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## The Right to Swing?

### Introduction

In *Labaye v. the Queen*, the Supreme Court of Canada recently held that the activities occurring inside a Montreal swingers club do not qualify as indecent.<sup>1</sup>

Undoubtedly speaking for many, the *Globe and Mail*, the country's most popular newspaper, claimed that the decision made "no sense," noting "You don't need to be a fuddy-duddy to cringe at the Supreme Court's libertarianism."<sup>2</sup>

*Labaye* is an incredibly significant case and raises important issues about the power of governments to prohibit morally offensive conduct. Although I concur with the judgment in the case, the Court's shift from a community standards test for indecency to one based on harm solely on harm is puzzling. *Labaye* is inconsistent with many of the court's previous rulings, and as a practical matter, may have abolished the crime of indecency all together. The decision also leaves the constitutional status of swingers clubs (and the acts that occur therein) unresolved. If such establishments are not indecent, can they be outlawed on other grounds? What type of regulations can be placed on them? *Labaye* suggests that the fact a society finds a particular practice morally

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<sup>1</sup> *Labaye v. The Queen*, 2005 SCC 80 (2005).

<sup>2</sup> Editorial, *Just Like That There Go Community Standards*, GLOBE & MAIL (Toronto), Dec. 22, 2005, at A2.

repugnant is not a legitimate reason to prohibit it. Does this mean that morality laws<sup>3</sup> in general are suspect?

In this article, I will argue that individuals have a fundamental right to participate in private sexual relations of their choosing without interference from the state. As the United States Supreme Court has held, there is “an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.”<sup>4</sup> I contend that the conduct at issue in *Labaye* is protected under the liberty provision of the Charter of Rights and Freedoms<sup>5</sup> and that the moral offensiveness of the conduct does not justify criminal prosecution. Restrictions might be placed on swinger clubs in so far as they pose a nuisance or bring about so-called secondary effects,<sup>6</sup> but the mere moral disapproval of swinging is not a strong enough interest<sup>7</sup> under section 1 of the Charter to justify infringing the rights of the participants. Indeed, it is not for the state to assess the propriety of private sexual behavior among consenting adults.

Under the approach I advance, we need not say that only harmful conduct can be prohibited. This claim, which lurks in the background of *Labaye*, has some appeal but

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<sup>3</sup> “Our society prohibits, and all human societies have prohibited, certain activities not because they harm others but because they are considered, in the traditional phrase, “contra bonos mores,” i.e., immoral.” *Barnes v. Glen Theatre*, 501 U.S. 560, 575 (1991) (Scalia, J., concurring).

<sup>4</sup> *Lawrence v. Texas*, 539 U.S. 558, 572 (2003).

<sup>5</sup> *See* Can. Const. (Constitution Act, 1982) pt. I (Charter of Rights and Freedoms), 7.

<sup>6</sup> *See Renton v. Playtime Theatres Inc.*, 475 U.S. 41, 50 (1985) (holding that strict zoning laws applied to adult theatres were constitutionally permissible because they sought not to suppress the speech of these theatres but eliminate negative “secondary effects” such as urban blight produced by the presence of adult theatres in certain neighborhoods).

<sup>7</sup> *See e.g.*, *Lawrence*, 539 U.S. at 578 (holding that Texas’s anti-sodomy law furthers no state interest that could justify interference with individuals’ private sexual decisions); *Dudgeon v. United Kingdom*, 45 Eur. Ct. HR (ser. A) para. 61 (1981) (holding that a concern for the moral fiber of society does not justify criminalizing sodomy); *Powell v. State*, 510 S.E.2d 18, 26 (Ga. 1998) (“While many believe that acts of sodomy, even those involving consenting adults, are morally reprehensible, this repugnance alone does not create a compelling justification for state regulation of the activity.”).

has been rejected by Canada's Supreme Court.<sup>8</sup> The Court cited cannibalism, bestiality, and cruelty to animals as examples of crimes that rest on their offensiveness to social values as opposed to the harm they might cause.<sup>9</sup> The reason sexual conduct like swinging cannot be prohibited is because it falls within the "irreducible sphere of personal autonomy wherein individuals may make inherently private choices free from state interference."<sup>10</sup> There may be legitimate reasons to regulate the conduct of swingers in certain instances. However, as a general matter, the state is not justified in interfering in the intimate relations of consenting adults, and the Court should have made this plain in *Labaye*.

#### Labaye v. The Queen

Labaye was the owner of club Orage in Montreal.<sup>11</sup> The club's purpose was to facilitate group sex among its members (and their invited guests).<sup>12</sup> Members paid an annual fee, and no one was permitted to join the club unless he/she expressed both knowledge of the nature of the club and shared the club's views on group sex.<sup>13</sup> A doorman manned the main door to ensure that only members and their guests could enter.<sup>14</sup> The club was three floors in all, and group sex occurred only on the third floor.<sup>15</sup> The two lower floors contained a bar and a salon, but no one was ever paid for sex.<sup>16</sup>

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<sup>8</sup> *The Queen v. Malmö-Levine*, 2003 SCC 74, para. 115 (2003). The case involves whether smoking marijuana should be protected under Article 7 of the Charter.

<sup>9</sup> *Id.*, para. 118.

<sup>10</sup> *Blencoe v. British Columbia*, 2000 SCC 44, para. 51(2000); *Godbout v. Longueuil*, 3 S.C.R. 844, para. 66 (1997).

<sup>11</sup> *Labaye v. The Queen*, 2005 SCC 80, para.1 (2005).

<sup>12</sup> *Id.*, para. 5.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*, para. 7.

The owner of Orage, Jean - Paul Labaye, was convicted of keeping a “common bawdy house for the practices of acts of indecency” under s.210(1) of the Criminal Code of Canada, R.S.V. 1985, c. - 46.<sup>17</sup> The Supreme Court overturned the conviction, holding that swinging was not indecent under Canadian law.<sup>18</sup>

In quashing the conviction, the majority defines an indecent act as one that “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.”<sup>19</sup> It cites as examples conduct that infringes the autonomy of others, predisposes others to anti-social behavior or physically or psychologically hurts participants.<sup>20</sup> In the Supreme Court’s view, the harm must also be “of a degree that is incompatible with the proper functioning of society.”<sup>21</sup> The dissent charges that the Court has replaced the community standards test of tolerance (i.e. what the community would tolerate others doing) with a test that looks solely at harm.<sup>22</sup>

The dissent overstates the point slightly. While it is true that the Court rejects the community standards test and views it as too subjective<sup>23</sup>, the majority is explicit that “[i]ndecency connotes sexual mores.”<sup>24</sup> Thus to be indecent, conduct must be harmful, and *also* violate sexual mores. Although the majority could have been much clearer on this point, the harm test is best understood as particularly demanding application of

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<sup>15</sup> *Id.*

<sup>16</sup> *Id.*, paras. 6- 8.

<sup>17</sup> *Id.*, para. 1.

<sup>18</sup> *Id.*, para. 70.

<sup>19</sup> *Id.*, para. 62.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*, para 75 (Bastarache dissenting).

<sup>23</sup> *See id.*, para. 18.

<sup>24</sup> *Id.*, para. 51.

community standards. Under *Labaye*, conduct is indecent if it offends prevailing sexual mores, but the fact-finder does not rely solely on his own nebulous concept of community standards to determine whether a violation has taken place. Rather, the sexual conduct at issue must be objectively offensive, and the only sexual conduct that is objectively offensive, according to the Supreme Court, is sexual conduct that offends a fundamental value of Canadian society by, for example, infringing the autonomy of others or predisposing citizens to anti-social behavior.<sup>25</sup>

In seeking to give objective content to indecency, Canada's Supreme Court divorces indecency from morality. Since Canada is a pluralistic society, offending the moral views of some group of people is not enough to make the conduct objectively harmful.<sup>26</sup> An act might not be indecent even if the majority of society finds it morally repugnant.<sup>27</sup> This narrow view of harm - along with the Court's demand that the allegedly indecent activity must be "incompatible with the proper functioning of society"<sup>28</sup> sets a very high bar for future prosecutions for indecency. Society has to tolerate all morally offensive sexual conduct that falls short of bringing about social disorder.<sup>29</sup>

It is an open question whether previous indecency cases are compatible with *Labaye*. In *Mara*, for example, the manager and owner of an exotic dancing establishment were charged with allowing indecent performances.<sup>30</sup> The establishment's dancers provided "lap dances" for a fee, and customers could fondle the breasts and

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<sup>25</sup> *See id.*, para. 36.

<sup>26</sup> *Id. But see id.*, para. 109 ("There is also harm where what is acceptable to the community in terms of public morals is compromised.") (Bastarache dissenting).

<sup>27</sup> *See id.*, para. 37.

<sup>28</sup> *Id.*

<sup>29</sup> *See id.*, para. 110 (Bastarache dissenting).

<sup>30</sup> *Mara v. The Queen*, 1997 Can. Sup. Ct. Lexis 41, para. 5 (1997).

genitalia of the nude dancers.<sup>31</sup> The Supreme Court found this conduct indecent, reasoning that it both demeaned and objectified women. The Court wrote, “[This conduct] dehumanizes and desensitizes sexuality and is incompatible with the recognition of the dignity and equality of each human being.”<sup>32</sup> The concerns cited here do constitute “harm” under the *Labaye* framework.<sup>33</sup> However, it is important to note how the Court came to its conclusion in *Mara*. It did not, for example, look at empirical data that suggested a connection between exotic-dancing establishments and the way women are perceived by society as a whole. Rather, it simply noted the community standards were exceeded as evidenced by the fact that Toronto had recently passed a by-law prohibiting contact between adult entertainers and their customers.<sup>34</sup>

The equality between the genders issue was specifically taken up in *Labaye* and discounted because of the government’s inability to produce evidence of anti-social attitudes towards women produced by swinging.<sup>35</sup> This is a dramatic departure from *Mara* as the burden is now on the government to prove that the offending conduct is truly harmful. As the Court stated in *Labaye*: “Vague generalizations that the sexual conduct at issue will lead to attitudinal changes and hence anti-social behavior will not suffice . . . The Crown must establish a real risk that the way people live will be significantly and adversely affected by this conduct.”<sup>36</sup> To prosecute swinging as indecency the state must show that swinging poses a significant risk of harm to society (by demeaning women for example), and that this harm would have to be of a degree that is “incompatible with the

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<sup>31</sup> *Id.*, para. 4.

<sup>32</sup> *Id.*, para. 34.

<sup>33</sup> *See id.*, para. 67.

<sup>34</sup> *Id.*, para. 36.

<sup>35</sup> *See id.*, para 67.

<sup>36</sup> *Labaye v. The Queen*, 2005 SCC 80, paras. 57-58 (2005).

proper functioning of society”<sup>37</sup> It is questionable whether the state could ever meet this high burden, raising doubts not only about *Mara* but *Queen v. Butler*, another significant indecency case.<sup>38</sup>

One possible way to distinguish *Labaye* from *Mara* is that in the former the establishment at issue is a “public tavern”<sup>39</sup> whereas, as the majority emphasizes, the swingers club in *Labaye* is private.<sup>40</sup> Of course, there is no fine line between “public” and “private” places.<sup>41</sup> The swingers club in *Labaye*, for example, was not open to the general public, but it did advertise in periodicals and was located in a commercial building. All that was necessary to join was a small fee and a short interview.<sup>42</sup> In any case, why should it matter that *Mara* involves a public tavern whereas *Labaye* involves a private club? Activities in private establishments can be just as indecent (i.e. harmful) as activities in public ones. In *Labaye*, the Court found no evidence of harm because the only ones exposed to the goings-on inside the club were already predisposed to swinging.<sup>43</sup> Similarly, the only ones exposed to the lap dances in *Mara* were the establishment’s patrons who were presumably there for the purpose of being titillated by

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<sup>37</sup> *Id.* (emphasis added).

<sup>38</sup> *The Queen v. Butler*, 1 S.C.R. 452 (1992)(holding that pornographic videos that portray women as sexual objects are obscene and indecent because of the harm they pose to women and society as a whole). In *Butler*, the Court noted that there was some evidence that pornography fostered negative views of women. *See id.* at 479. However, it also cited a government report that suggested there was no causal link between pornography and anti-social behavior. *See id.* at 501. The decision was ultimately not based on whether the videos posed a significant risk of harm but rather the fact that the community *perceived* this type of pornography as posing a significant risk of harm. *Id.* at 479. This is precisely the type of subjective moralizing that *Labaye* warns against. Moreover, presumably the only ones renting particularly hardcore pornography are those that already have certain types of views about sexuality in the first place so selling these materials would not significantly increase the harm to society, let alone cause social disorder.

<sup>39</sup> *See Mara*, 1997 Can. Sup. Ct. Lexis 41, paras. 34-35 (1997).

<sup>40</sup> *See Labaye*, 2005 SCC 80, para. 65.

<sup>41</sup> *See Lior Jacob Strahilevitz, Consent, Aesthetics, and the Boundaries of Sexual Privacy After Lawrence v. Texas*, 54 DEPAUL L. REV. 671, 697(2005). One commentator has argued, for example, that gay bars and bath houses are always private places because naive passersby are routinely warned about what they will see. LAUD HUMPHREYS, TEAROOM TRADE: IMPERSONAL SEX IN PUBLIC PLACES 160 (1975).

<sup>42</sup> *See Labaye.*, 2005 SCC 80, paras 78-80.

<sup>43</sup> *Id.*, para. 68.

nude women. If regular exotic dancing is permissible, how could the additional exposure to lap dances significantly exacerbate the harm to willing spectators and participants, let alone cause harm to a degree that is “incompatible with the proper functioning of society”?<sup>44</sup>

The crucial difference between *Mara* and *Labaye* in my view is that in the former the participants were paying individuals to have sexual relations with them. The fact that money is involved does not make an act more indecent, however, and *Mara* does not suggest otherwise.<sup>45</sup> Society would not be harmed any less - and the acts would be no less indecent in *Mara* - if the dancers allowed themselves to be groped for free. What the commercialization of sexual conduct does do is waive any constitutional protection the conduct may enjoy. “Liberty presumes an autonomy of self that includes freedom of thought, belief, expression and certain intimate conduct,”<sup>46</sup> and sex for money (whether in a bar or a private residence) is a commercial transaction, not intimate conduct.<sup>47</sup> Thus, the state can, if it chooses, prosecute lap-dancing as criminally indecent. *Labaye*, unfortunately, does not address whether the right to engage in the sexual relations of one’s choice is protected under section 7 of the Charter, suggesting that sexual conduct by adults in a private residence may merit no more protection than the lap-dances in *Mara*.

If the Supreme Court of Canada is correct, criminal indecency necessarily involves some harm.<sup>48</sup> However, the Court held previously in *Malmo-Levine*<sup>49</sup> that harm

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<sup>44</sup> *Id.*

<sup>45</sup> *Mara*, 1997 Can. Sup. Ct. Lexis 41, para. 35.

<sup>46</sup> *Lawrence v. Texas*, 539 U.S. 558, 562 (2003).

<sup>47</sup> *See id.* at 578; *see also* *State v. Conforti*, 688 So.2d 350, 353 (Fla. Dist. Ct. App. 1997) (“the right to privacy applies to personal matters, and not to commercial ventures or transactions”).

<sup>48</sup> *Labaye*, 2005 SCC 80, para. 24.

was not a prerequisite for criminalization: “[W]e do not think there is a consensus that the harm principle is the sole justification for criminal prohibition . . . . The state may sometimes be justified in criminalizing conduct that is either not harmful (in the sense contemplated by the harm principle) or that causes harm only to the accused.”<sup>50</sup> How to reconcile these two decisions? *Malmo-Levine* seems to allow the state to prohibit objectionable conduct such as swinging, but as limited by *Labaye*, prevents it from prosecuting such conduct for violating subjective standards of indecency. If this interpretation is correct, legislators, may, if they choose, criminalize conduct like swinging, but they must do so directly. This makes sense because of the Supreme Court’s concern in *Labaye* that juries and judges were merely expressing their personal preferences and not truly speaking for the community in criminal indecency cases.<sup>51</sup>

*Labaye* therefore leaves the status of swinger clubs to the legislature. Legislatures can either overturn the Court’s decision via the notwithstanding clause of the Canadian Constitution<sup>52</sup> or could enact a specific statute targeting swinging. While I do not deny that the lawmakers can regulate swinger establishments, I do not believe that the clubs such as the one at issue in *Labaye* can be prohibited and next I will turn to why this is so.

## The Right to Sexual Liberty

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<sup>49</sup> *The Queen v. Malmo-Levine*, 2003 SCC 74, para. 19 (2003) (holding that smoking marijuana in the privacy of one’s own home does not fall under the right to liberty - whether or not an individual’s marijuana-smoking harms society as a whole).

<sup>50</sup> *Id.*, para. 115 (2003).

<sup>51</sup> “In a diverse, pluralistic society whose members hold divergent views, who is the community? And how can objectively determine what the community, if one could find it, would tolerate? . . . . In the end, the question often came down to what they, as individual members of the community, would tolerate.” *Labaye*, 2005 SCC 80, para. 18.

<sup>52</sup> Can. Const. (Constitution Act, 1982) pt. I (Charter of Rights and Freedoms), 33.

Under Section 7 of the Charter of Rights and Freedoms, every person “has the right to life, liberty, and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.”<sup>53</sup> The Supreme Court of Canada has consistently held that “liberty” is more than freedom from physical restraint and should be interpreted broadly.<sup>54</sup> In *Children’s Aid Society of Metropolitan Toronto*, it declared, “In a free and democratic society, the individual must be left room for personal autonomy, to live his or her own life and to make decisions that are of fundamental personal importance.”<sup>55</sup> Individuals do not have an unbridled freedom to do whatever they please, but they have a right to make fundamental personal decisions without interference from the state.<sup>56</sup> The Court has held that section 7 allows a person to choose medical treatment for his/her child,<sup>57</sup> loiter in a public place,<sup>58</sup> and decide where to establish his/her home.<sup>59</sup>

Whereas Canada protects individual autonomy through section 7’s liberty provision, the United States Constitution protects individual autonomy as a matter of substantive due process. As the United States Supreme Court explained in *Casey*, “At the heart of liberty is the right to define one’s concept of existence, of meaning, of the universe, and of the mystery of human life.”<sup>60</sup> The European Convention on Human Rights similarly guarantees individuals “respect for his private and family life, his home and his correspondence,” and public authorities can only encroach when the public good

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<sup>53</sup> Can. Const. (Constitution Act, 1982) pt. I (Charter of Rights and Freedoms), 1.

<sup>54</sup> See e.g., *Blencoe v. British Columbia*, 2000 SCC 44, para 51(2000); *Godbout v. Longueuil*, 3 S.C.R. 844, para. 66 (1997); *B. v. Children’s Aid Society of Metropolitan Toronto*, 1 S.C.R. 315, 368 (1995).

<sup>55</sup> *Id.*

<sup>56</sup> *Godbout*, 3 S.C.R. 315, para. 66; see also *Blencoe*, 200 SCC 44, para. 49.

<sup>57</sup> *Children’s Aid Society*, 1 S.C.R., 315, para. 80.

<sup>58</sup> See *The Queen v. Heywood*, 3 S.C.R. 761 (1994).

<sup>59</sup> *Godbout*, 3 S.C.R., para. 66.

<sup>60</sup> *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992).

demands it.<sup>61</sup> Regardless of the precise formulation, there are some decisions - personal and private in nature - that individuals are entitled to make without interference from the state, even if the state is able to assert a strong reason to intervene.<sup>62</sup>

Whether to swing - or indeed engage in any other kind of private consensual sexual conduct - is increasingly recognized as the type of decision that must be left to the individual. Although the Supreme Court of Canada has never held that the right to liberty entails the right to have the private sexual relations of one's choosing, the European Court of Human Rights made clear in the *Dudgeon* case that this is precisely the type of highly personal and intimate decision that goes to the core of personhood.<sup>63</sup> Although the Court recognized that the state had a strong interest in fostering public morality, the state could not prohibit Mr. Dudgeon from engaging in sexual acts with consenting male partners.<sup>64</sup> Similarly, in *Lawrence v. Texas*, the United States Supreme Court reversed an earlier precedent<sup>65</sup> and concluded that individuals had a right to engage in sodomy as matter of due process even if the state found such acts deviant.<sup>66</sup> The Court took note of trends within the United States as well as internationally and concluded that there is an "emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex."<sup>67</sup> Justice Stevens made this point years earlier in his dissent to *Bowers* (adopted by the Court in *Lawrence*) when

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<sup>61</sup> See Convention for the Protection of Human Rights and Fundamental Freedoms, art. 8(2), Nov. 4, 1950, 213 U.N.T.S. 222.

<sup>62</sup> See e.g., *Casey*, 505 U.S. at 833 (holding that a woman's right to terminate an unwanted pregnancy trumps the state's legitimate interest in protecting potential life); *Dudgeon v. United Kingdom*, 45 Eur. Ct. HR (ser. A), para. 61 (1981) (holding that a homosexual individual's right to have private sexual relations is not superseded by the state's concern for public morality).

<sup>63</sup> See *id.*, para. 60 (Adult sexual acts are a "private manifestation of the human personality.").

<sup>64</sup> See *id.*, para. 41.

<sup>65</sup> *Bowers v. Hardwick*, 478 U.S. 186 (1986).

<sup>66</sup> *Lawrence v. Texas*, 539 U.S. 558, 567 (2003).

<sup>67</sup> *Lawrence*, 539 U.S. at 572.

he wrote that the Constitution's Due Process Clause protects personal decisions with regards "the intimacies of [the] physical relationship."<sup>68</sup>

We should not read *Lawrence* or *Dudgeon* to mean that people should feel free to pursue their sexual proclivities wherever they happen to take them. Certainly there is no constitutional objection to banning practices such as bestiality and necrophilia, no matter how much this happens to impact individuals interested in these activities. The reason that such prohibitions are permissible, however, is not that these individuals' behavior runs afoul of contemporary sexual mores. The fact that a given community morally disapproves of necrophilia and bestiality is irrelevant to the question of whether such behavior can be criminalized. Rather, these activities can be prohibited because society does not recognize the claims of those engaged in such activities as implicating individual autonomy. Choosing to couple with another consenting adult is an altogether different decision than choosing to sexually impose oneself on an animal or cadaver. Even those who are morally opposed to homosexuality must concede that the decision to engage in such activity goes to the core of individual autonomy. (Indeed, the claim that some opponents of homosexuality make is that homosexuals should choose heterosexuality, not that they should not be free to choose their sexual partners). The right to copulate with other consenting men and women, or not to do so, is important to everyone - even if there is moral disapproval of how some individuals exercise this right. Necrophilia only implicates the individual autonomy of necrophiliacs.

Sexual liberty, therefore, does not protect all conduct that can be loosely classified as 'pertaining to sex.' Rather, individuals have a right to make fundamental decisions about sex that go to the core of personal autonomy. This is the message of *Lawrence*.

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<sup>68</sup> See *id.* at 578 (citing *Bowers*, 478 U.S. at 216).

## Canada & Sexual Liberty

In *Labaye*, Canada's Supreme Court missed a valuable opportunity to determine what, if any, constitutional protection sex has under Canada's constitution.<sup>69</sup> Does the right to liberty allow one to make private decisions about sex? How far does this liberty extend? If the Court had confronted these questions, it might have resolved the status of swinger clubs without drastically redefining indecency law.

At least one Canadian court has recognized that the right to sexual liberty is within the ambit of section 7. In 2001, Prince Edward Island's Supreme Court ruled that the right to liberty protects a doctor's sexual relationship with his patient, when their relationship did not begin until several years after their professional relationship terminated.<sup>70</sup> The province's high court noted that section 7 is premised on a respect for individual autonomy, and if choosing where to establish one's home is a quintessentially private matter, then choosing with whom to establish a sexual relationship in that home must be one as well.<sup>71</sup> The court did not deny that the state had legitimate reasons to prohibit intimate doctor/patient relations, but this rationale did not justify infringing the rights of the doctor in this case.<sup>72</sup> As the Canadian Supreme Court has said, "[T]he

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<sup>69</sup> In Canada, sodomy laws were repealed in 1969 when then-justice minister Pierre Trudeau famously declared "the state has no place in the bedrooms of the nation." *Quoted in CBC News, U.S. Court Strikes Down Sodomy Laws*, June 26, 2003, at <http://www.cbc.ca/story/news/national/2003/06/26/ruling030626.html>.

<sup>70</sup> *B. v. College of Physicians and Surgeons*, 86 C.R.R.2d 358, paras. 30 & 35 (P.E.I. 2001).

<sup>71</sup> *See id.*, para. 34.

<sup>72</sup> *Id.*, para. 52.

rights protected by s. 7 - life, liberty, and security of the person - are very significant and cannot ordinarily be overridden by competing social interests.”<sup>73</sup>

In *Mussani*, the Ontario Court of Appeals rejected a challenge to Ontario’s ban on doctor/patient relationships without ruling on the section 7 issue.<sup>74</sup> A key difference between this case and the Prince Edward Island one is that the Ontario code only bans sexual relations with current patients.<sup>75</sup> Nevertheless, the court conceded, “[T]he argument that the liberty interest guarantees a general right to choose one’s consensual sex partner, on fundamental life choice grounds, is an intriguing one” before ultimately deciding that this right was not implicated in the case because of the fundamentally exploitative nature of the relationship at issue.<sup>76</sup> What is noteworthy, however, is that the Ontario Court of Appeals, like Prince Edward Island’s Supreme Court was open to the idea that there might be a right under section 7 to have private consensual sex. This is not to say that the right is absolute - and the right would not be implicated in cases of coercive sex like *Mussani*. But the idea that the right to liberty protects an individual’s consensual sexual relationships from the intrusion of the state is found in both domestic and international law and provides a better ground for the judgment in *Labaye*.

### Liberty to Swing?

One can accept that there is a fundamental right to have private consensual sexual relations with the person of one’s choosing without necessarily extending constitutional

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<sup>73</sup> *Id.* (quoting *New Brunswick v. G.*, 3 S.C.R. 46, para. 92 (1999)).

<sup>74</sup> *Mussani v. College of Physicians and Surgeons*, 74 O.R.3d 1 (Ont. Ct. App. 2004).

<sup>75</sup> *Id.*, para. 54.

<sup>76</sup> *Id.*

protection to swinging. *Labaye* involved group sex, where individuals would often be engaged in sex with multiple partners while others stood and watched.<sup>77</sup> While there has not been a plethora of cases dealing with group sex, some courts have been unwilling to extend constitutional protection to such conduct. In *Lovisi v. Slayton*, the 4<sup>th</sup> Circuit held that while the U.S. Constitution protects a married couple's private acts of sexual intimacy, once the couple admits strangers as onlookers (or participants) the acts lose constitutional protection.<sup>78</sup> The Fourth Circuit noted: "If the couple performs sexual acts for the excitation or gratification of welcome onlookers, they cannot selectively claim that the state is an intruder."<sup>79</sup> The court concluded that it was irrelevant whether the audience is one, fifty, or one hundred - the acts could not truly be considered private.<sup>80</sup>

*Lovisi* was not the Fourth Circuit's finest hour. First, the liberty interest at issue is defined exceedingly narrowly. The court was not prepared to grant that individuals have a right to engage in private consensual sex without interference from the state. Rather, the Lovisis' intimacies were protected only in so far as the acts took place within the privacy of their marriage.<sup>81</sup> Although its position was explicitly rejected by the Supreme Court in *Eisenstadt*, the 4<sup>th</sup> Circuit's decision was premised on the view that married couples were entitled to greater protection than single individuals.<sup>82</sup> Given that the 4<sup>th</sup> Circuit was not prepared to recognize the right of non-married individuals to engage in

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<sup>77</sup> *Labaye v. The Queen*, 2005 SCC 80, para. 7 (2005).

<sup>78</sup> *See Lovisi v. Slayton*, 539 F.2d 349, 351 (4th Cir. 1976).

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) ([T]he marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals . . . . If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion."). *See also State v. Onofre*, 51 N.Y.2d 476, 488 (1980).

consensual sexual relations, it is not surprising that it did not recognize the right of a couple to engage in sexual relations with a third party.

Perhaps more importantly, the distinction between public and private in *Lovisi* makes little sense. If the presence of a third person in the bedroom is sufficient to make sex public - or at least sufficiently public to allow for intervention from the state - does the presence of a third person in a home make the home a public place? It would be strange indeed if authorities could invade a home whenever they suspected the home's occupants had company. Moreover, as Lior Strahilevitz has pointed out, the presence of a second person in the room for privacy purposes is just as problematic as the presence of a third,<sup>83</sup> and outside of *Stanley v. Georgia*,<sup>84</sup> sexual gratification always involves the presence of a stranger in the room.<sup>85</sup> *Lawrence*, notably, allows adult persons to decide how to conduct their private lives in matters pertaining to sex without placing definite limits on the kind of sex people can have.<sup>86</sup> This is not to say that individuals are free to engage in sexual relations wherever and whenever they wish, and I will attempt to draw some limits in the subsequent sections. However, sex does not necessarily cease to be private when more than two individuals are involved. As the dissent properly concluded in *Lovisi*: “[T]he nature and kind of consensual sexual intimacy is beyond the power of the state to regulate or even to inquire.”<sup>87</sup>

The European Court of Human Rights faced a very similar case to *Lovisi* in *A.D.T v. United Kingdom*,<sup>88</sup> where five men were charged with gross indecency for engaging in

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<sup>83</sup> See Strahilevitz, *supra* note 39, at 682.

<sup>84</sup> 394 U.S. 557 (1969)(holding that an individual has a right to possess obscenity in the privacy of his own home).

<sup>85</sup> *Id.*

<sup>86</sup> See *Lawrence v. Texas*, 539 U.S. 558, 572 (2003).

<sup>87</sup> *Lovisi*, 539 F.2d at 354 (Winter, J., dissenting).

<sup>88</sup> *ADT v. United Kingdom*, 402 Eur. Ct. HR (ser. A)(2000).

oral sex with each other in a private home.<sup>89</sup> Much as the court did in *Lovisi*, the United Kingdom (the defendant in the case) attempted to draw a distinction between intimate, private, and “acceptable” homosexual activity between two men and unacceptable “public” activity (sex between more than two men).<sup>90</sup> The court rejected the United Kingdom’s argument, reasoning that the activity was still private because it was between a restricted group of friends, where it was unlikely that outsiders would become aware what was going on.<sup>91</sup> The court’s approach, which focuses on the likelihood of public exposure to the activity is far preferable to the *Lovisi*’s arbitrary rule that only sex between two people merits constitutional protection.

#### Private Sex and Public Effects

*Lawrence, A.D.T.*, and *Dudgeon* all recognize that individuals have a right to engage in intimate sexual relations with other consenting adults. The problem, expressed quite well in *A.D.T.*, is that at some point the government may legitimately interfere with the sexual relations of its citizens, but there is no clear answer as to when that may be.<sup>92</sup> Perhaps not when a “stranger” joins a married couple in their bedroom,<sup>93</sup> but surely Justice Scalia is right to suggest that were a group to rent out a coliseum for the purposes of having an orgy, this would not be mere “private” behavior with which the state could not involve itself.<sup>94</sup>

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<sup>89</sup> *Id.*, para. 10.

<sup>90</sup> *Id.*, para. 27.

<sup>91</sup> *See id.*, para. 37. The state only knew of the incident because the applicants made a video tape of their encounter that the authorities were able to procure. *Id.*

<sup>92</sup> *Id.*, para. 36 (“The Court can agree with the Government that, at some point, sexual activities can be carried out in such a manner that State interference may be justified.”).

<sup>93</sup> *See Lovisi v. Slayton*, 539 F.2d 349, 351 (4th Cir. 1976).

<sup>94</sup> *Some Non-Judicious Comments - for a Supreme Court Justice*, HOUS. CHRON., Oct. 2, 2004 (quoted in Strahilevitz, *supra* note 39, at 671).

Justice Scalia's example is of limited use. Private clubs can have thousands of members, and this does not make them public. Surely Neo-Nazis can rent out a large auditorium to hold a rally, and the mere size of their group does not turn the auditorium into a public commons, where others (racism opponents, for example) must be permitted to enter.<sup>95</sup> Sex in a private home or even a rented coliseum cannot be equated to sex in a public park or on the White house lawn.

Even if one grants that a coliseum is a private venue being rented for the purpose of facilitating private sexual activity, there is a natural trepidation to say that the sexual conduct that occurs therein is purely private behavior. Why is this? I submit it is *not* because the presence of multiple people is a license for the state to enter. Groups can expect privacy against outsiders while not expecting it with respect to insiders.<sup>96</sup> Rather, a massive orgy in a coliseum is likely to expose non-participants to something they would rather not see whereas there is little danger of this in a case like *A.D.T.* Scalia's example demonstrates only that when numerous participants are involved there is more likely going to be an effect on the public. As I will explain in the next section, the state has a strong interest in regulating private sex when it produces a nuisance, but this does not mean that sex is always the state's business.

Whether sex is private depends on the context in which it occurs, not its effect on the public.<sup>97</sup> In *Clark*, the Supreme Court of Canada was asked to determine whether a man's home transformed into a public place when his neighbors observed him

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<sup>95</sup> *Cf.* *Lloyd Corp v. Tanner*, 407 U.S. 551 (holding that large shopping mall is not a commons and could prohibit pamphleteering).

<sup>96</sup> Strahilevitz, *supra* note 39, at 683.

<sup>97</sup> *See Clark v. The Queen*, 1 S.C.R. 6 (2005).

masturbating through an uncovered window in his living room.<sup>98</sup> It is uncontroversial that if the man had not been observed, there would have been no crime - this was a private act undertaken in a private home. The Court's holding was that because the neighbors lacked physical access to the premises, the mere existence of spectators did not transform his home into a public space.<sup>99</sup> Although he still could be liable if he knowingly exposed himself to his neighbors from his private property, Clark was not guilty of being lewd in a public place.<sup>100</sup> *Clark* is noteworthy because of the Court's recognition that acts undertaken in private places do not become "public" merely because they have public effects.<sup>101</sup>

Why is this distinction important? Liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.<sup>102</sup> By blurring the line between public and private, the state is able to encroach on the intimate decisions of individuals that would seemingly be protected. The better approach - suggested by the Canadian Supreme Court in *Clark* and again in *Labaye* - is that when the general public cannot enter, sex retains its private character.<sup>103</sup> The question of effects is a separate matter.

## Regulating Sex: Nuisance and Secondary Effects

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<sup>98</sup> *Id.* at 12.

<sup>99</sup> *Id.* at 18.

<sup>100</sup> *See id.*, at 21.

<sup>101</sup> *See id.*

<sup>102</sup> *Lawrence v. Texas*, 539 U.S. 558, 572 (2003).

<sup>103</sup> *Labaye v. The Queen*, 2005 SCC 80, para. 5 (2005); *see also* *ADT v. United Kingdom*, 402 Eur. Ct. HR (ser. A), para. 37 (2000).

The common law has long distinguished between visible sexual conduct and conduct that takes place behind closed doors.<sup>104</sup> Private property gives the owner nearly absolute rights to exclude outsiders,<sup>105</sup> and one has a reasonable expectation of sexual privacy in one's home or club which he/she does not have when copulating on the steps of city hall. The individual loses his right to be "let alone"<sup>106</sup> when he engages in sexual activity in public. In *Lawrence* and *ADT*, the sex occurred in private residences. In *Labaye*, it was a private club where no one was permitted to enter unless they were with a member and approved of the swinging lifestyle.<sup>107</sup> As the Supreme Court of Georgia has held: "Adults who withdraw from public gaze to engage in private unforced sexual behavior are exercising a right embraced within the right of personal liberty"<sup>108</sup>

Nevertheless, constitutional protection does not extend to all conduct that relates to sex. As previously discussed, there is no right to pay for sex, for example. This is not because sex between a prostitute and her customer is always "public," but because commercial transactions do not implicate individual autonomy or personhood to the same degree that decisions relating to marriage, procreation, and a like do.<sup>109</sup> Just as the state can more easily regulate commercial speech than other kinds of speech,<sup>110</sup> it can regulate commercial sex more easily than non-commercial sex. Consenting individuals engaged

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<sup>104</sup> John Copeland Nagle, *Moral Nuisances*, 50 EMORY L.J. 265, 297 (2001).

<sup>105</sup> Strahilevitz, *supra* note 39, at 684.

<sup>106</sup> *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

<sup>107</sup> *Id.*

<sup>108</sup> *Powell v. State*, 510 S.E.2d 18, 24 (Ga. 1998).

<sup>109</sup> Compare *Lawrence v. Texas*, 539 U.S. 558, 573 (2003) with *West Coast Hotel v. Parrish*, 300 U.S. 379, 399 (1937).

<sup>110</sup> See e.g., *Board of Trustees v. Fox*, 492 U.S. 469, 477 (1989); *Central Hudson Gas & Electric Corp. v. Public Service Com.*, 447 U.S. 557, 563 (1980).

in private non-commercial sex have a presumptive right to engage in this conduct without the intervention of the government.<sup>111</sup>

The right to be free from state interference in one's sexual life is not absolute.<sup>112</sup> One does not lose the right when there is a 'stranger in the room' or when sex happens to involve multiple parties, but sexual liberty does not give one license to create a nuisance. Joel Feinberg writes, "[N]ude bodies and copulating couples, like all forms of nuisances, have the power of preempting the attention and absorbing the reluctant viewer, whatever his preference in the matter."<sup>113</sup> Mere moral disapproval of a sex act is not sufficient to prohibit individuals from engaging in it on nuisance grounds, however. As Richard Epstein explains with regards nuisance law in general, "[T]he abstract sense of being offended that certain activities are being conducted in one's own neighborhood" is "generally given little weight."<sup>114</sup> The state is only justified in intervening when third parties can perceive, with their own senses, the sexual conduct.<sup>115</sup> Seeing a sex act imposes a discrete harm on non-consenting adults, to say nothing of children.<sup>116</sup>

This is not to say that a person does not suffer harm when behavior he/she finds morally objectionable takes place in society. However, the harm is certainly greater when he/she actually perceives it. Society regards the woman walking down the street who is flashed by a man wearing only a trench coat as a victim - it does not regard someone who merely knows that another stranger has been flashed as a victim in the same way.<sup>117</sup> Knowing that swinging takes place in Montreal is a far cry from hearing

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<sup>111</sup> *Lawrence*, 539 U.S. at 578.

<sup>112</sup> *See e.g.*, *A.D.T. v. United Kingdom*, 402 Eur. Ct. HR (ser. A), para. 37 (2000).

<sup>113</sup> JOEL FEINBERG, *OFFENSE TO OTHERS* 17 (1985).

<sup>114</sup> RICHARD A. EPSTEIN, *TORTS* 356 (1999).

<sup>115</sup> *See Strahilevitz, supra* note 39, at 688.

<sup>116</sup> *See id.* at 689.

<sup>117</sup> *Id.*

the grunts and groans emitted from a swingers club. The former is simply too abstract a harm to be actionable. As Nagle explains:

“The simple awareness that a neighbor is engaged in activities that one regards as immoral does not support a nuisance claim. There is undoubtedly a sense in which one can be bothered by the knowledge that your neighbor is living with an unmarried partner, rooting for the Mets, or voting for Ralph Nader. But any offense that one takes from that knowledge is not actionable.”<sup>118</sup>

Were it otherwise, a person could be guilty of creating a nuisance merely because someone across town objects to his/her sexual practices.

One grounds for regulating sex, therefore, is when it causes a nuisance. In *Labaye*, there was no record of neighbors being exposed to sexual conduct from inside the club.<sup>119</sup> It would be within the state’s power, however, to legislate that such clubs have soundproofing or opaque windows. The state might also wish to ensure that no swinger clubs are in an area where there are a great number of children. Such regulations reasonably take into account the interests of the community without unduly burdening the right of swingers and can be readily justified under section 1 of the Charter of Rights and Freedoms.<sup>120</sup>

Another reason to regulate sex is when it produces so-called “secondary effects”; cities can regulate conduct that is constitutionally protected if their aim is to alleviate the blight brought about by such conduct.<sup>121</sup> In *Renton*, for example, the Supreme Court upheld a zoning regulation that targeted adult theaters because the ordinance was not

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<sup>118</sup> Nagle, *supra* note 101, at 295.

<sup>119</sup> *Labaye v. The Queen*, 2005 SCC 80, para. 12 (2005).

<sup>120</sup> Rights under Charter 7’s liberty provision, such as the one at issue here, are subject to section 1’s “reasonable limits . . . [that] can be demonstrably justified in a free and democratic society.” Can. Const. (Constitution Act, 1982) pt. I (Charter of Rights and Freedoms), 1. *See generally*, *Malmo-Levine v. The Queen*, 2003 SCC 74, paras. 91-98 (2003).

<sup>121</sup> *See e.g.*, *Renton v. Playtime Theatres Inc.*, 475 U.S. 41, 47-53 (1986); *City of Erie v. Pap’s A.M.*, 529 U.S. 277, 293-301 (2000).

intended to suppress speech but to prevent crime, protect the city's retail trade, maintain property values, and generally protect and preserve the quality of the city's neighborhoods.<sup>122</sup> If it could be shown that swingers clubs and other such establishments bring increased criminal activity, then the state could justifiably prohibit them from certain areas, but the burden would be on the state to prove that a causal link exists. In *Renton*, for example, the Court noted the existence of ample studies with detailed findings that proved the negative economic effects of adult movie theaters.<sup>123</sup> The end result of the secondary effects test might well be that swingers clubs can be prohibited in one part of city but not another. Because of the liberty interest at stake, however, the state cannot ban swinging entirely just as it cannot ban adult movies entirely.<sup>124</sup>

The Supreme Court of Canada in *Labaye* did not consider whether swingers clubs could be a potential nuisance or a source of secondary effects. Instead it attempted to discern whether swinging was indecent per se by producing harm “incompatible with the proper functioning of society.”<sup>125</sup> This narrow focus led the Court to avoid interesting issues such as whether the proliferation of swingers clubs might lead to more sexually transmitted diseases.<sup>126</sup> Such questions might not be crucial to a ‘community standards’ view of indecency, but once the court shifted to a theory of indecency as harm, it is not clear why it did not undertake an in-depth analysis of this particular establishment’s effect on the neighboring community.

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<sup>122</sup> *Renton*, 475 U.S. at 48.

<sup>123</sup> *See id.* at 50.

<sup>124</sup> *See id.* (noting that *Renton* must leave open reasonable avenues of communication for adult movie theaters and cannot ban adult movie theaters from operating within its city limits).

<sup>125</sup> *Labaye v. The Queen*, 2005 SCC 80, para. 62 (2005).

<sup>126</sup> *See id.*, para 51 (“The risk of disease . . . is not logically related to the question of whether conduct is indecent.”).

The character of a swinging establishment and its effect on the surrounding community should be a crucial part of any inquiry into the state's right to regulate. The Supreme Court of Canada in *Labaye* did not conduct such an inquiry. Having found that swinging does not inevitably produce harm - except perhaps harm to moral sensibilities, which the Court suggests is too abstract and subjective to count - it overturned Mr. Labaye's conviction for criminal indecency. While this was the right result, the state has no business judging propriety of private consensual sexual conduct. A proper analysis of the facts of *Labaye* would have given due consideration to the individual liberties of those engaged in swinging while addressing the impact of swinger clubs on their communities. The Court's decision does neither and ultimately leaves the status of clubs like Orage (and the conduct that occurs therein) unresolved.

## Conclusion

In *Labaye*, the Supreme Court of Canada recognized that there are no clear "community standards" to judge conduct such as swinging. In the Court's view, even if a majority of persons in a given society finds particular conduct morally repugnant, this is not sufficient reason to regard it as indecent. After *Labaye*, it is not clear what is left of indecency law in Canada, and the decision calls into question several earlier precedents.

Nevertheless, *Labaye* should not be read so broadly as to suggest that only conduct that runs afoul of the harm principle can be prohibited. Morals legislation that does not implicate individual autonomy is different from legislation that does and under Canadian law, moral considerations alone may be sufficient to prohibit some conduct, but

not swinging apparently (under the rubric of indecency at least). Unfortunately, the Court never delineates the limits of state power. Does the state have any business criminalizing the private, consensual sexual conduct of its citizens? The prevailing view in both the United States and Europe seems to be no. Of course, it is possible that Canada's Supreme Court would side with those who believe that there is no right to sexual liberty, only, perhaps, a right to couple with one's spouse.<sup>127</sup> The Court treated *Labaye* as a mere indecency case and offered few clues as to its thinking.

In this article, I have argued that personal decisions related to sex fall within the “irreducible sphere of personal autonomy wherein individuals may make inherently private choices free from state interference”<sup>128</sup> and are protected under section 7 of the Charter. Canada's Supreme Court has repeatedly recognized that the individual must be left room to live his or her own life and to make decisions that are of fundamental personal importance,<sup>129</sup> and few decisions are of more importance than how to order one's sexual life with others. This does not mean that swingers clubs and other sex establishments are immune from governmental scrutiny. These clubs lose constitutional protection if they deal in sex. Moreover, if such establishments pose a nuisance and bring about blight and other secondary effects, then the state has a right to craft reasonable regulations in response. But the Court in *Labaye* erred in not recognizing that swinging, like sodomy and other sexual activity, should be within the liberty of Canadians to choose, and the state cannot castigate such conduct as criminally indecent.

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<sup>127</sup> See *Lovisi v. Slayton*, 539 F.2d 349, 351 (4th Cir. 1976).

<sup>128</sup> *Blencoe v. British Columbia*, 2000 SCC 44, para. 51(2000); *Godbout v. Longueuil*, 3 S.C.R. 844, para. 66 (1997).

<sup>129</sup> *B. v. Children's Aid Society of Metropolitan Toronto*, 1 S.C.R. 315, 368 (1995)

Even if we disagree with the sexual decisions our fellow citizens make, this does not mean that we have the right to prevent them from making them.