teenagers and adults" (Vago and Nelson

2004: 178). This statement illuminates the capricious nature of criminalization because in the span of a few decades, many acts that were deemed to be unsafe, harmful and criminal are now accepted as harmless, legal and even 'normal'. The well-known Kinsey Report² supports this argument because at the time it was written (1948), 95 percent of the population would be criminals based on the standing laws in relation to the range of sexual activities discussed in the report (quoted in Kadish 1967). This is largely due to the fact that in many U.S. states acts such as sodomy (also referred to as buggery), adultery and homosexuality, to name just a few, were illegal at the time. There is perhaps no better instance of socially constructed criminals and 'problems' than this expansive legal cupboard of criminalized sexuality.

The creation of such a laundry list of sexual offences gave police forces, politicians and government administrations legitimacy in not only charging more 'criminals', but in securing the resources and making the necessary arrangements to combat the 'crime problem'. This is a tactic seen time and again from the "War on Drugs" to the "War on Terrorism". Making a problem seem worse than it is by shrewd and expeditious political maneuvering, at least temporarily, justifies the campaign that follows in the public's eyes. In the case of sexual deviance, the anxieties surrounding this particular topic have historically made it a suitable candidate for inclusion in the reformatory agendas of enterprising moral entrepreneurs. Authors of the sociologist's handbook, *Moral Panics: the Social Construction of Deviance* (1994), Ben-Yehuda and Goode define such campaigns motivated by political interests and agendas as a moral entrepreneurial-type of moral campaign, which involves zealous reformers who are able to impose their social schemas.

² Kinsey, Alfred C. *Sexual Behaviour in the Human Male*. Philadelphia: Saunders, 1948

The first step in embarking upon a moral campaign, which could be characterized as a crusade, or panic or witch-hunt (Ben-Yehuda and Goode 1994), is espousing an 'us-&-them' ideology that is premised on hierarchical social relations in order to clearly circumscribe a vulnerable social group as a target of increased regulation or social control. Ben-Yehuda and Goode (1994) describe this process as *deviantization*. For Becker, this is the process of creating *outsiders*. Says Becker:

Social groups create deviance by making the rules whose infraction constitutes deviance, and by applying those rules to particular people and labeling them as outsiders. From this point of view, deviance is not a quality of the act a person commits, but rather a consequence of the application by others of rules and sanctions to an "offender" (1963: 9, emphasis in original).

Becker's pioneering ideas demonstrated that the rule-making, and indeed rule-makers, were just as important as the rule-breakers within a sociological consideration of deviance. Furthermore, deviance and crime are not objective, ontological phenomena that can simply be discovered or pinpointed; "millions of people do not wake up one day and realize that a given condition is a serious social problem that must be addressed" (Ben-Yehuda and Goode 1994: 92). Rather, deviance and criminally defined behaviours result from a complex social interplay between individuals in institutions of power and the outsiders they create.

Taken too literally, this doctrine would have us believe that individuals who commit the so-called *mala in se* criminal behaviours are merely a subjugated social class created by the process of sociological 'othering', that murderers are criminals only because they are so labeled. This is where we must draw an important distinction. Reverting to the idea of behaviours that are generally agreed upon as criminal versus those that are not, the outsider theory has more of an explanatory impact in the latter case. This is due to the fact that when some behaviour or act is defined as a crime even though

a given society displays no collective moral authority over this particular 'crime', the *definitional* aspect of the criminalization process becomes more important to understand. In such a case, for example with prostitution, once again the question must be asked, "whose morality are we talking about?" For if an individual's act is regarded as criminal by law and is consequently criminalized, but there is no consensus as to the criminality of the act, Becker's idea of dominant moralities and labeling outsiders is more plausible.

Aligning tacitly with Durkheim, Becker notes that modern societies are organized along different social, ethnic, occupational and cultural strata. As such, these groups need not, and oftentimes do not, share the same rules and mores (1963: 15). Therefore, Becker's response to whose morality we are dealing with is a decidedly Marxist 'ruling classes' approach, or more precisely, "those groups whose social position gives them weapons and power are best able to enforce their rules" (*Ibid.* at 18). As was noted, this is in keeping with the power dynamic structure that involves the higher group in the social hierarchy dictating the rules for the lower group. Frequently in moral campaigns, the impact of these rules amounts to moral sanitization because the dominant group's morality is what is being asserted. When Chinese-Canadians were targeted as 'evil dope fiends' in the early 1900s, this was an index of the dominant group's racialized anxieties pertaining to a cultural practice of opium-smoking that they could not comprehend (Carstairs 1999). The main idea in this instance is that smoking opium was a morally repugnant act for those in authoritative positions (politicians, police, clergymen, etc.), and when practiced by individuals with an already marginalized identity, Chinese-Canadians represented a suitable group/class to be constructed as outsiders.

Moral Panics/Crusades

Moral reform campaigns are therefore predicated on the imposition of one dominant group's morality on the subordinate group. Typically, the aim is to sanitize or fix the undesirable morals of the subordinate group or class. Historically, such campaigns have involved alcohol use with Prohibition and organizations such as the Women's Christian Temperance Union (WCTU) (Cotterrell 1992; McLaren 1996); marijuana use and the *Reefer Madness* craze as well as the Marihuana Tax Act (Becker 1963; Ben-Yehuda and Goode 1994; Goode 1997; Ben-Yehuda 1990); heavy metal and 'gangsta' rap music with Tipper Gore's Parents' Music Resource Centre (Christie 2003); youth gangs (Carstairs 1999); and sexuality and the Victorian cleanliness/purity crusades as well as the prostitute 'round-up' (Young 2003; Poutanen 1998; Walkowitz 1980). The examples abound, but in all of the above two common threads can be found: they are all lucid demonstrations of moral crusades or panics, and they all reify the dominant/subordinate relationship with respect to the creation of an outsider group.

Some sociological scholarship debates the theoretical difference between panics and crusades, but in general they are overlapping and very similar phenomena. Perhaps the salient difference between the two is suggested by their linguistic referents: a panic may be just that- a period of collective social anxiety that is amplified by individual actors or agents of the state, which does not necessarily result in a sustained period of increased regulation or the creation of new law or policy. On the other hand, a moral crusade usually involves "moral entrepreneurs" (Becker 1963; Ben-Yehuda and Goode 1994), who are motivated agents with a specific sort of agenda to be implemented in mind. In short, a crusade is more of a calculated approach to impose dominant moralities

in contrast to a panic, where the protectionism/paternalism of the state, if any, may be slightly clouded or misplaced (*Ibid.*, 1994). The use in delineating the two distinctions of moral campaigns, albeit similar, lies in determining which phenomenon applies to the tradition of regulating 'fringe sexuality' in Canada, which seems to be typified by the long-standing effects of socio-politically and legally prompted moral crusades.

In the examples of prohibition and marijuana, both exhibited an aetiology of moral panic or crusade, which is a concept originally defined by Cohen as the following:

A condition, episode, person or group of persons emerges to become defined as a threat to societal values and interest; its nature is presented in a stylized and stereotypical fashion by the media; the moral barricades are manned by editors, bishops, politicians and other right-thinking people; socially accredited pronounce their diagnoses and solutions; ways of coping are evolved or (more often) resorted to; the condition then disappears, submerges or deteriorates and becomes more visible. Sometimes the object of the panic is quite novel and at other times it is something which has been in existence long enough, but suddenly appears in the limelight. Sometimes the panic passes over and is forgotten, except in folklore and collective memory; at other times it has more serious and long-lasting repercussions and might produce such changes as those legal and social policy or even in the way society conceives itself. (1972: 9)

The folk devil, a construction common to the enterprise of the moral panic, may be an embodiment of a range of objects, behaviours or characteristics much like the concept of the scapegoat, where societies of yore would symbolically transfer all the aspects within their culture they deemed undesirable onto an unlucky goat, which would then be ritually slaughtered. There are also underlying religious tones with the concept of the folk *devil*, which is an issue to consider later on in this chapter. Suffice it to say for now that the religious connotation aids in constructing the folk devil as something evil, unholy and therefore categorically undesirable.

These moral panics/crusades and folk devils are likely to "clarify the normative contours and moral boundaries of the society in which they occur" (Ben-Yehuda and Goode 1994: 29), much like the sociological process of 'othering', or creating outsiders, as Becker would have it. This process is undertaken to pursue the goal of creating some

sort of normative harmony, *à la* Durkheim, where a given society can condemn an individual, group or behaviour collectively.³ The dynamic process of creating an ‘us-&-them’ ideology necessarily involves the subjugation of ‘them’ by demonizing the individual/group who contravenes the dominant morality. This happens in the morality play as ‘us’ is characterized by “good, decent, respectable folk”, and ‘them’ represents “deviants, bad guys, undesirables, outsiders, criminals... disreputable folk” (*Ibid.* at 34).

One final theoretical note on moral panics and crusades is that it is certainly no coincidence that the individuals or groups that “come to be defined as a threat to social values and interest” (Cohen 1972: 9) are traditionally ‘powerless’ and marginalized. These individuals and groups constitute suitable targets as the objects of increased or expanded regulation precisely because of their lack of a meaningful and powerful (or a/effective) socio-political voice. Carstairs (1999: 68) claims that moral campaigns, by their nature, “depend on social inequality for their very existence”, and stigmatizing an already marginalized group serves to deepen the existing social cleavages. It is not difficult to understand why, contemporarily, the repetitive and recidivist antisocial behaviour of white collar criminals, corrupt politicians and drug-abusing private school kids does not engender moral campaigns to clean up their moralities. Rather, very recent and present-day moral campaigns have centered on the lower socioeconomic classes and youths’ drug use (Osborne 1999), these being conventionally socially subordinate and

³ The interesting point here is that the creation of an ‘other’ criminal identity is so fundamental for the project of criminal justice, and furthermore, the enterprise of legislating morality because it presupposes that there is a societal dichotomy of ‘normal’ and ‘pathological’ individuals. However, by the dictates of social constructionism we are all ‘criminals’ at one point or another because of the vast range of criminal behaviours, e.g., petty theft, minor physical altercations, public drunkenness, traffic violations, etc. Additionally, homicide research statistics indicate that most offenders are otherwise normal individuals up until the commission of their crime, dispelling the media-propelled notion that killers are a separate class of sub-human, quasi-maniacal born criminals, cf. Buss, *The Murderer Next Door* (2004).

powerless groups unequipped to question the legitimacy of the moral campaign that they are the subject/target of.

Again, since this social hierarchy confers legitimacy, moral imposition or transformation may be viewed as a good thing insofar as it betters the subordinate classes' collective (or individual) morality. Becker (1963: 149) provides the case of the Women's Christian Temperance Union (WCTU) and their ideal template of how a woman should behave: with chaste character, religiously motivated and comporting to their particularly circumscribed gender role as a maternal caregiver. Therefore, when the WCTU expressed its desire to protect sexually liberated women from the throes of male exploitation, it was imposing a moral high ground that appeared reasonable because of where it was originating: from the ideal, upright women, to the lowly, "fallen women".⁴

Sexual 'Deviants' as Folk Devils

Simply because the groups who are the subject or targets of moral campaigns are marginalized and lack an effective socio-political voice, does not imply that they do not want to defend themselves or evade the label that is appended to them. In his discussion of this resistance, Becker claims that

the person who is thus labeled an outsider may have a different view of the matter. He may not accept the rule by which he is being judged and may not regard those who judge him as either competent or legitimately entitled to do so. Hence... the rule-breaker may feel his judges are *outsiders*. (1963: 11)

Nonetheless, the political and social hegemony of the rule-appliers enables them to escape any such role reversal and upholds the hierarchy of power. But in the case of sex work, the fact remains that overwhelmingly, sex workers and other sexual 'deviants'

⁴ Helen Boritch's term from *Fallen Women* (1997).

earnestly do not feel they are doing anything wrong (Bruce and Severance 2003; Phoenix 1996; Walkowitz 1980; Brock 1998; Pivot Legal 2004). One may want to pursue the question of whether all these people can be deluded, like the mentally disordered offender who firmly believes that it was his or her God-given right to murder. Can all such sex workers simply be rationalizing their own behaviour? It is difficult to say conclusively, but what follows are a few examples of attitudes held by those in the industry.

Porn star and director Ron Jeremy has frequently engaged outspoken anti-porn advocate Michael Leahy, the figurehead of the “Porn Nation” movement, in friendly debates when Leahy travels around to college campuses to spread the ‘good word’ (<http://www.pornnation.org/>). Jeremy’s stance is uncomplicated; he claims that all participants in the porn business are there willingly and are there to make a living entertaining other adults. Anyone who does not like porn, thinks it is exploitive or degrading simply does not have to consume it. Voltaire’s famous exhortation, “I may disapprove of what you say, but I will defend to the death your right to say it”, seems to speak to censorship issues at stake here. Those who *subjectively* feel that porn is harmful do not have the right, or moral authority, to tell others that they cannot consume it because it has no direct impact on them. In any case, it is argued that Leahy is an unrepresentative example because he let his porn *addiction* ruin his marriage (*Ibid.*) and is now looking to assign the blame elsewhere. On the other hand, Jeremy certainly does not think of himself as a deviant; he feels he is just a man with a fairly normal career that simply does not appeal to everyone.

Swingers, or mate-swappers, are treated similarly to those in the porn world, with complaints levied against them that they are eroding the moral fabric of society by

destroying the concept of the traditional family and monogamous relationships (Bruce and Severance 2003). But swingers are also consensually acting individuals who do not require anything of those who do not wish to partake in the practice. These are just people whose hobbies include 'diversified' sex. Research indicates that swingers are actually more satisfied with their marriages on average and do not consider themselves adulterers or deviants in any sense (*Ibid.*).

And in the case of prostitutes, there exists a marked tendency among them to view what they do as nothing other than work. Even though, in the debate surrounding prostitution, it has been framed as a significant social problem, the workers maintain that it is a way to make a living and nothing more (Brock 1998; Phoenix 1999; <http://spoc.ca>). In her survey of several street sex workers in London, Phoenix (1999) underscores how prostitutes conceive of themselves as normal workers. Responses from sex workers ranged from, "I'm doing a job... Like any other person who goes out in the morning, goes to work, gets paid for it and goes home" to, "You're selling a skill. It's a job – that's what you class it as – a job" to, "it's just like doing paper work" to the very straightforward, "It's not sex, it's work!" (*Ibid.* at 128-9). Can all of these individuals thus rightly be labeled deviants? Time after time, individuals in all of the sex trades (including pornography, stripping, erotic modeling, etc.) convey the message that they are an unexceptional group of individuals whose work happens to coincide with subject matter that society has traditionally been uncomfortable with. Their collective attempts to shed the negatively connoted label of 'sexual deviant' have not been successful because of the very nature of their work, and how it renders them a collective social group (sex worker) lower in class than those who label, persecute and *prosecute* them.

Deviant sexuality such as prostitution, various sexual and nude performances have been and continue to be a ripe matter for eager moral entrepreneurs to mobilize campaigns around. Since these campaigns involve extensive increased regulation through statutory and legislative effort, they may be more appositely referred to as moral crusades. The sexuality crusades in Canada have typically centered on seemingly rational (to the reformers) criteria that are not wholly borne out of panic or hysteria, although, as noted, there are certainly features of moral crusades that overlap with panics.

Law and Religion: An Unholy Union

[O]ne thing is certain: the origin of the legal regulation of sexuality has a religious genesis (Young 2003: 19).

The regulation of ‘deviantized’ sexuality in Canada has traditionally fallen within the category of moral crusade because it has been a more sustained campaign that has remained fairly constant, yet has become nuanced over time, and has involved a collection of acts and behaviours that are in no sense historically novel.⁵ The religious connotation of the term ‘crusade’ is certainly appropriate to the discussion of prostitution as Becker notes that moral reformers or entrepreneurs may be referred to as crusaders because “typically *their mission is a holy one*” (1963: 18, emphasis added). Perhaps the most portentous aspect of the moral panic/crusade description relevant to prostitution and its related activities is the final part of Cohen’s definition where he states, “at other times [moral panic] has more serious and long-lasting repercussions and might produce such changes as those legal and social policy or even in the way society conceives itself”

⁵ ‘Deviant’ sexuality such as fellatio, cunnilingus, orgies, sodomy and prostitution can be traced back to the earliest civilizations, most notably, Egyptians, Greeks, Romans, Aztecs, etc. For first-hand evidence one need only to visit museums of sexuality documenting these behaviours in relic art, such as those found in Madrid, Barcelona, Miami Beach and Berlin.

(1972: 9). If this idea of moral crusades is employed, it is plausible to explain the continued regulation of deviantized sexuality in this manner.

Combining the two previous statements of moral crusades as religiously influenced and that they may have long-standing effects, we are left with the conclusion that there are religious overtones in our current laws dealing with certain outlawed forms of sexuality. Indeed, although Canadian law has evolved, the genesis of prostitution laws and other laws regulating sexuality are rooted firmly in the Biblical tradition. Exhortations from the Bible (Proverbs 7:27) such as “her [a prostitute’s] house is the way to hell, descending to the chambers of death” (quoted in Meier and Geis 2006: 30) reveal the dominant religious view on selling sex. The Bible also expressly forbids any Jewish fathers from turning their daughters into prostitutes as well as the women of Israel from practicing prostitution (*Ibid.*). Included in the Ten Commandments are prohibitions against adultery and coveting thy neighbour’s wife. Thus, evidence for religion’s influence upon constructing sexual deviance is well-documented. It is important to now answer the question of how religion manages to infuse the current criminal law.

The simple answer to the above question would be that since such acts of ‘sexual immorality’ have been decreed deviant by Biblical and religious authorities, the law has responded by criminalizing them. But this explanation does not detail how religion gained the legitimacy to influence criminal law-making. The answer becomes clear when we consider how religion operated in pre-secular states as the second, yet principal, pillar of moral authority. Law and religion, taken together, represented *the* combined and complicit authority over individual conduct. Marmor argues that the Medieval Church responded to a millennium of what it perceived as sexual licentiousness and impropriety

by “strengthen[ing] and extend[ing] its control over the peoples of Europe”, and as a result, “guilt about sexuality began to be a cardinal feature of Western life” (quoted in Goode 1974: 46). The Church’s aim in this crusade was to “make license in sexual intercourse as difficult as possible” by sanctioning it only for procreative purposes between man and wife (*Ibid.*). Subsequently, these moral precepts, and many others, entered the English common law, and hence became ingrained in Canadian and American criminal law (Meier and Geis 1997: 7).

By no coincidence, these religiously-valenced laws gained further authority and legitimacy in the Victorian era as they became intertwined with the philosophies of the social purity crusades. The pervasive manner in which religious authorities became involved in socio-political affairs in Canada with the end goal of complete “vice suppression” is well documented (McLaren 1996; Carstairs 1999). In the early 1900s, new drug laws were contemporaneously the subject of moral crusaders’ concerns in addition to the increased policing of sexual immorality, which signals crusaders’ pressing concern with vice as a broader characteristic of social impurity. Even as Canadian society moved out of the Victorian era proper (roughly the turn of the 20th century), its lasting puritan influence did not wane. Young argues that “moral crusades like temperance... [c]ombined with a sanctimonious Queen Victoria, paved the way for religion to sell a whole moral code to secular criminal-justice officials. The regulation, prohibition and condemnation of non-conventional sexual practices [therefore] became an important criminal-justice priority” (2003: 20).

Secularism and Criminal Justice in Canada

In the early 20th century in Canada there were crusades involving alcohol (Prohibition), illicit substances (marijuana and opium) as well as prostitution (Marquis 2005; Carstairs 1999; McLaren 1996). Earlier, in 1892, moral crusaders had already “secured the enactment of a series of criminal laws relating to bawdy houses, procuring and living off the avails of prostitution that effectively prohibited prostitution” (Lowman, 2005: 3). These laws have remained more or less unchanged and can be found in the current *Criminal Code* under ss. 210(1) Keeping a common bawdy-house, 212(1) Procuring, and 212(2) Living off the avails of prostitution. Because the Victorian social purity crusades meshed so well with, and indeed were motivated by, laws predicated on religious precepts, these laws were accorded further legitimacy and consequently were resistant to any meaningful reform, aside from slight modifications over the years.

As such, the religious moral crusade description seems fitting based on the enduring influence of these laws, and many others. For instance, ‘sodomy’ was only decriminalized in Canada in 1969, constituting the *de facto* decriminalization of male homosexuality,⁶ fellatio was still being framed as a criminal act in 1974 (*R. v. St. Pierre*) and clubs for mate-swappers were only legalized in 2005 (*R. v. Labaye*). It seems as though the influence of religiously-valenced laws is a difficult ‘demon to exorcise’ even in a secular society with evolved moralities in relation to sexual conduct. However, even if religion’s influence in the penal code is indirect it remains a ‘demon’ to exorcise because religion has *no place* in a secular society’s laws. This is why society no longer clings to anachronisms such as the Lord’s Day Act nor do we continue to persecute and

⁶ But it remains illegal in certain contexts, e.g., in persons under 18 or where there are three or more persons present.

punish 'sodomites'. However, Young asserts that "[t]he rigorous war on sexuality springs from the Judeo-Christian ethic, and in particular reflects early Christian perspectives on sex. Even though religion is no longer a force in social and political affairs, it *still* manages to modestly inform and influence modern criminal law" (2003: 61, emphasis added).

The fact that religion *still* manages to pervade our criminal law when we live in a secular state logically raises the questions of why and how. Quite simply, religious sentiments remain in the criminal law because they are historical vestiges that have been *transvalued*. In other words, bawdy-house, indecency and other relevant prostitution laws were originally spawned by zealous religious moral crusaders eager to cleanse the 'filthy minds' of sexual deviants. But now these laws have taken on new meaning related to preventing 'degradation', dehumanization' and sexually transmitted diseases. The overall effect is that Canadian lawmakers and criminal justice agents have painted over the religious vestiges with new, practical and expedient explanations. This transvaluation is responsible for the 'modest' influence upon our criminal law, which still criminalizes consensual, victimless sex-for-money transactions.

Thus, Cohen's declaration that moral panics/crusades may have "serious and long-lasting repercussions and might produce such changes as those legal and social policy" (1972: 9) speaks directly to the continued criminalization of prostitution and its related activities in Canada, specifically because of the current laws in such a progressive and liberal country. Furthermore, Canadian law seems to be exhibiting Cohen's idea of moral campaigns and indelibly altered policies, *especially* in the wake of other acts of legal reform involving religion-influenced laws such as sodomy (decriminalization in

1969), homosexual marriage (*Same-sex Marriage Reference* [2004]) and swinging (*R. v. Labaye* [2005]). In accounting for this persisting moral position, Young states that although “[m]any of the Victorian moral hygiene measures have been abandoned since the late 1960s... [p]lain and simple, our contemporary [Canadian] law grew out of a climate where it was a capital offence to have anal intercourse, so we should expect some irrational and hysterical leftovers” (2003: 20). It is now important to turn to the Canadian legislation that impacted prostitution in order to further understand the contemporary law.

Regulating Morality: The *De Jure* Legal Approach

Morals excite passions, and produce or prevent actions. Reason of itself is utterly impotent in this particular. The rules of morality, therefore, are not the conclusions of our reason.
- David Hume

Canadian legislative attempts to control socially constructed immoral or deviant sexual behaviour began early and, as was argued, have a residual effect today. Although regulation of fringe sexuality such as sodomy and homosexual relations has disappeared and considerably lessened in other areas, the legal vice grip on sex-for-money transactions has remained as tight as ever. It should be noted, however, that prostitution *per se* is not, and has never been, illegal in Canada. Rather, its surrounding and related aspects have been criminalized so as to *effectively* criminalize it. One of the main questions to pursue in this project is what is the effect of *semantical criminalization*? What do such laws say about Canada’s intent in regard to prostitution? And what impact does this have on society? In pursuing the answers to these problems, the main statutes and laws themselves must be first outlined with some contextual discussion.

The Contagious Diseases Acts: Medicalization of Morality

The first major prostitution laws were imported to Canada from Britain in 1865, beginning with Britain's 1864 passage of the first of three statutes (then 1866 and 1869) that together would comprise the *Contagious Diseases Acts (C.D. Acts)*.⁷ The impetus for the *C.D. Acts* came as a result of the high levels of venereal disease in the military, presumed to result from involvement with prostitutes. As a result, the Acts allowed plainclothes police officers to 'identify' diseased prostitutes who then could be medically interned for three months, and then a year, as mandated by the 1869 Act. Walkowitz (1980) has documented extensively the impact of these Acts and contends that they were a tool of sexual discrimination that justified increased surveillance and policing of women's sexuality. The *C.D. Acts* also reinforced existing sexual double standards whereby men's vice was sanctioned, but women's was, albeit indirectly, criminalized (*Ibid.*). Because of the risk of sexually transmitted diseases to soldiers looking for a sexual trick in garrison and port towns (such as Plymouth and Southampton) where they docked, the *C.D. Acts* were passed to 'protect' men from disease.

However, this explanation only obscures the true moral motivation behind socio-legally constructing prostitutes as sick, dirty, diseased and, above all else, deviant. Not surprisingly, the resulting increase in medical and police supervision "created an outcast class of 'sexually deviant' females" (*Ibid.* at 5). The salient point to note here is that the *C.D. Acts*, as one of the many legal measures in the moral crusades involving sexual immorality, shrouded its moral tonality by appealing to medical science. By presenting

⁷ Although, the *very* first legislation related to prostitution, indirectly as well, was a form of vagrancy under the Nova Scotia Act of 1759. Vagrancy was prohibited as a response to the growing ranks of the 'undeserving' poor (Lowman 1993: 58).

statutory law governing sexuality as a medical issue, attention could be diverted from the moral regulatory aspect constructing prostitutes and other socially undesirable women as outsiders. In Foucaultian fashion, this technique of medicalization constituted an expanded regulatory web that appeared even more legitimate because it was *presented* as a health issue; it professionalized moral judgements. Moreover, this first major statute initiated Canada's tradition of regulating prostitution in an indirect manner.

Vagrancy Law

Although scholars note that the *C.D. Acts* were rarely applied in Canada, and were in fact repealed soon after their implementation in 1870 (McLaren and Lowman 1990), it is nonetheless important to underscore their symbolic impact on prostitution. As was noted, bawdy-house, procuring and living off the avails laws were already in place around the end of the 19th century. But the passage of Canada's *Criminal Code* in 1892 added the offence of 'vagrancy' to the criminal justice arsenal to be applied to the socially undesirable suspected street-level sex workers. Once again adopting the British model, the vagrancy law under s. 175(1)(c) of the *Criminal Code* described a vagrant as a "common prostitute or nightwalker" found in a public place who cannot give a good account of *herself*. This vagrancy law, or Vag. C. as it was referred to (Lowman 1986), undeniably targeted women only and not their clients or 'johns'. As such, it perpetuated the social construction of the female sex worker, and only the female sex worker, as the folk devil within the prostitution 'game' and within the realm of sexual immorality more generally (Boyle 1987: 38-40). The vagrancy law can also be characterized as a 'dragnet

law' as it vastly increased the police's ability to 'investigate' and make arrests on the basis of status ("being" a prostitute), which could be open to wide interpretation.

Consequently, police "enjoy[ed] wide discretion to stop, question, and detain unescorted women at night" (Marquis 1999: 253), which in turn resulted in higher rates of vagrancy offences. This is a prime example of laws creating deviance and deviants rather than responding to actual instances of collectively agreed-upon criminal behaviour. In other words, the upsurge in vagrancy offenses was not indicative of an epidemic of crime like *objectively* rising gang violence rates, because the vagrancy law was a vague, catch-all social construction utilized to justify increased regulatory control. Poutanen contends that female vagrants represented an added threat to society "by virtue of their sex and public behaviour, [which] symbolized the decline of morality and the disintegration of the family on which society was based" (1999: 34-5). Thus, there was an additional interest in controlling the sexuality of women by using an open-ended law, which would, of course, increase rates of 'criminal' activity artificially.

However, any justice-of-the-peace, magistrate, police officer or any other agent of criminal justice could look at the rising offence rate and improperly conclude that there was an objective prostitution 'problem'. This process is akin to the one Cohen described in his moral panic theory, known as *deviancy amplification*. In this process, behaviours that are classed deviant propagate new regulatory laws that see a marked rise in the crime rate related to that behaviour. Since it was the street-based women sex workers who were most often penalized around the turn of the 20th century, as opposed to those in illegal brothels or 'out-call' girls (STAR Report 2005: 10), this meant that the vagrancy law was indeed accomplishing deviancy amplification. This social construction of deviance is

analogous to the illegal economic practice of artificial inflation. With a practice such as 'stock juicing', executives will fraudulently inflate a stock price so that its rise in value will stimulate buying, and it will eventually increase in value to appear as if it has done so on its own. Just as in the business world, this inflation serves a purpose in the criminal justice arena: to showcase a 'problem' and maintain that law will provide the solution. As Brock reminds us, social problems do not exist as "objectively discoverable conditions in society", but rather, as "a complex interplay of economic and social forces at particular historical moments in specific locations" (1998: 3). And this socially constructed problem of vagrancy/prostitution would accordingly perpetuate itself, giving rise to a continued regulatory tradition that sought to regulate women's deviant sexuality.

Similar vague 'dragnet laws' in the U.S. have been declared unconstitutional. For example, the "Void for Vagueness" doctrine has been established in U.S. jurisprudence in response to laws that are not clearly defined or are overly broad, giving criminal justice officials arbitrary powers of arrest and detention. In a seminal case, a Florida court cited the Jacksonville Ordinance Code, which criminalized the likes of "common railers, habitual loafers, wanton and lascivious persons" (*Papachristou v. City of Jacksonville* 1972), and repealed it due to its "impermissible vagueness" and use as a dragnet law.

The Solicitation Law

Canada similarly abolished the vague and arbitrary vagrancy law after its impact had significantly diminished over time. Following World War I, criminal justice priorities changed as the social purity crusades began to lose momentum and prostitution became more decentralized, occurring in hotels and nightclubs, which resulted in a proportional

drop in bawdy-house and vagrancy charges (Lowman 2005: 3). Thus, post-WWI, the sex industry carried on for roughly fifty years with very little public comment or policing (STAR Report 2005: 10). The sexual revolution of the 1960s also had an impact on criminal justice priorities with respect to regulating sexuality (Young 2003: 20), which helps to explain the drop-off in regulatory efforts. While Canada did not yet have a repatriated Constitution to challenge such vague laws as unconstitutional, the vagrancy law was inconsistent with principles laid out in the *Canadian Bill of Rights*. A submission from The Report of the Royal Commission on the Status of Women to Parliament became the impetus for legal reform (Lowman 1986). The submission focused partially on the fact that the law was vague but more on the basis that it was sexually discriminatory against women (Boyle and Noonan 1987). Along with the objection of other civil libertarians (Robertson 2003: 2), Vag. C was repealed in July 1972 and immediately replaced with the *solicitation law* (Lowman 1999: 4).

The solicitation law under s. 195.1 of the Criminal Code stated that “Every person who solicits a person in a public place for the purpose of prostitution is guilty of an offence punishable on summary conviction”. This law addressed the two shortcomings, as lawmakers perceived them, of Vag. C. inasmuch as the new law criminalized a specific act (solicitation) rather than a status, and it was gender neutral because both sexes could engage in the act of soliciting prostitution. However, the solicitation law was plagued by problems from the outset because the wording of the law made it very difficult to determine what exactly constituted ‘solicitation’. “Did it mean a wink, a nod, or a casual conversation...? What level of importuning or persuasion was required in order to meet the standard of solicitation?” (SCJHR 2006: 38).

After several years of uneven enforcement, the Supreme Court of Canada determined in *Hutt v. R.* (1978) that solicitation consisted of “pressing and persistent” conduct, which, when combined with the impact of a series of cases that followed, meant that police across Canada abandoned this law because of how hard it became to successfully enforce (Lowman 2005). The solicitation law, however, said nothing about prostitution *per se*; the law was premised on the act(s) required to secure sexual services. As such, it was tantamount to ‘semantical’ legalization *and* criminalization of the act of prostitution itself. And this rendered the official Canadian stance on the matter ambivalent and unclear, and thus only a modest improvement on the vagrancy law.

The Communication Law

The Canadian response to the above enforcement problems was to appoint the Special Committee on Pornography and Prostitution (*Fraser Committee*) in 1980, to ascertain why the prostitution law failed and suggest a future course of action. Due to the solicitation law’s ineffectiveness, a noticeable upsurge of street-level prostitution resulted (STAR Report 2005; SCJHR 2006; Fraser Committee 1985; Lowman 2005, 1993, 1989). The intricacies of the committee’s findings shall be examined in more detail in the fifth chapter, but for now, what is important is that the Fraser Committee’s Report resulted in another change in the prostitution law. The solicitation law was repealed in December 1985 and the ‘communication law’ took its place (Lowman 2005: 5). This reformulated prostitution law made it illegal for any person to stop or attempt to stop any motor vehicle, to impede the flow of pedestrian or vehicular traffic or to stop or attempt to stop any other individual for the purpose of obtaining the sexual services of a prostitute,

pursuant to s. 213(1) of the *Criminal Code*. The creation of this law was an attempt to ameliorate the inherent difficulties with the imprecise wording of the previous law and also maintain the orientation of a law that criminalizes both sexes equally, and therefore is not discriminatory. At its core, the new law was not fundamentally different from the solicitation law because of the reticence of the then Conservative government that balked at the idea of fully sanctioning acts of prostitution.⁸

Governance of Morality and Ambivalent Laws

There are several points of analysis to pursue in an examination of the history of prostitution regulation in Canada. While the bawdy-house, procuring and living off the avails provisions remained more or less unchanged since their initial inclusion in the *Criminal Code*, the statutes and laws targeting street prostitution demonstrate a regulatory tradition that is unsuccessful and unclear as to its precise aims. Save for the *C.D. Acts*, all of the outlined statutes led to the most charges within the prostitution realm, because street prostitution has always been socially constructed as the most serious problem (Lowman 2005, 1998, 1989; Wolfenden Committee 1957; STAR Report 2004; SCJHR 2006; Phoenix 1995; Sharpe 1998; Alexander et al. 1987). It can be argued that this is due to Canada's adherence to the British convention of criminalizing the surrounding 'nuisance' aspects (public visibility, exposure to children, etc.) of prostitution and related sex work and not the acts *per se*. Canadian law does not detail the *de facto* prohibited acts anywhere in the *Criminal Code*, e.g., by creating a crime that states that everyone

⁸ Interestingly enough, feminist anti-porn and prostitution lobbies allied with Conservatives to make the new communicating law only facilely different from the preceding solicitation law. In her book, *Imperiled Innocents*, Beisel (1997) details this partnership further making ironic reference to the 'strange bedfellows' these two traditionally opposed groups made for.

who pays for the act of fellatio is guilty of an offence punishable on summary conviction. Rather, Canada criminalizes the explicit and implicit contracting of the services, making the act of prostitution virtually impossible without committing a crime. This has been one of the most criticized aspects of the communication law, with scholars noting how problematic and contradictory such a law is (Lowman 2000, 1986).

Regulating sexuality remains, to be sure, a difficult enterprise. One of the most pressing criminal justice concerns in recent years is overcriminalization, which is a problem that is exacerbated by laws that govern morality. The Law Reform Commission of Canada claimed that criminal law “comes in by way of last resort” and that some ‘crimes’ “call not for criminal law and punishment, but rather for some genuine social reform” (1976: 11). These arguments emphasize the limited role of criminal law, which would ideally reduce overcriminalization, but still respond to genuine socially harmful behaviour. Generally speaking, the judiciary has also sought to strike this difficult balance by following Mill’s admonition to prevent harm to others and simultaneously protect the vulnerable. The problem is, of course, that definitions of what is harmful and who is vulnerable will not be uniform in a heterogeneous and diverse society, as *per* Durkheimian reasoning. This being so, it is my contention that Canada is in a sort of political ‘no man’s land’, unsure of exactly what to do with prostitution. Prostitution itself is technically (semantically) legal, but cannot be communicated for, nor can it occur indoors because this would make the establishment a bawdy-house. Prostitution cannot logically or practically be both ‘legal’ and ‘illegal’. And indeed, Lowman supports this claim when he argues that Canadian law seems to want it both ways: to libertarians it can say it is legal and to opponents it can say it is effectively illegal (2005: 4).

Contrasting classical liberalism/libertarianism with social constructionism in these first two substantive chapters has revealed the *schizophrenic* (literally, of two minds) and cognitively dissonant approach that the law espouses. In a psychological model of cognitive dissonance, criminalization is what the law 'does' because this is what it practices, but legalization/decriminalization/regulation is what the law 'believes' because this is the spirit of the law (semantically allowing prostitution). Just like the soldier who serves for a war he or she does not believe in, either the behaviour or the beliefs must change to achieve a state of psychological *homeostasis*. Canadian law, which is metaphorically in such a state of cognitive dissonance, must therefore change the law or change its 'mind'- this would mean expunging the communicating law and replace it with specifically worded criminalization of any sex-for-money transaction.

The Lasting Effects of Moral Regulation

From the *C.D. Acts* to the communication law, all these legislative efforts were motivated, directly or indirectly, by moral crusades; by pervasive normative judgements related to 'right' comportment and what an individual ought to be like. Earlier Canadian statutes treated prostitutes as diseased, sick, dirty, poor and helpless.⁹ The consequent social construction of a *pariah* group reinforced the underlying idea that women, by virtue of their sex and nature as caregivers, need to be surveilled and 'protected', and that their sexuality- not men's- needs to be regulated.

⁹ Around the same time (late 19th to early 20th century) in Italy, Lombroso was contributing to this marginalized identity by claiming that the prostitute was a distinct 'class' of woman, who represented the female equivalent of the male 'born criminal' (quoted in Phoenix 1999: 37-8).

Although criminal justice discourses of medicalization and dragnet-type laws were eventually abandoned, the effects of discursive identity formation have made the prostitute a permanent site of regulation. Bruckert, in her analysis of Toronto and Ottawa strip clubs, contends that strippers in the 1990s became discursively associated with prostitutes, drugs and crime, which accordingly contributed to a justifiable increase in policing and regulation (2002: 57). The crux of this example is that other attributes are appended to and associated with the sex worker's identity to, as is the case with moral crusades, make a social problem appear worse than it is. As such, sex workers earn a discursive label or identity that justifies continued and increased legal regulation. One prostitute, speaking for many, claims that she deplores the enduring stigma that comes with being a sex worker; too often, for others, the prostitute is a case of 'once a whore, always a whore' (Phoenix 1999). Ultimately, the increased legal regulation accompanying this persisting discursive identity is consonant with increased moral regulation (Bruckert 2002: 51). This fundamental point may help explain why *Labaye's* impact upon regulating prostitution has been non-existent thus far (see chapter 5).

Scientific and medical narratives in the *C.D. Acts*, 'legitimate' social concern in the vagrancy act and "political doublespeak" (Lowman 2000) in the soliciting and communicating laws all obfuscate the underlying, ever-present mechanism of moral regulation. Legal regulation of prostitution has appeared under this or that guise, only as a pretext for the true aim of moral governance. With respect to Canada's statutory law, while the façade has changed, the core of moral regulation has remained unaffected. Open expression or discussion of sexuality has never been welcomed and has frequently been the fodder for burgeoning moral crusades. For instance, Kinsey's benefactor, the

Rockefeller Foundation, retracted their money and support based on his revolutionary and controversial work; Playboy creator Hugh Hefner and Larry Flynt of Hustler magazine endured persecution and even legal scrutiny. By the logic of Mill's harm principle, such censorship is unreasonable, because moral reformers and other 'upright' individuals cannot adduce any harm in their efforts to censor/censure. The important point to emphasize here is that the law cannot in the same manner proscribe on the basis of something that is *only* deemed immoral by some.

The law should also not criminalize on the basis of something being irreligious, such as non-traditional sexuality. Henkin argues that "the proscription of sin is not a permissible function of a government of limited powers in a secular society" (quoted in Packer 1968: 265). Thus, moral regulation of sexuality is patently inappropriate in a modern secular democratic state because of the religious genesis of the relevant prohibitory laws. As Mill reminds us, it is more prudent to legislate on the basis of tangible harm rather than morality. Even if murder and robbery are immoral, the law proscribes these activities based on the fact that they cause observable, tangible harm to others. I may consider my adult neighbour's Roman-style orgies immoral, but there is no harm component present to justify criminal law intervention (unless it has to do with noise). If prostitution is simply conceived of as immoral, then criminalization is unwarranted, but if it is immoral and *harmful*, then it is an area appropriate for legal prohibition. In the next chapter, the Canadian courts' interpretation of harm will be examined to test the limits and foundations of the *de facto* prohibition.

Conclusion

This chapter's purpose was to illustrate how and why social problems such as street prostitution become constructed as social problems and to illustrate the long-term effects of the social construction of deviance. The way certain acts or behaviours are defined, and who defines them, are important aspects to consider in the critical consideration of the practice of criminalization. Criminals are not a distinct social class of individuals who are simply 'out there' for police to catch, but rather, they are individuals whose behaviour has come to be defined as socially and morally undesirable by those higher in the social hierarchy. Frequently within this social stratification, dominant moralities are imposed on lower classes in an effort to 'reform' them and 'sanitize' their morality. The social construction of prostitution and prostitutes as crime/criminals dovetails with the idea of moral crusades which may have long-lasting effects on social and legal policy. Thus, prostitution regulation as a moral campaign explains its continued regulation. However, sex workers and other sexual 'deviants' do not accept this criminal label when they claim what they are doing is a 'victimless crime'. This theoretical resistance has not been productive in creating legal change, however, because of the pervasive religious influences upon the regulation of sexuality in general. Religiously-valenced laws pertaining to all areas of sexuality were seen as legitimate to those in the Victorian era, responsible for the social purity crusades. As such, Canadian laws in relation to prostitution still retain some religious influence, which is incongruous with the aims of a modern secular society.

The *C.D. Acts*, vagrancy, solicitation and communication laws comprise together Canada's historical (and current) legal response to street prostitution. This tradition of

regulation is one that neither fully legalizes nor criminalizes the act of prostitution *per se*, but makes the act virtually impossible by criminalizing aspects related to it. Earlier laws such as Vag. C. and the *C.D. Acts* were obvious instances of moral regulation because of how vague and broadly defined they were in terms of their targets and their wording. The later solicitation and communication laws did not in any meaningful sense ‘fix’ the problems inherent in the old laws because they still displayed, and continue to display, an incoherent and schismatic stance on whether prostitution *per se* is legal or not. The Canadian legal position on prostitution indicates a reluctance to take a clear stance on the matter in order to both pass the ‘political hot potato’ as well as to assuage the concerns of civil libertarians and anti-choice feminists/conservatives alike. The effect of the current and historical prostitution laws is the discursive social construction of a pariah group/identity, which makes sex workers targets of increased regulation. In the absence of harm, the law’s continued regulation of ‘deviant’ sexuality is equivalent to moral regulation. The underlying argument in this chapter is that from the libertarian/liberal perspective, moral regulation itself is not an appropriate justification for use of the criminal law. As Beverley McLachlin C.J. reasons,

generally speaking, more than a breach of morality is required to justify the stigma and infringement on liberty that flows from criminalization. To justify making it a crime the act must be shown to be (1) generally condemned in society and (2) of harm to others. These characteristics are not always found in the feminine crimes [such as prostitution] (1991 at para. 5).

Chapter 4: Regulating Indecency, Regulating Morality

Introduction

The history of statutory law in Canada evinces a tradition that is guided by moral regulation. However, with the implementation of the Charter as well as the communication law that has been in place for over twenty years, we must explore the question of how the regulation of prostitution and its related activities has changed, if at all. Does moral regulation persist? Has the law attained a clear focus and approach with respect to criminalizing deviant sexuality, *viz.*, prostitution and its related activities? The use of Charter jurisprudence frames this discussion by contrasting the legitimacy of law with individual freedoms, which reflects the classic Millian struggle between ‘liberty and authority’. The handling of the obscenity provisions in case law continues to demonstrate an unclear approach to determining whether immoral sexuality is of legal concern. *R. v. Butler* (1992) and the ensuing debate over harms and pornography provides a valuable contribution to the discussion by highlighting moral regulation in practice.

Through cases subsequent to *Butler* involving indecency and bawdy-house offences, the interpretation of sexual immorality as a crime has come to be guided by Mill’s principle of harm. Even so, courts cannot uniformly agree upon what constitutes tangible harm in order to justify criminalization. The evolution of the legal test for determining obscenity/indecency to its present state as formulated in *R. v. Labaye* (2005) demonstrates a reconceptualization of the way law ought to regulate sexuality. The case involved a ‘swingers club’, but its impact extends to prostitution because these clubs were previously criminalized and labeled sexually deviant, involving the same laws and legal concepts that apply to prostitution. The impact of *Labaye* guides the discussion

toward indecency and bawdy-houses (acts amounting to, and facilities for, prostitutional acts), which are offences usually reserved for the crime of prostitution.¹ By implication, the reasoning in *Labaye*, also based on notions of objective harm, is directly applicable to prostitution legalization within certain contexts. Yet this ruling's legal and practical effect on the regulation of prostitution remains to be seen.

Morality and the Roadblock to Legal Reform

Any potential prostitution law reform is a prospect that has not been duly considered because of the long-standing effects of moral regulation. Too often, legal reform has been preemptorily vetoed because of the fear that prostitution and its related activities would be legitimized through its practical facilitation. Phoenix and Oerton (2005) argue that in the U.K., despite the fact that contemporary society is characterized by increasing levels of sexual freedoms and liberally tolerant views, *more* kinds of sexual behaviours are being regulated, which is an enterprise "marked by moral authoritarianism". Thus, once again, the lingering effect of the morally charged laws continues to exert an influence on contemporary societies, both in its values, and the formal legal expression of those values (Giddens 1978: 22). The *Criminal Code* explicitly demonstrates that sexual 'deviance' is a matter for moral regulation because the obscenity (and some indecency) provisions appear under the heading "Offences Tending to Corrupt Morals" (Boyle and Noonan 1987: 43).

¹ Since the case law will be confined to bawdy-house and indecency cases in the realm of prostitution there is no need to consider the law's legitimacy in other other provisions such as procuring, living off the avails and youth prostitution because they are undesirable, exploitive aspects of the trade.

Additionally, the pernicious effects of sex workers' discursive identity construction dovetails with the social taboo surrounding sexuality, especially 'unwholesome' or deviant sexuality. Valverde emphasizes this assertion when she states:

When we talk about sexuality we tend to rely uncritically on myths and vague feelings we have about it... and also, sexuality has become a kind of conduit for a whole series of collective anxieties, fears and doubts. (1987: 29)

I characterize this uncritical reliance on feelings and traditions as 'knee-jerk morality' because it is the standard, conditioned response to matters such as sexuality, which makes some uncomfortable. But even those who are uncomfortable with things such as pornography, escort services, massage parlours and strip clubs (all 'offshoots' of prostitution or at least related in some way), the fact is, while no one freely discusses patronizing a strip club or the latest pornographic titles, many individuals are in fact private consumers of sexual services/products. How is it possible that none of one's professional colleagues consumes porn when it is an estimated 9 billion dollar-a-year industry in North America? (Ritchie 2005) Perhaps even more astonishing, the sex industry in Las Vegas now draws in almost as much money as gambling in all the hotels (Sheehan 2004).² Evidently, individuals display just as much cognitive dissonance, and indeed hypocrisy, as the government when they claim one thing and then behave in a completely different manner. This illustrates how pervasive hypocrisy, individual morality and ambivalent attitudes are with respect to sex, which is reflected in the legal regulation of deviant sexuality.

² This is an outdated figure that has probably increased even more to the present day. Additionally, Cooke County, the county that Las Vegas is in, does not even have legal brothel-style prostitution, which means that the estimate over how much money the sex industry draws is largely from the strip clubs and outcall services.

Whatever fears and anxieties may be present with the prospect of reforming the Canadian legal stance on prostitution, a clear message must be sent to Canadian citizens with respect to what is *actually* legal and illegal. The Canadian government's *doublespeak* needs to be jettisoned, and taking its place should be a coherent stance that intelligibly expresses its philosophy of regulation. Incessantly contested legislation in the court system and a constitutional 'tug of war' do not display a set of reasonable, grounded laws. Lack of clarity and ambiguity with respect to criminal law are features antithetical to the very notion of the rule of law in a contemporary liberal democratic society. With this in mind, a preliminary look at the Charter is needed to aid in the forthcoming discussion.

Determining the Scope of Reasonable Limits: Law, the *Charter* and Sexual Deviance

The state has no business in the bedrooms of our nation.
- Pierre Elliott Trudeau

Former Prime Minister Trudeau's famous quote accompanied a new consciousness with respect to regulating deviant or immoral sexuality in Canada. His re-patriation of the *Canadian Charter of Rights and Freedoms* in 1982 encoded a system of constitutional rights that formally expresses and upholds values conducive to individual freedom and flourishing. If we analyze Trudeau's exhortation further, we come to the conclusion he is suggesting that sexuality in the context of a *private* setting is not a justiciable issue when there is no tangible harm to prevent, e.g., exploitation of minors, coercion or violence.

The 'spirit' of the Charter is to safeguard the individual against too much state interference and ensure that all laws are fair and equal. These fundamental values are specifically enumerated in the Charter under s. 2(b)- freedom of thought, belief, opinion and expression; s. 7- Life, liberty and security of the person; and s. 15(1)- Equality

before and under law and equal protection and benefit of law. Criminalizing prostitution may instantiate the potential violation of these rights and be subject to one of the remedy provisions under s. 24(1) and s. 52(1), known as the remedy provisions. The same is true of other acts such as indecent sexual performances, orgies, ‘full contact’ exotic dances, erotic massages and swinging. All of these acts or behaviours, if conducted or taken part of within a private environment, deal with constitutional rights of individual liberty, freedom of association and communication. As such, in the absence of harm, the legal prohibition of these acts or behaviours needs to satisfy the reasonable limits clause pursuant to s. 1 of the *Charter* in order to justify criminalization.

Section 1 of the Charter: The Reasonable Limits Clause

Section 1 and 33 are the judiciary’s override clauses, used to ensure that they are not ‘handcuffed’ by either of the constitutional remedies for impugned legislation. The latter clause is not relevant to the discussion because it is never used for political reasons. Section 1, or the ‘reasonable limits’ clause, is essential to the discussion because of its extensive application in common law. If a court determines there is a reasonable limit on any one of an individual’s Charter rights that right can be legally overridden.

The major case defining this important legal mechanism and establishing the precise legal test for Charter override is *R. v. Oakes* (1986). This was a drug case that involved a reverse onus provision (the accused was presumed to intend to traffic in addition to the charge of possession because of the amount he had) with a greater sentence at stake. The defense argued that this provision of the Narcotic Control Act (NCA) violated Oakes’ s. 11(d) right to the presumption of innocence. As such, Oakes

petitioned the court to invoke s. 52(1) as a Charter remedy *vis-à-vis* Section 8 of the NCA on the grounds that it impaired his Charter rights and was subject to a ‘just and appropriate remedy’. The court agreed and accordingly expunged the law while formulating the following two-pronged test to justify a s. 1 override:

1. The impugned provision must be significantly important to warrant an override of a constitutionally protected right, and if so,
2. The means to achieve the sufficiently important objective must pass the proportionality test:
 - (a) there must be a ‘rational connection’ between the objective and the override;
 - (b) there must be minimal impairment of the right or freedom in question;
 - (c) and the effects on the limitation of rights must be proportional to the objective.

An understanding of the use of the Oakes Test is indispensable to the case law surrounding prostitution and its related activities where constitutional questions are raised and infringements are at issue. The courts use this test in addressing whether or not one’s violated *Charter* rights and freedoms are *saved* or justified by s. 1.

Section 1 has been the subject of considerable scholarly debate and scrutiny because of its use in superseding constitutional rights. Scholars such as Dworkin advance the libertarian “rights should be paramount” position (Hiebert 1996: 36), which articulates that if a right is legitimately encoded, then it *cannot* be violated without that violation being considered an anti-democratic practice. However, as we have seen, it would be unreasonable to assume that rights are absolute because of their contextual nature.³ Others, such as Weinrib, see s. 1 as an extension of rights themselves because rights are “crystallizations of the concept of a ‘free and democratic society’” and their limitation may also be in accordance with such a concept of society (quoted in *Ibid.* at 37). As a concept, then, s. 1 seems to be a viable mode of ensuring that social morality

³ An example would be the right to consume alcohol versus the right to consume alcohol while driving or the right to privacy within one’s home and the loss of that right when there is a drug operation inside.

concerns, prudently considered, temper the potentially harmful secondary effects of self-regarding behaviour protected by encoded constitutional rights.

Charter Issues and the Prostitution Reference

Within the parameters of this discussion of prostitution and its related activities, s. 1 creates a tension with individuals' Charter s. 2(b) (freedom of communication) and s. 7 (individual liberty) rights. And indeed, both of these sections were used for the basis of a challenge brought to the S.C.C. in a landmark reference case, *Reference re s.193 and s.195(1)(c) of the Criminal Code (Man.)* (1990) (*Prostitution Reference*).⁴

This reference challenged the constitutionality of prostitution criminalization based on the current *Criminal Code* ss. 210(1) and 213(1)(c), bawdy-house and communicating, specifically on the grounds that it violates an individual's right to communicate with others, the right to liberty and bodily autonomy, the right to security of the person and the right to economic liberty (to make a living however one so chooses). The Court examined whether the laws in question, alone or in combination, infringed upon the above-mentioned Charter rights and concluded that the bawdy-house provision violated neither of the Charter rights but the communication law did. However, the majority of the Court reasoned that the s. 2(b) violation caused by the communication law was justified by s. 1. The rationale was laid out in the following way:

The limits on freedom of expression imposed by s. 195.1(1)(c) of the Code are justifiable under s. 1 of the Charter. Section 195.1(1)(c) is aimed at taking solicitation for the purposes of prostitution off the streets and out of public view and, to that end, seeks to eradicate the various forms of social nuisance arising from the public display of the sale of sex. These include street congestion, noise, harassment of non-participants and general detrimental effects on passers-by or bystanders, especially children. The legislation, however, does not attempt, at least in any direct

⁴ A reference case is one in which the Supreme Court renders a written decision on a particular matter without a specific case at bar. Typically, applications involve a socio-politically contentious issue, such as Quebec's application for secession and the recent same-sex marriage reference.

manner, to address the exploitation, degradation and subordination of women that are part of the contemporary reality of prostitution. The elimination of street solicitation and the social nuisance which it creates is a government objective of sufficient importance to justify a limitation on the freedom of expression guaranteed by s. 2(b) of the Charter. (*Reference re: ss. 193 and 195(1)(c) of the Criminal Code (Man.)* [1990])

Although the Court agreed that the communication law was a *prima facie* infringement on the Charter s. 2(b) right to freedom of expression, the majority held that it satisfied the first prong of the Oakes Test by being a sufficiently important issue and therefore it could proceed to the second prong. Here, it was declared that there is a rational connection between Parliament's intent and the impugned legislation (to criminalize the 'nuisance aspects of prostitution and not the act itself); the communication law is not unduly intrusive; and the effects of the legislation affecting freedom of communication do not outweigh the government's pressing and substantial objective. In sum, the specific 2(b) infringement passes the Oakes Test and is consequently saved by s. 1.

According to the Court, criminalizing communication for the purposes of prostitution does, *prima facie*, violate a sex worker's or consumer's right to free speech. Nevertheless, the Court reasoned that free speech does not extend to securing the services of a prostitute. The dissenting Justices centered on this distinction, claiming that free speech could conceivably encompass this activity and its proscription was consistent with the principles of fundamental justice. Wilson J. made the argument that since communication in general is a constitutionally protected activity and prostitution itself is also technically legal, "the legislative response of imprisonment is far too drastic" (*Ibid.*). This would, in the dissenting opinion, fail the proportionality requirement of the Oakes Test. However, since the majority did not feel this way, there was no recourse to a just and appropriate remedy (s. 24(1)) or an invalidation of the law (s. 52(1)). The reasoning

in the reference is also qualified to ensure that no comment is made on prostitution *per se*, which continues to skirt the issue of whether prostitution is actually legal/illegal.

Further in the dissent Wilson J. argues that

Section 195.1(1)(c) was not designed to criminalize prostitution *per se* or to stamp out all the ills and vices that flow from prostitution such as drug addiction or juvenile prostitution. The legislation was designed *only* to deal with the social nuisance arising from the public display of the sale of sex. The high visibility of this activity is offensive and has harmful effects on those compelled to witness it, especially children. (*Ibid.*, emphasis added)

The point of emphasis here is that the justices seem to have lost sight of the fact that the laws in question do amount to *de facto* prostitution prohibition. There is consequently a need to address the act of prostitution *per se* if the Court is justifying the laws effectively criminalizing it and infringing on very important Charter rights. If the laws at issue are saved by s. 1, then prostitution itself must be a practical reality insofar as the laws only target its surrounding aspects of street congestion, visibility to others and other nuisances. This is simply not the case because the laws directly impact the actual practice of prostitution. This legal state of affairs exhibits an unclear approach and a fundamental confusion about the status of prostitution *per se* (Lowman 2004). The Court tells us that the surrounding aspects of prostitution are sufficiently harmful to warrant criminalization, but says nothing about prostitution itself. To determine Parliament's scope and intent with respect to prostitution and its related activities, further case law must be examined.

“I only read it for the articles”: What can be learned from pornography

The only thing that pornography is known to cause directly is the solitary act of masturbation. As for corruption, the only immediate victim is English prose.
- Gore Vidal

Pornography can logically be included within the purview of ‘sex work’, even though it is structurally different, in the sense that the services provided are to an uninvolved third party, unlike prostitution and its related activities. Debates about the legality, immorality

and social consequences of pornography go hand in hand with those concerning prostitution and its related activities. In his autobiography porn star and director Ron Jeremy speaks about California's pandering law enacted in 1982 as part of California's concerns with moral hygiene and the 'white slave trade' (Jeremy 2007: 136). Moral entrepreneurs managed to legally conflate pornography and sexual slavery, the consequence of which was pornographers being charged as 'pimps' under the new law.

There is much to learn from the pornography discourses, especially since pornography itself is almost entirely legal and is generally more socially accepted than prostitutional acts.⁵ Within the legal realm, this comparison has been borne out, resulting in pornography and prostitution being treated within the same regulatory category. This means, of course, that the fundamentally important *community standard of tolerance test* used for determining legal standards of certain material/conduct has applied to both areas of sex work, broadly defined. In fact, the community standard of tolerance test in its modern form evolved from pornography (obscenity) cases because, according to Canadian law, whatever is obscene is indecent, and whatever is indecent is obscene (*R. v. Mara* [1997] 115 C.C.C. [3d] 539 [S.C.C.]).

Regulating Obscenity/Indecency: 'Just what is a community standard?'

In *R. v. Towne Cinema Theatres Ltd.* ([1982] A.J. No. 482), the issue at bar was whether an Edmonton theatre was guilty of presenting an obscene entertainment when it ran a mildly violent softcore pornographic movie entitled, *Dracula Sucks*. In the Supreme Court case subsequent to the appeal (1985), the Court reversed the conviction and

⁵ For a legal discussion of the limits of legally 'acceptable' pornography, see *R. v. Butler* (1992) 70 C.C.C. (3d) 129 (S.C.C.).

ordered a new trial on the grounds that the judge applied a subjective standard of intolerance with respect to the content of the film. The majority held that, to the extent that it is at all possible, an objective test for determining obscenity and indecency should be applied. The Court used the *undue exploitation of sex* as the base test for establishing indecency, which in turn was to be determined by the two-pronged community standard of tolerance test:

1. The standard of tolerance is distinct from personal *taste*. “What matters is not what Canadians think is right for themselves to see but what Canadians would not abide other Canadians seeing because it would be beyond the contemporary Canadian standard of tolerance to allow them to see it” (*Ibid.* at introduction).
2. The obscene material/act must be shown to have a potential or actual harmful effect on society.

The significant impact of this case is that it articulated a relationship between evaluating obscenity and a harm-based test. The subjective morality that would otherwise manage to suffuse judgements is at least lessened by appealing to an objective standard of harm.

Nonetheless, the difficult enterprise of determining exactly what an objective community standard is was recognized in *Towne Cinema* when the Court did not impose a duty on the Crown to adduce expert evidence as to community standards of tolerance because of how “unrealistic” an undertaking this would be. This sort of logic leaves open the possibility for individual ‘knee-jerk’ moral judgements to contribute to the legal regulation of deviant sexuality. What good is an objective standard if there is no way to determine it? Young argues:

We have to stop fooling ourselves. I am not sure there is even such a thing as a community standard. And if there is, isn’t this just a sugar-coated way of masking that it is the tyranny of the majority over the minority? And even if the standard does exist, and is sensitive to the nuances of our national mosaic, I don’t think there are many individuals, especially judges, who have any real sense of this standard. (2003: 52)

Furthermore, trial judges are frequently older, which means that the moralities that they bring to bear are not terribly current or ‘with the times’ (*Ibid.*). Aside from morality at

the individual level, viewing obscenity and indecency through an objective means, viz., the 'tolerance, not taste' distinction, seems intuitively difficult when dealing with diverse, heterogeneous communities. Therefore, a discussion of the objective/subjective distinction in relation to the tolerance discourse is needed to achieve some clarity. The Supreme Court would implicitly address this issue in *R. v. Butler* ([1992] 70 C.C.C. [3d] 129 [S.C.C.]), another obscenity case dealing with pornography and s. 2(b) rights.

The Impact of Butler

Butler is a good example of the practice of moral regulation and its inconsistency with principles of fundamental justice. This case involved the police raid on a store selling and renting hardcore pornography, resulting in obscenity charges, pursuant to s. 163(8) of the *Criminal Code*: "any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of... crime, horror, cruelty and violence, shall be deemed to be obscene". The Court found that while most of the materials in Butler's store were protected by s. 2(b) of the Charter, some were not because they fell into the category of obscene material. Accordingly, the "materials which contained scenes involving violence or cruelty intermingled with sexual activity or depicted lack of consent to sexual contact or otherwise" (*R. v. Butler* [1992]), were not included in Butler's s. 2(b) right because of the reasonable limits clause under s. 1. The override clause applied here because, according to the Court, the censured materials violate the community standards of tolerance in that they would be *harmful* in some way. In this case, Butler's materials which portrayed the intermingling of sex and violence would be presumed to impair society's function by promoting a predisposition to

antisocial behaviour, resulting in a degradation of morals and attitudinal shifts. This would be sufficiently harmful because it is inconsistent with the proper functioning of society (*Ibid.*).

Although their 'scientific conclusions' in *Butler* are far from proven, the Court's reasoning that harm prevention should be the focus of both the Charter override pursuant to s. 1 and the community standard of tolerance test was a reasonable and incisive measure in terms of Mill's principle of harm. Of course, the familiar difficulty is that not everyone will agree on exactly what is harmful and to what extent it is harmful, but at the very least the incorporation of the harm principle into the community standard of tolerance test attempts to inhibit moral regulation. It does so by explicitly adopting Mill's proposed strategy for legislating on the basis of harm prevention, and not *only* immorality (Husak 1987: 231). The key difference here is that the community standard of tolerance test can be applied more appropriately and objectively when there is consensus that certain conduct poses harm to the community (so long as that harm is intuitive, i.e., drunk driving, or can be empirically demonstrated). This is a more effective approach because shedding the 'tolerance, not taste' distinction should equate to less personal, subjective moral condemnations. Tolerance is merely a vessel in which ulterior notions of 'acceptability', 'normality' and 'desirability' get stored.

Butler's influence is significant from a precedent standpoint for the regulation of prostitution and its related activities even though, as was noted, it is an obscenity case. The harm-based community standard of tolerance test became streamlined and no longer appealed to vague and ambiguous attitudes of what individuals would tolerate for their neighbours to see/experience. The Court also appeared to adopt a classical liberal and

libertarian approach, *à la* Mill, to regulate only where there is a risk of harm to others. However, although the legal test for obscenity/indecency attempted to step away from the problematic practice of moral regulation *per se* with the harm-based component, the harm adduced in *Butler* remains questionable. Because the claims that pornography is harmful are so tenuous, the Court relied on the principle that legislation is justifiable when there is a significant “risk of harm” (Strossen 1995: 234). The Court claimed

[t]he portrayal of sex coupled with violence will almost always constitute the undue exploitation of sex. Explicit sex which is degrading or dehumanizing may be undue if the risk of harm is substantial. Explicit sex that is not violent and neither degrading nor dehumanizing is generally tolerated in our society and will not qualify as the undue exploitation of sex unless it employs children in its production... While a direct link between obscenity and harm to society may be difficult to establish, it is reasonable to presume that exposure to images bears a causal relationship to changes in attitudes and beliefs. (*R. v. Butler* [1992])

The controversial and unfounded ‘scientific conclusions’ upon which the *Butler* decision relies affords us the first glimpse into the mechanisms of legal paternalism. Legal paternalism is of course intimately connected with moral regulation due to its nature as a philosophy of *right* conduct; legal paternalism presupposes a manner in which one *ought* to behave. Paternalism is also based upon presumptive prevention, as the wording of ‘risk of harm’ in the above denotes, which is a practice that is premised on regulating morals. As such, *Butler*’s integration of harm into the community standard of tolerance test does not in any sense curtail the process of legislating morality, but only *obfuscates* it. As Eileen Flanders claims, “*Butler* is just about morality. It’s morality in the guise of protecting women and children. And who needs the protection of the [*sic*] male patriarchy anyway, of the state?” (quoted in Strossen 1995: 230)

Butler and 'Scientifically-Proven' Social Harm

In the second chapter, Mill's concept of social morality was discussed as a reasonable limitation upon one's liberty if, and only if, that social morality deals with the prevention of tangible harms. In the case of *Butler* a similar argument could be constructed in that an individual's self-regarding conduct of consuming pornography becomes a matter of social morality when it may harm the social fabric in some way. But this supposed "rational connection" between violence/pornography and harm has been depicted as far too great a "judicial leap" (Crerar 1997 at para. 13) for there is *no* existing evidence to indicate a causal relationship between the combination of porn and violence and *tangible* harm. For instance, a famous study of exposure to violent pornography concluded that men were as likely to behave more aggressively, less empathetically and believe in rape myths after watching both violent porn and non-porn depictions of violence against women (Donnerstein, Linz and Penrod 1987, quoted in Ben-Yehuda and Goode 1994: 46). Therefore, Donnerstein and his colleagues isolated violence on its own as the predisposing factor to these at best temporary attitudinal shifts. The use of Donnerstein as an expert witness in the *Butler* case helped the defense's case because he stated that "no one can show a causal link between exposure to porn and effects on violent behaviour" (quoted in Crerar 1997 at para. 17).⁶ Even anti-choice feminists who support the censorship of pornography admit that the asserted causal connection between porn and tangible harm such as violence against women cannot be proven. They simply argue that it must be taken "on faith" (Strossen 1995: 249).

⁶ Although Donnerstein and his researchers could find a somewhat of a correlation between attitudes and exposure to non-violent porn, it could not in any way be transferred to a proportionate effect on behaviour.

My contention here is that porn would consequently not, *prima facie*, be a matter for social morality because the potential harm it poses should not be taken “on faith”, but proven. We should accordingly take constitutional rights and their prospective violation through censorship of a form of free speech very seriously (Dworkin 1977). For the present purposes, the overall lesson from pornography must be summarized: *Butler* illustrates the extent to which the concept of harm can be manipulated and broadly interpreted to legitimize the practice of moral regulation under the veil of legal paternalism. Even though the *Butler* ruling coincides with most liberal Canadians’ view of porn (i.e., when it is paired with violence it is undesirable), Crerar claims that this decision is only ‘superficially satisfying’ because of the morality judgements that surreptitiously crept into the Court’s concept of harm (1997 at para. 12). What this means according to Crerar is that if the ruling is read more warily and the *pseudoscience* exposed, most liberal Canadians would reject its logic.

The overall message from *Butler* is that unless a particular act or behaviour is likely to cause tangible harm, that act or behaviour’s criminalization is presumptive, and therefore unreasonable from the libertarian’s perspective. As McLachlin C.J. reminds us, restrictions upon liberty- whether from criminalization, preventing individual autonomy or other personal freedoms- will almost never be justifiable from the standpoint of regulating morals (1991 at para. 5). Furthermore, what can be applied to the case of prostitution and its related activities is that if a legally-defined prostitutional act cannot be proven to be tangibly harmful, then regulation is also presumptive and unreasonable. This extrapolation can be made because of how similar pornography and prostitution are. They are both also socially constructed as immoral and criminal, which leads them into

the same legal province of paternalism, harm and moral regulation. Like the pseudoscience employed in *Butler* with respect to pornography, if no scientifically drawn conclusions concerning the harmful impact of prostitution can be made, continued regulation is an unjustifiable practice.⁷ The legal puzzle that *Butler* caused with a new community standard test was reflected in the indecision of the courts in three cases that would follow, all involving acts amounting to prostitution.

The Trilogy of Ambiguity⁸

[T]he criminal law is a rather ineffective custodian of moral norms, especially when these are disobeyed by many and disagreed with by many more.
- Benedikt Fischer (2005)

The three important post-*Butler* Supreme Court cases all involve ‘indoor prostitution’ with bawdy-house and indecency charges. The first case, *R. v. Tremblay* (1993), involved a Montreal strip club called the “Pussy Cat Club” where the owner was charged with keeping a common bawdy-house for the purposes of indecency. The strippers at this club could perform in private rooms with peepholes, which were reserved for supervision by employees and not for voyeurism, where men could masturbate to their ‘gyrations’. The women’s performances also included autoerotic stimulation with various sexual implements. The Court ultimately ruled in favour of Tremblay, claiming that the acts within the club were not indecent, and therefore, it was not a bawdy-house. This decision was reached on the basis of a strict application of the harm-based community standard of tolerance test. One of the most important factors the Court considered in their deliberations was the private context in which the acts took place. Cory J. noted that

⁷ The scientific conclusion would be whether, like pornography, attitudinal shifts, if they even occur, translate to a change in the behaviour of the participants in a prostitutional act.

⁸ This term is borrowed from Young (2003).

In any consideration of the indecency of an act, the circumstances which surround the performance of the act must be taken into account. Acts do not take place in a vacuum... However, just what the community will tolerate will vary with the audience... No one is compelled to attend the performance of a nude dancer. Nor could it be said that members of the audience were surprised by the performance if notice of the nature of the dancing has been given. (*R. v. Tremblay* [1993] S.C.C.)

The Court recognized that the context of a sexual performance along with men masturbating would not be appropriate in the public's view or for an audience of elementary school students, but is not harmful when it takes place in a private room and all parties are consenting.

Additionally, the expert witness, Dr. Michel Campbell, testified that "masturbation is a healthy and acceptable behaviour" (*Ibid.*) for both sexes, which led the court to conclude that masturbation in private to such performances is not sufficiently harmful to violate the Canadian community's standard of tolerance (since most Canadians tolerate what they, themselves, based on Dr. Campbell's statistics, would be likely to engage in). Coupled with the fact that the club had a strict no-contact policy, the Court concluded that there was no harm caused by the activities in the Pussy Cat Club. Surprisingly, this case was not the *coup de grace* for the legality of such performances inside strip clubs that many had anticipated. *Tremblay* thus 'left the door open' for a future liberal ruling on prostitution. However, Young contends that "[f]or many, [*Tremblay*] was a harbinger of a revitalized judicial tolerance of sexual activity approaching the fringe, providing some hope that legal professionals were getting tired of dictating sexual morality. But here's the hidden secret behind all legal precedent: it doesn't mean very much" (2003: 83). And indeed, *R. v. Mara* (1997) would not follow *Tremblay's* *laissez-faire* reasoning.

In *Mara* (1994), the owner of a Toronto strip club, Cheaters, and his manager were acquitted of presenting an indecent theatrical performance contrary to s. 167(1) of

the *Criminal Code*. Mara was charged specifically because his club offered 'lap dance' services, a new performance evolved from table dances in an effort to stimulate waning business. Three years later the Crown's appeal of this case reached the Supreme Court, which considered the dances involving "touching, grinding on the customer's lap, licking and fondling" (*Ibid.*) not within the parameters of the community standard of tolerance.

Sopinka J. argued as follows:

The relevant social harm to be considered pursuant to s. 167 is the attitudinal harm on those watching the performance as perceived by the community as a whole. In the present case... the patrons of Cheaters could, for a fee, fondle and touch women and be fondled in an intimately sexual manner, including mutual masturbation and apparent cunnilingus, in a public tavern. In effect, men, along with drinks, could pay for a public, sexual experience for their own gratification and those of others. In my view, such activities gave rise to a social harm that indicates that the performances were indecent. I agree with the Court of Appeal, which stated (at p. 650 O.R.): The conduct in issue in this case in the context in which it takes place is harmful to society in many ways. It degrades and dehumanizes women and publicly portrays them in a servile and humiliating manner, as sexual objects, with a loss of their dignity. It dehumanizes and desensitizes sexuality and is incompatible with the recognition of the dignity and equality of each human being. It predisposes persons to act in an antisocial manner, as if the treatment of women in this way is socially acceptable and is normal conduct, and as if we live in a society without any moral values. (*R. v. Mara* 1997 S.C.C.)

This type of logic is the same as in *Butler* where the Court made broad, largely unproven, and improvable, assumptions. Again, if attitudinal harm comes from obtaining or observing lap dances with some contact, where is the evidence to indicate that persons will *act* in an 'antisocial manner'? Moreover, television, cinema, advertising, etc. all participate in the 'dehumanization and desensitization' of sexuality, but these media are not considered socially harmful enough to criminalize.

The community standard of tolerance in *Mara* seems to be somewhat elusive. In *Tremblay*, masturbation to a sexually explicit performance would not exceed standards of tolerance according to the Court, but a sexual performance where some contact was permitted would indeed violate Canadian standards of tolerance. The presence of contact is thus isolated as the factor that goes beyond the threshold of acceptability. Since the

legal test employed test evolved to a harm-based one, transgressing a standard of tolerance alone is insufficient to warrant criminalization. Consequently, the Court once again infuses the concept of harm with subjective moral judgements to justify its decision. This ruling exposes the harm-based community standard of tolerance as a judicial construction and not an empirical reality.

The final case, *Blais-Pelletier v. R.* (1999), also demonstrates the Court's subjective decision-making regarding the community standard of tolerance and acts amounting to prostitution.⁹ *Pelletier* deals with the charges relating to the manager of a Quebec strip club in which patrons could pay for a cubicle dance where they were permitted to fondle the dancer(s)' breasts and buttocks (and could obtain further sexual services depending on the agreement between dancer and patron). Other patrons could see into some of the cubicles in which the 'dances' take place because the curtains did not close completely and were thus 'semi-private'. After police staked out her club, Pelletier was charged with keeping a common bawdy-house contrary to s. 210(1) of the *Criminal Code*. At trial, the court followed *Tremblay*'s precedent and stated:

Clearly, in the present matter, it is not for the Court to make a ruling based on its own moral standards or personal tastes. The relevant question is as follows: would Canadian society... tolerate other Canadians placing themselves in a similar situation. Taking account of the elements which I have just referred to, the Court therefore believes that these acts cannot be characterized as indecent because I do not have any evidence that they would not be tolerated by society in general. (*R. v. Blais-Pelletier* [1993] Que. Court)

Because of *Butler*'s reconfiguration of the community standard of tolerance test, it can be reasoned that society's tolerance of the acts in *Pelletier*, as implied by the Court, is premised on a lack of discernible harm.

⁹ *Blais-Pelletier*, like *Mara*, was the third case following two appeals. The number of times that the courts go back and forth in their decisions contributes to these cases, as well as *Tremblay*, being collectively referred to as the trilogy of ambiguity.

Interestingly, *Pelletier* had elements common to both *Tremblay* and *Mara*: there were dances in semi-private cubicles (like the peepholes in *Tremblay*), but there was also contact and some of the performances could be witnessed by others (like the lap dances in *Mara*). As such, it would seem logical that this fact pattern “should have posed problems for the court’s determination of community standards in the context of degrading and dehumanizing behaviour. But it did not” (Young 2003: 84). In the 1999 Supreme Court appeal of the Crown’s successful conviction on appeal, the court delivered a one-page decision, by a 3-2 margin, that simply stated the first judge applied the community standard test correctly and the appeal court was wrong. While the ultimate decision in *Pelletier* is liberal and progressive, this case shows how complex a matter sexuality is within the arena of legal regulation. Moreover, the case underscores the notion that opinions on (acts amounting to) prostitution vary greatly, and that trying to find an objective (community) standard of toleration may be an exercise in futility.

Much like Canada’s unclear statutes, this trilogy of cases does not display anything close to clarity with respect to the legal status of prostitution and its related activities. To complicate matters even further, two later cases involving bawdy-house and indecency charges broke with precedent as well. In *R. v. DiGiuseppe* (2002), the Supreme Court overturned a lower court’s ruling that a strip club/brothel owner’s Charter s. 7 rights violations were not saved by s. 1 because the definitions of ‘indecency’ and ‘prostitution’ were ‘impermissibly vague’. In *R. v. St. Onge et al.* (2001), a Quebec Court ruled that the activities within the Montreal club “Pussycorps”, involving almost identical circumstances as *Tremblay*, amounted to prostitution. The trilogy also illustrates the enduring difficulty in referring to elusive and non-objective ‘community’

standards of tolerance with respect to criminalized sexual conduct, even with the addition of the harm-based component. As was noted, it appears as if the notion of harm is merely an effective way of legitimizing moral judgements.

Definitions of private and public are also confounding in the above cases because of their varying interpretations. In *Tremblay*, an employee of the club could observe a private sexual act, and this was considered private, whereas in *Mara*, because other patrons could see lap dances, this was not a private sphere. And in *Pelletier*, because the curtains of a cubicle did not close entirely, this was not considered a private atmosphere either. All of these cases do not address the possibility that all the individual clubs are private establishments within the public domain, meaning not everyone can get in and there is a certain expectation of what goes on inside. Addressing all of these issues directly is the case of *R. v. Labaye* (2005), involving a Montreal swingers club.

Labaye: Forward Progress or a Hamster Running the Wheel?

Like the previous cases, Labaye's 2005 case was a Supreme Court appeal after a Quebec Court convicted, and Appeal Court upheld the conviction, for the charge of keeping a common bawdy-house at his private club, L'Orage. Labaye operated this club out of his third floor apartment above a first floor bar and second floor salon in a Montreal building. Individuals allowed into the club were fee-paying members only who could bring guests, and all were selected ahead of time through an interview process and individual scrutiny. The purpose of the club was to facilitate group sex between couples and therefore it was a 'swingers club'. At L'Orage, there was never any direct exchange of money for sexual services, all participants were willing and consenting adults over the legal age of consent

and no one was ever forced to participate in any activity they did not want to partake in. The Supreme Court, however, disagreed with the first two courts and overturned the conviction, effectively legalizing swingers clubs in Canada.

In its analysis of the issues at bar, the majority favoured a new test for indecency and determining criminal conduct. In straightforward fashion, they claimed that the community standard of tolerance test was not a helpful tool, and that

[t]he *Criminal Code* offers no assistance [in determining indecent criminal conduct], leaving the task to judges. The test developed by the cases has evolved from one based largely on subjective considerations, to one emphasizing the need for objective criteria, based on harm. This heightened emphasis on objective criteria rests on the principle that crimes should be defined in a way that affords citizens, police and the courts a clear idea of what acts are prohibited. We generally convict and imprison people only where it is established beyond a reasonable doubt that they have violated *objectively* defined norms. Crimes relating to public indecency are no exception. (*R. v. Labaye* [2005] at para. 75, emphasis added)

This being the case, the Court reasoned there was a need to employ a new test for indecent acts amounting to prostitution. Such a test would shed the ‘community standard’ component altogether in favour of a *strictly* harm-based test. Due to the subjectivity of morals and taste, and the fact that these aspects are “arbitrary and unworkable in the criminal context” (*Ibid.* at para. 14), the new test would rely on hard and fast notions of harm, with reference to its tangible social impact.

Therefore, the majority said that indecent criminal conduct would be established only where the Crown could prove beyond a reasonable doubt the following two requirements:

1. That, by its nature, the conduct at issue causes harm or presents a significant risk of harm to individuals or society in a way that undermines or threatens to undermine a value reflected in and thus formally endorsed through the Constitution or similar fundamental laws by, for example:
 - (a) confronting members of the public with conduct that significantly interferes with their autonomy and liberty; or
 - (b) predisposing others to anti-social behaviour; or
 - (c) physically or psychologically harming persons involved in the conduct, and
2. That the harm or risk of harm is of a degree that is incompatible with the proper functioning of society. (*Ibid.* at para. 62)

The Court ultimately found that no harm could be determined in the first branch of the test in Labaye's case and therefore it was unnecessary to address the second one. Unlike prior cases such as *Butler*, the Court could not adduce evidence, or moral positions disguised as evidence, that any antisocial behaviour or psychological harm would flow from participating in, or observing, *per Mara*, the activities within L'Orage.

To arrive at the above conclusions, the Court laid out its reasoning for the satisfaction of the new harm-based test in the following:

The autonomy and liberty of members of the public was not affected by unwanted confrontation with the sexual conduct in question. On the evidence, only those already disposed to this sort of sexual activity were allowed to participate and watch. There is also no evidence of anti-social acts or attitudes toward women, or for that matter men. No one was pressured to have sex, paid for sex, or treated as a mere sexual object for the gratification of others. The fact that the club is a commercial establishment does not in itself render the sexual activities taking place there commercial in nature. The membership fee buys access to a club where members can meet and engage in consensual activities with other individuals who have similar sexual interests. Finally, with respect to the third type of harm, the only possible danger to participants on the evidence was the risk of catching a sexually transmitted disease. However, this must be discounted as a factor because it is conceptually and causally unrelated to indecency. (*Ibid.* at paras. 66-8)

The majority appears to have taken a direct cue from Mill in attempting to be as objective as possible in ascribing matters to the domain of social morality. Private, consensual sexual relationships would thus not be a matter for social morality/law. Interestingly, the major argument in Bastarache and Lebel JJ.'s dissent was premised on how the new strictly harm-based test was "neither desirable nor workable" (*Ibid.* at para. 75). This seems to suggest that the only way in which swingers clubs could be criminalized would be through use of the arbitrary community standard of tolerance. This way the dissenting Justices could assert that the conduct in question violated the community standard of tolerance without any substantiation, as has happened in previous cases discussed.

With a newly-established, realistic harm principle for judicial decision-making, the Court could find no reasonable ground to proscribe conduct common to the swingers

lifestyle, namely, orgies in a private setting. Privacy was a central facet of the Supreme Court's decision as well, insofar as the initial ruling at trial stated that L'Orage was a public place. McLachlin C.J. stated that although Labaye's club was by *Criminal Code* definition a public place, the acts took place "in a context of relative privacy" ([2005] at para. 12). The dissent also targeted the concept of privacy much like the dissent in *Tremblay* where 'relative' privacy was construed as the "illusion of privacy" ([2005] at paras. 79, 144, 147). In any case, the concept of relative privacy prevailed and the acts in question would not in any sense be considered legally harmful. Based on the majority's reasoning, how might this decision be interpreted in the context of actual prostitution, and not just acts amounting to prostitution? The conceptual leap between the two is not great.

Based on the Court's use of a progressive harm-based test, it is my contention that this decision may have an impact on legal reform with respect to *indoor* prostitution. While the long-standing effects of moral campaigns around 'diseased', 'dirty' and 'vagrant' street prostitutes may preclude any legal reform in this area unless forced by the courts, *Labaye* acknowledges the significance of the private sphere and displays tolerance for the actions that take place within it. As the final line in the majority judgment reads: "[c]onsensual conduct behind [closed] doors can hardly be supposed to jeopardize a society as vigorous and tolerant as Canadian society" ([2005] at para. 71).

The recognition of such a private sphere is symbolically important because if what goes on within this sphere cannot be considered harmful, then, as Trudeau stated, it would not be any business of the law's. *Labaye* is integral to the future of the legal regulation of sexuality in Canada, especially prostitution and its related activities, because it establishes *empirically-determinable* (tangible) harm as the only valid basis for

encroaching upon liberty and opening the door to the bedroom, so to speak. Ernst reinforces this claim when he argues that “the State should keep out of the bedroom unless it goes there with good and sufficient reasons for the protection of people other than the occupants of that bedroom” (1948: 140).¹⁰

‘Good and sufficient reasons’ would of course have to lie within the purview of tangible harm. The majority in *Labaye* stressed the fact that “*Butler* is clear that criminal indecency or obscenity must rest on actual harm or a significant risk of harm to individuals or society” ([2005] at 70), and this simply could not be determined relative to the activities within L’Orage. If such harm cannot be determined for group sex within a private club, can it logically be established for sex-for-money within a private club? Whatever the answer to this question may be, *Labaye* appears to signal a change from moral regulation/presumptive prevention to a more rational approach in determining harm, which should logically affect future decision-making in the area of regulating sexual deviance. As Crerar argues in his analysis of *Butler*, “[a] true harm principle, in keeping with the aims of the Criminal Code, would look to a ‘clear and present danger’ before violating Charter rights and imposing penal sanctions” (1997 at para. 21). Perhaps the one certainty that can be taken from *Labaye* is that the Courts are attempting to espouse a ‘true’ harm principle, which will steer the pattern of judicial decision-making on to a path of clarity, objectivity and fairness. A protester’s sign at a demonstration on Parliament Hill regarding the ban on gay organ donation encapsulated this argument as it simply read: “Science, not Stereotypes”.

¹⁰ Ernst was commenting in the context of the debate following the Kinsey Report, which means that even sixty years ago in the U.S. there was (implicit) discussion of the harm principle.

Conclusion

In this chapter the aim was to illustrate Canadian courts' approach to dealing with prostitution and its related activities. All the cases involved a Charter dialogue, dealing with the struggle between balancing individual liberty and state control. Section 1 of the Charter has been the judiciary's primary justification for upholding the relevant prostitution laws because the proscription of prostitutional acts has been deemed to be a 'reasonable limitation' upon individuals' constitutionally entrenched rights. Examining the case law has borne out the inherent difficulty in regulating on the basis of harm, rather than morality as such. *Butler* underscores this point by showing that judicially-constructed notions of harm are inextricably bound up with morality. The ensuing debates on pornography also evidence this trend. Although subsequent cases dealing with acts amounting to 'indoor prostitution' incorporated *Butler*'s new community standard of tolerance test, precedent appeared to hold little weight, and judicial-decision making varied widely from case to case. This demonstrated a confused approach to regulating sexual 'deviance', as was the case in the 'trilogy of ambiguity'.

The reasoning in *Labaye* comports with, as close as possible, a 'true' harm principle, whereby subjective moral judgements are done away with to allow for rational, harm-based legislation and regulation. Since *Labaye* dealt with the *Criminal Code* provisions directly regulating indoor prostitution, its precedent should 'open the door' for a more liberal ruling with respect to prostitution in the future. At the very least, the reformulated community standard of tolerance test signals a step away from the legal regulation of morality. If the harms resulting from laws governing morals are reduced or minimized by adopting harm principle-based legislation, then this is a step right direction

in championing individual liberty and human rights. If this ruling fails to affect prostitution legislation, then conceivably the previous rights and values will continue to be negatively impacted. This is an issue that must be taken up in the next chapter.

Chapter 5: Prostitution and Legally-Produced Harm

Introduction

The previous chapter concluded with a discussion of *Labaye* and the ‘true’ harm principle that was adopted in the majority decision. With the use of this principle, moral judgements are replaced, as much as is possible, with a harm-based approach to criminalizing. The concept of harm is therefore central to this discussion and merits further exploration in this chapter. When we talk about tangible harm and the harm principle we need to look at both kinds: the harms that the law ostensibly seeks to prevent and the harms that are caused by the law. In so doing, both individual liberty infringement and legal discourses of paternalism emerge in the discussion, which instantiates the debate between *presumptive prevention* and individual autonomy. The focus in this chapter will be on the harmful consequences that arise from criminalizing a consensual crime as well as when individual choice is restricted. In essence, this chapter explores the subsidiary issue of what legally-produced harms will continue in the arena of sex work if *Labaye*’s reasoning is not applied to prostitution, and legal reform does not occur. This chapter also includes a discussion of what harms flow from limiting individual choice through paternalism and maternalism.

The recommendation in Great Britain on the law’s role in legislating sexuality in the *Wolfenden Report* has a great deal to contribute to the discussion, including the ensuing academic debates based, implicitly, on the determination of social harm. It is also important to discuss the Canadian *Fraser Report* because both *Wolfenden* and *Fraser* were implicitly proposing harm-reduction strategies for prostitution by regulating it in private contexts. This chapter will portray the social reality of the criminalized sex trade

and juxtapose it with the law's reasoning for regulating sex work. In effect, it weighs both types of harm and is intended to portray the problematic nature of sustained legal prohibition or the legal 'status quo', as it were. The aim is certainly not to engage in a normative debate about the viability and desirability of sex work itself. In an ideal world, there would not be a sustained demand for prostitution or negative conditions that conduce to its practice, such as substance abuse and the feminization of poverty (Lowman 2004). But this is not an ideal world, and thus a pragmatic approach must be considered. At the very least, the weighing of the actual, tangible social harms *vis-à-vis* the legal justification engages critical reconsideration of standing laws. It is the overall goal of this chapter to show that the current prostitution prohibition and resultant harms demand a new approach, i.e., a harm-reduction strategy, the subject of the final chapter.

The Wolfenden Report

The *Report of the Committee on Homosexual Offences and Prostitution* (Wolfenden Report) of 1957 was the result of the deliberations of a committee in England over a three year period on homosexuality and prostitution offences. Their conclusions were significant for a general discussion of law and morality, but especially so for the present case of prostitution and its related activities. The Committee concluded, upon careful examination of the acts of both homosexuality and prostitution, that "what consenting adults did in private should not be the concern of the criminal law" (quoted in Smart 1995: 57). Furthermore, the Committee argued, there should be a sphere of private morality that the repressive arm of the criminal law has no business infringing upon. The *Wolfenden Report* proposed the creation of such a sphere of private morality where even

acts judged by society to be immoral (i.e., private cubicle dances with contact, full-on prostitution, group sex, etc.) could be performed in private without fear of sanction (McTeer 1995: 897). The Committee's reasoning was thus consonant with the 'true' harm principle later developed in *Labaye*, which strives "to distinguish criminal conduct from merely immoral behaviour", and, "if properly employed, would restrain the state from punishing purely immoral wrongs" (Husak 1987: 232). Although the Report was crafted fifty years ago, it corresponds perfectly to a legal debate on the harm principle and has profound implications for the contemporary legal public/private debate. Even the legal notion of indecency is premised on this very dichotomy; if *Tremblay* had taken place in a less private venue, presumably the Court would have deemed the sexual acts indecent. But the context of privacy expunges any finding of indecency (it should unless the activities cross the threshold of tolerability, i.e., sexual violence).

The Report offered a conception of how the law *ought* to regulate and what boundaries it should respect in the following:

The law's function is to preserve public order and decency, to protect the citizen from what is offensive or injurious, and to provide sufficient safeguards against exploitation and corruption of others ... It is not, in our view, the function of the law to intervene in the private life of citizens, or to seek to enforce any particular pattern of behaviour... It follows that we do not believe it to be a function of the law to cover all the fields of sexual behaviour. Certain forms of sexual behaviour are regarded as sinful, morally wrong, or objectionable for reasons of conscience, or of religious or cultural tradition; and such actions may be reprobated on these grounds. But the criminal law does not cover all such actions... (Wolfenden Committee 1957: 9-10)

The Committee concludes this thought by arguing, in distinctly Millian fashion, that prostitution is a matter perhaps to be discouraged, but not a matter for criminal law. This stance is in line with the Committee's underlying argument that it is not the law's charge to govern morals. More significantly, this position postulates both a literal and figurative closed door, where the consensual activities going on behind the door are nobody's concern except the participants'. As such, individuals should have the right to "make

moral choices without legal interference as long as harm was not inflicted on another” (quoted in Sharpe 1998: 198).

Stated succinctly, the Committee argued that prostitution was *only* a matter for social morality, and thus the criminal law, when it was visible on the streets. This comports with the directives of the harm principle since no one should be subjected to public displays of prostitution, as was the case in *R. v. Sloan* (1994).¹ The Committee *ipso facto* espoused a controversial position on prostitution that was more concerned with removing it from public view than criminalization; they furthermore claimed that, “we are not attempting to abolish prostitution or to make prostitution itself illegal. We do not think that the law ought to try to do so; nor do we think that if it tried it could by itself succeed” (Wolfenden Committee 1957: 95). According to the Committee, prostitution *per se* is not a justiciable issue. Based on the notion of an untouchable sphere of private morality and the idea that what consenting adults did in private was their own affair, the pragmatic solution for the prostitution ‘problem’ would be licensed brothels. The Committee reached this position based on the logic that “[sex] is a perfectly natural, absolutely basic urge” which, if you can satisfy that urge in a civilized manner, “it surely must be to everyone’s benefit” (*Ibid.*). Another factor in this suggestion for legalized brothels hinged on the Committee’s perception of economic and social realities; prostitution will never ‘go away’ despite legal efforts to curtail it because of the simple law of supply and demand (*Ibid.* at 79-80). The best solution, based on the Committee’s

¹ Although the participants in this case did argue that their acts were private since they parked at the back of a bowling alley parking lot in the middle of the night, in the partial cover of a tree. Nonetheless, the Court ruled that “it is manifest that [a] bowling alley parking lot is a public space... and although the occupants of the car undoubtedly sought some reasonable degree of privacy there is no basis to conclude that the sexual act referred to in the information was not done in a public place” (*R. v. Sloan* [1994]).

findings, is to keep prostitution out of sight, and to manage the ‘nuisance’ aspects that arise from its inevitable practice.

Such nuisance would be, as was noted, prostitution’s visibility on the streets and occurrence in the public sphere, which would constitute an affront to “public order and decency” (*Ibid.* at 81-2). As such, a ‘sphere of private morality’ could only be encroached upon when there is tangible harm to others to prevent. It would be difficult to conceive of prostitution in a private setting such as a brothel as tangibly harmful without appealing strictly to moral taste. However, the spillover of soliciting for prostitution on to the street would be a matter for the criminal law because of the harm it causes to others such as children and those who do not want to be solicited or bothered.

The ‘sanctity of private sexual morality’ notwithstanding, the Committee asserted that the law *ought* to focus on street prostitution rather than indoor prostitution or even the clients of prostitution (Phoenix 2007: 78). Though seemingly contradicting their liberal orientation, an increase in regulation of street prostitution was in keeping with the Committee’s philosophy that only private prostitutional acts were beyond the law’s purview. All other visible manifestations of prostitution would still be a matter for criminal law. The problem was, however, that too much criminal justice attention was devoted to policing the public sphere, resulting in a distorted application of Wolfenden’s philosophies. The resulting *Street Offences Act* of 1959 made the surrounding aspects of loitering and soliciting for the purposes of prostitution illegal. Phoenix argues that the Wolfenden Report thus “shaped a modality of governance of prostitution which was predominantly coercive and punitive in its effect” (*Ibid.*). Much like Canada’s soliciting law, the *Street Offences Act* was criticized as being woman-centred, sexist and

chauvinistic (Meier and Geis 2006; Phoenix 2007, 1999; Brock 1998). Similar to the Canadian response, calls for action in the U.K. led to the Criminal Law Revision Committee's *Sexual Offenses Act* of 1985, which extended criminal culpability for soliciting to men (Phoenix 1999: 23). However, this measure also produced a "marked shift in approach towards a more systematic 'enforcement of morals'... and a gradual erosion of that brand of liberalism which once underpinned Wolfenden's approach" (Matthews 1986: 192, quoted in *Ibid.*). In practice, then, the Wolfenden Committee's suggestions were not borne out optimally. Unequally applied sexist laws, overcriminalization and governance of morality are decidedly illiberal practices flowing from such a liberal report.

In any case, the theoretical underpinnings of the *Wolfenden Report* remain sound to the extent that they implicitly employ Mill's harm principle which is of fundamental importance in disentangling the *moral* from the *legal*. The liberal 'permissiveness' in the Report was predicated on the "philosophical rationale which it employed [that] was the distinction between crime and sin, illegality and immorality" (quoted in Brock 1998: 28). But this permissiveness did not come without a price; increased freedom in the private realm was inversely proportionate to greater penalties and social control in the public realm (*Ibid.*). The ultimate problem with Wolfenden's theory and Britain's practice was a fundamental misunderstanding about what the law should accomplish. In 1983, Canada appointed its own version of the Wolfenden Committee to deal with the inherent problems with the solicitation law (among other things). The Fraser Committee would utilize the same theoretical precepts in Wolfenden and similar problems ensued as their recommendations were applied.

The Fraser Report: A Case of History Repeating Itself?

The Report of the Special Committee on Pornography and Prostitution (the Fraser Report/Committee) of 1985 dealt with the issue of street prostitution and the nuisance it caused. The similarities between the suggestions of the Wolfenden Committee and the Fraser Committee are striking. The legislature's response in each case was also similar. The Committee, first and foremost, recommended sweeping changes to the prostitution laws in order to make them "logically and philosophically consistent" (Lowman 1993: 78). And much like Wolfenden, the Fraser Committee looked at the prostitution problem in terms of its public nature on the street.

If prostitution were to remain *truly* legal, the Committee said, there must be a serious examination into where and under what circumstances it can occur (quoted in *Ibid.*). To this end, the Committee reasoned that

prostitution cannot be dealt with by the law on a piecemeal basis, but only by carefully linking the provisions on each aspect of prostitution-related activity. Moreover, [the recommendations] follow from the Committee's view, that, if prostitution is a reality with which we have to deal for the foreseeable future, then it is preferable that it take place in private, and without the opportunities for exploitation which have been traditionally associated with commercialized prostitution. (Fraser Committee 1985: 547)

The phrase 'each aspect' acknowledges the inter-relatedness of all the prostitution prohibitions. This means that, while the implication of the street prostitution law is that it *can* take place indoors, indecent acts and bawdy-house provisions prevent this reality. This is why, time and again, the contradiction (or 'schizophrenia') of the law surfaces as someone always seems to be saying, "You can do it, but don't do it here" (Lowman 1986: 205). Additionally, the Fraser Committee heralds the importance of the private sphere as a context in which 'deviant' sexual practices can take place, without fear of criminal law intervention and without the conditions that conduce to coerced labour. Such a proposal aligns with the harm principle and does not attempt to legislate morality as such.

The pith of the Committee's findings was that the solicitation law, which adopted the British model of 'partial legalization',² was "contradictory and self-defeating" and was directly responsible for an increase in street prostitution charges in the 1970s and 1980s (Lowman 2004: 147-8). Moreover, as Lowman (1998) notes, "the Fraser Committee concluded that the main problem with Canadian prostitution law is that it is at odds with itself. If prostitution is to remain legal, the legislature must decide where it is to be permitted, and under what circumstances". The Committee concluded that the solicitation law was a failure, based on the above reasons and because of the implications of the *Hutt* decision (Lowman 1986: 203).³ In light of these findings, the Committee put forth its proposals for law reform with respect to prostitution. Lowman argues that the Fraser Committee "brought together a wealth of empirical information and an insightful legal analysis to produce a series of forceful policy recommendations and a convincing indictment of the law as it stood in 1984 and is equally applicable to the law as it currently stands [the communication law]" (1993: 79). These proposals represented a blend of legalization and decriminalization, and among them were: the amendment of bawdy-house laws to allow for small-scale prostitution to take place in a private residence; the provincial licensing of controlled brothels; a clearly-defined street prostitution law that would target the 'real' social nuisances; and a tightening of the living off the avails law to apply only to coercive or threatening behaviour (*Ibid.* at 78).

In spite of all the Wolfenden-esque recommendations, the Fraser Report did not contribute to any meaningful prostitution law reform. As Lowman notes above, the

² Although, as we have discussed, the 'partial' in partial legalization is synonymous with 'semantical' and 'rhetorical'.

³ The *Hutt* decision, as discussed briefly in the third chapter, complicated matters by weakening the effect of the solicitation law by making convictions nearly impossible to secure, thereby discouraging enforcement.

Fraser Committee's critique of the solicitation law would be equally applicable to the communication law. And, as discussed in the third chapter, because of the aims of a morally paternalistic Conservative government, the 'new' and 'reformed' communication law differed almost imperceptibly from the solicitation law, except for the major alteration that it would apply to men (who comprise the vast majority of prostitutes' clients) as well (Lowman 1993: 76).⁴ Before its effects could even be assessed, the new law was summarily regarded as a failure by criminologists and legal scholars. Getting prostitution off the street seems to be the spirit behind the current communication law, but as Lowman contends, the prostitution law was actually re-written to make convictions easier to obtain (2004: 147-8). Despite the fact that the law attempts to eradicate 'social nuisance', what it really does is criminalize prostitutes further.⁵ Just like the *Wolfenden Report*, the *Fraser Report*, albeit unintentionally, resulted in an increase in criminalization rates and law enforcement, contrary to its very liberal philosophies.

In the aftermath of the Fraser Report, Canada faced many of the problems Britain did with the problem of street prostitution. Although the Fraser Committee directly espoused the liberal approach contained in *Wolfenden*, the subsequent legislation too fell prey to a disconnect between theory and practice. The Fraser Committee certainly did not intend to increase the criminalization of sex workers as evidenced by the fact that they proposed its legal practice in Canada. It is my contention that if the theory relating to 'facilitated prostitution' had actually been implemented and the idea of a sphere of private morality upheld, the current problems within the realm of street prostitution would be considerably lessened. While the *Wolfenden Report* represented a "double

⁴ For a complete discussion of the clients of prostitution see Lowman (2005), *Men Who Buy Sex*.

⁵ Lowman makes a further argument here, similar to the one made earlier with *Butler*, that 'nuisance' actually conceals a "moral epidemiology, the subject of which is prostitution itself" (1985: 194).

taxonomy in the field of moral regulation” (Brock 1998: 28), insofar as it advocated lenience in one area (indoor prostitution) at the cost of increased control and penalty in another (street prostitution), the *Fraser Report* resulted only in increased legislation and penalties. This claim can be drawn based on the fact that increased punitiveness with respect to street prostitution was not counterbalanced by leniency or any reform in the private, indoor sex trade. In the next section, the significant social harm that resulted from this increased regulation will be examined in order to make the case for meaningful legal reform and an eventual harm-reduction approach.

The Case for Preventing Prevention: An Examination of Legally-Produced Harms

The 1996 Canadian Centre for Justice Statistics (CCJS) Report on Homicide in Canada claimed that “some occupations involve more personal risk to personal safety than others” (Fedorowycz 1996). The report then singles out two categories of ‘high risk’ work: taxi driving and prostitution. From 1992 through 1995, eighteen taxi drivers were murdered during the course of their work, compared to thirty-nine prostitutes (Lowman 2000: 987). Even seemingly dangerous occupations such as police officer or correctional worker witnessed much lower homicide rates than prostitution (Fedorowycz 1996). The 1998 CCJS Report stated that sixteen more prostitutes were murdered between 1996 and 1997 while on the job (Lowman 2000: 987). This can be attributed to the fact that street sex workers are socially constructed as outsiders and outlaws, who, in addition to being the objects of regulation, do not receive equal protection of the law.⁶ Furthermore, Fedorowycz notes that, “the number of prostitutes reported killed most likely under-represents the actual figure: only those incidents where the police are certain that the

⁶ This is one of the grounds that the current constitutional challenges rely on.

victim was killed in the course of engaging in prostitution related activities are counted” (1996: 10). This means that even more prostitutes have been killed by virtue of their work and dangerous environment. It can be reasonably inferred based on the statistics, then, that prostitution is the most dangerous profession in Canada. But this has not always been the case, which is why it is crucial to explore how and why prostitution has become the most dangerous profession in Canada (Lowman 2005: 6).

The point is that the current law has directly contributed to street prostitution being the most dangerous career choice in Canada. Data to support this assertion can be drawn from the murder statistics after 1985 and the implementation of the communicating law. Because this law was harshly punitive and justified increased policing and surveillance (and therefore criminal charges), it simply forced street sex workers to conceal their transactions and not, as the law would like to believe, stop them altogether. As a result, what is described in criminological terms as the ‘balloon effect’ took place: prostitutes were forced off main streets and thoroughfares, and into alleys, unlit streets and parks at night- in short, all dangerous spaces. Based on Wolfenden’s notion that the demand side of prostitution will never diminish, and therefore prostitutes will continue to ply their trade despite the new law,

[m]any researchers, social service providers and health care workers argued that the new communicating law — which prohibits communicating in a public place for the purpose of buying or selling sexual services — would not have much impact on levels of street prostitution, but would merely serve to relocate the street trade in a way that exposed sex trade workers to more violence. Sadly, they were right. In British Columbia, for example, 11 prostitutes were murdered in the 25-year period before the introduction of the communicating law, as compared with approximately 100 in the 15-year period immediately after. (Lowman 2004: 147)

It certainly cannot be considered a coincidence that the rate of prostitute murders increased ten-fold after the law forced prostitutes off the streets and ‘into the alleyways’.

Furthermore, “by facilitating the displacement of prostitution into industrial areas, and by enlarging areas used as prostitution strolls- an unintended effect of ‘area restrictions’ often written into a street sex worker’s bail and probation conditions - street prostitutes... became more vulnerable to violence” (Lowman 2005: 6). These lucid data/examples illustrate how the communication law and its enforcement have directly contributed to the tangible harm sex workers endure.

Young also provides some unsettling statistics that, taken together, constitute the Canadian “legacy of prohibition”. Between 1991 and 1995, sixty-three prostitutes were murdered according to official statistics, of which fifty were murdered by clients and three by pimps (Young 2003: 22). In essence, the communication law is manufacturing this problem by first forcing female prostitutes into dangerous atmospheres, conducive to high rates of victimization. These statistics do not even take into account the interpersonal violence and ‘bad dates’ prostitutes deal with due to their insufficient efforts to screen clients. Therefore,

[m]uch the same can be said about the findings of research on violence against prostitutes. Canadian research has shown that street prostitutes are frequently sexually assaulted, physically assaulted and robbed. A series of studies funded by the Department of Justice Canada in the mid-1990s revealed high levels of victimisation of Canadian prostitutes... However, levels of violence may differ substantially in different areas of street prostitution... [and] they vary greatly in different prostitution venues. For example, in a study of prostitution in Birmingham England, Kinnell found that “violence was overwhelmingly associated with street work” and that off-street work was much safer by comparison. (Lowman 2001: 5)

The ‘good intentions’ of the Wolfenden and Fraser Reports suggesting state-facilitated or regulated prostitution are illuminated when all of the evils of the street trade are brought to attention. Because of the nature of Canada’s prostitution law, however, the respective Committees’ ‘indoor solution’ cannot be applied due to the indoor prostitution laws (indecentcy and bawdy-house).

The Canadian Law's 'Double Effect': A Legal 'Catch 22'

Lowman (2000) describes the 'vicious cycle' the communication law perpetuates in another capacity based on a highly publicized murder in Toronto:

In 1977 a shoe shine boy was sexually assaulted and murdered on Toronto's Yonge Street strip. In the ensuing furor over the sex industry that had long been a part of strip life, there was a clamp-down on massage parlors and other venues, with the obvious although apparently unanticipated result: more street prostitution.

In effect, zealous enforcement of the bawdy-house and indecency (indoor prostitution) laws, and periodic raids that result, forces sex trade workers on to the street. Once on the street, the communication law criminalizes them in greater numbers because now the prostitute's work is visible in the public sphere.⁷ Street sex workers note this contradiction (if prostitution *per se* is legal, it cannot be illegal in public and in private) and have demonstrated their frustrations with the communication law in the following:

I think that the communicating law is unfair. Girls have to make money and it puts girls at greater risk. Because of police, we end up moving to places that are darker and more secluded. It's more dangerous for girls.

The communicating law makes me worried because I do not have time to make sure that the car I get into is safe, and that the person is not dangerous. Three years ago I was working between Princess and the Raymur Projects. A car drove up to me and asked me if I was working, and I said, "Yes." He told me that he had the money to pay and I got into a car. He strangled me, threatened me, and sexually assaulted me, then left me on a corner close to the waterfront. If I had had more time, I may not have gotten into the car with him. (Pivot Legal 2004: 11)

There is no better definition of a 'catch-22' situation because there is no real place where prostitutional acts can occur without technically being considered an offence.

In describing the U.S. situation, West similarly argues that "[s]treet sweeps have never gotten rid of prostitution, just forced it into another neighbourhood or further underground. The sweeps often result in women working under more isolated and dangerous conditions or in turning to a pimp for protection" (quoted in Delacoste et al, eds. 1987: 283). This is analogous to the Canadian situation because the communication

⁷ If a prostitute is working outdoors but not visible in the public sphere, then it is likely that she has been forced to work in less than ideal conditions to conceal her work, as was discussed earlier.

law justifies sweeps to 'round up' women on the stroll every once in a while. A prostitute might then look to a pimp for protection as she works a stroll off the beaten path, away from enterprising police. Pimps, quite simply, have been described as the true evils of the prostitution world (Young 2003), and their parasitic, exploitive and often violent relationship with street prostitutes is the *raison d'être* for Canada's procuring and living off the avails provisions. There is an extensive literature on pimps, but it is sufficient at this juncture to say that their existence almost always constitutes an abusive relationship with a sex worker. Fabre (2006: 175) argues that prostitution criminalization is a sure way to make prostitutes vulnerable to pimps, who exist because of prostitution's outlaw status. Wacquant (2001) compares the pimp/prostitute relationship to that of boxer/promoter and horse/trainer to highlight the similarity of the exploitive dynamic. Snuffing out the pimp's existence can be made possible *only* through facilitating the trade in some way because as long prostitution remains underground, pimps will thrive.

Law enforcement and police typically do not treat prostitutes as human beings deserving of dignity and human rights, but as pitiful, social undesirables who deserve whatever befalls them (Lowman 2000: 1008). These attitudes further stigmatize and discursively construct prostitutes' pariah identity, perpetuating a vicious cycle. In describing her experiences on the street, a former prostitute notes some of the everyday occurrences:

When they [the police] decided who was going to jail (subsequent to rounding up a group of prostitutes) looks were a big factor. The police would take the hands of the girls who were not going to jail, and they would burn them on the hood of the engine. The women who were going to jail were piled in the back seat, usually six, seven or eight women. The police would drive us around for an hour or so, handcuffed, with people sitting on us... I have been arrested thirty or forty times, who's keeping count? (quoted in Delacoste et al., eds. 1987: 39)

This account goes on to detail instances of rape, violence and demands for sex, all from the law enforcement officials who are supposed to be providing a service to the rest of

society by removing these ‘nuisances’ off the street. Sharpe documents a similar dynamic in the U.K. with her interviews of Divisional Enquiry Team (vice) policemen. She notes that most of the officers held very negative opinions of the prostitutes they regularly picked up and had little sympathy or understanding for their lifestyle, often viewing prostitutes very cynically, e.g., “She makes easy money, violence is an occupational hazard” (1998: 139-40). Such attitudes translate to harsh enforcement practices, and contribute to an overall picture of prostitution as a dirty, brutish, reprehensible practice undertaken by morally bankrupt women. Framing the world of prostitution as such fosters the negative outlooks that lead to biased public opinion, which, in turn, *prima facie* legitimizes moral regulation.⁸ This moral regulation is especially problematic because it influences laws that violate human rights by forcing women to work in dangerous and risky areas where they are inevitably victimized.

Easy Targets: Sex Workers and Serial Murderers

A potent current reminder of these legally-produced harms is the recently-concluded Robert Pickton trial in New Westminster, B.C. Pickton, referred to as “Canada’s worst serial killer”, was convicted of the murders of six Vancouver downtown east-side prostitutes and is suspected of being involved in as many as fifty prostitute murders (Levitz 2007). All of the women Pickton killed, and is suspected of killing, were prostitutes working the dangerous east-side stroll in Vancouver, many of whom no doubt were attempting to conceal their work from agents of the law. Pickton is slated to be tried for a further twenty murders in the next year, but even this number probably does

⁸ On this matter, Valerie Scott succinctly states, “the government has told society that it’s OK [*sic*] to treat us like shit because the government is treating us like shit” (quoted in Brock 1998: 139).

not account for all the missing prostitutes whose deaths Pickton is responsible for because of his grotesque, yet effective, method of cadaver disposal: grinding them up, feeding the remains to his pigs and mixing the rest in with waste.

It should come as no surprise that the victims of Pickton's murder spree were prostitutes because of how serial murderers throughout history have been able to prey on street persons. Historically, examples of serial murders of prostitutes include the 'Green River' killer in Washington state (Lowman 2000: 998), 'Jack the Ripper' and the copycat 'Yorkshire Ripper' in London (Walkowitz 1982), among many others. Individuals such as the homeless and prostitutes are already in dangerous public places at night with little protection and have few meaningful social ties, i.e., parents, teachers, co-workers, who would worry if they were missing. This makes prostitutes easy targets of victimization, but not a high priority for police and politicians when it comes to ensuring their safety. In the film *American Psycho* (2000) a psychopathic killer finds an easy victim to satiate his bloodlust in the prostitution district. In one scene that serves as a metaphor for the apathy of Canadian officials toward prostitution victims, the prostitute attempts to escape the serial killer and is running hysterically through an apartment complex, screaming, bloodied and naked. Despite the commotion, no one opens their door to help, and she is eventually killed by a roaring chainsaw. In 'real life', because of their discursively socially constructed pariah identities, there is little concern when prostitutes are victimized on the street. From a basic human rights perspective, this is an attitude that must be discarded; prostitutes are no less deserving of human rights.

The Law's Complicity

Succinctly stated, when it comes to prostitution, “human rights hardly exist” (Nel van Dijk, quoted in Pheterson 1989: 52). Lack of human rights is, however, not something intrinsic to prostitution because there are conditions that could facilitate its practice as an ordinary profession- involving age limitations, consent, a safe, clean environment and a regulated clientele. But this is getting ahead of the discussion; at the present time, it must be emphasized how the government, by virtue of upholding the relevant laws, manufactures human rights violations. We would not necessarily frame the tangible harms sex workers endure as human rights violations if prostitution and its related activities were fully and formally illegal, with *Criminal Code* statutes explicitly criminalizing prostitution.⁹ In this case, the prostitute, at least technically would be partially responsible for their human rights being violated because the law is clearly stated. However, this is not the case in Canada, and therefore we can assign a lion’s share of the blame to the government and its unclear, ambivalent prostitution laws.

As a related example, when the Canadian government increased its issuance of temporary visas to foreign sex workers for its ‘critical shortage’ of strippers, many migrant workers found themselves in abusive, coercive situations of indentured labour in Canadian strip clubs and other venues. Macklin outlines this practice in detail and concludes that the Canadian government is responsible for “sanctioned abuse” (2004: 167). Similarly, the communication and indoor prostitution (‘double effect’) laws sanction abuse and foster human rights violations. These laws, which pay lip service to legalization but criminalize nonetheless, need to be reformed because the British model of ‘partial criminalization’ is simply not practicable. But as long as the government

⁹ Even so, this ‘offenders, not victims’ view is insufficient as Lowman (2000: 21) points out.

continues to prevent prostitution law reform, it is, and will continue to be, “complicit with murder” (Sandborn 2006).

The price of “political doublespeak” (Lowman 2000) is costly. Murder, interpersonal violence, rape and general victimization are more than sufficiently harmful consequences to warrant legal reform. Utilizing a ‘true’ harm principle would acknowledge this legally-produced harm and make the case for ‘preventing prevention’ plausible. There are a myriad other harms that flow from the ambivalent and self-defeating prostitution laws, which strengthen the case further for wholesale legal reform. Two such important concerns prompting change are overcriminalization and deprivation of liberty. Two prostitutes’ testimonials outlined earlier (regarding being arrested repeatedly) in this chapter demonstrate the self-perpetuating prostitution ‘problem’ the law creates with expansive and selectively-enforced prostitution laws. In turn, rising offense rates create a “crisis of overcriminalization” (Packer 1963), which is consonant with a ‘revolving door’ criminal justice system. Overuse of the criminal justice apparatus is an imprudent use of resources, diverts attention from more important crime problems and fosters disrespect for the law. These are supplementary justifications for ‘preventing prevention’, as *per* the application of a true harm principle. Perhaps the most serious impairment the prostitution laws cause- ancillary to human rights violations- is individual liberty deprivation. Cornerstones of liberalism/libertarianism such as choice, privacy, bodily autonomy and individual morality are all negatively impacted with a prostitution prohibition. The justification for the effective s. 1 override of these rights and values shrouds moralistic paternalism, which, at the very least, is a problematic basis of legal prohibition.

‘Degrading’ and ‘Dehumanizing’: To Whom?

Neither one person, nor any number of persons, is warranted in saying to another human creature of ripe years, that he [or she] shall not do with his [or her] life for his [or her] own benefit what he [or she] chooses to do with it. (J.S. Mill, quoted in Wasserstrom, ed. 1971: 107)

‘Degrading’ and ‘dehumanizing’ are epithets that were bandied about in *Butler* and *Mara* and are central to the feminist prostitution debate. In *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)* (2000), a Supreme Court decision concerning a customs seizure of gay pornography, the appellants raised the argument that (ab)using such terminology can lead to justifying the prohibition of *any* conduct on moral grounds. They claimed that the ‘degrading and dehumanizing’ arm of the *Butler* test is open to “homophobic prejudice” and that the community standard of tolerance test is merely “morality in disguise” (*Little Sisters v. Canada* [2000] at paras. 60 and 61). Adding to the critique of utilizing ‘degrading’ and ‘dehumanizing’ with respect to prostitution and its related activities, Young argues that “[d]egrading, obscene and dehumanizing’ are empty categories that get filled with such content as homophobia, whoreophobia... and fear of difference” (2003: 60).¹⁰ This is a characterization that is entirely congruous with moralistic laws, which purport to prevent such ‘degradation’ and ‘dehumanization’.

Through the 1980s and into the 1990s, exploitation discourses, which were previously secondary to the communication law’s focus and the Fraser Committee’s primary concern with ‘public nuisance’, have become the mainstays of socio-legal and political rhetoric (Lowman 2001: 3). Lowman furthermore comments that the contemporary judiciary cannot consistently decide whether the prostitution laws are geared toward preventing nuisance or exploitation/dehumanization (2005: 8). The

¹⁰ These ‘fears’ have been presented throughout this discussion in the Wolfenden Report, social construction of a prostitute identity, and moral pluralism in the following.

exploitation discourses centre on children/youth and women, and embody the radical feminist and conservative position. In exploring the law's justification for harm prevention, it is useful to turn briefly to the notable H.L.A. Hart and Lord Patrick Devlin debate that followed the release of the *Wolfenden Report*.

The Hart/Devlin Debate

This dispute was much like the social harm debate in *Labaye*, which included issues such as the merits of moral regulation, legal indecency and the harm principle.¹¹ Both scholars agreed that what goes on behind the figurative 'closed door' may have consequences significant for social morality, e.g., the sexual violence in *Butler*. The philosophical difference between the two was that Devlin (1965) espoused a moral prohibitory stance because he believed that in certain instances "society's constitutive morality" would override matters of private morality, and legal intervention would be necessary to prevent social disintegration. Whereas Hart, agreeing with Devlin that certain matters of private morality were amenable to legal intervention, demanded *empirical* proof of potential harm to legitimize legal intervention (McTeer 1995: 897).

Devlin's position is very much in line with a presumptive prevention approach, viz., in *Butler* where the court justified the s. 1 override based on the unproven 'risk of harm' to the proper functioning of society. On the contrary, Hart's position adopts the aims of the outlined 'true' harm principle in *Labaye* because of how closely the decision follows the principle of legislating on the basis of harm prevention and not morality as such. Husak (1987: 230) reasons that Devlin's moral regulatory approach, and

¹¹ For a more on the substance of this historical debate, see Devlin (1965), Hart (1963) and Wasserstrom, ed. (1971).

specifically his support of laws against homosexuality and prostitution, were motivated by underlying homophobic and prejudicial tendencies. And Hart felt that Devlin was afraid that the existence of moral pluralism would threaten society (McTeer 1997: 897). This 'threat' of moral pluralism, to Devlin, is sufficient to safeguard against by punishing conduct which society disapproves of, but is not necessarily harmful, "on the ground that the state has a role to play as a moral tutor and the criminal law is its proper tutorial technique" (Dworkin 1977: 242-3). Devlin, like radical feminists, would support the concepts of 'degrading' and 'dehumanizing', which align with the aims of legal paternalism. Highlighting this debate is not intended to show who was 'right' and who was 'wrong'. Rather, the purpose is to illuminate the difficulties with justifying a presumptive moral regulatory approach regarding prostitution criminalization. Illustrating Devlin's position in particular serves to show how tenuous his reasoning is and how it is similar to that of radical feminists, to be discussed in the following.

Strossen v. 'MacDworthodoxy': Liberal Feminism Takes on the 'Radicals'

Contemporarily, the previous debate continues in the U.S. (with global implications) between the two main 'camps' of radical and liberal feminism- the former represented by moral crusaders and 'anti-choice' feminists Catherine MacKinnon and Andrea Dworkin, and the latter by ACLU President Nadine Strossen. This ongoing public debate centres on pornography, but as was shown in the previous chapter, pornography and prostitution are functionally very similar, and treated as such by the law. Dworkin (1997, 1989) and MacKinnon (2005, 1997, 1993) have produced a series of works that vituperatively condemn pornography, with the main argument being that sex work inherently demeans

women under *any* circumstances, and more specifically, that it reduces women to “man’s object” (Dworkin 1997). MacKinnon claims that “pornography, with the rape and prostitution in which it participates, institutionalizes the sexuality of male supremacy” (1984: 325). The fact that sex work such as pornography and prostitution even exists hurts women, according to Dworkin and MacKinnon, “even if it cannot be shown to cause some tangible harm” (Strossen 1995: 13). This has led Strossen to refer to Dworkin and MacKinnon’s feminist politics as “MacDworkinism” and “Macdworthodoxy” (*Ibid.* at xxxix), hinting at the religious crusaders and zealots that they are ideologically partnered with. This stance also partners these feminists with conservative politicians and legislators who are unified in their quest to prevent the sin and crime- not choice- of prostitution.

Despite the previous ‘MacDworkinite’ (Strossen 1995) sentiments, “prostitute activists everywhere are adamant about distinguishing *forced* from *voluntary* prostitution or, as the 1st World Whores Congress put it, ‘adult [female] prostitution resulting from individual decision’” (Alexander 1997: 93). The symbolic figurehead of the opposition to radical feminist thought, Nadine Strossen, encapsulates the position of liberal feminists when she argues forcefully against the censure of sex work. Strossen, like others (cf. Pateman 1980; Valverde 1987), contends that sex work is not the primary site of women’s oppression, and that there are other more fundamental issues (such as political and economic inequality) that must be first addressed in ameliorating women’s oppression. Thus, these two opposed feminist camps (radical/anti-choice and liberal/pro-choice) differ in their interpretation of “whether prostitution is an ugly and intolerable consequence of the power of men over women and the sexual exploitation of women, or

whether it is a commercial enterprise like so many others that is entered in by a seller who possesses a commodity that has a market value” (Meier and Geis 2006: 42).

However, even the consent distinction does not vitiate anti-choice feminists’ arguments (according to them) because of their insistence on the existence of absolute and systemic patriarchy. Thus, radical feminists’ counterargument to the notion of consensual prostitutional acts rests on the questionable concept of ‘false consciousness’. According to this term, no woman can freely consent to sex work because she is making that choice within the oppressive, misogynist, male-dominated context of patriarchy (Alexander 1997: 83). Pateman (1988, 1980) problematizes the notion of a ‘sexual contract’ between, e.g., a prostitute and her client, because it intrinsically subordinates women and is figuratively authored within a network of patriarchy. Consequently, lack of coercion in the prostitution agreement is irrelevant; contracts are not a useful avenue for progressing toward women’s equality or empowerment, according to Pateman.

Along a similar line of reasoning, in *Butler* the Court claimed that an individual cannot consent to ‘degrading’ or ‘dehumanizing’ behaviour. In fact, consent can make the acts even more egregious (Strossen 1995: 231). This, like the judgement itself (as noted in chapter 4) seems to be a superficially satisfying statement, but is problematic when degrading and dehumanizing behaviours are broadly defined. If broadly defined, then consenting to behaviours that are labeled ‘degrading’, such as sado-masochism, but otherwise normal to the participants, may be illegal.¹² For instance, MacKinnon and Dworkin (as well as other MacDworkinites) believe that the act of sex *itself* is degrading when they claim: “[p]hysically the woman in intercourse is a space invaded... occupied even if there has been no resistance; even if the occupied person said, “Yes, please, yes,

¹² For a more interesting discussion on this matter see *R. v. Bedford* (2000) 143 C.C.C. (3d) 311 (Ont.C.A.).

hurry, yes, more” (Dworkin in Strossen 1995: 188), and, “the major distinction between intercourse (normal) and rape (abnormal) is that the normal happens so often that one cannot get anyone to see anything wrong with it” (MacKinnon in Strossen 1995: 108). While the law would not go so far as to label intercourse degrading, the lack of consent discourse and the similarity to the language in *Butler* is intriguing because the ruling apparently was influenced by a brief that MacKinnon co-authored (Strossen 1995: 19). This brand of *maternalism* is overall more damaging to women than protective because it makes choices and decisions on the behalf of all womankind that are based on spurious data, presumptive moralities and pernicious illiberal philosophies.

‘My Body, My Choice’: When is Legal Intervention Appropriate?

Within the realm of sex work, the problem with the combined forces of law’s paternalism and radical feminists’ maternalism is that there is a pernicious impact on individual liberty and autonomy. When choices are made for an individual there must either be a good reason to do so, or that individual must be incapable of making a choice. If we hark back to Mill’s definition of ‘vulnerable’, neither of these characterizations applies to sex workers. Thus, the law’s stated aim to prevent degradation and dehumanization ironically results in the degrading consequences of treating sex workers as children or non-agents by restricting their free choice, bodily autonomy and individual liberty.

In responding to radical feminists’ claims of women’s exploitation and false consciousness with respect to consent, liberal feminists stress how liberal values of choice and autonomy cannot be devalued or underestimated for their impact on empowerment. The corollary of this statement is that preventing such choice/autonomy

is an obstacle to empowerment, for even if a choice ends up being a bad one, adults should be permitted to make their own choices- especially in relation to their own bodies- in the absence of tangible harm to others.¹³ Lenore Kuo argues that prostitution prohibition and the underlying philosophy of legal moralism “ha[ve] traditionally undermined women” (2002: 121). As a result, Kuo claims that “feminists should distrust appeals to legal paternalism or legal moralism, requiring an extreme degree of justification to override a presumption against them”, and therefore she is convinced that “feminists need to adopt a *neo-Millian* stance” (*Ibid.*). This statement directly supports what has been argued throughout this discussion regarding harm prevention, legal paternalism and the aims of liberal feminism. With a ‘neo-Millian’ position in place, the law’s damaging impact on women’s liberty (and human rights) can be lessened by not treating them as non-agents incapable of doing what is ‘right’.

Restricting choice and autonomy in the quest to prevent self-harm is not something that can be legitimately done according to classical liberalism/libertarianism. Indeed, Husak (1987: 235-6) claims that proscribing harm to oneself is antithetical to the harm principle, whose essence is encapsulated in the Latin maxim *volenti fit non injuria*. Liberal feminism echoes this mantra in its support of women’s choice in all spheres ranging from abortion to prostitution. While the radical feminist criticism is levied that, as the James Brown song goes, “This is a man’s world”, liberal feminists might respond by citing the very next line of the song, which is, “But it’s nothing without a woman”. That is to say, women are equal to men, and therefore should be afforded the same fundamental rights and values conducive to human flourishing. Men in the sex work

¹³ This line of reasoning has also been asserted convincingly by assisted suicide advocates, and a good legal discussion can be found in *R. v. Rodriguez* (1999), where the applicant was awarded a “constitutional exemption” to this right.

realm would and do not merit the same protective paternalism, nor are they portrayed as vulnerable victims who are incapable of freely choosing sex work; these characterizations are predicated on traditional sexual stereotypes.

As a related example, with the practice of plastic surgery, radical feminists claim it is “largely an oppressive technology”, moulding the body “in accordance with prevalent ideals of feminine beauty” (Negrin 2002: 21). Conversely, liberal feminists do not reproach this process because choosing to have plastic surgery for how it will subsequently make one feel as a whole person can be empowering (*Ibid.*). This leads liberal feminists to pose the question within the realm of prostitution of why “markets in sexual favours” (Scheper-Hughes 2001: 3) are so disturbing. Furthermore,

[some] argue that free markets, including body markets, are liberating in their valuing of individual choice [and] autonomy. Body parts are, and should remain, private parts, free of outside meddling, let alone state or governmental regulation. Social theorists... can all too easily fall prey to an *uncritical moralizing rhetoric*, a knee jerk reaction against body commodification to which still attaches fairly ‘primitive’ sentiments... (*Ibid.*, emphasis added)

While Scheper-Hughes is analogizing sexual services to actual body markets, her point is well-drawn. The argument against body commodification (e.g., dehumanization) is too often part of this ‘uncritical moralizing rhetoric’ stemming from the “frighteningly effective” alliance between anti-choice feminists and conservatives (Strossen 1995: 13).

The Right to ‘Follow Your Own Lights’

The right to follow ‘one’s own lights’, even if it involves what are perceived of as ‘bad’ choices, involves a struggle between the countervailing forces of liberty and authority, of individual freedom and legal coercion. Striking the balance is the perennial problem. Regulating such bad choices, albeit only partially, by, e.g., imposing high tobacco taxes and an indoor smoking ban in Ontario, should be based on empirical data. Too much

tobacco intake leads to health complications and premature deaths- empirically-proven harm- that significantly harms both the individual user as well as society (through second-hand smoke and healthcare costs). The argument here in relation to prostitution is that it should not necessarily be considered a bad choice if it is made freely, without coercion, youths are not involved and the choice is not impelled by other factors such as substance abuse or parasitic relationships. Conceived of in this manner, there would be no evidence to suggest that prostitution is harmful, and harm to self cannot logically be the justification for prevention because other empirically-proven harmful acts such as smoking and eating fat-laden diets are legal, though, as noted, discouraged. Thus, the majority of sex workers feel the law and radical feminists have no right to make choices for them through a prostitution prohibition, because they do not consider their choices bad, wrong or harmful, nor must they be 'saved' from themselves (St. James 1987: 83).

The following are a handful of examples that lucidly demonstrate sex workers' reservations with paternalism/maternalism. Roberts details a prostitute's view on the matter: "Antiporn feminists have patronizingly told strippers and prostitutes that we should raise our consciousness and self-esteem [by working 'real jobs']. No thanks, sisters" (quoted in Meier and Geis 2006: 43). A stripper, whose work is often conflated with prostitution (Bruckert 2002), compares her time as a sex worker and working in theatre. Because she is labeled a 'victim' in her 'legitimate' career based on her former work, she feels far more exploited by her artist colleagues and feminist sisters than by the nature of her former work (Bell, ed. 1987: 120). Veronica Vera, a former porn star who looks upon her time in the industry positively, claims, "I don't think it would help women to beg the government to play Daddy to protect us from ourselves and then at the same

time expect equality” (quoted in Strossen 1995: 185-6). Another former porn star, Candida Royalle, explains that she understands radical feminists’ desire to ‘help’ women, but that the ideology behind their efforts is “out of touch with women in the industry” (*Ibid.*). And finally, in a poignant letter sent to Professor Nadine Strossen by a stripper and New York law student, ‘Karen’ (stage name), remarks:

Erotic dancing has been extremely liberating for me. The first time I ever got up on stage and took off my clothes, I was terrified. But at some point I crossed a line after which I left behind... all the baggage of sexual inhibition society had impressed upon me. Women who still cling to that baggage imagine the woman who dances or poses nude [or sells sexual services] as vulnerable and degraded. They don’t understand that for the woman who has crossed that line and embraced the taboo, she feels instead the thrill of empowerment. (quoted in *Ibid.* at 195)

In light of these examples from sex workers, it is understandable why they are disillusioned with discourses of preventing exploitation, and therefore why they would want to be protected against radical feminists’ protection (*Ibid.* at 215). And it is furthermore conceivable why there is a plausible case for *preventing prevention* in the legal realm because of the negative impact legal paternalism has on individual liberty and bodily autonomy, which can be powerful conduits to empowerment.

‘Women and Children Last’: No Possibility of a ‘Sexual Contract’(?)

It is appropriate to highlight the notions of contract and commodity before we move on to the final chapter. Pateman’s argument, as previously mentioned, outlines that a prostitutional contract between a woman sex worker and client will never be ‘fair’ and thus re-entrenches the patriarchal male/female dominant/subordinate relationship. But Schultz disagrees, and argues that there is in fact the “possibility of a compatible relationship between human flourishing and commodification” (1997: 1851). Moreover, Shultz even claims that she “would place higher priority on increasing women’s capacity to use markets and commodities as an essential avenue to power” (*Ibid.* at 1852). The

opposing view that commodification and the prostitutional contract are demeaning and degrading rely on the misleading assumptions that a woman 'gives away' part of herself or 'sells' her body. This "impoverished reductionism" (*Ibid.* at 1860) to which radical, anti-choice feminists subscribe fails to realize that a prostitute and her body are not owned or taken over in the transaction; rather, a service is provided which analogizes the transaction to a rental contract in the economic sphere.¹⁴ The inability to enter into such a contract because of paternalistic 'protection' ends up treating women, once again, like children or mentally disabled persons (Strossen 1995: 181).

Dworkin and MacKinnon have directly contributed to the infantilization of women sex workers; their proposed Minneapolis anti-pornography ordinance stated:

Children are incapable of consenting to engage in pornographic conduct, even absent physical coercion, and therefore require special protection. By the same token, the physical and psychological well-being of women ought to be afforded comparable protection. (quoted in *Ibid.* at 182)

This leads Young (2003: 21) to pose the question: "How can some feminists support a [prostitution] law that treats women as if they are too stupid and victimized to make sound decisions on how they express their sexuality, whether for commercial purposes or for pure recreational fantasy?" While women do not *need* to use their sexuality to achieve empowerment, they ought not to be denied that option in the name of presumptive, protective paternalism. Preventing women from entering into figurative 'sexual contracts' when they are of adult age and freely choose to do so is no different than telling a child, "No, just because". The prevention of exploitation justification is simply incoherent when sex work involves liberal subjects (consenting adults). In fact, allowing the contracting of these services can be extremely liberating. Camille Paglia

¹⁴ This also precludes women's economic liberty, which the Court expressly stated was not be a part of s. 7 liberty rights in the Prostitution Reference, but would probably qualify under equality rights in comparison to men, who, in the law's eyes, do not need to be protected.

even claims that the prostitute is the “ultimate liberated woman, who lives on the edge, and whose sexuality belongs to no one” (1994: 58-9).

Conclusion

The Wolfenden Committee’s recommendations sought to *amoralize* the legal response to prostitution by postulating a sphere of private morality. While their rationale was in keeping with Mill’s harm principle, the practical implementation of their ideas was very problematic, resulting in a more punitive approach to street prostitution. The Fraser Committee espoused an almost identical philosophy with respect to prostitution and, again, difficulties resulted in the subsequent legal reform. The pragmatic harm-reduction strategy that both committees proposed becomes even more important in light of the harmful street trade, rife with murder, interpersonal violence, robbery and other forms of victimization caused in part by the very legal reforms that came after the committees. The increase in these harms is, by no coincidence, contemporaneous with the communicating law and therefore makes the government complicit in abuse and murder.

From Hart/Devlin to MacKinnon and Dworkin/Strossen, the debate over prostitution’s ‘degrading’ and ‘dehumanizing’ aspects is guided by moralistic paternalism and maternalism, which is more damaging to women sex worker’s rights than any well-intentioned protective efforts. As liberal feminists insist, choice ought not to be underestimated in its potential for achieving empowerment. Furthermore, restricting choice and bodily autonomy for those who willingly choose to work in the sex industry is no different than instructing individuals that they cannot pursue any unconventional, socially ‘inappropriate’ career. Instead of contributing to the infantilization of sex

workers, the law should allow them to be ‘grown-ups’ and make their own choices, learning from any potential mistakes along the way. Such an approach would avoid the possibility of blocking an essential avenue toward the realization of equal rights, autonomy, economic liberty/equality and empowerment. The principle of harm should in fact be applied to the law’s own use of the harm principle in justifying paternalistic prostitution laws in order to put an end to the harms to which the law itself contributes.

Chapter 6: *Labaye* and Harm-Reduction

Introduction

As was shown in the previous chapter, the legally-produced harms in the prostitution realm are multi-faceted and extremely problematic from a human rights perspective. The paternalistic/maternalistic condemning laws/rhetoric uniting anti-choice feminists and conservative politicians and lawmakers is equally as problematic with respect to individual liberty deprivation. A possible solution would be a harm-reduction approach that prudently and cautiously facilitates sex work in some capacity. This would obviate the confusion and problems endemic to the current law, as is argued by many critics and legal scholars (Lowman 1993, 1985; Young 2003; Pivot Legal 2006, 2004; Fraser Committee 1985). In this final chapter, the argument will be asserted that facilitated or partially legalized prostitution, based on *Labaye*'s precedent, would present benefits to society and mitigate the harms prevalent in the sex industry. Such a scenario could also be potentially liberating for women insofar as it would afford full autonomy and economic liberty. The goal is to show that an efficient and practical response to the 'prostitution problem' can be found in the harm-reduction and -prevention logic in *Labaye*, which would justify a system of legalized brothels. This would address legally-produced harm; champion autonomy, as well as individual and economic liberty rights; and attend to the hypocritical approach in relation to prostitution in Canada. Collectively, this approach would recognize that prostitution is an issue needful of a practical, new solution as opposed to something that will go away on its own if ignored. And as such, licensed prostitution in a private milieu can be *out of sight, but not out of mind*, instead of the current government's position of 'out of sight, out of mind' (Lowman 2005).

Labaye, Harm-Reduction and Licensed Brothels

In a morally ambiguous matter such as prostitution, regulation needs to be guided by clarity at a very minimum, not moral presumption. The majority in *Labaye* recognized this and thus reconfigured the test for determining obscenity/indecency by aligning it as closely as possible to Mill's harm principle. This ensures that tangible harm must be a threat in order to warrant prevention and criminalization. However, *Labaye*'s possible impact on prostitution is specific; it would directly affect the facilitation of indoor prostitution only. In essence this would represent the harm-reduction solution articulated in both the *Wolfenden* and *Fraser* reports, suggesting the possibility of licensed brothels. Valverde (2005) proposes the possibility that the majority in *Labaye* thought of the consequences of their liberal ruling on bawdy-house and indecency beyond its impact on swingers clubs in the case at bar. Certainly, if paying a fee to join a club that facilitates group sex is now permissible in Canada, why not extend these privileges to private acts of sex-for-money?¹

Harm-reduction strategies are firmly rooted in the realm of illicit drugs. Analogizing from the case of drugs is appropriate because of the way drugs have historically been treated as an immoral vice. In discussing the efficacy of a harm reduction approach for drug use, Goode states, "its goal is stated in its title: Rather than attempting to wipe out drug distribution, addiction, and use- an *impossibility*, in any case- its goal is for drug policy to attempt to minimize harm... [T]he emphasis is on practicality- what works in concrete practice rather than what seems to look good on paper or in theory" (1997: 81-2, emphasis added). 'Impossibility' is emphasized because,

¹ The argument can be made that pornography already makes the case for prostitution decriminalization because it too is a type of sex-for-money transaction that is regulated in the private sphere.

like drugs, the complete abolition of prostitution- both the ‘supply’ and the ‘demand’- is also impossible. Apprehension is of course present with harm-reduction programs for intravenous drug users, which were developed first in Holland and are now widespread. Supervised injection sites or safe injection facilities have been considered to be useful developments in reducing the harms that are associated with street intravenous drug use in urban areas in cities such as Vancouver (Haden 2004: 330). While intravenous drug use is, unlike prostitution, actually seen as tangibly harmful in addition to immoral, the effects of harm-reduction programs are nonetheless effective when faced with minimizing resultant social harms, i.e., health care funds, policing and criminal justice resources. This ‘lesson’ can thus be applied to the case of street prostitution.

Many of the legally-produced harms, it becomes clear, have to do with the fact that prostitutes continue to thrive and conduct their business on the streets despite the communicating law. As the Fraser Committee argued, if prostitution is to be a reality in Canada, there must be a place where it can legally occur (Lowman 1993: 78). But as Lowman argues, the current Canadian practice is simply geared toward keeping prostitution out of the public eye and political consciousness by confining it to certain areas and “keep[ing] its visibility to a minimum” (*Ibid.* at 69). As was argued in the fifth chapter, this approach fosters significant social harms and is guided by a philosophy of ‘out of sight, out of mind’. Facilitated or state-regulated prostitution, on the other hand, would create an atmosphere of privacy and principally of safety, thereby mitigating the harms associated with the street trade.

Proponents of harm-reduction principles support the idea of legalized brothels because they are an altogether “more comfortable and manageable setting” (quoted in

Sharpe 1998: 152). “Advocates of legalization cite numerous advantages to the brothel system, most notably that removing prostitutes from the streets would negate the public nuisance aspect of prostitution whilst simultaneously protecting prostitutes from pimps, violent clients... and sexually transmitted diseases” (*Ibid*). By removing the solicitation aspect and only slightly altering the communication law, yet reforming the interpretation of bawdy-house and indecent acts, the Canadian law’s ‘double effect’ can be broken. This would remove prostitution from the public sphere, but not ignore its practice altogether, hence, ‘out of sight, but *not* out of mind’.

Pivot Legal’s report, *Voices for Dignity*, concluded that changing bawdy-house laws was the premiere area of legal reform that sex trade workers are concerned with (2004: 8-9).² Many of the testimonials included in the report affirmed this conclusion:

Build a house for us, so the girls can go to [*sic*]. Where the John’s get screened. That’s all I can say. That’s my statement. Build a house. Build a house...

In my opinion, the ability to work indoors is much needed in this community. If women could work indoors with each others’ support, in a clean and organized environment, where johns are screened, the health and safety benefits would [be] great. It seems that the government does not want the sex trade to be visible, and does not want to pay attention to the needs of workers...

Working indoors is better than standing on the street. I have felt that my life was in danger three times in the past year. Each time that happened, I was standing on the street. I have never felt that my life was in danger when I have had dates in my own residence. (*Ibid.*)

All of the responses speak directly to the issues of safety and privacy which would be afforded by a harm-reduction approach in a system of brothels. This proposal is exactly what the Wolfenden Committee suggested almost exactly fifty years ago. It must be stressed that a brothel system must not be seen *only* as a legitimate facilitation of prostitution, but as a genuine avenue toward reducing the negative aspects of the insuppressible street trade. For, as Pivot Legal’s report insists, there are greater battles to wage in the realm of prostitution involving poverty, drug addiction and social inequality

² All but one individual supported a repeal of the bawdy-house law from the 91 person sample of former and current sex workers.

(*Ibid.* at 6). A beneficial partial solution (coupled with other measures), then, would be a regulated indoor trade, which positively addresses women sex workers' liberty and human rights. This suggestion also does not support decriminalization as such because, as both the Wolfenden and Fraser Committees argued, and as *Labaye*'s application of the harm principle directs, there is a need to prevent harm to others. And the nuisance that a visible street trade causes in the form of frequent solicitation of passers-by, attracting unsavoury individuals such as pimps and drug dealers, and exposure to minors (among other aspects), requires some type of solicitation law. Other countries have implemented such a strategy, which necessitates a brief look at this point.

The Netherlands' Approach: Harm-Reduction and 'Amorality'

While Canada is in the vanguard of some areas such as legalized homosexual marriage, it trails behind other progressive nations with respect to alternative approaches to prostitution; nations such as Holland, Australia, New Zealand, Sweden and even (parts of) the U.S. (Hindle and Barnett 2005; Plamondon 2002). The most well-known example embedded in the public's consciousness is Holland's approach of full legalization. Although brothels were theoretically banned in the Netherlands for most of the 20th century, they continued to flourish in practice based on a model of "pragmatic tolerance" (*gedogen*), which comports with the philosophy of harm-reduction (Hindle and Barnett 2005: 15). *Gedogen* does not imply that criminal offences are ignored because "brothels and other prostitution establishments were required to follow municipal by-laws, and exploitation and coercion of prostitutes continue[d] to be prosecuted" (*Ibid.* at 16). In

this sense, prostitution was not truly decriminalized or even approved by Dutch society, but simply facilitated by the state to prevent harm resulting from its prohibition.³

Due to mounting pressure from advocacy and rights groups for better working conditions and labour rights, the Netherlands' law was reformed in 2000 to *fully* and *formally* legalize brothels along with a licensing scheme in order to regulate prostitution (*Ibid.*). This change in the Dutch *Penal Code*, highlighted by the distinction between voluntary and involuntary prostitution under Article 250a, accorded voluntary sex workers the same rights as 'normal' workers (*Ibid.* at 17). As such, women in Holland are not pre-empted full economic liberty rights and are protected against the exploitive aspects characteristic of the street trade.

In Nevada, prostitution is similarly regulated in a brothel system in all counties with less than 400,000 persons (*Ibid.* at 33),⁴ which means that 14 of Nevada's 17 counties can legally facilitate prostitution, though only 11 do (Meier and Geis 2006: 38). The industry is highly regulated with worker identification cards, weekly/monthly medical examinations for HIV/STDs and zoning restrictions as to where the brothel can be located (*Ibid.*). The women are therefore very unlikely to be victimized with all of the administrative and functional safeguards in place such as police checks on licensees, client screening, security personnel ('bouncers') and a supervised environment. The same health and safety measures are in place for other manifestations of prostitution such as escort services and body-rub parlours (Hindle and Barnett 2005: 27). These might similarly be categorized as harm-reduction approaches because they occur in private,

³ The Ministry of Justice's argument was that prostitution was, is and will be a "given fact", which requires a "realistic approach without moralism" (Hindle and Barnett 2005: 17). This language is consonant with a harm-reduction philosophy.

⁴ Originally 250,000 persons.

regulated spheres where the sex worker is insulated from violence and uncoerced, as opposed to reality of the dark and dangerous 'mean streets'.

Ironically, the argument has been made that permitting prostitution confers secondary harm-reduction benefits such as crime control. Fabre argues that, for many, sex is a need, not as basic as food and water, but a need nonetheless (2006: 164). However, not everyone is privy to this need perhaps because they may be too old, unattractive or shy to find a consenting sexual partner (Meier and Geis 2006: 33). Lack of sexual partnership can be frustrating and may incite some individuals to pursue a sexual partner in an aggressive and inappropriate manner (*Ibid.* at 48). And indeed, some of the sex workers Phoenix interviewed made statements such as:

I think that by doing this, it's gonna [*sic*] stop more rapes and all that.
It's people like me that keep rapes down. If some bloke needed it and there weren't no [*sic*] prostitutes he might go and rape someone for it.
... You see they [the punters] come to us and so they don't need to rape. (Phoenix 1999: 130-1)

While these women's statements cannot be proven, they nonetheless convey a good sense of the reality that sex is a need that will always be sought after, irrespective of the legal efforts to curb the sale of this need.

A Right to Economic Liberty

It is clear as noon-day, that man, by his [or her] industry, changes the forms of the materials furnished by Nature, in such a way as to make them useful to him [or her].
- Karl Marx

The *Prostitution Reference* outlined that liberty under s. 7 does not include a constitutional right to economic liberty. In other words, s. 7 does not encode a sex worker's right to make a living by selling sexual services. However, this conclusion does not seem to be based on solid or harmonious logic. For instance, if a person can legally make a living stripping, posing for nude pictures, acting in pornography or modeling,

why is prostitution beyond the legal pale? Quite naturally, we use our bodies in some capacity to earn money in the same way we transform natural resources to 'make them useful'. Therefore, we are in the Marxist sense commodifying some aspect of ourselves- in one way or another- in any line of work. One prostitute appropriately remarks, "[a] woman has the right to sell her sexual services just as much as she has a right to sell her brains to a law firm" (quoted in Meier and Geis 2006: 41). 'Karen', the woman whose correspondence with Professor Nadine Strossen (1995: 193) was previously referenced, is both a law student and stripper, and claims that she finds stripping to be a "dream job" for the money it yields for so little time and effort.

The argument for economic liberty is, and has been, peremptorily challenged on the ground that prostitution is a unique phenomenon- certainly one that cannot simply be considered 'work'. Politicians and anti-choice feminists insist that prostitution is equal to exploitation, without any empirical arguments to reinforce their claims. The Canadian government's response to the Standing Committee on Justice and Human Rights' Report, *The Challenge of Change* (2006), acknowledges that prostitution is an area needful of attention and further research, but that legal reform is not the solution.⁵ In the last paragraph of the government's response to the report, Robert Nicholson (2007) claims:

Undeniably, those involved in prostitution are at a significantly greater risk of abuse and exploitation; strong and consistent responses to this serious social problem are required. This Government views prostitution as degrading and dehumanizing, often committed and controlled by coercive individuals against those who are frequently powerless to protect themselves from abuse and exploitation. Prostitution harms all of Canadian society, and Canadian women in particular. This Government condemns any conduct that results in exploitation or abuse, and accordingly does not support any reforms, such as decriminalization, that would facilitate such exploitation. Commodification and exploitation of women is never acceptable.

⁵ Conservative party members "agree that the status quo with respect to the enforcement of [prostitution] laws is unacceptable, but disagree that decriminalization is the solution" (SCJHR 2006: 91).

In essence, the Conservative government realizes that criminalizing prostitution causes harm, but nonetheless justifies its moralistically paternal approach in preventing degradation and exploitation. In legal terms, the government acknowledges *prima facie* rights infringements, but reasons that they are subject to reasonable limits, saved by s. 1.

Like the situation in the Netherlands, treating prostitution as a business subject to labour law provisions means not regarding prostitution- an inevitable, everyday occurrence- as an unsolvable 'problem'. Cecile Fabre argues for prostitution's regulation under labour and contract law from the 'sexual services as work' perspective (2006: 154). She challenges the view that sex work is demeaning, degrading and exploitive by comparing it to other service professions with where women are subordinate to male superiors/bosses such as "nurses, secretaries, supermarket cashiers, nursery and primary school teachers" (*Ibid.* at 178), not to mention women's traditional role performing tasks such as housework, clerical duties and caregiving. It is ironic that the government construes the liberty/choice to pursue one's own way of making money as more demeaning than being consigned to vocational roles under the proverbial 'glass ceiling'.

Prostitution in Canada: 'Don't Ask, Don't Tell'

Prostitution is a social reality in Canada. It goes on unabated every day, no doubt aided by the legal efforts to keep it out of sight. In Montreal, although federal law dictates that prostitution and its related activities are still illegal, municipal laws permit 'contact bars', which are strip clubs where contact is permitted between worker and client. In clubs such as 'Supersexe' and 'Supercontact', indecent acts amounting to prostitution are effectively permitted in the private or cordoned off areas of the club in V.I.P. rooms, 'champagne rooms' and semi-private cubicles. Thus, even in Canada, prostitutional acts occur in the

alcoves of 'champagne rooms', which represent a safe, private environment that certainly does not warrant criminalization. Given the reasoning in *Labaye*, a reasonable question to ask is why Canada does not legally formalize this if its approach is supposed to be unconcerned with governing morality.

Moreover, it is evident that Canadian law's approach to keep prostitution 'out of sight, out of mind' implicitly legitimizes indoor prostitution even though bawdy-house laws still exist. The Standing Committee on Justice and Human Rights asserted:

When prostitution is discussed, it is often the image of street prostitution that comes to mind. However, according to the testimony provided to the Subcommittee and most studies on the subject, street prostitution accounts for just 5% to 20% of all prostitution activity in the country. Street prostitution is the most visible manifestation for both the public and police, who often have to intervene when residents complain about the presence of persons practising prostitution on their street... [T]he enforcement of prostitution laws generally focuses on people involved in street prostitution, while those who engage in other forms of prostitution "operate with virtual impunity" (2006: 5-6)

Lowman (http://24.85.225.7/lowman_prostitution/ProLaw/prolawcan.htm) corroborates this argument with his data documenting a sharp decline in bawdy-house offences subsequent to the implementation of the communicating law. Indoor prostitution is thriving in Canada with most criminal justice attention being directed at the visible aspects of the trade. The indoor or off-street trade takes place through escort and call-girl services, massage and body-rub parlours, strip club champagne rooms and other specialty clubs or bars (*Ibid.*). Aside from the occasional police raid or undercover operation, these services are largely allowed to flourish.⁶ One sex worker summarizes the current situation in Canada when she claims, "[p]rostitution is going on all over. Everybody knows it's a hypocrisy [*sic*] and it's really okay; otherwise, the phone books wouldn't be advertising it" (St. James 1987: 86).

⁶ Most of the time these raids or 'crackdowns' result from community members' complaints (N.I.M.B.Y.) or from tips that there are coerced persons or minors in the facility (Ward 2003).

My own analysis found that on a given day, the Toronto Sun (April 2, 2008, p. 53) had 66 personal ads for escort or call-girl services and 65 for massage or body-rub parlours, with some ads implicitly advertising sexual services, and many *explicitly*. Eye Weekly (April 3, 2008, pp. 55-61) had seven full pages of sexual ads, with as many as 40 per page. And 13 of Now Magazine's (April 3, 2008, pp. 109-121) 122 pages were devoted to sexual services. One might draw the conclusion that the criminal justice system is engaging in a *de facto* legalization of the off-street trade and that legal reform is therefore unnecessary. This would be a hasty and myopic conclusion; formalization of a harm reduction approach to prostitution is necessary not only to primarily address the violence and abuse associated with a black market trade, but also to avoid the legal 'guessing game' of whether it is legal or not.

Writing sixty years ago, Ernst contended that there should be a reappraisal of statutes to make a "real distinction" between those who harm others and those who engage in self-regarding conduct that has no bearing on anyone else's life (the harm principle). He claimed that in practice, "this is done on a hit-or-miss basis by the vagaries of enforcement, but perhaps it would *serve a good purpose to formalize the procedure*" (1948: 139, emphasis added). If indoor prostitution is already a social reality and there is no discernible tangible harm flowing from this practice, the hesitance to formally regulate an off-street trade is illogically hypocritical and clings to moral sentiments. As *per* harm-reduction, it is also important to have legal regulation in order to impose standards and have recourse for violations and abuses.

Perhaps the most glaring hypocrisy in Canada is the current licensing schedule in place for body-rub parlours. In Lowman's analysis of Vancouver *de facto* prostitution

licensing by-laws, he finds that a body-rub parlour (a known venue for prostitution) has an annual fee of over 6,500 dollars in comparison to a normal massage parlour's fee of 172 dollars (2005: 14). Along with the fact that a body-rub parlour and escort service are the only two venues where the police take the names and addresses of the employees, Lowman's argument is that Vancouver is attempting to limit prostitution, *knowingly*, to these two venues. There is no other explanation for why employees are kept on police file and the fee to operate is so inflated. This practice is much like police corruption in the days of Prohibition where speak-easy operators paid policemen a little bonus 'on the side' to not bother their establishments. Barnett and Lowman outline the argument that this body-rub licensing schedule makes the government guilty of living off the avails of prostitution (2005: 27; Gardner 2002). Young (2002) certainly agrees, claiming that "the City is a pimp" as he documents the identical practice in Toronto with licensing fees for body-rub parlours of over 6,000 dollars compared to a holistic practitioner's fee of 100 dollars.

'Don't Smoke, Says the Smoker': Prostitution, Hypocrisy and Arbitrary Standards

Prostitution in one form or another, for better or worse, exists and will continue to exist. The argument has even been made that there are already manifestations of prostitution-related practices embedded within 'normal' society. For instance, Goode (1974) reasons that some non-careered wives might be considered 'prostitutes' inasmuch as they provide sexual (and other) services for the male who, in turn, provides them with a home and financial security. Kinsey's pioneering study also observed that paying for the services of a prostitute is similar to the process of dating where money- in the form of flowers,

candy, dinner dates, parties, theatres, nightclubs, trips, etc.- is exchanged for the eventual goal of sex (hopefully) (1948: 608). The utility of prostitution is that it allows an individual to circumvent the lengthy and uncertain process of courtship (*Ibid.*). These examples lead attorneys Gloria Allred and Lisa Bloom to highlight the law's hypocrisy by rhetorically asking, "Why is it immoral to be paid for an act that is perfectly legal if done for free?" (quoted in Meier and Geis 2006: 37). Deeming 'unmeaningful' or 'unloving' sex illegal is not only moralistic and subjective, but it should logically criminalize casual sexual relationships. Columnist Dan Gardner asks (March 14, 2008), "Is it worse to be caught paying for sex than simply having an affair?" The lines that society has drawn regarding sexual morality are simply arbitrary.

The hypocrisy that lawmakers display toward prostitution is, at times, almost comical. Public officials who create, uphold and enforce the prostitution laws have certainly been caught with their pants down, so to speak, in "hooker heaven" (Young 2002). In the U.S., the recent Eliot Spitzer affair highlighted the hypocrisy of public officials in punishing and condemning the very acts that they take part in. Spitzer, on at least two occasions during his time as Attorney General, held press conferences to boast about laying charges against the "wicked malefactors of the flesh trade" (Gardner 2008). Thus, Young fittingly remarks that the honourable profession should never have met the oldest profession, except to buy a trick (2003: 22).

The reality is that the street trade, and in fact much of the prostitution realm, is not glamorous. Most sex workers do not live the life of Julia Roberts in *Pretty Woman* or Demi Moore in *Striptease*. Too much of prostitution is motivated by poverty, drug

addiction⁷ and trafficking, or involves minors or a lack of economic alternatives (Plamondon 2002: 6). There is also the issue of the overrepresentation of Aboriginal women in the street trade in certain cities in Canada (SCJHR 2006: 12-3). The ‘messy actualities’ of the street trade thus explain the government’s strategy of ‘out of sight, out of mind’. But a legalized indoor trade would serve as a harm-reduction approach to ensure that street work would be prevented to as great an extent as possible by providing a legal venue for consenting adults. It would also address some of the above problems such as coerced work, poverty and trafficking by regulating the industry and counterbalancing this regulation with education that would disincentivize entry into prostitution and provide helpful and accessible means to pursue exit strategies from sex work (Lowman 2001: 8).

Turning the Tide: Can There Legally Be Sex in the Champagne Room?

The *Labaye* judgement seems to reflect contemporary Canadian liberal society’s sentiments toward sexual ‘deviance’: many may not like the idea of swinging or even approve of it, but they would not want to punish those who engage in it. In most parts of Canada, I contend, it would be very difficult to find anyone who believes that what fully consenting adults do behind closed doors should engage criminal justice concern, without appealing to religion or ‘puritan’ morality. For example, a 1984 poll found that a “substantial proportion of Canadians are prepared to tolerate prostitution in private premises” (Lowman 1993: 80). A 1992 public survey found that 52 percent of Canadians felt that prostitution should be fully legal, and earlier surveys found that this number

⁷ Although, whether drug abuse is a cause or effect (coping mechanism) with respect to prostitution is not always clear, nor can it be empirically determined (Plamondon 2002: 7).

would be much higher were the public informed that solicitation would not be allowed to take place in public (Ward 2003). Lowman opines that a majority of the public today would likely favour an 'indoor solution' based on the highly publicized Pickton trial (*Ibid.*). As noted, current prostitution law enforcement practices reflect Canada's practice of implicitly regulating an indoor trade, and many public officials are apparently growing weary of the hypocrisy and ambivalence of the current law and its selective enforcement:

Like most people in Canada, the police, even "vice" cops, no longer feel that they should be enforcing a moral code on consenting adults... And it's not only the police. Few judges or prosecutors want to punish prostitution involving consenting adults. Alan Young, a professor of criminal law at Osgoode Hall who has defended prostitutes and massage parlour owners in court, says he was even told by one judge that "we don't conduct bawdy house trials in this jurisdiction." Most criminal justice officials just don't see prostitutes as criminals, Mr. Young says, nor are they eager to punish their customers. (Gardner 2002)

Alan Young and a team of law students/lawyers have recently brought a constitutional challenge against the prostitution laws, concurrent with one in B.C., on which the Superior Court of Ontario will issue a decision later on this year. The challenge is based on "the recognized constitutional doctrine that the principles of fundamental justice under section 7 of the Charter of Rights prohibit the enactment of arbitrary and irrational laws that do greater harm than good" (Young 2007).

Young explains the justification for the challenge as follows:

People may strongly disagree about the morality of prostitution, but in a secular and pluralistic society it is impossible to construct a moral justification for any legal regime where physical security and the sanctity of life do not clearly trump sexual morality and the so-called "social nuisance" evil of prostitution... Knowing that there has never existed a legal or political regime that can eradicate prostitution, it is time we stopped the futile quest for a prostitute-free society and started to construct a legal regime that respects the safety and security of anyone who freely chooses to earn a living through the sale of sexual services. (*Ibid.*)

Puzzled by the fact that *Labaye* has not yet impacted bawdy-house laws, Young argues:

Whether one pays to participate in an orgy or to hire the services of a prostitute, I see no reason to bring in the heavy guns of the criminal law. When it comes to sex, I see only one legal rule of any real importance: for sex to be lawful there only needs to be consent, and it should not matter whether consent is secured by direct payment or weeks of expensive courtship with fine dining and false promises. (January 5-11, 2006)

The social reality implies that sustained criminalization is an exercise in ‘gross hypocrisy’. While the implementation of an ‘indoor solution’ remains to be seen in Canada, the Standing Committee on Justice and Human Rights urged that any approach must proceed without moral judgement (2006: 90). Law reform/harm-reduction with respect to prostitution may be a morally complicated issue for some, but it is a measure that strives toward the preservation of constitutionally entrenched values and basic human rights. As such, it is time for legislators, judges, Parliament and the Canadian public to accept the ‘inconvenient truth’ of a legalized indoor sex trade.

Conclusion

Based on the reasoning in *Labaye*, an indoor trade should be a very real possibility in Canada. The utility of subordinating the Conservative government’s hegemonic political ideologies in favour of a harm-reduction strategy lies in putting an end to the harms associated with a thriving street trade. Harm-reduction policies have been implemented in other countries, which signals an acceptance of the fact that prostitution is a continuing reality, best dealt with through means other than criminalization. Countries such as Holland thus feel it is more prudent to focus on mitigating prostitution’s harmful aspects through strict legal and economic regulation. Such economic regulation under labour and contract law would afford a right to economic liberty and equality that is not explicitly enumerated as a constitutional right. In any case the government continues to maintain that sex work is not work, but rather a form of degradation and exploitation. However, instructing adult women that they should only pursue ‘legitimate’ jobs such as nurses and nannies is a debasing stance itself. The fact that there is a flourishing indoor trade in

Canada in the recesses of champagne rooms, hidden-away brothels as well as within a staggering call-girl industry, and licensed massage and body-rub parlours attests to the government's vulgar hypocrisy in dealing with prostitution.

Labaye provides an ideal point of departure to end this hypocrisy and formalize a harm-reduction strategy, which would ensure that sex work is well out of the public view but not out of the government's consciousness. And prostitution needs to be a matter for the government's concern because breaking the cycle of hypocrisy and ambiguity is a necessary first step in preventing the high rates of women's murder, abuse and general victimization. These ills will only persist and conceivably worsen if the Canadian government continues to marginalize prostitution. The government has for too long circumvented its duty of effectively dealing with an issue of great public concern.

Chapter 7: CONCLUSION

The legal situation in relation to prostitution in Canada remains a complicated one. Some claim that we do not know what the legal status of prostitution is in Canada (cf. Lowman 2005). This argument is based on the conflicting theory and practice of the law: police ‘sweep’ the streets to keep it out of sight; an indoor trade is, again, some would say, *explicitly* regulated (Barnett 2006; Young 2001; Lowman 2005); a monolithic escort service industry is allowed to flourish; and yet there are still laws on the books pertaining to the venues (bawdy-houses) in which all these clandestine prostitutional acts take place. The purpose of this thesis was to show a way in which this situation can be addressed effectively by adhering to fundamental liberal principles and avoiding the practice of strict moral regulation. This is why *Labaye* provides such an excellent opportunity to launch a re-examination of the indoor prostitution prohibition: the reasoning in that case renounced moral regulation and exhorted a harm-based approach to determining criminal behaviour. The approach in *Labaye* to criminalize on the basis of tangible harm (implicitly guided by J.S. Mill’s harm principle) can provide a solution to the Canadian prostitution ‘problem’. The application of this strategy would ensure that what is morally undesirable or distasteful to some does not entail criminal sanctions for those who take part, absent adducible harm. And more importantly, it would curtail unacceptably high rates of victimization and violence that occur within the black market street trade, as well as aggressive law enforcement practices that target already marginalized women. Therefore, this thesis argues for the recognition and promotion of individual liberty and human rights for consenting adults in the arena of selling sexual services.

The intent in this thesis is not to suggest that prostitution is desirable or undesirable, nor good or bad. Rather the intent, upon taking stock of contemporary liberal Canadian society and the symbiotic evolution of morality and law, is to propose legal reform based on harm-reduction principles. The corollary of applying *Labaye*'s harm-based approach to the prostitution prohibition is that continued criminalization becomes unjustifiable when the moral regulation aspect is removed. Thus, there are no preconceived notions or biases that are brought to this argument; the conclusion is a natural outcome of the application of the harm principle to an area of moral ambiguity.

The relevant literature on prostitution is replete with arguments for harm-reduction and legal reform. It was therefore a goal of this thesis to provide a new perspective on a perennially contentious and oft-debated social issue such as prostitution. The 'fresh' aspect I have provided to this debate is using the libertarian logic of a recent Supreme Court case to argue for prostitution legal reform with the goal of ending of human rights abuses and individual liberty violations. Although *Labaye* was a swingers case, it dealt with legal issues related to prostitution (bawdy-house and indecency laws), and more importantly it demonstrates the utility of harm-based legislation. This work takes on a deeper dimension when the statistics concerning sex workers' victimization rates are considered. It also heralds individual liberty and autonomy as fundamental values that should only be encroached upon for *demonstrably* important reasons.

The prevailing public perception of prostitution is typically black or white, good or bad; normative assumptions are the norm, so to speak, for media portrayals of prostitution-related stories and thus the public's opinion. When explaining my work to others, the question I receive most is, "So, are you saying it's good or bad?" I have

attempted to say neither, but rather to show that by extricating morality from the current prostitution legal regime, reform *must* occur. Individuals are constantly inundated with images of sex work as dirty, wrong, sinful and immoral. The aim, as stated, has been to avoid these moralistic conceptualizations and progress toward a new legal approach to a complex matter. Given the social realities- that there is a thriving indoor/off-street trade, that the ambivalent and unclear legal structure causes significant harm and that this harm will continue with an insuppressible profession- a new legal approach is direly needed. And this new approach must be premised on clarity, fairness and an overall principled approach. The failure of Parliament to engage in this 'challenge of change' as suggested by the Standing Committee on Justice and Human Rights' 2006 Report illustrates a reluctance to take a firm stance on a matter of great public importance. This thesis is therefore a concerned response, with a new approach based on a recent Supreme Court ruling, to the government's frustrating lack of decisive action.

Constructing the argument required a solid grounding of the relevant theoretical precepts, Canadian legislation and case law, and the social realities of the trade. The first two chapters were together an expansive examination of the theoretical aspects of the argument. In the first chapter specifically, liberalism was discussed in order to introduce the principle of harm, a fundamental component of the argument. A further discussion of crime, morality and the limitations of the criminal law served to frame the libertarian view of harmless criminalized behaviour as victimless or consensual crime, which naturally set up the discussion of social constructionism. Liberal philosophy is absolutely central to the argument and thus it was important to emphasize the notion of legitimate criminalization being based upon harm, and not immorality as such.

The law's governance of morality was examined more generally in the third chapter by referencing the social and religious genesis of Canadian laws relating not only to prostitution, but non-traditional sexuality. Demonstrating that the social construction of 'criminality' does not necessarily reflect an act's inherent 'badness' was an integral distinction to make for this discussion in framing sex work as a deviant behaviour only in the literal sense of the word deviant, i.e., non-traditional. It was also essential to outline the effects of discursive identity construction, something that to this day contributes to the enduring legal prohibition of prostitution. This led to the later argument that the moral regulatory aspect intrinsic to prostitution criminalization becomes highlighted when the ruling in *Labaye*, which dealt with payment for group sex in a private club, and thus with legal issues of bawdy-houses and indecency, has yet to have an impact on prostitution's bawdy-house law.

An evaluation of case law dealing with obscenity and indecency revealed that the way courts interpret and assess sexual immorality is vastly inconsistent but nonetheless has relied often on moral judgements. As the legal test for determining indecency became more objective in the cases over the years, the courts continued to display a preference for legislating on the basis of morals, rather than harm. *Labaye* thus was seen to be a hallmark case insofar as it explicitly delineated the parameters of the community standard of tolerance test. This new standard was articulated to be as 'amoral' and harm-based as possible, implicitly abiding by the strictures of Mill's harm principle. As such, the majority of the Court could not appeal to any facts showing that swingers clubs do or would cause any tangible harm. As the dissenting Justices stated, the only way that the activities in *Labaye* could be considered criminal would be if the community standard of

tolerance test was never supplanted by a strictly harm-based test. This case is of eminent importance to the discussion because of the eventual harm-reduction solution it aids in (conceptually) supporting.

Since *de facto* criminalization of prostitution persists, the legal justification for this continued criminalization was taken up in the fifth chapter. While it is generally recognized by many (e.g., Standing Committee for Justice and Human Rights 2006) that prostitution is an area needful of legal reform, prior attempts to do so in Canada and Great Britain resulted in no meaningful change. The liberal principles embodied by the Wolfenden and Fraser Committees as well as *Labaye*, though, would beneficially impact prostitution regulation if cautiously and judiciously implemented. Since this has not happened, the ‘underworld’ of prostitution remains rife with serious problems and harms. The unequivocal qualitative and quantitative data illuminating the significant harms prevalent in the sphere of street prostitution render legal paternalism an illegitimate criminal justice practice. The discussion of radical feminism’s maternalism was intended to underscore how harmful it is to proscribe individual choice and autonomy for moralistic reasons. The goal of the chapter, then, was ultimately to make the case for *prevention of prevention* and ‘embrace’ *Labaye*’s precedent. This enables me to logically and coherently posit a harm-reduction ‘solution’ in the following chapter.

Labaye was used specifically in the sixth chapter to justify a regulated indoor facilitation of the sex trade toward the end of the severe harms associated with a black market street trade. As observed in Holland, a regulated industry protected by labour law provisions *amoralistically* addresses the inevitability of prostitution and seeks to control its exploitive and undesirable aspects such as violence, pimping and youth prostitution

(not to mention STDs, a topic not discussed). Using Holland as an example helps to support the claim that Canada would profit from a similar harm-reduction approach. Primarily, women would be accorded full equality, liberty and bodily autonomy, which are all fundamental constitutional and basic rights/values. Based on current patterns of enforcement and criminal justice concern targeting only the visible aspects of prostitution as well as highly questionable licensing practices, the argument was made that Canada already regulates an indoor trade. It is therefore imperative to apply *Labaye*'s logic to prostitution to avoid the 'gross hypocrisy', for which there are costly results: unwarranted deprivation of liberty and continuing high rates of sex workers' victimization. The opportunity that *Labaye* provides for adopting a new approach to prostitution regulation, without moralistic paternalism and toward harm-reduction, must be seized.

Benedikt Fischer (2005) astutely argues that, "This matter [prostitution] has thus become a political 'no-winner', and law and policy reform will occur only if politicians are pressured to assume proactive and determined leadership, which may be poor in terms of potential vote gains but rich in merit for 'good government'...". Certainly, hesitating to formalize a harm-reduction strategy and maintaining a set of laws that are both hypocritical and harmful are practices antithetical to 'good government'. While the current Conservative government's stance is that prostitution is tantamount to exploitation, it was noted earlier that they nonetheless agree that the legal status quo with respect to prostitution is 'unacceptable'. MP Libby Davies claims:

From 2003 to 2006, I participated in an all-party parliamentary committee that studied extensively the current laws pertaining to prostitution. After cross-Canada hearings, both in public and in-camera (a closed session), there was near unanimous agreement from the over 300 witnesses heard by the committee that the present regime concerning prostitution is unworkable, contradictory and harmful. (www.libbydavies.ca/pdf/sex-law-rabble-june07.pdf)

This committee's ultimate submission (*The Challenge of Change* [2006]) did not, as was

argued, produce any meaningful legal change because of the Conservatives' insistence on 'protecting' women. Lowman nonetheless believes that "[t]his report and its research gives a good portrait of prostitution in Canada today, and listened to sex trade workers far more than any earlier government effort. It is a very important document, if only because it forced the Harper Conservatives to reveal their radical moral agenda on this matter" (Sandborn 2006). In addition to leading Canadian scholars such as Lowman, it is no coincidence that almost everyone closely involved in the realm of sex work, whether they are sex workers themselves, scholars/researchers, or part of outreach organizations or unions, agree that the current legal regime in relation to prostitution is 'unworkable, contradictory and harmful'. If forced from their judgemental high towers to face the social realities up close/in person, perhaps moralistic politicians, law-makers and judges would reach the same conclusions.

However, the reality is that politicians, lawmakers and individual citizens are not likely to be roused from their entrenched moralistic positions effortlessly or quickly. It is therefore appropriate in closing to be reminded of Beverley McLachlin's 'neo-Voltairian' reasoning in *Labaye* when she notes that moral views are insufficient to warrant criminalization, no matter how widely held those are. Rather, "as members of a diverse society, we must be prepared to tolerate conduct of which we disapprove, short of conduct that can be objectively shown beyond a reasonable doubt to interfere with the proper functioning of society" (*R. v. Labaye* [2005] at para. 52).

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