Chapter One

Theoretical Debates

Harm in the Context of Obscenity and Indecency Law in Canada

This book traces the socio-legal history of the criminalization of both pornography[1] and "bawdy houses"[2] in Canada. Our aim is to provide an historical awareness of our present circumstance with respect to the Canadian law of obscenity and indecency and to show that contemporary norms produced in law around obscene and indecent sexual practices and commodities are very much shaped by the past. Despite the implementation of the *Charter of Rights and Freedoms* in 1982, the rationality underpinning obscenity (criminalized sexually explicit expression) and indecency (criminalized sexually explicit conduct) laws has shifted only marginally since Confederation in 1867. Indeed, it may be argued that the "calculus," or process, for determining whether something is obscene or indecent, has not changed at all. Instead, what has changed is what is perceived to cause harm. Harm is liberalism's justification for using the power of the state to criminalize.

Our empirical focus is on how the state works out the tension between liberty (as self-government) and coercion (as non-liberal exercise of power) in, and through, the courts' justifications for interfering in the sexual lives of its citizens through censorship and criminal sanction. Contemporary jurisprudence of obscenity and indecency is working out tensions inherent to liberalism; the tensions between sexual freedom as a form of self-government, market freedom, including the freedom to manufacture, distribute and profit from the consumption of commoditized sexually explicit materials and services, and state sanction. These tensions also sometimes support justifications for censorship and criminal sanction when sexual self-government is presumed to have a negative impact on women in a society characterized by the constitutional commitment to equality as guaranteed by section 15 of the *Charter*. We trace the legal authorities, techniques and lines of state force that are deployed where competing discourses of liberty and coercion both contest and defend governmental strategies (Rose and Valverde

1998: 541). We locate our analysis in other criticisms of liberalism, or what has come to be known as "neoliberalism," with the goal of understanding how obscenity and indecency jurisprudence creates sexual subjects through relations of power and subjugation. Keep in mind from the outset that criminal obscenity/indecency law is only one source of subjugation that influences sexual subjectivity and that the state also implements other techniques of constraint (Foucault 1997: 266).

Beginning roughly in late 1980s, the pornography industry has flourished under the so-called "free market" conditions of neoliberalism, which characterizes Western liberal democracies. Angela Harris summarizes neoliberalism as follows:

> Neoliberalism entails a commitment to the dismantling of the economic arrangements sometimes called "Fordism," and their replacement with an economy driven by substantially deregulated markets (themselves driven by the interests of corporate and finance capital), an economy in which capital's upper hand over labour has led to dramatically increasing inequalities of income and wealth. Neoliberalism also entails the dismantling of state institutions meant to cushion citizens against economic risk, and an approach to governance that favors "privatization," "deregulation," and other policies that transfer political power from governments to markets. Finally, neoliberalism entails a series of social projects (often described as "culture wars") that address the anxieties of the increasingly economically precarious and politically disempowered middle and working classes by constructing a sentimentalized vision of the innocent yet victimized, taxpaying, suburban good citizen and then attacking that citizen's purported enemies — reliably, queers, liberals, feminists, and blacks; episodically, Asians and immigrants; and most recently people (in the United States and abroad) who "hate America." Neoliberalism, then, is a complex set of projects that operate simultaneously on economic, political and cultural fronts. Not surprisingly, neoliberalism has also entailed significant changes in legal thought and practice. (Harris 2006: 1541–42).

Part of our aim in this book is also to understand obscenity and indecency law as a important feature of sexual citizenship and a reflection of sexual values inherent to North American liberalism.

Liberalism has created the fiction of "free" markets by choosing when and where to focus government intervention. Neoliberalism is said to be much more "laissez-faire" than early to mid-twentieth-century forms of liberalism, which focused on social welfare spending. When this form of spending declined, a concomitant increase in economic inequalities (particularly for

non-whites and women in the former Soviet Union and Eastern bloc states, particularly the Balkans) fuelled the rapid expansion of the sex trade industry (Malarek 2003). This time period witnessed the dismantling of the welfare state in Canada, the U.S. and Britain, along with the upward distribution of social and economic resources to the wealthy. The widespread use of computers in the home and the implementation of infrastructure to provide each and every household with cheap and easy access to the Internet further expanded what is now largely a cyber-porn market and sex trade industry. According to *Macleans* (Polak 2008: 37), "the North American cyber-porn industry brings in about 2 billion dollars per year." Online pornography is easily accessible and virtually unregulated. In Canada, no corporation has ever been convicted (or perhaps even charged) with possessing or distributing "obscenity." Successive Canadian governments have viewed this pornography market as something that should not be subject to state intervention, well in keeping with neoliberalism's transfer of power from governments to markets. Thus, the state constitutes the commodified sex trade as outside of politics and therefore operating within that "private" space that does not belong to government. Only when private individuals complain to the authorities are prosecutions likely to be launched, as we saw in the case of Montreal "zombie-porn" maker, Rémy Couture. As a result, these prosecutions are *ad hoc* and highly individualized.

Liberalism has developed its legal technologies for intervening into the terrain of "the social," defined as the "public" sphere, when unruly subjects fail to self-govern in a manner consistent with its vision of a well ordered, properly functioning society (what we term a functionalist account). But this intervention is mainly, if not entirely, directed at the sexual conduct of *individuals*. To the extent that governments have adopted a largely laissez-faire approach to the regulation of the porn industry (and we are not arguing that they should or should not), the notion of "the social" with respect to the sex trade has largely disappeared (Rose 1999).

As part of an overall political project, our aim is to take up Harris's (2006: 1581) challenge to "'politicize' (that is, make visible the politics already hidden but already within) the 'private' sphere." In order to achieve this politicization, we provide a description of the governmental rationales and techniques following the Supreme Court decision in *R. v. Labaye* — the largely ignored Canadian case which ruled that a popular swingers club in Montreal was not an indecent bawdy house under the *Criminal Code*. The *Labaye* case is particularly interesting because it re-defined the judicial test for establishing indecency and obscenity in Canada. In the process it revealed the longstanding rationale for criminal intervention in the context of the laws of sexual expression and conduct.

We show how early obscenity cases enforced religious and class-based

morality, while later cases focused on community standards of tolerance and the furtherance of normative political objectives. These earlier cases were in response to the state's attempts at repressing sexually explicit materials that satirized and sexualized religious figures or made any references to homosexuality, as well as materials that provided education about reproduction and birth control.

Later, in the twentieth century and throughout the post-*Charter* era, liberals and feminists were critical of the justifications for censorship adopted by judges, seeing them as forms of *moral* regulation. Their criticisms were levelled mainly on liberal and various feminist grounds in reaction to the conservative religious- and class-based justifications for censorship. In response, conservatives reacted negatively to the liberal and feminist criticisms on the grounds that theirs was too liberal (or too feminist) an approach for dealing with sexually explicit materials, largely because such materials could corrupt the morals of the unruly consumer (Johnson 1995). Now with the apparently neutral language of "harm" and "risk of harm," the Court continues to use political values to justify censorship of obscenity and the criminalization of indecency in a manner that may satisfy all its critics across the political spectrum. The Supreme Court decision in *R. v. Labaye* created a seemingly "objective" test for criminalizing obscenity and indecency by reconfiguring the harms-based obscenity test established in *R. v. Butler* [1992].[3] The decision has been positively received and seen by some commentators as a victory for liberalism and feminism in both Canada and the United States (Boyce 2008; Craig 2008, 2009).

Law and the Censorship of Obscenity

In the nineteenth century, the Victorians associated non-monogamous and non-heterosexual sexuality with "vice" leading to the corruption of morals. The Victorians regulated these non-normative sexualities through a religious- and class-focused application of criminal law on the grounds that unconventional sexuality caused moral harm to those susceptible to depravity and corruption, which meant especially those at the "bottom" of the social hierarchy. These "depraved and corrupted" groups were in turn understood to harm society as a whole. This perceived corruption of morals undermined the proper functioning of society during the Victorian era, and courts sought to steer society in the direction of achieving moral equilibrium or homeostatic perfection. This functionalist project has remained to the present day (Johnson 1995).[4]

Courts continue to presume that sexually explicit imagery and unconventional and commercial sex practices cause harm to the fabric of society. State intervention through criminalization which places limitations on freedom of expression, in the classic justification for obscenity and

indecency laws, is for the purpose of preventing this general moral harm. This is equally a strategy for normalizing sexual practices and attitudes. Protecting the moral fabric of society is the principal justification for both obscenity and indecency laws, one that can be traced back to early obscenity cases. The purported aim of obscenity and indecency law is to protect us from the negative attitudes created by sexually explicit publications and unconventional and commercial sex practices as well from as the affront to certain kinds of constitutionally enshrined political values such as liberty and equality. The regulation of the sex trade through indecency law is largely based on the notion that public sex is a public nuisance because it exposes non-consenting populations to sexually explicit activities — that it disrupts the prevailing social order (Jochelson 2009a, 2009b).

Our analysis demonstrates that the social demands for equality and civil rights with respect to sexual expression of the 1980s and 1990s of the various feminists and gay, lesbian, bi-sexual and trans-gendered (GLBT) movements have been translated into obscenity and indecency jurisprudence by the Supreme Court decision in *R. v. Labaye* in a manner that re-brands liberalism to make it both feminist and queer friendly.[5] This façade of friendliness masks an insipid variant of freedom because it empowers the new "risk of harm" test for obscenity and indecency. As Valverde argues in relation to earlier indecency cases, the legal categories of "harm" and "risk of harm" "[act] as veritable joker cards that can serve completely different purposes depending on the context" (1999: 184). The harm test articulated in *Labaye* is presented *by the Court* as a more sophisticated test for harm, rooted in objectivity and empiricism. However, we show, through an examination of indecency cases following the *Labaye* decision, that harm and risk of harm are fluid categories that carry with them no consistent or pragmatic meaning. These categories are empty containers ready to be filled. According to Valverde (1999: 184):

> The religious right can read their moral concerns onto "risk of harm," since they believe pornography is harmful to the soul; modernizing actuarial types can breathe a sigh of relief upon hearing that risk is being acknowledged; and feminists can also, on their part, feel pleased that what they think of as the harms of pornography are finally recognized.

These categories are represented as objective but allow for the deployment of political moral value judgments, which in turn create categories of sexual danger and sexual health. Our analysis of *Labaye* also demonstrates that the Court's imposition of particular value judgments about dangerous sexuality using harm and risk of harm inscribe a vision of a consensual moral order to be protected by the work of courts. This vision is always being "protected" in variable ways. The categories of sexual

danger are always in a process of (re)construction and often communicate normative ideas about sexual self-regulation. They also can carve out that space deemed private (private property, the market, etc.) into which the state cannot venture when courts decide jurisdictional issues. Thus, determinations of what is sexually dangerous versus sexually healthy (which *are* political) have become dependent upon the predilections of a particular judge, in a particular court, in a particular context, and function like "veritable joker cards" just as Valverde predicted. That these judgments are represented as "objective" simply reveals the Court's faux empiricism — the harm test still depends on the judge's views, regardless of its roots in constitutional values like liberty or equality.

Any deviation from the norm imposed by the Court requires penal intervention as a mode of correction to preserve its own vision of a properly functioning society. This deviation is delineated by the *Labaye* Court as a type of "harm" to be avoided. In the context of the indecency and obscenity debate, the concept of "harm" has been central to the criminalization of acts or speech of a sexual nature.

Liberalism and Harm

The starting point for understanding how harm is understood by the courts in the context of obscenity and indecency rests on the liberal principle that a government ought not intrude in the lives of the citizen, unless it acts to prevent harm to an individual or society. While a seemingly simple creation, defining what is, and is not, harmful is highly contingent upon the context and other variables. It is an established liberal philosophical principle that materials that cause *offence* and even extreme *offence* to one's moral or political values ought not be censored by the state (Feinberg 1985). In other words, being offended by a mere idea or practice engaged in by others in a liberal democratic society is, on this philosophical reading of harm, no justification for state coercion into the lives of its citizens. Therefore, for some liberals, being offended, or having one's morals challenged, is not a justification for censorship because offence falls short of a threshold of harm required to trigger the coercive power of the state. Those who argue for this threshold often point to tangible harms (such as physical harms to participants) as the litmus test for state intervention. Of course this is not a fixed understanding of harm, but it is nonetheless used regularly to justify state intervention. Those who argue that evil ideas (which may or may not lead to evil deeds) ought to be justification for criminal sanction are firmly in the *offence* category of harm. In both Canadian and U.S. law, the criminalization of obscenity is anomalous because constitutional protection extends to all sorts of speech that is unpopular, offensive and even harmful. For example, Hitler's *Mein Kampf* (1925/1926) and Karl Marx's *Das Kapital* (1867, Eng. trans. 1887)

contained ideas that, through the incitement of action, caused considerable harm to millions of people.

According to Koppelman (2005, 2008), the idea that morally repugnant literature results in morally repugnant fixed norms is not a matter that obscenity law can fix. Koppelman argues that even if obscene materials promote bad fixed norms, "nothing about its effects on its readers necessarily follows from this fact" (2008: 122). In other words, for Koppelman, the focus on sexual objectification and the eroticization of cruelty as the moral harm of pornography cannot ground the arguments for censorship firmly in a liberal harm principle, because these claims about pornography tell us nothing about its actual effects on readers. Advocates of this position point out that social scientific research on the connection between pornography and violence against women is weak and inconclusive, sometimes showing limited long-term effects, if any (for other examples, see Cossman 2003; Sumner 2004).[6] This sort of research has never been able to sort out the interactive effects of broader already existing societal norms concerning women's sexuality. Put succinctly, study of the causal effect of exposure to obscene materials has yielded results that are equivocal, and liberal philosophers generally believe that the causal case for harm has not been made. Rather than viewing the effects as harmful, certain liberal scholars contend at most that the effect of our exposure to obscene material is some kind of damage to our conception of how a society ought to function. In this regard, liberals generally are unsupportive of the legal idea that exposure to sexually explicit materials results in verifiable harm to our attitudes about women and thus undermine societal values. From this perspective, to suggest that the state *must* intervene to criminalize obscenity that is harmful to attitudes is to assume that obscenity short-circuits our ability to conduct a rational assessment of sexually explicit and other morally offensive materials.

This resistance to paternalism is evident in the early works of classical liberalism. According to liberal doctrine, since at least the writings of Mill (1869), the state has been justified in curtailing its citizens' liberty *only* to protect others from harm. In *On Liberty*, John Stuart Mill explored the legitimate exercise of societal power on the individual (Mill 1869: para. 9). His argument was that "the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others; his own good, either physical or moral, is not a sufficient warrant" (1869: para. 9). From this perspective, citizens in a liberal democratic society have the intrinsic freedom to express hateful or obscene (morally evil) ideas mainly because free speech plays an important role in democratic societies. This "democratic" argument against coercion of unpopular, offensive or harmful expression holds that within the realm of public speech, freedom is absolute; for liberals democratic governance requires free and open speech

as a matter of self governance. People need free speech "because they have decided, in adopting, maintaining, and interpreting their Constitution, to govern themselves rather than to be governed by others" (Meiklejohn 1961: XX). This aligns with the liberal contention that more speech rather than less speech is the prescription to solving the problems inherent in controversial expression. For instance, Strossen writes that "a central tenet of… free speech jurisprudence: [is] that the appropriate antidote to speech with which we disagree, or offends us, is more speech" (Strossen 1995: 1168).

A further liberal rationale against censorship and in defence of freedom of speech is connected to the right of citizens to autonomy. From this perspective, autonomy requires personal sovereignty in determining what to believe and in weighing competing reasons for action; when the state intervenes to make those choices it behaves in an illiberal manner. The autonomy-based account of free speech focuses on the individual involved in a speech event, whether it be the speaker or the listener. Any argument in favour of censorship that is based on the idea that morally repugnant ideas cause harm, including the formation of false beliefs about women and harmful acts as a result of those beliefs, is a form of tyranny. Even where a causal link may be established between the promotion of false beliefs and morally repugnant ideas, liberals argue that the state interferes with our autonomy when it intervenes to criminalize morally undesirable ideas (Scanlon 1972: 758–59). Therefore, if the government interferes with our freedom to consume sexually explicit materials that present humans in degrading or violent sexual activities, they violate our freedom to determine *for ourselves* whether or not the materials are morally repugnant. In any free society, individuals must be treated sufficiently so as to be capable of forming and acting "upon intelligent conceptions of how their lives should be lived" (Dworkin 1978: 272). This aligns with Mill's (1869) concerns that the pursuit of truth, while important as a justification for free expression, is but one fundamental political concern. Mill (1869) also argued that multiple viewpoints enhance judgment and intellect. For Mill (1869), the pacification of the mind is one consequence of censorship. Free speech, even if it conveys "evil" ideas, are important acts of communication because the public debate that often results from morally evil ideas nevertheless enhances "knowledge, friendship, and self-government" and other socially and politically valuable activities (Mill 1869: 19; Moon 2000).

Koppleman articulates these traditional liberal ideas in a modern context, pointing out that that censorship of "evil" ideas (i.e., through suppressing "objectionable" materials such as hardcore pornography) "dulls" societies *towards* evil because "evil is rarely committed by mustache-twirling villains. More often it is done by people who have succeeded in weaving an elaborate tissue of self-justification, so well-crafted that it completely masks the reality

of what they are doing to other people" (2006: 70). In other words, in order to learn about evil we cannot permit our governments to censor it. Koppelman cites Azar Nafisi's *Reading Lolita in Tehran* to buttress his argument. In discussing the dictatorship of Ayatollah Ruhollah Khomeini, Nafisi writes that "Islamic fundamentalism called for micromanaging the lives of everyone and of women in particular" which included banning Western texts like *Lolita* (Koppelman 2006: 68).[7] For Nafisi, the value in reading such texts lies in "a parallel between what Humbert tried to do to Lolita and what Kohmeini tried to do to his subjects: both involve 'the confiscation of one individual's life by another'" (Koppelman 2006: 68). Because the text teaches us about the parallels between Islamic dictators and sexual dictators, "the portrayals of evil such as occur in *Lolita* are risky, but morally valuable, precisely because they help to dispel the comfortable notion that evil is wholly other. That notion tends to beget the thought that what we are doing cannot possibly be evil, since we are the ones who are doing it" (Koppelman 2006: 68). In other words, there is profound educational value to be had in the wide dissemination of morally evil ideas.[8]

These liberal accounts of free expression have provided ammunition for the rejection of the feminist governmental rationalities that animate the argument in favour of censorship in order to foster women's equality. Other liberals moderate their positions regarding censorship, viewing sexual speech and activities not as absolute but rather as actionable when a certain threshold of "harm" is met, that is, some activities or expression could be limited in the service of avoiding harm. These moderated liberal viewpoints require more than the mere assertion of harm or risk of harm and look for something more tangible upon which to justify state intervention. For instance, some would argue that sexual expression should only be limitable when its effects amount to the willful promotion of hatred against women (Jochelson 2009a; Sumner 2004; Ryder 2001). Anti-pornography feminists tend to equate harms to women's equality as ammunition for suppressing sexual activity and expression. These claims fall short of the harmful links sought by moderated liberals, but nonetheless, the analytics of harm as a justification for state suppression has provided powerful fuel for many anti-pornography activists (Jochelson 2009a, 2009b).

The Mutant Harm Principle

The following chapters show that the *Labaye* Court has articulated a justification for censorship of obscenity and criminalization of indecency that is not confined to a single logic. By shifting the test away from the values and opinions of the "community" to the abstract values of liberalism, the new test can easily be read in multiple directions including a feminist one. This approach has been embraced by those who want to use the power of

the state to promote women's equality (Craig 2009). In this book, we wrestle with the way in which the harm principle has been used to justify censorship in the context of obscenity and indecency. Liberals have criticized the use of the harm principle by the state and other administrative bodies to justify censorship on the basis of "*feeling* subordinated or *feeling* silenced [by obscenity and/or indecency] which in turn [is] inextricably bound up with feeling put upon, outraged or offended, at which point we may approach moralism of the old sort" (Green 2000: 29, emphasis in original). Criticisms are also levied against the use of the harm principle to justify state sanction when it is used to censor sexually explicit materials which are said to cause harm, whether it be direct or indirect harm. We argue that judges continue to operationalize "moralism of the old sort"; on some occasions they even do so "in the name of feminism," which we find interesting.

Currently, in Canadian law, criminalization is legitimized by the courts in relation to the kinds of harm, or risk of harm, caused by obscenity and indecency. Harm is framed chiefly as "harm to society," a category that includes harm to women and men, affronts to our personal liberties and damage done to other constitutional values such as equality (Jochelson 2009a, 2009b). Valverde (1999) describes such harms as multi-vocal, which illustrates the multiple affected perspectives of the targets and participants of sexual speech and conduct. We argue that in Canada, the test, while wearing a veil of multiplicity of contexts, has actually been cloaked in terms of the "proper functioning of society." The multi-vocality observed by some scholars has been subsumed under a broader category of harm which the courts see themselves as tasked with preventing — a category we call "societal harm." Harm to women, harm to men and harm to political values such as liberty and equality have historically been deployed to constitute a consensual moral order — a uni-vocal goal.

Nevertheless, we agree with Valverde that the characterization of Canadian sex laws as a "relatively smooth progress towards modernization and rationalization" is a narrative "without foundation" (Valverde 1999: 182). Indeed, any attempts to read a new found liberalization and/or feminism into the law of obscenity and indecency are illusory post-*Labaye*. We argue throughout this book that the elimination of the voices of sexual communities from judicial decision-making about what counts as *bad* sex (and by extension what counts as *good* sex) is a development that took place gradually but which reached fruition when the Supreme Court retired its community standards of tolerance test in *Labaye*, replacing it with the harm test as the determining factor in whether obscenity or indecency has occurred.

The use of harm as defined by the *Labaye* Court selects for a universalizing "political morality of harm," which erases the potential for context-based sexual discourses based on diverse experiences. Since at least the passage of

the Canadian *Charter of Rights and Freedoms* in 1982, diverse voices were heard as formal legal interveners in Supreme Court cases, offering arguments in the context of constitutional litigation. We explore why those voices have been all but silenced following the decision in *R. v. Labaye*. Before we proceed though, it is vital that we briefly review the most common arguments in the censorship debate in recent Canadian history. This includes, most saliently (often because of their involvement in the litigation), prominent feminist accounts of obscenity in the Canadian context.

The Censorship Debate

One important issue with respect to obscenity has to do with the question of whether pornography is "speech." Both feminist and conservative commentators have argued that pornography is not speech, viewing it instead as something different, which causes direct (participatory) and indirect (equality based, or morally corruptive) harms (MacKinnon 1987). Conservatives have argued that obscene pornography ought to be censored to protect patriarchal values, whereas anti-pornography feminists have argued that obscene pornography ought be censored to protect women and more abstractly women's equality (Jochelson 2009a, 2009b). However, the notion that pornography is not a form of "speech" has been largely discredited (Koppelman 2005, 2006, 2008), a matter that Canadian case law has clearly revealed as well (see for example, *Butler* [1992]).

In the contemporary Canadian constitutional era, this criminalization of both obscenity and indecency is justified to protect a society that claims to be committed to preserving liberty and equality, and it is not unusual for the criminalization of pornography and prostitution to be justified as necessary to protect women's equality. However, where feminists seek to promote women's equality in an inherently unequal society, the courts have taken a much different approach. Courts view society as *threatened* by the existence of obscenity and seek to control it as a way of protecting a "properly functioning society," which is not characterized by social inequality (Johnson 1999). In particular, courts imagine women and men as approaching a properly functioning society as equal subjects, and a society without obscenity and indecency supports this world order. Thus, in deploying the harm test, courts see themselves as moving society away from or inoculating society from the possibility of a "transient pathological state." They see their role as selecting for moral equilibrium or homeostatic perfection. Importantly, this homeostasis assumes a baseline equality of its subjects; the repudiation of obscenity returns the subjects back to the equal baseline. This model of society is quite at odds with the model that underpins most feminist debates in respect of pornography and censorship. A feminist argument would avoid constructions of a "proper society," which are rooted in the idea of an unruly

class of morally corruptible innocents — a notion steeped in its own brand of patriarchal hetero-normativity, about which many feminists remain deeply suspicious. In particular, most feminist perspectives would conceive that men and women rarely approach a legal contest as equal subjects (Cossman et al. 1997).

The test for obscene pornography established in *R. v. Butler* by the Supreme Court in 1992 was the first constitutional challenge to the obscenity provisions of the *Criminal Code*. The obscenity provision was upheld by the *Butler* Court on the grounds that "obscene" pornography is harmful to society and therefore its criminalization is justified to protect society. The *Butler* Court continued to rely upon a community standards of tolerance test, in keeping with the case law since the 1950s, when the current obscenity provision was passed. The Court constructed harmful sexual expression as materials which the average Canadian would not or could not imagine other Canadians viewing. The relevant section of the *Criminal Code*, section 163, criminalizes any sexually explicit materials (pornography) as obscene where "a dominant characteristic of the matter or thing is the undue exploitation of sex, violence, crime, horror, cruelty or the undue degradation of the human person." Therefore, the criminal law connects obscenity with the undue exploitation or the undue degradation of the human person and aims to prevent these harms on the grounds that they undermine society's proper functioning. We show that *Labaye* is a continuation, even a strengthening, of this functionalist project.

In practical political and legal terms, lobby groups like the Canadian Civil Liberties Association (CCLA)[9] have sought to protect freedom of expression in cases dealing with sexually explicit materials, while feminist advocacy organizations like the Women's Legal Education and Action Fund (LEAF) have sought to protect equality rights for women.[10] Conservative religious lobbies such as Winnipeg-based, GAP (Group Against Pornography) are opposed to both liberal and certain feminist positions on the state's role in regulating sexually explicit materials seeing a much stronger role for the state.[11] Similarly, Muslim religious groups, such as the Canadian Council of Muslim Women (CCMW), believe that the state ought to criminalize most forms of pornography and other sexually explicit materials.[12] They share a conservative belief that pornography undermines the religious value placed upon heterosexual monogamy and the nuclear family and that pornography promotes the sexual abuse of women and girls.

It is commonly accepted in some feminist circles that anti-pornography feminists have framed their arguments in much of the same language as moral conservatives in respect of pornographic expression (Cossman et al. 1997). According to Gotell (1997: 64):