

Selling What No One Can Buy

by

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A thesis submitted in conformity with the requirements
for the degree of Master of Laws

Faculty of Law
University of Toronto

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2018

Abstract

Through legal process theory, this thesis examines Parliament's deliberations leading up to the enactment of Bill C-36, which was introduced to govern the exchange of sexual services for consideration after the Supreme Court of Canada's landmark decision in *Bedford v Canada*. Grounded in legislative principles and functions, Part I's "objective-perceptual" approach to legislative intent conceives of Parliament as an institution comprised of rational, reason-giving agents who must have a reasoned apprehension to legislate. Part II evaluates the evidence, argument, and participation at Committee Hearings to demonstrate that Parliament's democratic, legal, and institutional legitimacy deteriorated from misapprehending polls, social science, and testimony. After analyzing Bill C-36's Preamble and legislative objectives at Part III's outset, the connection between the form and content of law is illustrated by arguing that s 213(1.1) of the *Criminal Code* has an invalid purpose, which in turn shows the inextricable link between rationality and legitimacy.

Acknowledgements

To my supervisor, Professor Hamish Stewart, I am grateful for your guidance, patience, and time. Thank you for seeing potential in my ideas and for asking provocative questions to shape and strengthen my arguments into intriguing directions. Your creative and cogent scholarship is a spring of knowledge and source of inspiration for me.

I am also inspired by the kind, brilliant people at the Faculty of Law who build the flourishing academic and social community. Many thanks to the faculty, staff, and students who continue to enrich my life in Toronto, especially the Graduate Program Team, the GLSA, the David Asper Centre, and the Bora Laskin Law Library. I also appreciate the fruitful discussions and exciting opportunities with colleagues and mentors at the bar back on the East Coast, as well as in Ontario.

To my friends and family whose love and support has helped me strive towards my goals, I am forever indebted. Thank you to my sister, Charity, for being my confidante and best friend; to my grandparents for your sacrifices and stories; and to my parents for fostering the joy of reading and for always believing in my abilities. I am eternally grateful to my late Pop Tulk for demonstrating the unique value of self-directed learning. Your steady hands, curious mind, and open heart will always keep me anchored and afloat.

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Part I: Context and Theory

A. Introduction

The evidence, argument, and participation culminating into the *Criminal Code*'s recent proscriptions on sexual services are the subject of this project. The setting is the interval from the Supreme Court of Canada's decision in *Bedford v Canada (AG)*¹ until Parliament's legislative response entered into force. Using evidence of the words spoken on the record at Parliament, I argue that Parliament struggled to rationally debate about converting the Government's policy into law, and in turn Parliament's legitimacy deteriorated. Theoretically, I connect rationality to legitimacy, converge process into substance, and place individual actors within institutional actions. Analytically, I explore three strands of legitimacy - institutional, legal, and democratic – all united by a definition of deference as constitutional coordination among the executive, legislative, and judicial branches of power.

Bedford and Bill C-36 step in as thematic examples for Part I's theory. This framework of legislative principles and functions is built through classic and contemporary political and legal scholarship. Primarily, I engage with David Dyzenhaus' development of Lon Fuller's "conversion", which transforms policy into fully legitimate, enforceable law. However, I also use case law from s 1 of the *Charter* to distil an evaluative standard specifically for the legislative process: "the reasoned apprehension". Throughout this project, the legislative record (especially

¹ *Bedford v Canada (AG)*, 2013 SCC 72, [2013] 3 SCR 1101 [*Bedford* 2013], rev'g in part 2012 ONCA 186, 346 DLR (4th) 385 [*Bedford* 2012], aff'g in part 2010 ONSC 4264, 327 DLR (4th) 52 [*Bedford* 2010]. Where capitalized, "Court" refers to the Supreme Court of Canada. I use the terms "prostitution" and "sex work" interchangeably, according to their historical legal context. To avoid polemical connotations of the terms "prostitute", "sex worker", "john" and "customer", and in an effort to be consistent with the current law, I often use the term "sellers" to refer to individuals who provide sexual services for consideration, and the term "purchasers" to refer to individuals who receive sexual services for consideration.

Committee meetings in both the House of Commons and Senate) is used to track the reasoned apprehension standard throughout the conversion process.

This immersion within the reasons expressed by legislators leads to a thicker conception of legislative intent, which disputes the metaphor that Parliament is a corporate body, and challenges the notion that the legislative record is empirically untouchable. Through an “objective-perceptual” kaleidoscope, I reframe legislative intent to adhere to the idea of Parliament as an institution of active, reason-giving individuals. I then apply the reasoned apprehension standard in Parts II and III, using three modes of practical reasoning: evidentiary, technical, and moral.

These modes of reasoning complement the structure of this exposition. Part II is directly concerned with apprehensions of fact, and so evidentiary reasoning about the factual context for legislating is often prominent. Since Part III takes up apprehensions of law, technical reasoning about the proposed legislative text and broader legal structure prevails. Undergirding both Parts II and III is moral reasoning, which I conceive of not as instrumental or ideological reasoning about facts and law *per se*, but instead as reasoning about whether and how the proposed legislative action promotes constitutional values and aspirations.

Part II first anatomizes the facts that legislators (mis)apprehend by distinguishing among legislative, social, and adjudicative facts. When it comes to those facts, the invisible influence of the bureaucracy is brought into plain view from the Department of Justice’s handling of the online consultation, and its use of social science evidence in Bill C-36’s Technical Paper. Part II concludes with two contrasts: whether and how minorities are heard and treated first, in the Court as opposed to Parliament in general; and second, between the upper and lower chambers of Parliament.

Prefacing Part III is Bill C-36's Preamble. I suggest that the Preamble's use as a political marketing tool impacts the quality of the debate at Parliament, before I turn to it as a device of statutory interpretation. The Preamble's role in statutory interpretation is the launching point for moderating an ongoing debate about Bill C-36's legislative objectives(s), where I initially show that two competing accounts are sustainable, depending upon how closely the legislative record is examined. However, I then offer a slightly different take on the idea that Bill C-36 has two legislative objectives by applying the "objective-perceptual" approach to legislative intent from Part I, which unfolds across Fuller's conversion process.

To concretely demonstrate why Parliament must offer reasons during the legislative process in order to maintain full legitimacy, I criticize two different types of misapprehensions involving the re-enactment of the unconstitutional s 213 of the *Criminal Code* into the now narrower s 213(1.1), which prohibits communicating to sell sexual services in three select public places near children. Those two misapprehensions are: first, that a significant segment of legislators invalidly intended to enact s 213(1.1) as an enforcement power; and second, that legislators incorrectly understood the consequences of criminal convictions under the former s 213. Finally, I conclude with remarks about the role of Committees and their capacity for action, and observe that *Bedford* may have helped and hindered the legislative process.

i) *Bedford v Canada*

Buying sex for money is now a crime in Canada.² Until four years ago, the criminal law had prohibited only *some* activities *surrounding* the transaction of prostitution. Historically, participating in prostitution itself had always been lawful. Presently though, as a matter of fact and as a matter of law, it is still (and perhaps even more) unclear, whether a person who sells what no one can (now lawfully) buy might incur liability. That is because on November 6, 2014, the Governor General assented to Bill C-36, and in doing so, brought into force *An Act to amend the Criminal Code in response to the Supreme Court of Canada decision in Attorney General of Canada v. Bedford and to make consequential amendments to other Acts*.³

According to Bill C-36's long title, this new criminal legislation attempts to reply to the Supreme Court of Canada's decision in *Bedford v Canada*. The eponymous applicant, Terri-Jean Bedford, along with Amy Lebovitch and Valerie Scott, overcame adverse precedent from the *Prostitution Reference*.⁴ The now unanimous Court in *Bedford* also overhauled colossal constitutional doctrine (on *stare decisis*, standard of review, and causation) to hold that the *Criminal Code*'s prohibitions on keeping bawdy-houses, living on the avails of prostitution, and publicly communicating for prostitution unjustifiably infringed s 7 of the *Canadian Charter of Rights and Freedoms*, which provides:

*Everyone 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.*⁵

² *Criminal Code*, RSC 1985 c C-46, s 286. Cf *Bedford 2013*, *supra* note 1 at para 1.

³ *Protection of Communities and Exploited Persons Act*, SC 2014, c 25 ["Bill C-36"].

⁴ *Reference re ss 193 and 195.1(1)(c) of the Criminal Code*, [1990] 1 SCR 1123 [*Prostitution Reference*].

⁵ *Criminal Code*, *supra* note 2, ss 197(1), 210, 212(1)(j), 213(1)(c); *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982 c 11 [*Charter*].

The novel plea in *Bedford* was not that breaching the *Criminal Code* engaged s 7 by risking physical liberty, as was the complaint in the *Prostitution Reference*;⁶ but rather, the applicants alleged (and the Court agreed) that obeying the *Criminal Code* invoked s 7 by jeopardizing personal security in fundamentally unjust ways. The living on the avails prohibition (under which Amy Lebovitch feared her partner would be charged) was overbroad by capturing relationships that were not exploitative, but were security-enhancing, such as receptionists, bodyguards, and drivers.⁷ The bawdy house prohibition (under which Terri-Jean Bedford, who ran the Bondage Bungalow, served 15 months in jail), confined prostitution to more dangerous locations on the street or to out-calls at unknown locations, and also prevented resorting to safehouses. These effects were therefore grossly disproportionate to the object of the bawdy house prohibition, which was to deter community disruption.⁸ The impacts of the communication prohibition (which interfered with Valerie Scott's precaution of screening clients in public before working with them from her home) were also grossly disproportionate to its nuisance prevention objective by isolating prostitution to transient, remote areas out of doors, and by impeding basic safeguards such as scanning for signs of violence, and negotiating health and safety conditions.⁹

In the not too distant past, the Court's next manoeuvre would have been remarkable for departing from the dictates of the Constitution.¹⁰ For the judgment skipped over s 52(1) of the

⁶ *Prostitution Reference*, *supra* note 4. The s 7 argument in the *Prostitution Reference* was also based on different norms under the principles of fundamental justice (vagueness and indirect criminalization). The living on the avails prohibition was not considered. Although *Bedford*'s applicants also claimed that s 213(1)(c), the communicating prohibition, violated freedom of expression contrary to s 2(b), the Court in *Bedford* held that the application judge was still bound by the *Prostitution Reference* on that issue. Furthermore, because the case was resolvable under s 7 alone, the Court in *Bedford* chose not to reconsider its earlier *advisory* opinion in the *Prostitution Reference*.

⁷ *Bedford 2013*, *supra* note 1 at paras 12, 66-67.

⁸ *Bedford 2013*, *supra* note 1 at paras 8-9, 61-65, 130-136.

⁹ *Ibid* at paras 13, 68-72, 146-149.

¹⁰ For a critical analysis of this manoeuvre and a proposal for procedural reform, see Carolyn Moulant, "Remedying the Remedy: *Bedford*'s Suspended Declaration of Invalidity" (2018) 41 MLJ [Forthcoming in Issue 4]. The overlap in subject matter between this previous article and the current thesis is identified in the footnotes throughout.

Constitution Act, without stopping to even cite the constitutional authority.¹¹ Ordinarily, the supremacy clause, which is a remedial provision, does not permit unconstitutional laws to stay in force. Rather, the law which holds the Constitution supreme mandates that unconstitutional legislation be immediately nullified:

*The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.*¹²

Instead, the Court preempted to a perfunctory debate about whether or not it should immediately declare the unconstitutional prohibitions to be invalid. The Court ordered that those “fundamentally flawed” prohibitions that not only ran “afoul of our basic values” but also “aggravate[d] the risk of disease, violence and death” would remain part of the law of the land for another 12-months.¹³ What was a harsh result for individuals exposed to such grave risks was, conversely, a brief reprieve for the government’s policymaking and lawmaking institutions. The Executive and Parliament refused to let *Bedford* stand as the final word on prostitution in Canada.

During this 12-month interval of suspended invalidity, some scholars welcomed the doctrinal clarification brought by *Bedford*’s key import. Lisa Dufraimont announced that s 7’s “norms against arbitrariness, overbreadth and gross disproportionality are very much alive and capable of placing meaningful limits on legislative choices”.¹⁴ Analytically, s 7’s limits on legislative choices spread across two layers. The first layer covers three interests: life, liberty, and security of the person. So, a claimant must first prove that at least one of these three interests is

¹¹ *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982 c 11 at s 52; *Cf Bedford 2013, supra* note 1 at paras 160.

¹² *Constitution Act, 1982, ibid* at s 52(1). On interpreting this remedial provision, see *R v Ferguson*, 2008 SCC 6 at paras 64-65; Kent Roach, “Principled Remedial Discretion Under the Charter” (2004) 25 SCLR (2d) 101 at 105; Kent Roach, *Constitutional Remedies in Canada*, 2d ed (Toronto: Canada Law Book, 2014) at 3.210, 14.40.

¹³ *Bedford 2013, supra* note 1 at paras 88, 105.

¹⁴ Lisa Dufraimont, “Canada (Attorney General) v. Bedford and the Limits on Substantive Criminal Law under Section 7” (2014) 67 SCLR (2d) 483 at 489-490.

engaged. Once that s 7 right is engaged, the second layer protects fundamental justice. Laws cannot deprive that claimant's interest in life, liberty, and/or security in a manner that is not accordance with the principles of fundamental justice. So, in a legislative challenge where life, liberty, and/or security is allegedly violated, a claimant must then identify and explain how at least one principle of fundamental justice is violated by the content of the impugned provision(s). As controls on the substantive content that scrutinize the legislative means against their ends, the principles of fundamental justice include (but are not limited to) the three norms litigated in *Bedford*: laws cannot be arbitrary, overbroad, nor grossly disproportionate.¹⁵

Unfortunately, Dufraimont's optimism for these three substantive principles of fundamental justice may have been premature, at least when it comes to prostitution. For after the 12-month suspension expired, Angela Campbell lamented that *Bedford's* mandate to the Government "to engage in law reform so as to ensure that Canadian criminal law no longer endangers sex workers' lives and security" went unfulfilled "particularly because [the new Bill] advances the interests of 'communities' without recognition of sex workers' membership within such communities, and in a manner antithetical to workers' social, political and personal security interests".¹⁶ From the perspective of those individuals whose right to security was violated, *Bedford's* invigoration of the substantive principles of justice were not meaningful limits on Parliament's legislative choices.

Bedford did, however, instigate a fast Government reaction. The Justice Minister briskly and emphatically reasserted the choice of a criminal justice policy when he ushered in Bill C-36.¹⁷ Enacting a policy that opted not to decriminalize, but to instead offer immunity from prosecution

¹⁵ For an inventory and explanation principles of fundamental justice recognized up to 2012, see Hamish Stewart, *Fundamental Justice* (Toronto: Irwin Law, 2012) [Stewart, *Fundamental Justice*] at Chapters 4-5.

¹⁶ Angela Campbell, "Sex Work's Governance: Stuff and Nuisance" (2015) 23 Fem Legal Stud 27 at 29.

¹⁷ Bill C-36, *supra* note 3.

to sellers of sex in select situations, the armoury of new criminal offences now target purchasers and exploiters of sex through prohibitions on purchasing sexual services, receiving a material benefit from sexual services, advertising sexual services for sale, and through modernized versions of the pre-existing procuring and communicating offences.¹⁸ With exemptions that purport to permit individual sellers to work indoors and to hire bodyguards and drivers, the new laws nominally take up the Court's concerns in *Bedford*.

Whether these exemptions, combined with immunity from prosecution, disclose an objective to make the sale of sex safer, or are just a way to attain a single ambition of abolition, is unclear and uncertain. In 2017, Debra Haak asserted that the Bill C-36 does not aim to reduce the dangers of selling sex, but rather, there is one overriding legislative objective: "reducing the demand for prostitution with a view to discouraging entry into it, deterring participation in it, and ultimately abolishing it as much as possible."¹⁹ On Hamish Stewart's earlier interpretation in 2015, Bill C-36 endeavours to shift the purposes of the new prohibitions away from the old unconstitutional provisions through two newfangled objectives: first, "discouraging sex work", and second, "reducing the danger of sex work to sex workers".²⁰ Separated, these two objectives, enacted into criminal offences with enumerated immunities, seem rational. Hand in hand, these two objectives make "an incoherent piece of legislation" which "could well amount to the same kind of constitutional flaws that led the Supreme Court of Canada to strike down much of the former sex work law."²¹ If the academic debate is any indication, then it is arguable whether

¹⁸ *Ibid.*

¹⁹ Debra M Haak, "The Initial Test of Constitutional Validity: Identifying the Legislative Objectives of Canada's New Prostitution Laws" (2017), 50 UBC L Rev 657 at 661.

²⁰ Hamish Stewart, "The Constitutionality of the New Sex Work Law" (2016) 54:1. Alta L R 69 at 88. [Stewart, "The New Sex Work Law"].

²¹ Stewart, "The New Sex Work Law", *ibid.*

Bedford's rational judgment, despite elucidating what is required for instrumental rationality, translated into rational legislation.²²

ii) Legitimacy Defined: Democratic, Legal, Institutional

To gain insight from hindsight, Bill C-36 raises two important questions about the legislative process responsible for its enactment: first, why did the Court indulge Parliament with 12-months grace; and second, was that indulgence warranted? To the first question of why the Court indulged Parliament, the Court's fear to maintain legitimacy is one possible answer. Testing this proposition first entails asking what legitimacy means. Perhaps because legitimacy, like fairness and justice, is a concept that is so elemental to our legal system, lawyers and legal analysts regard it as second-nature. Perhaps because legitimacy is inherent to our roles and frequently twirled around in our jargon, it has often escaped definition, despite its potentially vast-ranging connotations. In the interests of a clear, consistent vision of full legitimacy, I will denote three facets. Assessed by degree, legitimacy in a constitutional democracy includes democratic legitimacy, legal legitimacy, and institutional legitimacy.

Instructively, David Dyzenhaus has drawn commonalities and distinctions between democratic legitimacy and legal legitimacy, which are mutually reinforcing.²³ These two facets of legitimacy sustain and connect the process and substance of public law.²⁴ Under Dyzenhaus' definition, democratic legitimacy is the political warrant for a policy which proposes to affect standards governing the public. The authority for that political warrant is granted by a process of open deliberation among the public's representatives. However, that political warrant does not acquire legal legitimacy unless and until it has been formalized into law. While democratic and

²² Stewart, "The New Sex Work Law" *ibid* at 80, citing *Bedford 2013, supra* note 1 at para 107.

²³ David Dyzenhaus, "Process and Substance as Aspects of the Public Law Form" (2015) 74 C L J 284 [Dyzenhaus, "Process and Substance"].

²⁴ Dyzenhaus, "Process and Substance", *ibid* at 297.

legal legitimacy are both necessary for full legitimacy, they are also conceptually distinct. Legitimacy is irreducible to adding and subtracting democratic deficits and legal defects from an undichotomized form of process and substance.²⁵ These distinctive conceptual features reside on fertile ground where Dyzenhaus has discovered and developed Lon Fuller's process of conversion.²⁶ The process of reducing "a political programme to the explicit terms of a statute" does not simply render public policy into its operational legal form. Conversion injects the internal morality of law into a concrete public standard by adding a "legal surplus value".²⁷ Reasoned argument within the interval of conversion infuse eight desiderata into the legal surplus value: a law must be generally applicable, promulgated through publication, clear and intelligible, avoid contradicting other laws, be possible to follow, apply prospectively, remain stable over time, and maintain congruence between its administration and previously declared content.²⁸

When this legal surplus value has flaws, legitimacy appears superficial, manufactured instead from mere compliance with the policy preferred by most politicians, without attending to that policy's legal content. So, even if Bill C-36 was converted into law within a democratically deficient process, and by way of those democratic deficiencies, it loses democratic legitimacy, it does not automatically follow that Bill-C36 is wholly illegitimate. Not only are those deficiencies a relative question of degree, but it is possible for the Bill's form to adhere to law. At the same time, if Bill C-36's policy had a democratically authorized political warrant, yet defects of legal form remain after conversion ought to have occurred, then the policy decision, now converted, remains democratically legitimate, while legal legitimacy diminishes with those formal defects. In

²⁵ *Ibid.*

²⁶ *Ibid* at 287 (i.e., on surprisingly "common ground" between positivist and naturalist philosophies of law), citing Lon Fuller, "The Forms and Limits of Adjudication" (1978) 92:2 Harv L Rev 353 [Fuller, "Adjudication"]. Cf John Rawls, *A Theory of Justice*, (Cambridge, Harvard University Press, 1971) at 195-201.

²⁷ Dyzenhaus, "Process and Substance", *ibid.*

²⁸ *Ibid* at 284, 294, 297; Lon Fuller, *The Morality of Law*, Rev ed (New Haven: Yale University Press, 1969) at 46-91.

both scenarios, full legitimacy gradually deteriorates with the interweaving of the decision-making process and the substance of the produced decision.

The final facet to see legitimacy in full view is institutional legitimacy,²⁹ which stratifies its democratic and legal counterparts. By allocating labour among the constitutional institutions responsible for conversion, institutional legitimacy is characterized by two complementary criteria: first, competency from unique institutional features, and second, capacity to fulfil a different constitutional function. These performance criteria of competency and capacity will inform the answer to a second question in the channel between *Bedford* and Bill C-36: whether deferring the remedy to Parliament was warranted. Institutional legitimacy is implemental of the state's claim to authority and the citizenry's claim to protection. By fastening controls on power and facilitating constituent rights, institutional legitimacy is also necessary to harness full legitimacy in a constitutional democracy. But institutional legitimacy is also a deft analytical device. For when the competency and capacity of one institution is strained, full legitimacy is jeopardized if its partnering institutions cannot adapt their functions.

Part of the Court's function, as vested by both the *Charter* and the *Constitution Act's* supremacy clause, is to adjudicate claims of individuals against the state according to minimum objective standards, and to invalidate laws adjudged to violate those minimum requirements of constitutionality. Part of what the Court lacks in fulfilling this function is political accountability to the democratically represented public. Perhaps, in the language of Alexander Bickel, the Court's disposition of *Bedford* was a projection of its passive virtue of judicial restraint, as an acquiescence to the inevitable counter-majoritarian difficulty: an unelected Court should not have the last word

²⁹ This conception of institutional legitimacy seems implicit in Fuller's theory, and Dyzenhaus' interpretation of Fuller. See Dyzenhaus, "Process and Substance", *ibid* at 296-297 (noting how "institutional framework" enables conversion, where adjudicative conversion precedes legislative conversion, and administrative conversion may then follow).

on the public's rights.³⁰ This objection from principle merges into practice. As the scholarship of Kent Roach has catalogued and clarified, there is also a pragmatic difference between what rules can be prescribed through court order and proscribed by legislation, and between what remedies judges can fashion and legislators can devise.³¹

iii) Deference Defined: Institutional Attitude and Action

This merged principled and pragmatic difference underlies the reasons stated in *Bedford's* final five paragraphs. For after reasoning through doctrinal renovations to *stare decisis*, causation, and the *Charter* claim, when it came time to decide what constitutional remedy should be ordered under s 52(1), the Court's cursory remedial reasons tossed the hot potato of prostitution with deference to Parliament.³² For this project, deference is defined as both an institutional action and attitude.³³ Synonymous with interinstitutional comity, judicial deference ascribes weight to the perspective or decision of Parliament, because Parliament has a different perspective or decision to offer, or because the Court's assessment of the outcome is uncertain.³⁴ To defer should not be to subordinate; to defer should be to move a decision forward and manifest respect for the competency and capacity of the coordinate branch.

³⁰ Alexander Bickel, "Foreword: The Passive Virtues" (1961) 75 Harv L R 40. Alexander Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*, 2d ed (New Haven: Yale, 1986) at 16-23.

³¹ For a recent example, see eg. Kent Roach, "Polycentricity and Queue-Jumping in Public Law Remedies: A Two-Track Response", (2016) 66 UTLJ 3. For an earlier sample, see Kent Roach, "Remedial Consensus and Dialogue Under the Charter" (2002) 35 UBCL Rev 211.

³² For a suggestion that the duration of the suspended declaration undermined the display of deference in *Bedford*, see Mouland, "Remedying the Remedy", *supra* note 10 at 21-23.

³³ David Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy" in Michael Taggart ed, *The Province of Administrative Law* (Oxford: Hart Publishing, 1997) 279 [Dyzenhaus, "Politics of Deference"] at 286, 303 (distinguishing an attitude of deference as respect from a positivistic conception of deference as submission).

³⁴ Aileen Kavanagh, "Deference or Defiance?: The Limits of the Judicial Role in Constitutional Adjudication" in Grant Huscroft ed, *Expounding the Constitution: Essays in Constitutional Theory* (New York: Cambridge University Press, 2008) 184 (unlike Dyzenhaus' dichotomy, Kavanagh advances a conception of deference as a matter of degree, ranging from minimal to substantial to complete, which, at the extreme of complete deference would amount to subordination).

Deference from respect is intrinsically democratic in a legal culture of justification,³⁵ where all institutions hold each other to account when they pay attention to the reasons provided for a decision.³⁶ Illuminated by Dyzenhaus' philosophy, this culture of justification is reflected in s 7's ethos of rationality, and is transposed into s 1 of the *Charter*.³⁷ In constitutional adjudication, s 1 is often the terminal point where deference is actualized and respect is expressed. That is because s 1 explicitly obligates the Government to demonstrably and reasonably justify its limits on rights according to the values of a free and democratic society.³⁸ Yet in falling into the trend where no s 7 infringement has ever been justified under s 1 at the apex Court, in *Bedford*, the Government barely attempted to justify the infringement, so consequently, s 52(1) then became the doorway to Parliament.³⁹ For when the Court suspended its declaration under s 52(1), its equivocation about the appropriate remedy yielded to uncertainty about the public's perspective, and avowed the Court's respect for Parliament's role. Immediate invalidity could have purportedly left "prostitution totally unregulated while Parliament grapples with the complex and sensitive

³⁵ Dyzenhaus, "Politics of Deference", *supra* note 33 at 302.

³⁶ Dyzenhaus, "Politics of Deference", *supra* note 33 at 307 (though articulated in the administrative law context of judicial review, in exploring how the culture of justification is connected to the rule of law when a court interacts with a tribunal's reasoning, Dyzenhaus extended this to all institutional interactions. See especially at 286 and 307: "...they have to take the tribunal's reasoning seriously because what they are primarily concerned to do is to find the reasons that best justify any decision whether legislative, administrative or judicial."). See further in Part III, *infra*, in *An Act to amend the Criminal Code (self-induced intoxication)*, SC 1995, c 32, Parliament took issue with both the Court's factual findings and new common law defence for intoxicated automatism in *R v Daviault*, [1994] 3 SCR 63. For a more moderate and recent example, after debate and study for new legislation to regulate medical assistance in dying, Parliament generally followed the Court's reasoning, but narrowed the Court's guidelines. Compare *Carter v Canada (AG)*, 2015 SCC 5, [*Carter 2015*] at para 127, with *An Act to amend the Criminal Code and to make related amendments to other Acts*, SC 2016, c 3, s 241.

³⁷ *Vriend v Alberta*, [1998] 1 SCR 493 at paras 134-142 (citing ss 7 and 1 as textual expressions of mutual respect, Iacobucci J highlighted a "dynamic interaction among the branches of governance" where "each of the branches is made somewhat accountable to the other", with "the effect of enhancing the democratic process, not denying it");

³⁸ See eg. Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue?* (Toronto: Irwin Law, 2016) at 181-196 [Roach, *The Supreme Court on Trial*]; Sujit Choudhry, "So What is the Real Legacy of Oakes?: Two Decades of Proportionality Analysis under the Canadian Charter's Section 1" (2006) 34 SCLR (2d) 501 [Choudhry, "Proportionality Analysis"].

³⁹ *Bedford 2013*, *supra* note 1 at paras 161-163. But see *R v Michaud*, 2015 ONCA 585 (finding that a highway traffic provision violated security of the person, but was justified under s 1).

problem of how to deal with it.”⁴⁰ Noting that “few countries leave it entirely unregulated”, the judgment stated, “how prostitution is regulated is a matter of great public concern”.⁴¹ Given the complexity and delicacy of regulating prostitution, the Court pronounced, “[i]t will be for Parliament, should it choose to do so, to devise a new approach, reflecting different elements of the existing regime.”⁴²

Embedded within that sanction of a temporary departure from the constitutional imperative is a connection between legitimacy and deference. By suspending its declaration of invalidity out of deference to Parliament, the Court presumed that Parliament was competent and capable to address prostitution, and in no more than 12-months. This presumed legitimacy of the legislative process - the linchpin of the Court’s deference to Parliament – is the principal concern of this thesis. While legal scholars have critically explored both *Bedford* and Bill C-36, until now, the gulf between the judgment and the legislation has been largely uncharted.⁴³ Before embarking into Bill C-36’s legislative process, we will begin from a general overview of Parliament’s constitutional functions, and the principles for harnessing those functions in the legislative process.

⁴⁰ *Bedford 2013*, *supra* note 1 at para 167.

⁴¹ *Ibid.*

⁴² *Bedford 2013*, *supra* note 1 at 165.

⁴³ In addition to Dufraimont, *supra* note 14; Campbell, *supra* note 16; Haak, *supra* note 19, and Stewart, “The New Sex Work Law”, *supra* note 20, see Robert Leckey, *Bills of Rights in the Common Law* (Cambridge: Cambridge University Press, 2015); Robert Leckey, “The Harms of Remedial Discretion” (2016) 14 *ICON* 584; Roach, *The Supreme Court on Trial*, *supra* note 38 at 363-364 (stating that the “decision reconciled the Court’s duty to enforce the *Charter* with its recognition of Parliament’s ability to shape policies”); Christopher Manfredi, “Conservatives, the Supreme Court of Canada, and the Constitution: Judicial-Government Relations, 2006-2015” (2015) 52:3 *Osgoode Hall LJ* 951 [Manfredi, “Judicial-Government Relations, 2006-2015”].

B. Functions and Principles of the Legislative Process

i) Parliament's Functions: Deliberating, Legislating, Accounting

It is within the Constitution that the Crown, the Executive, Parliament and the Courts are constrained. It is the individual actors within those institutions entrusted by the people. And it is when each institution at large, acting through the accumulated actions and decisions of its actors, that the people's trust is earned and affirmed by actualizing law's principles, values, and aims. Earning the people's trust to express the people's will to create and apply rules also animates the Constitution's constitutive role,⁴⁴ thus structuring the Constitution as an apparatus that secures rights and promotes free and democratic values:

*Our democratic government consists of several branches: the Crown, as represented by the Governor General and the provincial counterparts of that office; the legislative body; the executive; and the courts. It is fundamental to the working of government as a whole that all these parts play their proper role. It is equally fundamental that no one of them overstep its bounds, that each show proper deference for the legitimate sphere of activity of the other.*⁴⁵

Peculiar is the occasion when one branch of the constitutional powers can legitimately (in the institutional sense) step inside the bounds of another. When the Speaker of the House of Commons appealed to the Supreme Court of Canada in *Canada (House of Commons) v Vaid*, the Court unanimously affirmed the judiciary's constitutional jurisdiction to adjudicate claims of Parliamentary privilege.⁴⁶ The Court then stepped farther to encircle Parliament's three

⁴⁴ Vanessa A MacDonnell, "The Constitution as Framework for Governance" (2013) 63 UTLJ 624; Jeremy Webber, "Democratic Decision Making as the First Principle of Contemporary Constitutionalism", in Richard W Bauman & Tsvi Kahana, eds, *The Least Examined Branch: The Role of Legislatures in the Constitutional State* (New York: Cambridge, 2006) 411. For a perspective from a political scientist, see also Dennis Baker, "Checking the Court: Justifying Parliament's Role in Constitutional Interpretation" (2016) 73 SCLR (2d) 1.

⁴⁵ *New Brunswick Broadcasting Co v Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 SCR 319 at 389, McLachlin J.

⁴⁶ 2005 SCC 30, [2005] 1 SCR 667 [*Vaid*].

constitutional functions: deliberating, legislating, and holding the government to account.⁴⁷ In performing these three functions, Parliament is directed by “the privileges, immunities and powers enjoyed by the Senate, the House of Commons and provincial legislative assemblies, and by each member individually.”⁴⁸ By conveying that the intra-institutional authority of Parliament does not depart from the inherited Constitution, and does not defy the written text of the *Constitution Act*, but is instead a central part of the Constitution, this construction of Parliamentary privilege navigates Parliament towards legislating, deliberating, and accounting.⁴⁹

Parliamentary privilege also orients us out of the fray as we tour the formulation, introduction, study, and passage of Bill C-36. It can be hard to resist gawking at the political theatre on such an unspeakable, blush-inducing subject like selling sex. Tempting as it may be to shrug off shenanigans at Parliament as indomitable traits bred by politics, the dividends and deficits to watch for are not just produced by political affairs; the law has a part to play too. While Parliament, comprised of the House of Commons, Senate, and Governor General, is of course a political institution, it is also a legal institution, but of a different species than curial bodies. Together with (but also separate from) its legislative function to produce statutes applicable to the whole nation, Parliament is also the sovereign creator and master of its own canon of procedural rules.⁵⁰ Applied only inside Parliament’s elected House of Commons and appointed Senate to resolve intra-institutional conflict, to direct daily operations, and control individual conduct, these unique internal rules can enable or disable Parliament’s constitutional functions,⁵¹ when quality is

⁴⁷ *Ibid* at para 41.

⁴⁸ *Ibid* at para 2.

⁴⁹ *Ibid* at para 3; Rob Walsh, *On the House* (Montreal & Kingston: McGill-Queen’s University Press, 2017) at 89-107. Technically, the reasons in *Vaid* about the scope of privilege and functions of Parliament are *obiter dicta*. The Court did not decide whether Vaid’s employment as a chauffeur was privileged, instead resolving the *lis* on a procedural point of administrative law.

⁵⁰ Fuller, *The Morality of Law*, *supra* note 28 at 115.

⁵¹ *Vaid*, *supra* note 46.

confronted with political opportunity and expediency. Though often overlooked in legal scholarship, the legislative process itself is worthy of our attention.

Given that autonomy, dignity, and efficiency ground the standards for Parliament's operations and parliamentarians' conduct,⁵² the procedural strain experienced during Bill C-36 presents an opportunity to investigate Parliament's capacity and competency – that is, the institutional advantages which the Court in *Bedford* took for granted when it deferred the remedy to democratic debate and expert policy development. Parliament's ability to address issues that splinter society is predicated upon handling such controversies “openly, carefully, and fairly”.⁵³

ii) Legislative Principles: Explicit Lawmaking and Publicity

Although courts may legitimately make law through their judgments, the limits of adjudicative lawmaking are bounded by judges' foremost task to decide a particular dispute on particular facts.⁵⁴ As such, the task of adjudicative lawmaking is *secondary* to adjudication's primary function of dispute resolution.⁵⁵ Yet when Parliament makes law through enacting legislation, as *Vaid* affirmed, legislators' task to legislate is one of Parliament's *primary* functions. This “oblique” form of adjudicative lawmaking is thus functionally distinct from “direct” legislative lawmaking.⁵⁶ From this institutional difference, Jeremy Waldron has set forth the principle of explicit lawmaking. To fulfil its “raison d'être” to make law explicitly, if Parliament chooses to make or unmake law, then Parliament must do so “openly in a transparent process

⁵² *Ibid* at para 46.

⁵³ Jeremy Waldron, “Parliamentary Recklessness: Why we need to legislate more carefully” (Annual John Graham Lecture, delivered at the Maxim Institute, Auckland, 28 July 2008), at 14-15, online: < https://issuu.com/maximinstitute/docs/sjgl_2008_monograph_jeremy_waldron >.

⁵⁴ Fuller, “Adjudication”, *supra* note 26; Bertha Wilson, “Decision-Making in the Supreme Court” (1986) 36 UTLJ 227.

⁵⁵ Beverley McLachlin, “The Role of the Court in the Post-*Charter* Era: Policy-maker or Adjudicator?” (1990) 39 UNBLJ 43.

⁵⁶ Jeremy Waldron, “Principles of Legislation” in *Political political theory* (Cambridge: Harvard, 2016) [Waldron, “Principles of Legislation”] at 154, citing John Austin, *Lectures on Jurisprudence*, 5th ed (John Murray, 1885).

publicly dedicated to that task”.⁵⁷ The principle of explicit lawmaking is part of what paves the avenues for Parliament’s legislative, deliberative, and accounting functions. Transparent, open procedures foster the flow of information, debate, and checks for accountability, all of which accrue into degrees of legitimacy. So, to enter into an evaluation of institutional legitimacy when Parliament unmade the unconstitutional prostitution prohibitions, we can station ourselves at each institution’s *raison d’être*: for Parliament, explicit legislating; for the Court, explicit adjudicating.

Adjudicative procedures, firmly secured in the open court principle, also foster transparent lawmaking. As litigation transpires in public courtrooms,⁵⁸ judges receive facts and hear arguments, which are then considered and incorporated into the formal reasons for a decision to justify and explain the legal outcome. The decided outcome is produced into an official, tangible judgment which is (subject to limited exceptions) also public.⁵⁹ And so, when judges change the law, their written judgments can be seen to provide explicit notice of that legal change; notice not just to the parties before them, but to everyone who will be bound and affected by the legal change. At minimum then, by the public virtue of promulgation,⁶⁰ it should be legitimate for judges to change the law under what Waldron scorns as “the guise of a matter of interpretation”, if that change is necessary to resolve the dispute under adjudication.⁶¹ Suppose that the Supreme Court of Canada had crafted a more elaborate interpretive remedy to the living on the avails prohibition than did the Ontario Court of Appeal,⁶² such as by enumerating exemptions for familial and business relationships, as well as indicia of exploitation. The knowledge imparted to the public by

⁵⁷ Waldron, “Principles of Legislation”, *ibid.*

⁵⁸ Fuller, “Adjudication”, *supra* note 26 at 383-384 (explaining that adjudication’s commitment to publicity promotes relevance and rationality).

⁵⁹ Bora Laskin, “The Institutional Character of the Judge” (1972) 7 *Isr L Rev* 329 at 343-344, 348; Beverley McLachlin, “The Supreme Court and the Public Interest” (2001) 64 *Sask L R* 309 at 320-321.

⁶⁰ Fuller, *The Morality of Law*, *supra* note 28 at 49-51.

⁶¹ Wilson, *supra* note 54 at 233-235 (discussing the tension between incremental judgments that decide only what is necessary and expansive judgments that oversee the jurisprudence).

⁶² *Bedford 2012*, *supra* at para 327.

the Court's analysis of how the prohibitions were unconstitutionally dangerous, plus its tailoring of the remedy to that danger could have enhanced the public's empathy for their fellow citizens, as well as educated the public about the law.

Of course, there is more to the publicity of lawmaking than its educational purpose to notify and inform those to whom the law will apply. The wisdom of Lon Fuller imparts that the publicity of lawmaking also has a *contributory* aspect. Fuller linked the clarity citizens gain from being informed about the law to their ability and willingness to contribute their views on legal change when he wrote, "the laws should also be given adequate publication so that they may be subject to public criticism, including the criticism that they are the kind of laws that ought not to be enacted unless their content can be effectively conveyed to those subject to them".⁶³ Thus, as a legislative principle that belongs to all citizens, not just those whose rights are directly imperiled, the principle of explicit lawmaking thereby provides an opportunity for citizens to direct their attention to proposed change *before* it occurs.⁶⁴ So, when citizens are first notified about proposed legislative change, and based on that information, they desire and are willing to contribute their perspectives, they can enhance the democratic legitimacy of that legislation, and even potentially alter its normativity.

This theoretical insight has practical applications for Bill C-36's legislative process. When the legislative process contemporaneously engages Parliament's deliberative and accounting functions, we can test whether and how membership in the Canadian polity can be sufficient to contribute information and argument into legislation. Public contribution to legislation differs quantitatively and qualitatively from submissions that occur through participation and intervention

⁶³ Fuller, *The Morality of Law*, *supra* note 28 at 51.

⁶⁴ Waldron, "Principles of Legislation", *supra* note 56 at 154-155.

in litigation. Standing and status to submit information and argument to a court case is limited by a nexus to disputed facts or issues (or both) in the matter at bar;⁶⁵ but whether an individual or group can officially contribute their views to inform and influence legislative decisions does not hinge upon whether that individual or group will reap benefits or bear burdens from legislation. At a time when access to justice concerns fill dockets and courtrooms to the brim with interveners and public interest litigants, are the Parliamentary chambers also bloated? Reviewing the information presented after *Bedford* and listening to the opinions offered on Bill C-36 will raise related issues such as whether matters traditionally appropriate for Parliament's ears have been shunted to the Court, and if so, what does that mean for each institution's legitimacy?

The answer matters, because despite the merits of adapting and partnering to meet the changing dynamics of society, Parliament, the Court, and the Crown each have enduring core features that are indispensable for stable governance. Regardless of whether Canadians do so directly (e.g. as witnesses in Parliamentary proceedings or signatories to petitions) or indirectly (e.g. by reaching out to their elected members of Parliament), and regardless of how far removed they may be from the immediate impact of legal change, when Canadians participate in democratic deliberations about law, they can devote their attention to and gain an appreciation for the rights and interests of their fellow citizens, while also pursuing their own political autonomy. This active engagement suffuses legislative lawmaking with a dimension of legitimacy that adjudicative lawmaking cannot imitate.⁶⁶ The extent and intensity of Canadians' engagement with lawmaking

⁶⁵ For an overview of the difficulties with leave to appeal and status as principals or interveners prior to the relaxed test for standing in *Canada (AG) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, [2012] 2 SCR 524 [*Downtown Eastside*], see Sanda Rodgers, "Getting Heard: Leave to Appeal, Intervenors and Procedural Barriers to Social Justice in the Supreme Court of Canada" (2010) 50 SCLR (2d) 1. For a more recent assessment of intervention, see Daniel Sheppard, "Just Going Through the Motions: The Supreme Court, Interest Groups, and the Performance of Intervention" (2018) 82 SCLR (2d) 179.

⁶⁶ Waldron, "Principles of Legislation", *supra* note 56 at 154-155.

is therefore one strand that will weave throughout our assessment of legitimacy when Parliament created new laws after *Bedford*.

Comparing and contrasting Bill C-36's Parliamentary record with *Bedford*'s evidentiary record can reveal how judges perceive legislators, and how legislators regard judges. When judgments propound changes in the law, judges often do regard how those judgments may apply to situations beyond the scenario at bar, and it is possible for us to regard *Bedford* as such a judgment.⁶⁷ Although judicial lawmaking primarily applies retrospectively⁶⁸ (even when a live controversy has become moot⁶⁹), judges (particularly those at apex courts) can tap into their discretion to espouse expansive judgments instead of incremental steps, such as when the legal issue carries future import for cases that have yet to be litigated, or bears on nationwide interests of justice.⁷⁰ Divided or united, a panel of appellate judges, though unelected, produce publicly accessible judgments by employing an institutional trait that Parliament also shares – that is, deciding according to majority consensus. Rising to a leadership role to guide judges below on enforcing the law (or more controversially, the Executive),⁷¹ the Court's function can take on a prospective direction.⁷² Even when a single transgressive event surges litigation into full steam, public law claims, to which at least one government arm responds or defends, are steered towards redressing social conditions that surpass a singular discrete instance of wrongdoing.⁷³ When that

⁶⁷ Laskin, *supra* note 59 at 341-343; Wilson, *supra* note 54 at 233-235 (discussing the tension between incremental judgments that decide only what is necessary and expansive judgments that oversee the jurisprudence).

⁶⁸ Abram Chayes, "The Role of the Judge in Public Law Litigation" (1976) 89:7 Harv L Rev 1281; Fuller, "Adjudication", *supra* note 26 at 391-392.

⁶⁹ See e.g. *R v Oland*, 2017 SCC 17; *Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62; *Borowski v Canada (AG)*, [1989] 1 SCR 342.

⁷⁰ Laskin, *supra* note 59 at 474-475; Wilson, *supra* note 54 at 233-235 (eg. criteria for leave to appeal).

⁷¹ *Canada (AG) v PHS Community Services Society*, 2011 SCC 44 [*Insite*] at paras 116, 150-153.

⁷² Wilson, *supra* note 54 at 234.

⁷³ Chayes, *supra* note 68 at 1290; Fiss, "Foreword: The Forms of Justice" (1979) 93:1 Harv L Rev 1 at 18.

is the case, correcting errors of lower courts is no longer the principal preoccupation of the final appellate court, which is instead absorbed in systemic correction.⁷⁴

Yet without a complete view of the depths of the system to be corrected, beyond those materially relevant to disposing of the instant case, those systemic judgments cannot reach deep in the way that general legislative decisions can. Institutionally for judges, and jurisprudentially for cases, experience and expertise is obtained from applying logic and reason to evidence and argument when courts are called upon to respond to a past transaction (and less commonly, an ongoing incident). While courts are adept at interpreting general information materially relevant to dispose of a specific dispute, they have less practice at applying general information to anticipate a future event with consequences flowing to the general population.⁷⁵ However, the dexterity of Himel J, who presided over *Bedford*'s application, advances that courtrooms are not always caves inhabited by paleolithic judges, and courts might be capable of evolving to manage the sorts of information and issues naturally within the remit of Parliament.

Exceptionally, the Court does speculate without disposing of rights, but when it does so, in say, a reference opinion, it is at the invitation of the Executive, and there is no legal effect.⁷⁶ Although Parliament is not tethered by the same legal constraints, and is free to take up issues proactively, we will query whether prostitution was an issue that was just too inflammatory for the Government to handle with bare hands. More specifically, we will unpack what happens when a judgment itself is an event which catches Parliament by surprise. Should that novel circumstance change whether and how Parliament reacts? As we trace *Bedford*'s imprints, we will also

⁷⁴ Laskin, *supra* note 59 at 475.

⁷⁵ Chayes, *supra* note 68 at 1292; Fuller, "Adjudication", *supra* note 26 at 385-386 (the integrity of adjudication in part comes from courts' reactive nature).

⁷⁶ *Cf Reference re Secession of Quebec*, [1998] 2 SCR 217 at paras 4-31; *Reference re Same-Sex Marriage*, 2004 SCC 79 at paras 8-12, 61-72.

investigate how *Bedford*'s facts and law tread onto the new legislative ones, and into impressions of each branch's legitimacy.

C. Evaluating the Legislative Process: The *Reasoned* Apprehension

Grounded now in Parliament's functions of legislating, deliberating, and accounting, as well as the principles of explicit lawmaking and publicity, which shape how Parliament performs its three functions, we are now in a position to set a normative standard for assessing what Parliament did and did not do during Bill C-36. The standard of a "reasoned apprehension" is consistent with jurisprudential and executive norms, but is also appropriately deferential to Parliament's functions.

i) Jurisprudential Norms

With s 7's textured entitlements to life, liberty, and security qualified by nebulous notions of fundamental justice, with its capacious kitchen sink holding all of the *Charter's* legal rights, and with its wide berth spanning procedure and substance,⁷⁷ *Bedford's* embrace of s 7 amply lends itself to exploring legitimacy. Under s 7, overly wide and unduly narrow interpretations from subjective valuations and a smorgasbord of methodologies have plagued the Court's institutional legitimacy⁷⁸ with staunch objections from the right, the left, and everywhere else in between.⁷⁹ Encapsulating how derivative and evolutionary approaches supplant the historical explanation of judicial review under s 7, Nader Hasan has noticed s 7 evolve from an individual-centric analysis to a state-centric analysis, where these substantive norms are "anathema to Canada's pre-Charter

⁷⁷ *Re BC Motor Vehicle Act*, [1985] 2 SCR 486.

⁷⁸ Jamie Cameron, "From *MVR* to *Chaoulli v. Quebec*: The Road Not Taken and the Future of Section 7" (2006) 34 SCLR (2d) 105 [Cameron, "The Future of Section 7"]; Alana Klein, "The Arbitrariness in "Arbitrariness" (And Overbreadth and Gross Disproportionality): Principle and Democracy in Section 7 of the Charter" (2013) 63 SCLR (2d) 377 [Klein, "Principle and Democracy in Section 7"]

⁷⁹ See eg. Christopher P Manfredi, *Judicial Power and the Charter*, 2d ed (Don Mills, ON: Oxford University Press, 2001); Andrew Petter, *The Politics of the Charter: The Illusive Promise of Constitutional Rights* (Toronto: University of Toronto Press, 2010); FL Morton and Rainer Knopff, *The Charter Revolution & The Court Party* (Toronto: University of Toronto Press, 2000).

Westminster system of government, where Parliament reigned supreme”.⁸⁰ The norms of arbitrariness, gross proportionality, and overbreadth are at odds with the tradition of Parliamentary supremacy – a tradition transformed by the *Charter*’s entrenchment of a modern constitutional supremacy.⁸¹

To insist upon the principle of explicit lawmaking, it would be unfair to criticize (and difficult to evaluate) Parliament’s performance without setting realistic criteria. In adjudication, there must be a sufficient factual record capable of proving a legal claim on a balance of probabilities in a civil suit, or beyond a reasonable doubt in a criminal trial.⁸² The Court’s legitimacy deteriorates, when, having examined the explicit reasons for a court’s judgment against the evidence and argument, there is a palpable and overriding error of fact which influenced the overall appreciation of the evidence, or an incorrect interpretation of law which affected the legal conclusion.⁸³ Yet since Parliament is our present focus, how are we to assess when Parliament’s legitimacy deteriorates across these substantive standards for rational legislative content? Affixing adjudication’s burdens of proof and standards for rationality to legislative reasoning - even legislative decisions aimed at fixing “fundamentally flawed” and “inherently bad”⁸⁴ defects of rationality - could be absurd or paralyzing.⁸⁵ The objective here is more modest and moderate. An appropriate litmus is one that is set from the traditional role of each branch, but is limber enough to adjust to circumstances when competency and capacity are strained.

⁸⁰ Nader R Hasan, “Three Theories of ‘Principles of Fundamental Justice’” (2013) 63 SCLR (2d) 339 [Hasan, “Three Theories”] at 371, 348.

⁸¹ Lorraine E Weinrib, “The Canadian *Charter*’s Transformative Aspirations” (2003) 19 SCLR (3d) 17.

⁸² *Operation Dismantle Inc v R*, [1985] 1 SCR 441; *R v Oakes*, [1986] 1 SCR 103.

⁸³ *Housen v Nikolaisen*, 2002 SCC 33. For an example of a case where the legitimacy of the Court’s majority may have deteriorated from its haphazard engagement with the evidentiary record, see *Chaoulli v Quebec (AG)*, 2005 SCC 35 at para 235 (LeBel and Binnie JJ, dissenting), discussed in Stewart, *Fundamental Justice*, *supra* note 15 at 140-142.

⁸⁴ *Bedford 2013*, *supra* note 1 at paras 105, 123.

⁸⁵ Eoin Carolan, “Dialogue isn’t working: the case for collaboration as a model of legislative-judicial relations” (2016) 36:2 LS 209.

The jurisprudence is a natural starting point. After all, it was the Court's decision in *Bedford* which stimulated the Government to introduce Bill C-36; and if we are interested in institutional interactions, it is instinctive to question how what the Court says and does affects what Parliament then says and does. To be clear, this thesis does not set out to carve a template for a *Charter* challenge to Bill C-36 using s 7 doctrine. Nonetheless, because we are concerned with reasoning about rights, doctrine will inevitably inform our analysis. And when it comes to reasoning, because *Bedford* was disposed of solely under s 7, (despite concurrent claims under ss 2 and 15), and because *Bedford* finetuned the substantive principles of fundamental justice - the *sine qua nom* of rationality – norms of arbitrariness, overbreadth, and gross disproportionality will loom in the background.

Within the balance of probabilities required to reasonably and demonstrably justify laws under the *Charter*, Parliament is equipped with a more plastic standard to tackle harm when it lacks concrete, conclusive scientific proof. Running across the constitutional jurisprudence on empirical uncertainty is a theme of judicial circumspection to enable Parliamentary action, seen through the Court's resistance at micromanaging the Government's agenda.⁸⁶ This sequence of cases began with testing the rational connection between the ends and means of limits on freedom of expression and whether such means were minimally impairing under s 1,⁸⁷ then extended into questions of arbitrariness under s 7's substantive principles of fundamental justice,⁸⁸ and has

⁸⁶ *R v Malmo-Levine; R v Caine*, 2003 SCC 74 at para 133 [*Malmo-Levine*]; *RJR-MacDonald Inc v Canada (AG)* at para 27, LaForest J, (dissenting); [*RJR-MacDonald*]; *Thomson Newspapers Co v Canada (AG)*, [1998] 1 SCR 877 [*Thomson Newspapers*].

⁸⁷ *Ford v Quebec (AG)*, [1988] 2 SCR 712; *Irwin Toy v Quebec (AG)*, [1989] 1 SCR 927 [*Irwin Toy*]; *McKinney v University of Guelph*, [1990] 3 SCR 229; *R v Butler*, [1992] 1 SCR 452; *Little Sisters Book and Art Emporium v Canada (Minister of Justice)*, 2000 SCC 69; *R v Sharpe*, 2001 SCC 2; *R v Bryan*, 2007 SCC 12; *Saskatchewan (HRC) v Whatcott*, 2013 SCC 11. For a synopsis, see Roach, *The Supreme Court on Trial*, *supra* note 38 at Chapter 9, 175-196.

⁸⁸ *Malmo-Levine*, *supra* note 86; *Insite*, *supra* note 71.

reached outside the *Charter* to federal legislative competency over criminal law.⁸⁹ Along this line, Parliament enjoys a “margin of appreciation to form legitimate objectives”⁹⁰ and to pursue those objectives with means based on a “reasoned” or “reasonable” “apprehension of harm”.⁹¹

Folding into the reasoned or reasonable apprehension are three overlapping concerns: context, deference, and standard of proof.⁹² Contextually, the sphere of legislative power invoked, the specific right impugned, and the values engaged (including competing interests of social groups) set just how deep the apprehension ought to be.⁹³ In the historically less deferential sphere of criminal law,⁹⁴ to ask whether there was a demonstrated casual connection between prohibitions on tobacco advertisements and the objective of reducing tobacco consumption in *RJR-MacDonald*, all three opinions on s 1 moulded the standard of proof to fit the social, economic, and political context.⁹⁵ The epistemological and practical barriers of creating policy solutions fix how flexible the deference to Parliament ought to be; however, McLachlin J (as she then was) was clear that simply asserting that the problem is serious and a solution is difficult will not pass constitutional muster, for it would erase the burden of justification.⁹⁶ Almost twenty-five years have passed since McLachlin J folded context and deference into the following well-known characterization of the standard of proof:

First,...the infringing measure must be justifiable by the processes of reason and rationality. The question is not whether the measure is popular or accords with the current public opinion polls. The question is rather whether it can be justified by application of the

⁸⁹ *Irwin Toy*, *supra* note 87; *RJR-MacDonald*, *supra* note 86; *Malmo-Levine*, *supra* note 86; *Reference re Assisted Human Reproduction Act*, 2010 SCC 61.

⁹⁰ *Irwin Toy*, *supra* note 87 citing *Ford v Quebec (AG)*, *supra* note 87; *Malmo-Levine*, *supra* note 86 at para 78.

⁹¹ See fn 86-90, *supra*.

⁹² Choudhry, “Proportionality Analysis”, *supra* note 38 at 527.

⁹³ *Cf* fn 85-89, *supra* with *Adler v Ontario*, [1996] 3 SCR 609.

⁹⁴ *RJR-MacDonald*, *supra* note 86 at para 68, La Forest J.

⁹⁵ *RJR-MacDonald*, *supra* note 86. Dividing also on division of powers and the *Charter* infringement, and disposition, on the s 1 issue, the Court highlighted context as follows: McLachlin J (+ Sopinka, and Major JJ) at paras 131-134; Iacobucci J (+ Lamer CJ) at para 189; La Forest J (+ L'Heureux-Dubé, Gonthier and Cory JJ) (dissenting, found the infringement justified by an attenuated standard) at paras 60-77, 96-116.

⁹⁶ *RJR-MacDonald*, *supra* note 86 at para 136.

processes of reason. In the legal context, reason imports the notion of inference from evidence or established truths. This is not to deny intuition its role, or to require proof to the standards required by science in every case, but it is to insist on a rational, reasoned defensibility...Second, ...[t]he choice of the word "demonstrably" is critical. The process is not one of mere intuition, nor is it one of deference to Parliament's choice. It is a process of demonstration. This reinforces the notion inherent in the word "reasonable" of rational inference from evidence or established truths.⁹⁷

If anything, in today's times when uttering the word 'fact' in political arenas can be both fractious and factitious, and where 'evidence-based' policy-making can be offered as an excuse for inertia on one hand, and exorbitant expenditures on the other, this passage resonates all the more with the milieu of modern governance.

Before long, even this prescient approach climatized to new problems of proof confronting Parliament. Less than a decade after the Court decided *RJR-MacDonald*, acting in the absence of conclusive evidence became doctrinally indistinguishable from acting on the basis of conflicting evidence. In the 2004 decision of *Harper v Canada*, a differently constituted but still-divided Court wrestled with whether the reasoned apprehension should stretch farther than empirical uncertainty.⁹⁸ Defined broadly by Bastarache J for a majority of six, "electoral unfairness" was the harm that Parliament sought to prevent through limitations on third party campaign spending.⁹⁹ The preliminary research Parliament had turned to as support for spending caps conflicted with final conclusions about whether third party advertising had actually impacted the 1988 federal election.¹⁰⁰ From his broad definition of the harm of electoral unfairness, Bastarache J expanded the reach of deference from empirical uncertainty to cover empirical controversy, holding that

⁹⁷ *RJR-MacDonald*, *supra* note 86 at para 127-128.

⁹⁸ *Harper v Canada (AG)*, 2004 SCC 57.

⁹⁹ *Ibid* at para 79.

¹⁰⁰ *Ibid* at para 51.

“[w]here the court is faced with inconclusive or competing social science evidence relating the harm to the legislature’s measures, the court may rely on a *reasoned* apprehension of that harm.”¹⁰¹

Soon after, in the 2007 case of *R v Bryan*, which involved blackout periods for publishing voting tallies, Bastarache J was again concerned with the harm of electoral unfairness, and reaffirmed his holding from *Harper* on the sufficiency of evidence under s 1.¹⁰² Yet this time around, when Bastarache J articulated the standard of proof, “reasoned” slipped out, and “reasonable” slid in.¹⁰³ While it may sound like mincing words, this seemingly innocuous lexical swap – whether an apprehension of harm is “reasonable” or “reasoned” – is problematic when we remind ourselves that the actors we are evaluating in Bill C-36’s legislative process are both legislators and executives.¹⁰⁴

ii) Executive and Legislative Norms

Thus, to avoid skewing our analysis with a court-centric lens, we should also align our angle outside of the courtroom. Translating a reasoned or reasonable apprehension from judicial language directly into the vernacular of legislative deliberations could be unsound, given that reasonableness and rationality are two different ideas, with each implicating distinct norms with different consequences. Reasonableness is outcome-focused, while rationality is process-focused;

¹⁰¹ *Ibid* at paras 77-79. In my view, it is this broad definition of the harm that at least partly enabled the expansion of the standard, but the reasons Bastarache J provides for the empirical difficulty are more specific: “the subtle ways in which advertising influences human behaviour; the influence of other factors such as the media and polls; and the multitude of issues, candidates and independent parties involved in the electoral process.”

¹⁰² *R v Bryan*, *supra* note 87.

¹⁰³ *Cf R v Bryan*, *supra* note 87 at para 20; *Harper*, *supra* note 98 at paras 77, 88, 98. Prior to the extension of the standard to situations of conflicting empirical evidence, the terms were also switched in a way that is both internally and externally inconsistent. See eg. *Thomson Newspapers*, *supra* note 86 at para 115, Bastarache J; *Cf Butler*, *supra* note 87 at 504, Sopinka J; *Sharpe*, *supra* note 87 at paras 85-89, 122-123, McLachlin CJ (+5); paras 198, 217 (L’Heureux-Dubé, Gonthier and Bastarache JJ, dissenting).

¹⁰⁴ *Ontario (Community Safety and Correctional Services) v Ontario (Information and Privacy Commissioner)* 2014 SCC 31 at para 58 (Rejecting the analogy between the administrative formulation of a “reasonable basis for believing” that a disclosure requests under provincial privacy legislation would result in harm with the “reasoned apprehension of harm” test under s 1, due in part to Parliament’s distinct policy role when enacting legislation).

and whether an apprehension was reasonable is not the same as whether an apprehension was reasoned.¹⁰⁵ A legislator's or administrator's *ex ante* apprehension can appear to be reasonable to a judge *ex poste*, but it does not follow that the legislator or administrator who apprehends a harm or mischief articulated any rational thought before acting or voting upon his or her apprehension.¹⁰⁶ Plus, even if an elected actor does reason about an apprehended harm, it does not follow that those reasons are shared with those who will rely on the resulting decision to govern their own actions,¹⁰⁷ nor those who will come to evaluate the outcome.

To think about this tangibly, consider the Justice Minister's statutory duty to alert the House of Commons to Bills inconsistent with the *Charter* and the *Bill of Rights*.¹⁰⁸ Recent litigation started by Edgar Schmidt, a former legislative drafter, has disclosed that in practice, the Minister's reporting duty is only triggered if proposed legislation appears "manifestly unconstitutional, and no credible (i.e, reasonable and *bona fide*) argument exists in support of it".¹⁰⁹ On judicial review under administrative law, the Federal Court of Appeal recently held that the Minister's interpretation and application of this standard is reasonable.¹¹⁰ Put plainly, to fulfil her statutory duty, it is reasonable for the Minister to merely answer yes or no when asked whether she believes proposed legislation can be defended in future litigation.¹¹¹ So, even if the Minister

¹⁰⁵ For an elaborate distinction between the reasonable and the rational, see John Rawls, *Political Liberalism: Expanded Edition* (New York: Columbia University Press, 2005) [*Political Liberalism*] at 48-53.

¹⁰⁶ See e.g. *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 12, citing David Dyzenhaus, "Politics of Deference", *supra* note 33. The lower courts could not identify the arbitrator's reasoning process, but in the final appeal, the decision was determined to be reasonable, having considered the whole record and the range of outcomes, as a reviewing court can *supplement* the reasons actually provided.

¹⁰⁷ *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32 at paras 52- 56, Abella J (for the 5-member majority), citing *Catalyst Paper Corp v North Cowichan (District)*, 2012 SCC 2 [*Catalyst Paper*].

¹⁰⁸ S 4.1 of *Department of Justice Act*, RSC 1985, c J-, s 4.1; *Statutory Instruments Act*, RSC 1985, c S-22, ss 3(2), 3(3).

¹⁰⁹ *Schmidt v Canada (AG)*, 2016 FC 269 (Agreed Statement of Facts at p 23), *aff'd* 2018 FCA 55 [*Schmidt FCA*]

¹¹⁰ *Schmidt FCA*, *ibid*.

¹¹¹ *Schmidt FCA*, *ibid* at para 66. Prior to the *Schmidt* appeal, Janet Hiebert described the political standard in very similar terms i.e, the risk of surviving *Charter* litigation: See Janet L Hiebert, *Charter Conflicts: What is Parliament's Role?* (Montreal: McGill-Queen's University Press, 2002), at 65-66 [Hiebert, *Charter Conflicts*]; Janet L Hiebert,

does apprehend an issue for complying with civil liberties, she need not share her reasons, nor her reasoning process with the legislators who will vote on it, nor with the public who must (if the legislation is passed) conduct themselves according to it.

Troubling as the Minister's ethical trilemma may be for pitting the principle of responsible government¹¹² against a lawyer's professional duties,¹¹³ irrespective of whether she is the Government's lawyer or the Justice Minister *qua* Attorney General, many legislators do defer to the Minister's expertise – or they at least defer to her judgment of political risk. And in so deferring, those legislators presume that serious calls about a Bill's potential unconstitutionality have been answered at the desks of lawyers employed in the public service who conduct an internal constitutional risk assessment.¹¹⁴ The Minister relies upon the advice of those lawyers to satisfy her statutory reporting duty, and legislators then rely upon the absence of a report of inconsistency to infer that a Bill does not violate fundamental rights and freedoms – without knowing the potentially vast number of *Charter* issues that did not qualify as manifestly unconstitutional. Thus, without reasoned debate about and above what the Minister and the public service say about Bill C-36's legal issues *before* parliamentarians cast their votes, this reliance may be to the detriment of Parliament and the public, as earlier research suggests.

"Parliamentary Engagement with the Charter: Rethinking the Idea of Legislative Rights Review" (2012), 58 SCLR (2d) 87 at 95.

¹¹² Here, I am referring to the fact that the elected politician selected by the Prime Minister to serve as Minister of Justice then also concurrently serves as the Attorney General, who oversees federal litigation, in addition to the fact that the legislative and executive branches do not operate separately. See *Wells v Newfoundland* [1999] 2 SCR 199 at paras 52-54. See also Peter W Hogg, *Constitutional Law of Canada*, 5th ed (Toronto: Carswell, 2007) (loose-leaf updated 2017, release 1) at 9.1.

¹¹³ See eg. Grant Huscroft, "Reconciling Duty and Discretion: The Attorney General in the Charter Era" (2009) 34:2 Queen's LJ 773; Andrew Flavelle Martin, "The Attorney General as Lawyer (?): Confidentiality Upon Resignation from Cabinet" (2015) 38:1 Dal L J 147.

¹¹⁴ Huscroft, *ibid* at 782-783; Hiebert, "Parliamentary Engagement, *supra* note 111; Lori Sterling, "The Charter's Impact on the Legislative Process: Where the Real "Dialogue" Takes Place" (2007) 23 NJCL 139; Walsh, *On the House*, *supra* note 49 at 70-73.

Before *Schmidt* exposed the thinness of the Minister's statutory reporting duty, Janet Hiebert probed the *Charter*'s influence on legislative decisions. In her piercing research, Hiebert discovered that legislators lacked the knowledge and capacity for reasoned deliberation, and that they did not appreciate the *Charter* ramifications of their decisions.¹¹⁵ Like Hiebert, James Kelly assigned part of the blame for the decline of rational legislative debate to the congested corridors inside the Department of Justice, which serve a centralized Cabinet.¹¹⁶ Grant Huscroft has admonished legislators' "learned helplessness" (i.e, their overreliance on the Department of Justice) to argue that Parliament's reasonable disagreement with both the Executive's and the Court's pre-legislative opinions on *Charter* compliance is not only legitimate, it is also desirable.¹¹⁷

That said, some bureaucrats do not share these scholars' scruples about pre-legislative *Charter* vetting, since "vibrant" and "robust" dialogue takes place among the analysts, drafters, and lawyers who convert policy into draft Bills.¹¹⁸ Surely though, regardless of whether they are appointed, elected, or contractually employed, a culture of rights and a culture of justification should vitalize the actions of all institutional actors in a healthy constitutional democracy.¹¹⁹ And positive as it is that the bureaucracy cherishes *Charter* rights, Bill C-36's legislative process will reveal that relying on the Department of Justice is not a safe bet to become fully informed about policy and law, nor a cogent reason for Parliament to hoard all of its rhetorical energy in reserve for non-legislative matters.

¹¹⁵ Hiebert, *Charter Conflicts*, *supra* note 111 at 3-19; Hiebert, "Parliamentary Engagement", *supra* note 111.

¹¹⁶ James B Kelly, "Legislative Activism and Parliamentary Bills of Rights" in James B Kelly & Christopher Manfredi, *Contested Constitutionalism: Reflections on the Canadian Charter of Rights and Freedoms* (Vancouver: UBC Press, 2009) at 90. For an earlier empirical account, see James B Kelly, "Bureaucratic activism and the Charter of Rights and Freedoms: the Department of Justice and its entry into the centre of government" (1999) 42 Can Pub Adm 476.

¹¹⁷ Huscroft, *supra* note 113.

¹¹⁸ Sterling, *supra*, note 114.

¹¹⁹ David Dyzenhaus, "Law as Justification: Etienne Mureinik's Conception of Legal Culture" (1998) 14 SAJHR 11.

Notably, the current Justice Minister has assumed responsibility for preparing what her Ministry calls “*Charter* statements”, and has introduced legislation to mandate that practice into a new statutory duty.¹²⁰ This move towards informed debate is welcome, but whether *Charter* statements will actually improve the rationality of debate remains to be seen, for there are still at least two persistent problems: the scope of liability, and timing of pre-legislative vetting. First, assuming that *Charter* statements will indeed become a new legal duty to survive future sessions and new Parliaments, as general overviews, *Charter* statements lack scope, and are not legal opinions.¹²¹ Furthermore, although I have so far tied the reasoned apprehension to the *Charter*, the entire field of legal and constitutional liability extends much farther. Devoting direct attention and resources to respecting the *Charter* may leave other rights and duties neglected. No matter how vigilant pre-legislative *Charter* vetting by the public service may be, the narrow focus of *Charter* statements could pre-empt consideration of federalism, the common law, Indigenous law, contractual obligations, and international treaties. So much emphasis on *Charter* compliance can neglect other legal considerations.

Second, when it comes to timing, because these skeletal statements are presented at the time a Bill is tabled, they do not incorporate new information that is adduced as the Bill proceeds through Parliament’s conversion process; nor are *Charter* statements revised to cover amendments. So, given that *Charter* statements were not in practice at the time Bill C-36 was debated, there was less information on the public record available for citizens and legislators to consider the legal ramifications of Bill C-36’s policy than if it had been introduced today.

¹²⁰ Bill C-51, *An Act to amend the Criminal Code and the Department of Justice Act and to make consequential amendments to another Act*, 1st Sess, 42nd Parl, 2017; Department of Justice Canada, “Charter Statements” (2017), online: < www.justice.gc.ca/eng/csj-sjc/pl/charter-charte/index.html >. According to the website, “The Minister of Justice prepares Statements to help inform public and parliamentary debate on a proposed bill.”

¹²¹ *Ibid.*

But even with the decreased access to information back then, we can still hear how the Department of Justice's pre-legislative work indirectly tuned Bill C-36's debate into the Government's political priorities. As noted, the Justice Minister is not only the political head of the Department of Justice and as such, was Bill C-36's sponsor at the House of Commons, but the Justice Minister is also the Chief Law Officer of the Crown. In that capacity, the Justice Minister is responsible for advising Cabinet and conducting all federal litigation. The ethical trilemma in performing all of these roles is apparent in how Justice Minister MacKay came to accept a high level of constitutional risk. He safely bet that "as sure as night follows day" Bill C-36 would be challenged, yet conceded that Bill C-36 infringed at least one *Charter* right; for when asked about the pre-legislative review process, and whether he had been advised that ss 2, 7, and/or 15 were infringed, he referred to the proportionality test under s 1 as "very much ultimately the determining factor."¹²² While scant on details, the Minister's refusals and acknowledgements at least confirm how significant reliance on the legal reasoning of the public service routed the deliberation to limiting rights and defending legislation instead of upholding rights and promoting constitutional values.

Certainly, the public service does essential work; but that work takes place in the abstract, pre-legislative factual void, and can easily remain off the public record when the political head of a Department stands on Cabinet confidence. From the Minister's admission that s 1 was the ultimate legal factor, it meant that the public service had advised the political Executive that the *Charter* would be infringed, and consequently, for Bill C-36 to weather a challenge, it had to be

¹²² House of Commons, Standing Committee on Justice and Human Rights, *Minutes of Proceedings and Evidence, Debates*, 41st Parl 2nd Sess, No 44 [JUST Proceedings] (7 July 2014) (Hon Peter MacKay) at 1000. For further on this point, including other statements in the record, see Moulard, "Remedying the Remedy", *supra* note 10 at 20, 23, 49-51. More generally, see Huscroft, *supra* note 113 at 777-778 (the factual void present in Parliament before Bills are enacted into law can be generative).

dressed in proof under s 1. Part of that proof – the Technical Paper and an online poll - were produced from within the Department of Justice itself. Regardless of the uses for which they were initially designed, Part II will depict how these two policy resources worked as political tools which were effective in controlling and deflecting the reasons offered for and against Bill C-36. To be careful here, I do not remonstrate the merit of many diligent public servants within the Department of Justice, nor am I insinuating that they acted improperly. Pegging the subsidiary political effects of the policy development and legal advice by apolitical government actors accentuates why, for the sake of democratic, legal, and institutional legitimacy, it matters for legislators outside of Cabinet to actively participate in legislative debates, and to also contrast the empirical evidence and legal expertise furnished by the Department of Justice from that created by independent, nongovernmental sources.

Indeed, the Department of Justice has a key role to advise Cabinet of zones of risk, and to inform legislators of nuances that may be inscrutable from a policy brief from a politician's staff, particularly when it comes to the mechanics of drafting. Part III will be particularly demonstrative of this point by exhibiting how the Department of Justice's technical strategy in drafting s 213(1.1) deviated significantly from the legal purposes that some legislators fathomed. Legislators need to understand *how* the textual measures of a bill transmute the Government's policy proposal into distinct legal standards which are capable of bestowing power, providing direction, and proscribing conduct. When drafters explain what they have drafted and how the drafted text specifies the Government's proposed policy, it helps legislators, regardless of political denomination, to make an informed decision. Thus, in the conversion process, drafters contribute an ingredient to the "legal surplus value" that accrues as legislators organically develop reasons to

justify *why* and *how* that policy is to be converted into law.¹²³ Simply stated, the Department of Justice's explanation of proposed legislation *for* Parliament at Introduction should not replace reasoned justification *by* Parliament throughout the legislative process.

¹²³ Dyzenhaus, "Process and Substance", *supra* note 23 at 297.

D. Parliament Personified

i) An Objective-Perceptual Approach

At this stage, my emphasis on reasoned justification *by* Parliament should lead us to ruminate about what it means for Parliament to offer reasons that purport to justify legislative action. When judges or administrative officials make decisions affecting the rights, interests, or privileges of an individual, they typically owe a legally enforceable duty to provide reasons for that decision.¹²⁴ Although elected municipal councils, in exercising their provincially-delegated power to make by-laws, do *not* owe any duty of procedural fairness to provide reasons for making that by-law,¹²⁵ it is far from clear whether that rule would extend under constitutional doctrine to the provincial legislatures and the federal Parliament¹²⁶ in exercising their non-delegated power to make statutes.¹²⁷ Under principle, I want to now stake a position that it is desirable to regard Parliament as a reason-providing institution, which will lead to what I call an objective-perceptual approach to legislative intent.

In staking this principled position, it is helpful to start from the ground up with a *tabula rasa*. Pretend, for a moment, that we are suffering from a spell of amnesia, and have now forgotten everything we once knew about Parliamentary democracy. From this raw slate, if we are to learn about making and enforcing law, it might feel almost fantastical to imagine an incorporeal entity named Parliament (physically housed in an institution bearing the same name) thinking and

¹²⁴ I do not mean this absolutely – even litigants are not always entitled to receive reasons for decisions by courts and tribunals. On judges’ duty to give reasons, see *R v REM*, 2008 SCC 51 at paras 11-12. For administrators’ duty to give reasons, see, *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paras 37-39.

¹²⁵ *Catalyst Paper*, *supra* note 107 at para 19 (because the municipality was acting as a democratic institution, the Court held “reasonableness means courts must respect the responsibility of elected representatives to serve the people who elected them and to whom they are ultimately accountable”).

¹²⁶ *Authorson v Canada*, 2003 SCC 39; *Wells v Newfoundland*, *supra* note 112. For an argument distinguishing these cases from constitutional rights, see Klein, “Principle and Democracy in Section 7”, *supra* note 78.

¹²⁷ Though the rule has been extended to provincial Law Societies operating in a democratic capacity when the *Charter* implicated. See *Law Society of British Columbia v Trinity Western University*, *supra* note 107 at paras 52- 56.

behaving as though it possesses one human brain and body. Yet, strange as it sounds, we already use the same cognitive schema to personify the Court and the Crown.¹²⁸ And in organizing our understanding of governmental power through personification, we regard those judicial and administrative institutions as singular entities capable, competent, and required to give reasons. But we do not expect judgments to be literally posted on the pillars of the Courthouse, nor do we envision justifications for Crown decisions to be engraved into a gilded piece of headwear. We readily dispense with these absurdities without difficulty, and without underappreciating the symbolic and instrumental significance of the authority expressed by those institutions, and the individual actors entrusted to animate them.

So why then, is there no unified duty across all branches of power to justify state authority, such that legislative actors also ought to express reasons for legislative decisions? Since the concretization of those judicial and administrative duties coincided with the *Charter* era, perhaps the *Charter* might lend some harmony here. After all, the *Charter*'s first provision conditions "reasonable limits prescribed by law" as those which "can be demonstrably justified in a free and democratic society".¹²⁹ But we have to be careful not to become blinkered by the *Charter*. Never mind that judicial and administrative duties to provide reasons evolved out of the common law, at best, the trappings of the *Charter* alone are only one part of a culture of justification. More specifically, approximating and anchoring a legislative duty to express reasons under the *Charter* is awkward and inadequate, owing to at least three differences in proximity: who, when, and where the reasons justifying government decisions are expressed.

¹²⁸ Fuller, *The Morality of Law*, *supra* note 28 at 86; Dyzenhaus, "Process and Substance", *supra* note 23 at 297-298 (noting that one of the elements of Fuller's theory of legality upon which positivists and naturalists agree is "the idea that the institutions of government in a legal order are legally constituted artificial persons").

¹²⁹ *Charter*, *supra* note 5 at s 1.

Practically, the first difference is who authors and narrates that justification when the citizenry seeks to hold Parliament to account for its legislative decisions. The actor who voices that justification in Court is not the same actor who actually makes the decision. The second difference is in time. The justification is put forward after the decision has already been made, and part of the reasoned proof might include how that decision has since been implemented and executed afterwards. The third difference is the venue where the justification is heard. Reasons for legislative decisions are not only stated by non-legislative government officials to prevent the undoing of the decision *after* it has already come to pass, those reasons are funneled into a different institutional setting, where the form of what is presented and the nature of what persuades is filtered by and for that setting. What we see across three levels of reason-giving – verbal, temporal, spatial - is a remoteness experienced only by Parliament, which creates a disjuncture between the branch which decides, the promulgation of reasons for that branch's decision, and the ability to hold that branch accountable before, during, and after the decision-making process has ended.

Curiously, this problem, twisted within the branches at large, has wound its way into a both a descriptive and empirical issue when identifying legislative intent. In empirical terms, when the Court has grappled with what legislators say about proposed legislation prior to enacting the Bill into law, the Court has blanched at making much of anything about what those legislators stated on the record about what exactly they were enacting. Understandably and desirably, relevance and reliability limit the admission and use of what legislators say on the Parliamentary record. Surely, statements made primarily for political gain should not determine a statutory provision's best legal meaning.¹³⁰ Yet instead of clearly overruling or restating the historical rule against admitting legislative history, or instead of developing analytical tests to ameliorate concerns for irrelevance

¹³⁰ *Re BC Motor Vehicle Act*, *supra* note 77 at paras 47-50.

and unreliability (as evidence law has accomplished with, for example, hearsay and expert evidence), to sidestep around “the indeterminate nature of the data” comprising legislative intent, the Court has resorted to rather maladroitly analogizing Parliament to a corporation.¹³¹

The hands-off posture against legislative intent was parceled with metaphorizing Parliament as a corporation in the s 7 jurisprudence. Consider *R v Heywood*, which declined to resolve contested positions on admitting and using evidence of what legislators understood the undefined term “loitering” to mean when they legislated the *Criminal Code*’s vagrancy prohibition.¹³² In the narrow five-to-four decision, Cory J stated the following on behalf of the majority:

*First, the intent of particular members of Parliament is not the same as the intent of the Parliament as a whole. Thus, it may be said that the corporate will of the legislature is only found in the text of provisions which are passed into law. Second, the political nature of Parliamentary debates brings into question the reliability of the statements made. Different members of the legislature may have different purposes in putting forward their positions. That is to say the statements of a member made in the heat of debate or in committee hearings may not reflect even that member’s position at the time of the final vote on the legislation.*¹³³

That Parliament’s work occurs in a unitary fashion is not what is objectionable here. What is objectionable, in my opinion, is how the corporate analogy both oversimplifies the nature of legislative decisions, yet overcomplicates evidence of legislative statements. Evoking connotations of self-interested decisions by corporations, which are rendered primarily to seek profit through private power allocated in *pro rata* shares, is ill-suited to government decisions. The political power signified and executed by each individual legislative vote is not distributed in such a divisible, trackable manner as corporate decisions.

¹³¹ *Re BC Motor Vehicle Act*, *supra* note 77 at paras 51-52; *R v Heywood*, [1994] 3 SCR 761.

¹³² *R v Heywood*, *ibid* at 787-789.

¹³³ *R v Heywood*, *ibid*.

Moreover, prioritizing the Parliamentary outcome over the process, without attending to the incalculable value of the *interval* in converting policy to legal text depreciates the public interest character of public law, where ends are not merely instrumental and utilitarian, but also possess intrinsic worth. Part of this intrinsic worth is the publicity principle – informing the citizenry about and allowing them the opportunity to contribute ideas and perspectives, and to share challenges. From the text of a Bill, a citizen cannot read the express reasons why a particular legislator voted in favour of a particular outcome – unlike adjudicators who sign on to a majority or concurring or dissenting opinion, or administrators who issue approvals and denials. In theory, a constituent might infer their representative’s reasons for voting for or against a Bill from what the legislator says on the record during debate, but in reality, the ability of to be heard in the House is subject to the whips and whims of partisan politics.¹³⁴ It is for this reason - the impossibility of attributing a particular apprehension to a particular parliamentarian - that misapprehensions about the information and legal effect of Bills which seep past party lines and eclipse the elected and unelected Parliamentary chambers can destabilize Parliament’s legitimacy. At the same time, legislative statements can be depoliticized and dialled down with objective factors. For starters, it would not be onerous to note when and where in the legislative process a statement is uttered, so as to distinguish Question Period from Committee Studies, and votes on procedural motions from those to enact Bills.

Unless the reasons for legislative action come from the legislators who decide upon that precise action, and are expressed *while* they are deciding to act, then in a strong majority Government where the political head of the Department of Justice (which crafts the policy and

¹³⁴ *R v Heywood, ibid*; Michael Chong, Scott Simms, & Kennedy Stewart, *Turning Parliament Inside Out: Practical Ideas for Reforming Canada’s Democracy* (Madeira Park: Douglas & McIntyre, 2017) [*Turning Parliament Inside Out*].

drafts the Bill) is the same legislator who sponsors a Bill, then there is a risk that Parliamentarians will become automatized into thoughtless scribes of the Government's policy. In these circumstances, under Richard Ekins' view, the resulting product would be both unintentional and irrational legislation: "any 'legislature' that aggregates preferences, constitutes a voting machine, or acts on a minimal intention to change the law would fail to exercise legislative authority and would be unlikely to enact reasonable legislation".¹³⁵ Understanding the legislature as a rational agency of individuals therefore finds affinity with Dyzenhaus' reformulation of Fuller's conversion process, for both Ekins and Dyzenhaus regard the legislative process as a time and place for testing the durability of a policy as it progresses towards enacted law.¹³⁶

Conversion creates an interval where committed, freethinking individuals convene to deliberately and actively engage in a task with a view to advancing and refining the work that a coordinate body (the administrative branch) has already begun, and holding the lead political actors account for what it has directed the administrative branch to do. Understanding conversion as a deliberative process where the ultimate goal is an improved, informed decision (which may be deciding *not* to legislate), mobilizes legislators into a collectively rational agency that fulfils Parliament's constitutional functions of legislating, deliberating, and accounting in a meaningful way. To treat the legislative process as a corporate meeting or passive aggregation of majority preferences is to defeat the purpose of having three readings in each chamber before Royal Assent. If the legislative process is simply a rigmarole to approve of legislation democratically, then in effect, there is no prospect of improving the Bill, and no practical point in even attending

¹³⁵ For a sophisticated description of this thoughtless machine metaphor, and for Ekins' perspective of legislating more generally, see Richard Ekins, *The Nature of Legislative Intent* (Oxford: Oxford University Press, 2012) at Chapter 4. I do not fully endorse Ekins' entire theory of statutory interpretation and disagree in particular with his opposition to admitting Hansard as evidence in adjudication (see 261-274).

¹³⁶ Ekins, *ibid*; Dyzenhaus, "Process and Substance", *supra* note 23.

Parliament in person to attend debates and cast votes, because legislators are seen not as persons, but like satellites that transmit the results of opinion polls.

The purposive, thicker account of the legislative process percolating in the scholarship befits a constitutional democracy better than a self-interested corporation or automatized machine. To see Parliament as a diligent, rational agent with the capacity and competency to improve the substance of legislation between drafting and Royal Assent is to set high standards for the individuals who deliberate, legislate, and hold the Government to account. However, even this higher standard may be unsatisfactory. Although I agree that full legitimacy of the ultimate legislative decision ought to be a function of the quality of the reasons preceding the vote, this shared presupposition does not answer a troubling issue emanating from Bill C-36's legislative process, which we will witness closely in Parts II and III.¹³⁷

Generally, the trouble brews when the legislative record transcribes reasons that support the Bill, but those reasons are premised upon plainly wrong facts and/or clearly incorrect understandings of law. In keeping with legitimacy as a question of degree, democratic legitimacy could withstand flawed perceptions of peripheral facts by a handful of legislators, and legal legitimacy could tolerate misconstrued interpretations on ambiguous points of law. But when these errors are glaring and cut to the reasons provided by numerous legislators at multiple stages of the legislative process, Parliament's institutional legitimacy – its competency and capacity – is destabilized, and with it, democratic and legal legitimacy begin to slip and slide. Making sense of Bill C-36 and the struggles of time, resource, and priorities which contracted the conversion

¹³⁷ I attempt to make the insufficiency of current approaches to legislative intent especially apparent in Part III. B., when I discuss the purpose of s 213(1.1). For now though, the gist of what it means for Parliament to offer reasons during the legislative process is still germane to Parts I and II.

process may therefore entail an expanded theoretical view of *how* Parliament rationally converts policy into law. This is the objective-perceptual approach which I mentioned earlier.

Refining what it means for Parliament to offer reasons involves more than caving at the impossibility of inquiring into the *actual* subjective mind of each legislator. First of all, when it comes to objectivity, the law already recognizes and applies meaningful distinctions between appearance and reality, and between subjective and objective inquiries into states of mind.¹³⁸ On an institutional level, this harkens back to hallowed principles of natural justice. Public trust and faith in the integrity of our legal and political institutions hinges upon *appearance*.¹³⁹ Importantly, the high threshold enforced for such principles to carry force (for example, to set aside decisions of judges and administrators for bias) is commensurate with the significance of the legislative occasion, without rashly jettisoning the importance of the task. High standards bulwark legitimacy through stability and certainty. Infusing our understanding of what it means for Parliament to offer reasons according to an appearance of illegitimacy is, on an individual level, also related to the cognitive schema we use to organize the branches of power. But as noted, there is a dissonance in how we personify those institutions if we demand sound reasons from administrative and judicial actors, yet deny the same capability to legislative actors within Parliament. Second of all, then, the perceptual prong of this approach believes that cognition might be part of the answer.¹⁴⁰

Given that empirical indeterminacy is part of the intractability of current approaches to legislative intent, there is some solidity in now availing of an idea that emerged from empiricists.

¹³⁸ See eg. the *mens rea* for conspiracy, *R v Dery*, 2006 SCC 53; *USA v Dynar*, [1997] 2 SCR 462; and the *mens rea* for uttering threats, *R v McCraw*, [1991] 3 SCR 72 at 82-83 (“Looked at objectively, in the context of all the words written or spoken and having regard to the person to whom they were directed, would the questioned words convey a threat of serious bodily harm to a reasonable person”).

¹³⁹ *Imperial Oil v Quebec (Minister of the Environment)*, 2003 SCC 58.

¹⁴⁰ Fuller, *The Morality of Law*, *supra* note 28 at 86 (“We tend to think of intention as a phenomenon of individual psychology, though what we are interpreting is a corporate act”).

Though later subsumed by the larger field of cognitive science, *Gestalt* principles were produced from experiments by German psychologists who sought to explain how self-determining individuals gain and perceive meaning from the behavioural environment in which they are situated.¹⁴¹ Enclosed in this dynamic environment are other self-determining individuals, who also think and behave in response to their perception of each other, as well as the information present and the task before them.¹⁴² Here, principles of particularity and totality, and of quality and quantity operate reflexively. A close frame looks inward from the individual, who has their own subjective perception uniquely unknowable to those people surrounding him or her; yet simultaneously, a pan outwards integrates the influence of all of those surrounding perceptions, which may clarify and enhance what each individual alone perceives and understands. This clarified perception is possible because when assembled, the presence of multiple perspectives and stimuli can coalesce into an objective character. In other words, this objective-perceptual approach can explain what occurs when legislative statements bespeak potential misapprehensions that go to the core of legislative intent.

Earlier, we imagined that we had amnesia to see how our view of Parliament is inconsistent with our cognitive schema for the relationship between institutional actors and institutions. Now imagine we are looking into a kaleidoscope to see how an objective-perceptual approach can also offer a normative foundation for determining whether misapprehensions distort legislative intent. In the intricate process and place where law is made, it is the reflecting, rotating individual perceptions that converge into common intent. This common intent – the shared visual field in the kaleidoscope - leads to a single action, typically manifested by the outcome of a vote. When and

¹⁴¹ Kurt Koffka, *Principles of Gestalt Psychology* (Abingdon: Routledge, 2005). Query whether John Rawls' idea of an overlapping consensus is the modern philosophical analog to *Gestalt*: See John Rawls, *Political Liberalism*, *supra* note 105 at 144-150.

¹⁴² Koffka, *ibid* at 21.

where there is a pattern of dysfunction, the projected image – the legislative decision - becomes distorted to the onlooker who tries to envision the symmetry - symmetry which all of the individual facets are trying to project in concert. While one dysfunctional facet or perspective may not alter the complete picture that emits from the interacting reflections, if there is a patterning or refracting of dysfunction, then the image is blurred, and intent is askew. Enriching legislative intent with *Gestalt* principles therefore suggests that when it is *apparent*, on an objective scrutiny of the reasons stated during the legislative process that there was a shared misapprehension of fact or law, then there is an *appearance* that Parliament’s legitimacy is deteriorating.

Although often miscited in everyday parlance, *Gestalt*’s seminal principle is that “the whole is something else than the sum of its parts”.¹⁴³ This principle behooves the individual-associational conversion process in which legislative intent transforms policy into law. This principle is commensurate with the significance of what Parliament attempts to accomplish in a constitutional supremacy – a reasoned attempt to apprehend the factual and legal context for converting policy into a form capable of enforcement, and in an environment where the political power Cabinet members exact over the process and substance of legislation cannot be quantified with exactitude according to votes. If the whole were greater than the sum of its parts, then for the Court to presume that Parliament did not intend to violate the Constitution - despite evidence of misperceived facts and misunderstood law - would be to defer out of subordination, not coordination. That subordinate deference would infer a devolution to a pre-1982 system of Parliamentary supremacy in which the judiciary lacked its remedial mandate under s 52(1),¹⁴⁴ and would also overlook that law enforcement officials are guided in administering law from their

¹⁴³ *Ibid* at 137.

¹⁴⁴ Weinrib, *supra* note 81 at 24-25; Hasan, “Three Theories”, *supra* note 80.

discussions with legislators.¹⁴⁵ If all branches have to collaborate in a constitutional supremacy to justify laws, pretending that constitutionally suspect reasons were not uttered could transform working together into working against each other.

The transformation from Parliamentary supremacy into constitutional supremacy (which uses s 7's instruments of rationality as powerful tools) draws out a strength of this objective-perceptual approach, as it actually shares a premise upon which proponents of the "voting machine" have constructed a supreme view of Parliament. For one, Jeremy Waldron encourages legislators to speak thoughtfully and responsibly about their votes because doing so can improve the quality of the outcome.¹⁴⁶ Similar to the concerns in *R v Heywood*, Waldron eschews evaluating what individual legislators say in debates because extraneous issues can influence their position on the issue under vote. Yet at the same time, Waldron recognizes that it is each legislator's *interaction* and *behaviour*, when congregated together that may create "high-quality outcomes" through "something like an invisible-hand mechanism".¹⁴⁷ In reconciling these conceptions of what it means for Parliament to reason, what emerges is a shared recognition that there is something unique from the individual-collective relationship that endows Parliament with the capability to do that which single legislators alone, cannot.

That uniqueness, assessed objectively, suggests that if a substantial subgroup of legislators *appear* to be fundamentally misconceived in the either factual nature and/or legal consequences of the issue before them, then we can infer from that distortion (which may not be shared by all)

¹⁴⁵ See eg. *R v Mercer*, 2016 NSPC 48 (pre-trial abuse of process and entrapment applications); 2017 NSPC 3 (entrapment ruling); 2017 NSPC 20 (sentencing). Bill C-36's Technical Paper was cited *verbatim* to uphold the constitutionality of police action when the Cape Breton Police deployed a sting to enforce the new laws in Cape Breton. The legislation itself was not challenged in the s 7 application.

¹⁴⁶ Jeremy Waldron, "Judges as moral reasoners" (2009) 7 ICON 2.

¹⁴⁷ *Ibid* at 8; *R v Heywood*, *supra* note 131.

that the decision which follows is unreliable, and should, at the very least rebut the presumption that Parliament acted constitutionally.¹⁴⁸ Clearly, democratic legitimacy suffers a blow if, on a vote, a backbencher prioritizes his own promotion over his constituents' interests. But if a shared misapprehension of fact goes to both the policy (eg. most Canadians support criminalizing buyers of sex) and the legal consequence (eg. a seller is decriminalized) then both legal and democratic legitimacy are debilitated. The legislators who misapprehend the factual grounds for legislating are impaired from assessing whether their constituents would indeed support the policy, and if legislators do not appreciate the legal implications of the policy they are converting into law, then there is an increased likelihood that the form and content of the Bill is legally defective.

There is not enough space here to polish this objective-perceptual approach to legislative intent, but this sketch is a starting point for a deeper analysis. If the confidence this enriched foundation reposes in Parliament gives an overly rosy impression, then it is because this confidence is also placed in a collaborative constitutional framework where reasons are the stimuli that enable government acts and actions to be constrained and constituted. If an objective-perceptual approach to legislative intent were enforced, it would push Parliament to make conscious and conscientious decisions. For reasons to be given, reasons also have to be demanded, and these demands are placed before or made by the judicial and administrative branches.¹⁴⁹

Individually, if a legislator is cognizant that what they state will not just be sensationalized to their constituents by journalists or tweeted for amusement in social media, but could very well be scrutinized for cogency, then it would contribute to a continuing, robust accountability between

¹⁴⁸ The issue of whether the presumption of constitutionality even applies to the *Charter*, or at least in the same manner as it does to federalism questions has not been resolved. *Cf R v Ahmad*, 2011 SCC 6 at paras 31-32; *Manitoba (AG) v Metropolitan Stores*, [1987] 1 SCR 110 at paras 12-26.

¹⁴⁹ David Dyzenhaus, "Deference, Security and Rights" in Benjamin J Goold & Liora Lazarus, eds, *Security and Human Rights* (Oxford: Hart, 2007) 125-156.

election cycles. That ongoing vigilance can solidify democratic legitimacy in a meaningful way: voting is a poor proxy for membership in the polity when the persons most acutely affected by legislative decisions on criminal justice issues are often politically marginalized or effectively disenfranchised. Institutionally, reasons ensure that deference is earned and that policies are converted into law in a democratically, legally, and institutionally legitimate process that is more likely to be sound in outcome.

ii) Three Modes of Practical Reasoning: Evidentiary, Technical, and Moral

The conceptual framework for appreciating Parliament's constitutionally distinct role to legislate with reasoned intent also raises a practical question: what kind of statements qualify as reasons for legislative action? Which institutional actor – judge or legislator – is better at moral reasoning is a perpetual quarrel over which classic and contemporary legal philosophers have broken quills and now keys.¹⁵⁰ Historically, this competition was somewhat unruly for ignoring the Executive's central role, and for calling up unworkable distinctions between policy and principle that in turn stacked individual rights against communitarian interests.

Nevertheless, preliminarily attending to a modern edition of this debate is instructive for grasping some practical considerations. Take the complex, recent episode between Dyzenhaus and Waldron. From Waldron's narrower position, we can glean that legislative reasons can be highly persuasive when expressed as interrogatories (not only assertions), and that what is indeed asked and asserted when political stakes are high and community ramifications are imminent may sound undisciplined, but is not necessarily unsound if we dilute the hyperbole accordingly.¹⁵¹ While

¹⁵⁰ See eg. Ronald Dworkin, *Law's Empire* (Cambridge, MA: Harvard University Press, 1986); John Finnis, "On Reason and Authority in Law's Empire" (1987) 6 *Law & Phil* 357. For a more recent example that engages with earlier debates, see Waldron, "Judges as moral reasoners", *supra* note 146 and David Dyzenhaus, "Are legislatures good at morality? Or better at it than the courts?" (2009) 7 *ICON* 46 [Dyzenhaus, "Are legislatures good at morality?"].

¹⁵¹ Waldron, "Judges as moral reasoners", *supra* note 146 at 6-8, 20-21.

Waldron primes us to sensibly adjust our expectations to the reality and nature of legislative reasoning, Dyzenhaus adverts us to particular forums where legislative reasoning matters to broader constitutional commitments. In this shared undertaking, each government actor across the branches has distinct, yet equally essential work to contribute. So, to presume that the dispute of who lavishes the last word can (and should) be ultimately resolved is to obfuscate a pragmatic comparative question that is more material to the citizenry: how should the Court, Executive, and Parliament interact when legislation is constitutionally suspect?¹⁵²

To help answer this impactful question, Dyzenhaus leads us to the records of institutional reasons. In marking out Hansard and Committee proceedings as prompts for public debate and worthy comparators to adjudicative proceedings, Dyzenhaus identifies three modes of reasoning that are employed in all governmental institutions:

*While each forum will consider the same range of issues, the way in which those issues are formulated and discussed is quite different ... the various components of moral, legal, and policy-based reasoning will figure, but which element dominates will depend on the attributes of the forum.*¹⁵³

And as for the attributes of Canada's Parliamentary Committees, former Parliamentary Counsel, Rob Walsh, reminds us that the fact-gathering and legal analysis at Committees, and the extent of reasoned argument is contingent on broader priorities and available capital:

*Neither justice nor truth, it must be said, is the dominant priority...Instead, they attempt to propose better public policy or call the Government (or the government bureaucracy) to account, based on testimony that is a mix of facts and opinions, allegations and arguments. Their work is a political exercise done in the public interest...Members of Parliament need to hear testimony, uncensored, if they are to understand the issues presented to them within the limited time and resources available to them.*¹⁵⁴

¹⁵² Dyzenhaus, "Are legislatures good at morality?", *supra* note 150. This functional question connects to what I have proposed to address in my doctorate through s 7 cases.

¹⁵³ Dyzenhaus, "Are legislatures good at morality?", *supra* note 150 at 50-51.

¹⁵⁴ Walsh, *On the House*, *supra* note 49 at 30-31.

Given that this exercise relies on testimony from external participants, yet the ability to participate depends on political power,¹⁵⁵ reasons at Committees are especially important to imbuing the ultimate legislative decision with democratic character and legal rigour. Thus, although the reasons of judges, legislators, and administrators are geared towards different outcomes from the purpose and nature of the task before them, and while their institutions vary in strengths, resources, and reach, there is a fortifying effect for our constitutional commitments in that the same devices are used to devise all government acts and actions. And there is further fortification in the movement of these three modes of practical reasons. Reasons which purport to justify legislative proposals on moral, legal, and policy grounds circulate throughout interdisciplinary theory, span common law jurisdictions, and circle back as far into history as Aristotle's heyday.¹⁵⁶

However, since inconsistent terminology for characterizing each mode also besets the literature, it is important to ask what exactly is practical about this type of reasoning. In the pointed words of John Finnis, practical reasons prevent futility:

*The fundamental principle of practical rationality is: Take as a premise at least one of the basic reasons for action and follow through to the point at which you somehow instantiate that good in action- do not act pointlessly.*¹⁵⁷

Here, Finnis rustles up the active, purposive role of reasons. Thus, as a call for logical action, a practical reason offered to justify an authoritative action must be formulated from a premise of sound policy, law, and/or morality. To be cautious though, action does not always follow from a logical conclusion. Practical reasons require thinking actively, so that the conclusion that follows therefrom leads directly to an institutional choice and outcome.¹⁵⁸ Following a premise - *when*

¹⁵⁵ Marc Bosc and Andre Gagnon, "Committees" in *House of Commons Procedure and Practice*, 3rd ed (Cowansville: Éditions Yvon Blais, 2017). Parliamentary privilege governs Committee Proceedings, including who is invited to testify.

¹⁵⁶ John Finnis, "Natural Law and Legal Reasoning" (1990) 38 Clev St Rev 1 at 2-3.

¹⁵⁷ *Ibid* at 3

¹⁵⁸ *Ibid* at 9.

sellers communicate with clients, it reduces the risk of violence to sellers - to its logical conclusion - therefore communication should be allowed - may require inaction - I decide not restrict sellers' ability to communicate. Regardless of whether the premise is correct, diagramming the elements of a practical reason into this simplistic example highlights how the consequential decision which follows from a conclusion contains value or principle – *autonomy, restraint in the criminal law* – and it is at this element where most reasonable legislators are likely to disagree¹⁵⁹ for example, if one prioritizes deterrence over restraint. Here too, is the difference between a reasoned and a reasonable decision. And in any one decision, if we add Dyzenhaus' supposition to Finnis' call for logical, purposive action, then all three modes of practical reasons

*are necessary if the legal order is to satisfy...the ultimate commitment of any legal order...that all public decisions be fully justified, where part of the requirement is that the decisions are shown to be at least consistent with constitutional commitments, including the commitments to rights, and, preferably, are seen as advancing the project of a progressive realization of such commitments.*¹⁶⁰

Moving the thoughtworthy debate forward onto practicalities is worth pursuing because when institutional actions comport with the variety of reasons that precede them, those reasons contribute to legitimate government decisions, and firmly secure the broader constitutional apparatus.

As I now move to the practicalities of Bill C-36, I use these three modes of reasoning as analytical devices for exploring the link between the rationality and legitimacy of Bill C-36's legislative process. Though my terminology – evidentiary, technical, and moral - slightly differs

¹⁵⁹ Rawls, *Political Liberalism*, *supra* note 105 at 55-58. See how Waldron reconciles Rawls' idea of burdens of judgment with public reason in Jeremy Waldron, *Law and Disagreement* (Oxford, Oxford University Press, 1999) at Chapter 7. Conversely, if a premise is wrong or unclear, and introduces another premise (eg. communication does not increase safety, and selling sex is unsafe), then the conclusion (restrictions on communicating may reduce an unsafe behaviour) and decision (so I will restrict sellers' ability to communicate) can produce a pointless result even if there is agreement on value.

¹⁶⁰ Dyzenhaus, "Are legislatures good at morality?", *supra* note 150 at 52.

from the terminology above, it is because I match these modes to the three categories from my research method for analyzing Bill C-36's record,¹⁶¹ and because each mode of practical reasoning should be calibrated from the adjudicative and administrative context to legislative functions more generally.

Evidentiary reasoning, as its name suggests, relies on a fact as its main premise, like the communication example above. It requires identifying and absorbing pertinent information about the physical world and the public's interactions within it.¹⁶² To be offered as a reason, the fact often adds to one's own knowledge about the past and present societal circumstances: the situation that the Bill seeks to redress or alter through policy. To justify taking legislative action, evidentiary reasoning addresses the legislative situation, such as the existence and extent of a risk of violence to a particular group of people. Phrased in lay terms, if we do not know what the problem even is, then it is irrational to decide upon a solution.

If the problem is understood, however, it is still irrational to decide upon a solution if we do not understand how the solution is supposed to work. Technical reasoning is more paradigmatic and instrumental, as it begins from the technique for redressing or altering the legislative situation, such as prohibiting activities that (now known from the facts) surround that actual or potential risk of violence, or permitting those that reduce the risk. A technical mode of reasons locate the measures to be taken within a normative structure or set of rules. In its more detailed iterations, technical reasoning will take the features of the proposed text or measure as its premise to then assert that the legislative solution may or may not accomplish its end. But reasoning from technique is also more than a question of proportionality confined to the Bill. If passed, a criminal

¹⁶¹ For a description of the coding scheme used to research and analyze the Committee meetings, see the Appendix.

¹⁶² Ekins, *The Nature of Legislative Intent*, *supra* note 135 at 131; Dyzenhaus, "Process and Substance", *supra* note 23 at 298.

statute joins and affects an existing body of law, including the common law, which is applied not just by judges, but by police and prosecutors as well.¹⁶³ Technical reasoning should therefore (at least in broad strokes) consider collateral impacts on the legal system that may make the Bill itself unworkable, including elements of the existing legal and regulatory structure that are never recorded in statute form. To justify choosing a specific legislative model, legislators dealing with an ambitious criminal justice Bill ought to also reason technically from administrative rules, and engage with jurisprudence, where relevant.

Now, even if we know what the problem is, and we understand how a potential solution would work, does it then follow that the decision to move forward with that solution is a rational one? Might there be some other persuasive reason to instead decide against following through with the solution? Moral reasoning is perhaps the most ubiquitous and controversial mode. For those who equate instrumental rationality with morality at large, persuasive evidentiary and technical reasons might suffice to justify legislative action. But as we will see, the reasons offered in support of Bill C-36 (and I believe, more generally, the reasons offered to endorse laws that restrict individual rights and freedoms) do diverge from strictly factual and technocratic justifications into more profound assertions – assertions that are more than provocative or ideological appeals to emotion. Moral reasons stem from values and principles. Here, I adopt a modest version using constitutional values and principles endorsed in judgments, enunciated in legislation, and referenced in policy protocols. Those which have been inscribed into case law already are ready sources, such as the values of a free and democratic society articulated in *R v Oakes*, or the unwritten constitutional principles harvested in the *Secession Reference*.¹⁶⁴ So, too, would

¹⁶³ John Gardner, “Rationality and the Rule of Law in Offences Against the Person”, in John Gardner, *Offences and Defences: Selected Essays in the Philosophy of Criminal Law* (Oxford: Oxford University Press, 2007) at 43-45 (distinguishing between textual clarity from good drafting and moral clarity to secure notice to the public).

¹⁶⁴ *R v Oakes*, *supra* note 82; *Reference re Secession of Quebec*, *supra* note 76.

premises from Preambles of our constitutional enactments sustain a moral reason, as those Preambles recite the “political theory which the Act(s) embodies,” as well as codified principles of criminal law, such as deterrence and denunciation, restraint and rehabilitation, to name a few.¹⁶⁵

Moral reasons also have a tie-breaking function. Alone, their generality and abstraction might not lend much assistance to making a decision. But in a practical decision-making scenario that often includes empirical uncertainty, legal ambiguity, and novel policy models, these values and principles might help. To move beyond equivocation, it is logical to resort to some mediating level of reasons or additional support, lest the ability to respond to society’s needs be crippled. This additional layer of justification may be what Dyzenhaus had in mind when he argued (albeit in the context of adjudication) that the elision of reasons from facts (what I have called evidentiary reasoning) with the formal compulsion to obey the law for authority’s sake cannot justify law’s content.”¹⁶⁶ Despite disliking *how, when, and where* we have to comply, moral acumen for *why* we nevertheless comply with law is borne under Dyzenhaus’ interpretation of Fuller’s internal morality of law, which, reflects most purely a morality of aspiration, rather than a morality of duty.¹⁶⁷ So while strong moral reasons may seem unnecessary in the face of forceful evidentiary and technical reasons, they have merit in the equivocal area of uncertain facts and ambiguous law.

When policy is grounded on tenuous legislative situations and precarious models, there is a real risk of converting a buried, subterranean sort of wrong into law – in other words, a wrong that encroaches upon core constitutional values, but has not yet crystallized into juridical or justiciable form. And this therefore, is partly why reasons are so important. Because those

¹⁶⁵ *Switzen v Elbling and AG of Quebec*, [1957] SCR 285 at 306, Rand J. For definitional purposes, I exclude less universally-held premises that often come to the fore in public debates about penal sanctions, like the classic harm principle, and broader notions of utility. See eg. *Criminal Code*, *supra* note 2 at s 718.

¹⁶⁶ Dyzenhaus, “Process and Substance”, *supra* note 23 at 291-294.

¹⁶⁷ Dyzenhaus, “Process and Substance”, *supra* note 23 at 301; Fuller, *The Morality of Law*, *supra* note 28 at 42-44. The idea of moral reasons as a tie-breaker seems to underly the s 1 jurisprudence on empirical imprecision: see fn 103, *supra*; see also *Sauvé v Canada, (Chief Electoral Officer)*, 2002 SCC 68, Gonthier J (dissenting).

subterranean wrongs remain unreachable and incorrigible unless we aspire to progress forward, they must be recorded into institutional memory by the individuals responsible for them, until a time when we are capable and competent to learn from and uproot those wrongs.

Part II: Factual Apprehensions

Part II begins to take the “reasoned apprehension” standard to assess Bill C-36’s legitimacy through evidentiary, technical, and moral reasoning. Delving into the facts underlying *Bedford* and Bill C-36 brings forward a theme that the House of Commons, and to a lesser extent, the Senate, misapprehended some key information that informed legislators’ votes for or against Bill C-36. Because Part II focuses on the information and facts open for Parliament’s consideration, evidentiary reasoning about the legislative situation is prevalent.

Over and above the occurrence and outcome of *Bedford* itself being a fact capturing Parliament’s attention, *Bedford*’s evidence also captivated the proceedings. Much of the evidence submitted by *Bedford*’s litigants in Court was rebroadcasted through witnesses who testified at the House of Commons Standing Committee on Justice and Human Rights (‘JUST’) in July 2014, as well as at the Senate Standing Committee on Legal and Constitutional Affairs (‘LCA’), which conducted both a Pre-Study in September 2014 before its general Study in October 2014. Although Bill C-36 was parlayed into the Government’s tough-on-crime strategy, but-for the Court’s release of *Bedford*’s judgment on December 19, 2013, wholesale prostitution reform would not have been on Parliament’s agenda at that time. In an effort to show how the Government’s loss in *Bedford* rolled into Parliament’s legislative process, Part II is structured to compare and contrast the record in *Bedford* with the record in Parliament.

Section A will introduce how evidence is anatomized into three types of facts: social, legislative, and adjudicative. Next, Section B admits us into Parliament, beginning with the debate over the Government’s online consultation, which was an opportunity to produce new facts to inform Bill C-36. Given that Parliament depends upon its Committees to gather facts and analyze technical matters, it should come as no surprise that the legislative proceedings reproduced in

Sections C and D are almost exclusively that of the two Standing Committees mandated to study constitutional and criminal law.

By engaging with new rules in *Bedford*, Section A argues that this anatomical division of evidence affects not only the courts, but the institutional division of labour among the branches of power. In addition to *Bedford*'s remedy, which constrained the time to develop and pass new legislation to 12-months *if* Parliament chose to take action before the unconstitutional provisions lost legal force, the content of *Bedford*'s judgment also stretched Parliament's capacity through new legal rules that reshaped constitutional law. The unusual and untimely burden – beyond the typical legislative process and daily political pressure - sets the stage for Sections B, C, and D, where we will watch the Government attempt to refute *Bedford*'s social science evidence and try to rebut *Bedford*'s adjudicative facts.

How legislators handled the unusual and untimely burden gives us a glimpse at the relationship among the branches of power at the time. The Government was still reeling from “a narrative of conflict” with the Court: the Health Minister had arbitrarily pulled the plug on a safe injection site, the Government had no authority to appoint its preferred judicial candidate to the ranks of the Court, and Parliament could not implement the Government's proposed reform to the Senate without violating the Constitution.¹⁶⁸ During this turbulence, politicians often blamed the *Bedford* case (and arguably not unfairly) for hampering the legislative process, and this institutional strain sparked early concerns for democratic and legal legitimacy.

Thus, to temper the tone of what follows, we also ought to bear in mind that these Committees carried out their studies in the thralls of political urgency and in the throes of

¹⁶⁸ *Insite*, *supra* note 71; *Reference re Supreme Court Act, ss 5 and 6*, 2014 SCC 21; *Reference re Senate Reform*, 2014 SCC 32. For a detailed account, see Manfredi, “Judicial-Government Relations, 2006-2015”, *supra* note 43 at 965-967 (characterizing the interaction between the Court and the Government as part of a larger “narrative of conflict” during Stephen Harper's tenure).

tempestuous relations with the Court. During a time allocation motion to curb debate on Second Reading to five hours, immediately before the Bill would be sent to JUST, Justice Minister MacKay pressed that Bill C-36 “needs to proceed because of the timelines and the pressure we are under, placed on us by the Supreme Court.”¹⁶⁹ Numerous parliamentarians, fraught with worry about the new legal complexity, wanted a full debate at Second Reading, and argued that Bill C-36 ought to be referred back to the Court.¹⁷⁰ Although we would expect the time allocation motion to succeed since the House of Commons was stacked with a strong majority Government, it is still unfortunate for Parliament’s accountability function that no legislator put it to the Justice Minister to don his Attorney General hat and ask the Court for an extension, as had happened (and would soon again) under other Governments.¹⁷¹

Since the entire legislative process is where policy is converted into law, Second Reading adds a special ingredient immediately before Committee, as Second Reading is the stage for wider deliberation of the whole House on the principle and policy proposed by the Bill.¹⁷² The loss in Debate at Second Reading could therefore not be completely salvaged at JUST - not only because of JUST’s precious time and stretched resources, but also because of JUST’s distinct function. When it comes to democratic legitimacy – that is, the political warrant that ought to precede the legal warrant – the short cut at Second Reading meant the race to enact Bill C-36 sustained a

¹⁶⁹ *House of Commons Debates*, 41st Parl 2nd Sess, No 44 [Hansard] (12 June 2014) at 1145-1150 (Hon Peter MacKay).

¹⁷⁰ Hansard (12 June 2014) at 1139-1210.

¹⁷¹ Eg. *An Act to Amend the Criminal Code (mental disorder)*, SC 1991, c 43 in response to *R v Swain*, [1991] 1 SCR 933, the initial 6-month suspended declaration was extended after a brief hearing (28 October 1991), 19758 (SCC) (“with the proviso that for whatever reason the parties may reapply”), online: <<http://www.scc-csc.ca/case-dossier/info/dock-regi-eng.aspx?cas=19758>>. For an example soon after, see *Carter v Canada*, 2016 SCC 4 (extending the original 12-month suspended declaration by 4-months to enact *An Act to amend the Criminal Code and to make related amendments to other Acts*, SC 2016, c 3.)

¹⁷² Bosc and Gagnon, *House of Commons Procedure and Practice*, *supra* note 155 at Chapter 16; Hansard (12 June 2014) at 1205 (Hon Françoise Boivin, “Second Reading “gives people from across Canada the opportunity to express themselves about the topic at hand. Then, study in Committee calls on experts and people in the field to add to the debate”).

handicap early on. Although JUST could not fully compensate for that loss of representative deliberation, the exceptional circumstances surrounding JUST'S and the LCA's work on Bill C-36 invested much value in participation, making it all the more important to listen carefully to what was said and take seriously those who were (and were not) able to speak.

A. Anatomizing the Evidence: Social, Legislative, and Adjudicative Facts

To compare the facts adduced in *Bedford* with the facts adduced in Bill C-36's legislative process, Section A outlines the nomenclature for evidence in courts and legislatures. Information received by these legal institutions to inform their legal decisions can be anatomized into adjudicative, legislative, and social facts. Social facts, which are derived from social science research, "construct a frame of reference or background context for deciding factual issues crucial to the resolution of a particular case".¹⁷³ Implicating policy concerns that transcend the unique circumstances of a case, social facts conjoin into legislative facts. Legislative facts "establish the purpose and background of legislation, including its social, economic and cultural context".¹⁷⁴ Because of their generality, in contrast to adjudicative facts, to be admitted in *Charter* adjudication, legislative facts enjoy more flexible requirements for proof.¹⁷⁵ Offering details strictly about the specific case at bar, adjudicative facts are subject to strict rules for proof. Adjudicative facts drill into "who did what, when, where, how, and with what motive or intent".¹⁷⁶ While each of these three limbs – social, legislative, and adjudicative facts - were hefted in *Bedford*, the contested social and legislative facts during and after the case were copious.

i) Key Factual Findings in *Bedford*

Controversy over the evidence in *Bedford*'s application mushroomed into questions of law ripe for appellate intervention in both of *Bedford*'s appeals. In overturning the Ontario Court of Appeal, the ultimate unanimous judgment in 2013 significantly reallocated the institutional

¹⁷³ *R v Spence*, 2005 SCC 71 at para 57, [2005] 3 SCR 458.

¹⁷⁴ *Danson v Ontario (AG)*, [1990] 2 SCR 1086 at 1099. For concerns about deciding *Charter* cases based on a paucity of legislative facts, see *R v Malmo-Levine*, *supra* note 86 at paras 28, 72.

¹⁷⁵ *Ibid*; *R v Spence*, *supra* note 173 at paras 59-60.

¹⁷⁶ *Ibid*, attributing the terminology of adjudicative and legislative facts to Kenneth Davis, "An Approach to Problems of Evidence in the Administrative Process" (1942) 55 Harv L Rev 364 at 402-410.

division of labour. The Supreme Court of Canada proclaimed that first instance factual findings - regardless of whether they are categorized as adjudicative, social, or legislative - are all equally entitled to deference (short of palpable, overriding error).¹⁷⁷ Applying this new rule to *Bedford*'s appeal, the Court deferred to Himel J, the application judge, thereby leaving the entire evidentiary record undisturbed. The facts litigated in *Bedford* then became replicated during Bill C-36's formation and passage.

Understanding how *Bedford*'s evidence figured into the legislative process is therefore the first step to understanding how *Bedford*'s judgment reallocated the division of labour between courts and legislatures. To hash out Himel J's key factual findings from the original application, we can compare facts of consensus with facts of controversy. All experts reached consensus upon the following:

- prostitution, regardless of where it occurs, carries a risk of violence;
- that risk of violence is a function of multiple factors;
- street prostitution is dangerous, and indoor prostitution can be dangerous; and
- all prostitution carries social stigma.¹⁷⁸

However, the applicants' experts and the Government's applicants parted ways on the following three controversial factual issues:

- whether the harm surrounding indoor prostitution is less than street prostitution;
- whether the harm surrounding indoor prostitution can be reduced, and specifically whether prostitutes working indoors are better placed to prevent harm; and

¹⁷⁷ *Bedford 2013*, *supra* note 1 at paras 48-56.

¹⁷⁸ *Bedford 2010*, *supra* note 1 at para 116.

- whether the prohibitions on keeping a bawdy house, communicating in public for, and living on the avails of prostitution materially contributed to the risk of harm.¹⁷⁹

This third disputed matter, however, by intertwining the impugned provisions with the concept of material contribution, relates to causation, which was another crucial doctrinal point. The Court relaxed the causal standard to the flexible level applied by Himel J. A “sufficient causal connection” can be indirect, and flexible enough to withstand negation by third parties, because it focuses on an increased risk.¹⁸⁰ An applicant alleging that a government Act or action violates the *Charter* need only show that the impugned government Act or action is one link within a larger causal chain.¹⁸¹ Although the applicants’ experts opined on the connection between the impugned Canadian prostitution provisions and the risk of harm, most of the Government’s experts testified about prostitution in general, not in Canada specifically, let alone the impugned Canadian laws.¹⁸² Unsurprisingly, this central evidentiary division enveloping causation also became a central issue on both appeals.¹⁸³

The impact of *Bedford*’s evidence pertaining to causation cannot be completely disaggregated from any knock-on consequences to Bill C-36. What can be laid out, though, are the disputed factual findings which were generated from combining the individual applicants’ testimony with the expert evidence and governmental publications that established social and legislative facts.¹⁸⁴ Fused together, the facts below demonstrate the strength of Himel J’s role at first instance, and the significance of the deference accorded to her factual findings. These findings

¹⁷⁹ *Bedford 2010, supra* note 1 at para 117.

¹⁸⁰ *Bedford 2013, supra* note 1 at para 76.

¹⁸¹ *Bedford 2013, supra* note 1 at paras 73-92.

¹⁸² *Bedford 2010, supra* note 1 at paras 125, 131.

¹⁸³ *Bedford 2012, supra* note 1 at paras 107-142; *Bedford 2013, supra* note 1 at paras 73-92.

¹⁸⁴ See e.g. *Bedford 2010, supra* note 1 at paras 26-28 (summarizing Terri Jean Bedford’s testimony). The mixing of all three forms of factual findings as a justification for equal deference are discussed in *Bedford 2013, supra* note 1 at paras 48-56.

were significant not only for *Bedford*'s final result, but also for the evidence then proffered for Bill C-36:

- Prostitutes are at a high risk for physical violence, especially those who work from the street;
- That high risk of physical violence can be lowered by safety measures, including:
 - Working indoors;
 - Working near others, including paid security personnel;
 - Time to screen potential clients for intoxication or signs of violence;
 - Maintaining a regular clientele;
 - Making the client aware that the sexual interaction will occur in a pre-determined, monitored location;
 - Employing third parties, including drivers, bodyguards, and receptionists; and
 - Negotiating financial details in advance, and indoor fixtures, such as closet-circuit television, call buttons, and audio monitoring;
- The bawdy house prohibition can endanger prostitutes by preventing indoor, in-call work from a fixed, regular location, and by precluding the use of the above indoor fixtures and security staff, and working near others;
- The living on the avails prohibition can increase the risk of violence by preventing prostitutes from lawfully hiring bodyguards or drivers. Without those staff, prostitutes are more likely to work from isolated, unknown locations with anonymous clients, with no one else present to identify the client, nor witness or any disrupt violent conduct; and

- The communicating prohibition can increase the risk of violence to prostitutes working from the street by yielding to the client without the opportunity to screen before proceeding into the transaction.¹⁸⁵

From this fusion of the applicants' adjudicative testimony with the expert evidence on social science and documentary legislative materials, the restructuring of institutional labour and responsibility occurred in two different directions: vertically and horizontally. Plainly visible from the Court's judgment in *Bedford* itself, the vertical shift from appellate to superior courts matched the fused nature of the evidence at the application. The Court was concerned with efficiency; this standard would not only save time and avoid delay, it would also save appellate courts from the impracticable (possibly impossible) task of disaggregating these sources of evidence.¹⁸⁶

However, the Court's two efficiency rationales for this new standard of review, by focusing on judicial labour, adverted only to the vertical shift, without expressly anticipating how the combined effect of its new rules on causation and deference might horizontally impact legislative labour.¹⁸⁷ To endorse or expect judges to be just as competent and capable in the dominion of finding social and legislative facts as they are on their home domain of finding adjudicative facts is to task judges with an array of policy predictions outside of the analytical steps in ss 7 and 1. From this endorsement, there may be a corollary consequence for legislators, who may have a more complex task to identify and predict indirect, intervening factors that influence future liability, as Part III will later suggest when we look at apprehensions of law underlying Bill C-36.

¹⁸⁵ *Bedford 2010*, *supra* note 1 at para 421.

¹⁸⁶ *Bedford 2013*, *supra* note 1 at paras 50-56.

¹⁸⁷ *Ibid.*

ii) Changing Litigation Dynamics

Parallel to this two-directional shift in institutional labour was also a two-dimensional change in dynamics between *Charter* claimants and Government defendants. Like the shift in institutional labour, this change is a function of the nature of the evidence in Court and new judicial lawmaking in *Bedford*. Given that the Government explicitly responded to its liability in *Bedford* by introducing Bill C-36, the changed dynamic between the litigants in Court may have implications for the nature of the facts that inform Parliament's legislative reasoning.

At the second step of the s 7 analysis, to demonstrate a deprivation of the principles of fundamental justice, *Bedford* ruled that it could suffice for an applicant to demonstrate that the rights of only *one* hypothetical individual would be violated by the alleged infringement.¹⁸⁸ Theoretically, if the actual, named applicant lacks favourable adjudicative facts that would fit the alleged infringement to advance her claim, then a hypothetical *Charter* applicant could be imagined from social or legislative facts alone to stand in the named applicant's stead. While reasonable hypotheticals have been a staple to assessing the gross disproportionality of mandatory minimum sentences since the *Charter*'s early days, those hypotheticals under s 12 of the *Charter* were primarily painted by knowledge of prosecutorial practice, illustrated by judicial imagination, or drawn from actual past precedents litigated inside the courts.¹⁸⁹

¹⁸⁸*Bedford* 2013, *supra* note 1 at para 123. This nuance on the reasonable hypothetical was reaffirmed in *R v Appulonappa*, 2015 SCC 59 at paras 28-30. As Hamish Stewart has pointed out to me, it is unclear from *Bedford* whether this rule would apply only to the three norms of arbitrariness, overbreadth, and gross disproportionality. In my opinion, although *R v Appulonappa* dealt only with overbreadth, the Court's unqualified, broader reaffirmation at para 28 suggests that the Court would entertain this rule beyond those norms discussed in *Bedford*: "a court may consider "reasonable hypotheticals" to determine whether a law is consistent with the *Charter*". For a pre-*Bedford* articulation which also suggests that the rule would apply even more broadly to any constitutional violation under s 52(1), see *R v Ferguson*, *supra* note 12 at paras 59-61. Moreover, it would also be consistent with the standing rule which permits a corporation to challenge a criminal law for violating s 2(a)'s freedom of religion per *R v Big M Drug Mart*, [1985] 1 SCR 295, and the flexible approach to public interest standing per *Downtown Eastside*, *supra* note 65.

¹⁸⁹ *R v Smith*, [1987] 1 SCR 104; *R v Goltz*, [1991] 3 SCR 485; *R v Morrissey*, 2000 SCC 39.

Similarly, to strike down the former vagrancy offence under s 7 for overbreadth in *R v Heywood*, Cory J (writing for four others) extrapolated likely scenarios from precedent and practice.¹⁹⁰ As Part I previewed, with the majority's hands-off, corporate approach to legislative intent, *R v Heywood* aired misgivings about admitting legislative facts to understand Parliament's intended reach of the vagrancy offence.¹⁹¹ Nearly twenty years later, courts seem more curious to peer into the legislative record, and it is possible that *Bedford*'s unanimous gander at reasonable hypotheticals could be piquing that curiosity. The fluid use of legislative materials to enforce s 7 in cases that followed *Bedford* telegraphs that applicants no longer have to wait for reasonable hypotheticals to appear from the institutional experience of testing laws in the courts, which consequentially could ripen newly enacted legislation to be challenged much earlier than before.

Indeed, recent s 7 litigation following *Bedford* suggests that judges are looking outside of the courts to locate hypotheticals within the legislative process to see how far legislators envisioned the breadth of criminal offences. Take *R v Appulonappa*, where the Court struck down a human smuggling offence for overbreadth.¹⁹² One of the two hypotheticals accepted by the Court came from legislators themselves, who openly recognized that humanitarian workers and family members of asylum seekers would be theoretically caught after they were assured from the Department of Justice's staff that those hypothetical offenders would not be prosecuted. More recently, although the overbreadth claim against mandatory lifetime sex offender registration in *R v Long* did not succeed, the Ontario Court of Appeal sounded unimpressed by the "somewhat

¹⁹⁰ *R v Heywood*, *supra* note 131 at 794-795, 798-799. The version struck down had last been amended in the 1953-54 *Criminal Code*, SC 1953-54, c 51, having originated in the Middle Ages.

¹⁹¹ *R v Heywood*, *supra* note 131 at 787-789.

¹⁹² *R v Appulonappa*, *supra* note 188 at para 30. For recent uses of hypotheticals in s 7 applications, see *R v D'Souza*, 2016 ONSC 2749 at paras 76-78, 170-171 (hypotheticals did not establish overbreadth); *R v Tinker*, 2017 ONCA 552 (hypotheticals did not establish overbreadth nor gross disproportionality s 7, and observing the analytical differences between gross proportionality under s 7 versus s 12).

sparse” Parliamentary record, noting that Parliament “did not yield” to concerns of a defence lawyer testifying before Senate, who posited minor scenarios caught by the impugned means.¹⁹³

Downstream, if this line of precedent flowing from *Bedford* continues, it might elevate the rigour of legislative reasoning required to justify penal legislation. To decide what inferences Parliament was entitled to lawfully draw from the facts before it, *R v Appulonappa* used *Bedford*’s recognition of reasonable hypotheticals to listen to what individual legislators actually said. If legislators are to reason technically about the legislative means in light of a broad legislative situation, *R v Appulonappa* warns that the Department of Justice’s opinion is no safe bet. *R v Long* then took up *R v Appulonappa* to hear testimony from nongovernmental actors at LCA. *R v Long* suggests that for an evidentiary reason to be an adequate justification, legislators have to persuasively respond to concerns that go beyond the general scenario generated by events and the average offenders from the past, and seriously consider collateral situations that are plausible. Combined with equal deference to all forms of facts and then relaxed causation, the availability of reasonable hypotheticals under s 7 might magnify the power of social and legislative facts in the hands of the applicants, and sheds light upon the legislative record as a potentially rich place for finding them, at least according to the way legislators have glided over the reach of criminal liability in the past.

Though not strictly obligatory, these tactical consequences that follow from *Bedford* may configure a dynamic where future applicants’ cases – not the Government’s - are built and buttressed upon social and legislative facts. However, this seems to cut against the Court’s expressed intention in *Bedford*. The Court refused to saddle s 7 claimants with the burden under s 1 “to establish the efficacy of the law versus its deleterious consequences on members of society

¹⁹³ *R v Long*, 2018 ONCA 282 at paras 93-98.

as a whole”.¹⁹⁴ But we should wonder what might happen if each renovated element of the s 7 analysis is consolidated into one individual claim looking forward, instead of analyzing each element in isolation, looking backward on appeal. Consolidated into one future application, *Bedford*’s doctrinal renovations could actually undermine the Court’s desire to avoid bootstrapping the Government’s s 1 burden to the applicant’s burden under 7. It is bewildering to wonder how a claimant could establish a “sufficient causal connection” indirectly to engage s 7, and then also rely upon a reasonable hypothetical to prove that her s 7 interest is affected in a way that is detached from or grossly out of proportion to the legislative object – without also relying upon social or legislative facts about whether that object is attainable, and if so, how attaining that object would affect its targeted population. We can detect a whiff of this dynamic in the deferential language that the Court uses to describe the sufficient causal connection.¹⁹⁵ Satisfying the balance of probabilities through reasonable inference about indirect factors resembles the deferential standard of proof under s 1, which (as discussed in Part I) the Government (*not* the applicants) enjoys in situations of empirical controversy or uncertainty.

This similarity between the relaxed onus on the Government under s 1 and the would-be relaxed onus on s 7 applicants also stirs an implication for evidentiary reasons in the legislative process, since the Court presupposed that the Government is generally better positioned to call social science evidence in *Charter* litigation.¹⁹⁶ Certainly, when it comes to power and resources, the Government may have more capital to *produce* social science evidence to inform Parliament’s lawmaking. Yet, it seems that from both the empirically-laden evidence and the efficiency-based doctrine in *Bedford*, claimants who are able to *adduce* expert evidence are better positioned to

¹⁹⁴ *Bedford 2013*, *supra* note 1 at paras 126-127.

¹⁹⁵ *Bedford 2013*, *supra* note 1 at paras 75-78.

¹⁹⁶ *Ibid.*

succeed. After all, it was *Bedford*'s applicants - not the Government - who adduced the expert social science evidence that dealt directly with the impact of the infringing legislative means¹⁹⁷ - and that expert social science evidence is precisely the kind of evidence so critical to explicitly stating the value judgments inherent in proportionate limitations on rights.¹⁹⁸

Furthermore, if Parliament is to explicitly state those value judgments so critical to proportionality, then we should consider how two additional holdings from *Bedford* could alter the dynamic between the litigants in a way that could increase the quantity and quality of evidence at Parliament afterwards. Here, *Bedford*'s revision of the relationship between ss 7 and 1 responds at least in a preliminary way to Jamie Cameron's critique that s 7's internal balancing failed to "consider societal interests in a disciplined manner; unlike its section 1 counterpart".¹⁹⁹ For *Bedford* also ruled that once a s 7 infringement is proven, the s 1 justification then demands attention to the following two analytical differences:

- One: the legislative purpose of the infirm provision is no longer taken at face value to be constitutional, thus requiring a quantitative analysis of the provision's efficacy, beyond its quality; and
- Two: in qualitatively and quantitatively analyzing the impact of the infirm provision, the subject of the analysis is the collective public interest, which is cordoned off from s 7's individual focus.²⁰⁰

¹⁹⁷ See also *Insite*, *supra* note 71; *R v Smith*, 2015 SCC 34. *Cf Carter v Canada*, 2012 BCSC 886 at para 1001 (where building the evidentiary record appeared to be more evenly shared among the litigants).

¹⁹⁸ *R v KRJ*, 2016 SCC 31 at paras 77-79, Karakastanis J.

¹⁹⁹ Cameron, "The Future of Section 7", *supra* note 78 at 158-159 (further stating that "the justificatory analysis under section 7 lacks structure and rigour. To reform this methodology would require the Court to reconceptualize the fundamental justice clause and to redefine the relationship between sections 7 and 1").

²⁰⁰ *Bedford 2013*, *supra* note 1 at paras 124-128. On implications of the revised structure of proportionality under ss 7 and 1, see Hamish Stewart, "*Bedford* and the Structure of Section 7" (2015) 60:3 McGill LJ 575.

The empirical focuses of these two analytical steps entail two preferences, one for the nature (qualitative and quantitative) of the evidence, and one for the subject (collective) of the information that legislators premise their reasons upon during the legislative process. If Bill C-36 does infringe s 7, then *Bedford*'s empirical proclivity suggests that the most probative method to justify it under s 1 will be quantitative evidence demonstrating the efficacy of the means through some salutary effect on a social good or competing *Charter* interest, or significant public consensus.²⁰¹ Taking these two judicial clarifications forward into legislating after an empirical controversy, options available to a Government bent on making new laws to redress its liability could include:

1. attempt to rebut the facts that were fatal to its defence with new research to then
 - a) distinguish the adjudicative context from the new legislative context, and/or
 - b) reject the Court's interpretation of s 7; or
2. accept the facts and law found in *Bedford*, but generate new research to inform a new policy, guided by new doctrine.

No matter which option the Government pursues – either the first defensive approach to evade litigation, or the second repentant response to mend and maximize *Charter* protection - these changing litigation dynamics may propel Governments to manufacture a foundation for its policies by taking the pulse of the public at large. Irrespective of whether the Government was impeded, illuminated, or ambivalent about the Court's clear preference for evidence-based decision-making, enlarging the legislative record with quantitative evidence could be a diligent measure to avoid the futility of brand new legislation being quickly struck down, and/or a principled prevention of repeating the harms of the past. Yet to the extent that the Court's own increased capacity to receive and competently reason with social science evidence keeps the Government on the defence in

²⁰¹ *Carter 2015, supra* note 36 at para 95.

Parliament, the Court, and in the boardrooms of the Department of Justice, then protecting and advancing constitutional values and principles – the moral reasons which also bolster Government decisions – may fall to the citizenry and civil society to initiate.

With *Bedford*'s doctrinal restructuring and evidentiary implications as part of the legislative background, Section B first scours inaccuracies in an online survey that the Government conducted to check the public's pulse on Bill C-36's policy. Section C investigates Parliament's skim of new data and research in developing Bill C-36's legislative model, particularly for the new advertising offence. In doing so, Section C also punctures holes in the Department of Justice's Technical Paper. Finally, Section D pauses at places in Parliament where expert testimony from *Bedford* on the age and location of prostitution resurfaced on the legislative record. The misapprehensions of the legislative situation trickled into the evidentiary and technical reasons necessary to obtain the political and legal warrants for Bill C-36, though there were some institutional strengths exuded by attempting to move beyond *Bedford*'s facts in Section D.

B. The Online Consultation

When the Court deferred the remedy to Parliament, the Court signalled that latitude in the unconstitutional provisions as they stood at *Bedford*'s time – rather than a brand new regime - could suffice:

*Greater latitude in one measure — for example, permitting prostitutes to obtain the assistance of security personnel — might impact on the constitutionality of another measure — for example, forbidding the nuisances associated with keeping a bawdy-house. The regulation of prostitution is a complex and delicate matter. It will be for Parliament, should it choose to do so, to devise a new approach, reflecting different elements of the existing regime.*²⁰²

And to arrange the size of that latitude, the Court also emphasized that public concern, as it stood at that time, would be important, stating in part that “[h]ow prostitution is regulated is a matter of great public concern... moving abruptly from a situation where prostitution is regulated to a situation where it is entirely unregulated would be a matter of great concern to many Canadians.”²⁰³ Naturally, we would expect Parliament to gauge the direction of Canadians’ concern through engaging with the electorate.

Thus, a crucial institutional trait that the administrative, executive and elected branches possess is the ability to expand the factual basis for changing laws beyond those directly implicated in adjudication. Within this distinct capacity to gather new facts, as Section A identified, one way governments can make informed legislative decisions is by conducting additional research. That is exactly what the Government tried to do after *Bedford*. Announced by a news release, the Government’s month-long online consultation was trumpeted by the Justice Minister as “one of

²⁰² *Bedford 2013*, *supra* note 1 at para 165. For alternative interpretations of the ambiguity in this paragraph of *Bedford*'s judgment, see Moulant, “Remedying the Remedy”, *supra* note 10 at 20-21.

²⁰³ *Bedford, 2013*, *supra* note 1 at para 167.

the most comprehensive polls ever undertaken by the Department of Justice”.²⁰⁴ This poll was introduced by the Department of Justice with a brief Discussion Paper that summarized *Bedford* and listed three policy options: decriminalization/legalization, prohibition, and the Nordic Model.²⁰⁵ From February 17, 2014 to March 17, 2014, the Department of Justice’s website invited Canadians to write replies to six questions – questions which made it clear that the legislation in train was a direct reply to *Bedford*. And unlike the Parliamentary debates, which we will soon dive into, these questions, reproduced below, were posed narrowly within the situation of adult prostitution - not child exploitation, and not human trafficking:

1. *Do you think that purchasing sexual services from an adult should be a criminal offence? Should there be any exceptions? Please explain.*
2. *Do you think that selling sexual services by an adult should be a criminal offence? Should there be any exceptions? Please explain.*
3. *If you support allowing the sale or purchase of sexual services, what limitations should there be, if any, on where or how this can be conducted? Please explain.*
4. *Do you think that it should be a criminal offence for a person to benefit economically from the prostitution of an adult? Should there be any exceptions? Please explain.*
5. *Are there any other comments you wish to offer to inform the Government's response to the Bedford decision?*
6. *Are you writing on behalf of an organization? If so, please identify the organization and your title or role.*²⁰⁶

The poll’s questions are also telling for what they did not ask. While it is plain to see that the Department of Justice was posturing for the new purchasing and material benefit offences, there

²⁰⁴ Hansard (4 June 2014) at 1454 (Hon Peter MacKay); Canada, Department of Justice Canada, “Government of Canada launches on-line consultations to seek views on criminal code prostitution-related offences”, News Release (Ottawa: DOJ, 17 February 2014), online: <<https://www.canada.ca/en/news/archive/2014/02/government-canada-launches-line-consultations-seek-views-criminal-code-prostitution-related-offences.html>>

²⁰⁵ Department of Justice Canada, “Public Consultation on Prostitution-Related Offences in Canada: Discussion Paper” (Ottawa: DOJ, 2014), online: <<http://www.justice.gc.ca/eng/cons/proscons-conspros/index.html>>.

²⁰⁶ Department of Justice Canada, “Online Public Consultation on Prostitution-Related Offences in Canada: Final Results” by Research and Statistics Division (Ottawa: DOJ, 2014), online: <http://www.justice.gc.ca/eng/rp-pr/other-autre/rr14_09/rr14_09.pdf> [“*Online Public Consultation: Final Results*”].

was no inkling of the new advertising offence. Completely critiquing the content canvassed by the \$175,000 online consultation, however, exceeds our purview here. Since process is part of our preoccupation, there are two procedural issues to touch upon with the consultation undertaken to inform Bill C-36: its untimely disclosure, and its methodology.

ii) Untimely Disclosure

During question period on Bill C-36's First Reading, which took place on June 4, 2014, Françoise Boivin, the Opposition Justice Critic and a Vice-Chair of JUST, observed that the Government's online consultation had concluded four months earlier.²⁰⁷ To assist JUST in its imminent study of the Bill, she requested the Government to release the poll results. Boivin noted, "[r]eforming our prostitution laws is a complex issue. Canadians expect their government to work in a transparent and thorough manner." She then asked, "so why is the Minister of Justice refusing to release this poll? What information is he trying to hide?" Justice Minister MacKay at least agreed that prostitution reform was complex:

*Mr. Speaker, cue the scary music. The reality is this is a very serious and complex issue, and that is why we have taken the time and made the effort to consult broadly. We heard from some 31,000 Canadians through an online consultation, one of the most comprehensive polls ever undertaken by the Department of Justice. There is other polling information available that will be released in due course.*²⁰⁸

Minister MacKay's facetious response does not explain why the results had not yet been released. And during Second Reading on June 11, 2014, Minister MacKay was pressed again (now by the Liberal Justice Critic, Sean Casey (also a Vice-Chair of JUST)) to explain why the report still remained undisclosed. At that time, Minister MacKay acknowledged that it was possible to disclose the report in time for JUST's Study.²⁰⁹ He did not suggest that there was any outstanding

²⁰⁷ Hansard (4 June 2014) at 1454 (Hon Françoise Boivin).

²⁰⁸ Hansard (4 June 2014) at 1455 (Hon Peter MacKay).

²⁰⁹ Hansard (11 June 2014) at 1722 (Hon Sean Casey, Hon Peter MacKay).

data analysis to be conducted, nor that the findings were otherwise unprepared for release. In fact, mere minutes before, in promulgating his speech to the House, Minister MacKay dangled one tidbit from the analysis: while Canadians were divided, they preferred a criminal response, and specifically, Canadians preferred to criminalize purchasers.²¹⁰ And hypocritically, in the same response to Sean Casey, the Justice Minister cited the unnatural timeline imposed by the Supreme Court's suspended declaration as one possible reason *in favour* of releasing the results to JUST.²¹¹ Thus, at the crossroads between Second Reading and JUST's study, choosing to follow the six-month "natural timeline" for release was the only reason that the Justice Minister provided for withholding disclosure at this key time – so key, that, for Bill C-36's sake, JUST had made an exception to its own natural timeline to sit during the summer.²¹²

Cramming fifteen meetings into eight days, JUST commenced its exceptional summer study of Bill C-36 on July 7, 2014. Before ultimately concluding with clause-by-clause consideration on July 15, JUST held four full days of testimony from 81 witnesses. On the first day of JUST's study, the Justice Minister backtracked from his earlier acknowledgement that the poll could be made available before witnesses began testifying at JUST. This time, the Justice Minister refused to answer whether he possessed the power to abridge the natural timeline, instead recapitulating that "[w]e'll release it when the six-month timeframe is up".²¹³ On July 9, Vice-Chair Boivin moved for JUST to request the Justice Minister to table the poll results prior to clause-by-clause consideration. Vice-Chair Casey supported the motion; however, Bob Dechert (the

²¹⁰ Hansard (11 June 2014) at 1710-1715 (Hon Peter MacKay).

²¹¹ Hansard (11 June 2014) at 1722 (Hon Peter MacKay): "...the natural timeframe for release is six months. We may release in advance of that in the interests of ensuring that the committee is able to do its good work and in response to the timeframe that we are working under as a result of the Supreme Court giving us one year to respond. With that as the backdrop, again, we may decide to release that information in advance of the six-month timeframe."

²¹² As the Minister later recognized when he later testified at JUST's study. See JUST Proceedings (7 July 2014) at 0940 (Hon Peter MacKay).

²¹³ JUST Proceedings (7 July 2014) at 1010-1015 (Hon Peter MacKay, Hon Sean Casey).

Parliamentary Secretary to the Justice Minister) opposed the motion with a recital of the Treasury Board's six-month guideline. The motion to request the poll results was defeated by a vote of five-to-three.²¹⁴ Since the Justice Minister did not ramp up the release of the online poll to keep pace with the accelerated legislative process, as a stopgap, Vice-Chair Casey then proposed that the poll's author should testify at JUST's Study. Unfortunately, the author did not appear.²¹⁵

All of this hullabaloo over disclosure is not just politically relevant; it may be relevant to s 1 in a future case. Bill C-36 was not the first time that the Government had shielded its own research on alternative legislative measures from disclosure. In *RJR-MacDonald*, when the Government invoked Cabinet confidence to hide studies into the efficacy of an advertising prohibition on tobacco, "one [was] hard-pressed not to infer that the results of the studies must undercut the government's claim that a less invasive ban would not have produced an equally salutary result".²¹⁶ Of course, that invocation of Cabinet confidence was in the Government's litigation capacity, not its legislative capacity. So, to be fair, because the Court, not Parliament, is the usual stage for launching complaints about timely and adequate disclosure, we should revise our procedural expectations to fit the venue and the activity. For an adjudicative audience, complaints of untimely or inadequate disclosure would not be misplaced, they would be appropriate and expected. Thus, what counts as full and frank disclosure for defending allegations in Court might be unreasonable to expect for justifying legislation in Parliament. If we therefore revise our expectations based on legal norms within the legislative process, then we can see whether the struggle for disclosure to inform Bill C-36's legislative deliberations was a false alarm.

²¹⁴ JUST Proceedings (9 July 2014) at 1530 (Motion by Hon Françoise Boivin).

²¹⁵ JUST Proceedings (7 July 2014) at 1010-1015; (10 July 2014) at 1640 (Hon Sean Casey).

²¹⁶ *RJR-MacDonald*, *supra* note 86 at para 166 per McLachlin; see also para 186 per Iacobucci, paras 100-101 per LaForest J (dissenting).

Thinking back to the principle of explicit lawmaking from Part I reminds us that Parliamentary privilege is our entry point for legal norms within the legislative process, where it is the responsibility of Parliamentary Counsel to the House of Commons to advise upon such matters. It is therefore worthwhile to ponder recent reflections by former Parliamentary Counsel, Rob Walsh, on disclosure to Committees. In the latter part of his tenure from 1999 to 2012, Walsh became perturbed by an apparently routine practice across departments and agencies to deny Committees' requests for disclosure.²¹⁷ When the Department of Justice advised that administrative officials could refuse to disclose recordings to a 2009 Standing Committee by hiding the recordings behind the *Privacy Act*, Walsh reminded the Department of Justice about the law of Parliamentary privilege and constitutional status bracing all Standing Committees:

*“..These committees are entitled to receive the information they ask for. If the practice of a given department, whether a legal practice or administrative, can trump this committee in its access to information, then Parliament becomes a joke. It’s that simple. There is some misconception here on the part of our witnesses to think that the role of Justice, as adviser to the government, somehow takes priority over the rights of a parliamentary committee, which ostensibly and legally is serving the public interest in its pursuit of information...”*²¹⁸

Walsh’s reproof to the Department of Justice’s knee-jerk refusal to disclose demonstrates not only how unsound internal legal advice and slavish adherence to policy can impair the legislative process, but also how the Department of Justice’s culture and perception of its own role as departmental legal adviser can ferment into disregard for the constitutional stature of legislative sub-bodies, and their concomitant functions to deliberate, legislate, and account.

Viewing this reproof in light of JUST’s study of Bill C-36, however, cautions against eliding the distinction between preventing disclosure and delaying eventual disclosure. The nature

²¹⁷ Walsh, *On the House*, *supra* note 49 at 101.

²¹⁸ Evidence, Meeting No 29, Standing Committee on Public Accounts, House of Commons, 40th Parl 2nd Sess (18 June 2009) at 1605 (Rob Walsh).

of the information sought also matters. The whole purpose of undertaking the online consultation was to inform the legislative process, and the whole purpose of JUST, as the House of Commons Committee dedicated to Justice and Human Rights, is to study and improve proposed legislation. So, when the only explanation provided for depriving JUST of information enabling it to fulfil its function is reverence for malleable bureaucratic policy, there is a beguiling suspicion that delaying the poll's results was an act of political finagling that impaired JUST's ability to delve deeply into Bill C-36. In effect, delaying disclosure until after JUST's Report to the House of Commons was to deny disclosure to JUST for its critical study.

Since timeliness forms part of the search for truth, the timeliness of results from public opinion polls impacts the ability to make informed decisions.²¹⁹ Although capacity for democratic expression is essential for democratic decisions, it is important not to conflate withholding information into purveying misinformation. Possessing the poll results during JUST's study may not have had any ascertainable impact on JUST's report to the House if the members voted along party lines, given that JUST was composed of six Conservatives, three NDPs, and one Liberal.²²⁰ But we should also recall the one tidbit that the Minister did disclose prior to JUST's study. To the House of Commons at large, not just the ten members on JUST, the Minister had leaked a seemingly anomalous fact: Canadians were torn on how to respond to prostitution, yet united on preferring to criminalize purchasers of sex. Whether or not this factual assertion was capable of misleading all parliamentarians requires looking also at how the poll was conducted.

²¹⁹ *Thomson Newspapers*, *supra* note 86 (see especially the threefold dissent per Gonthier J, recognizing the importance of timely disclosure of opinion polls for citizens' democratic decisions during elections).

²²⁰ JUST Committee Membership, 41st Parl 2nd Sess, No 44 (4 February 2014), online: <<http://www.ourcommons.ca/Committees/en/JUST/Members?parl=41&session=2&membershipOn=2014-02-04>>.

iii) Flawed Methodology

From testimony before JUST, we can unravel a series of methodological flaws with the poll, which stem from who was researched and how. Legal experts voiced an important concern for sampling bias against minority interests. Kyle Kirkup, a Trudeau Scholar, suggested that if a similar “Survey Monkey”-style poll been conducted decades earlier, then the same majoritarian mores would have reinforced the criminalization of homosexuality.²²¹ Pointing to both the *Charter* and peer-reviewed research as reliable compasses, Sandra Ka Hon Chu of the Canadian HIV/AIDS Legal Network echoed Kirkup’s warning against using public opinion polls to direct public policy.²²² While it is fair to assume that people interested in whether and how prostitution is controlled could be incentivized to provide their opinion, without any control mechanism to prevent sampling bias against individuals to whom Bill C-36 would directly affect – both sellers and buyers of sex – the poll may have instantiated the very overweening majoritarianism that necessitated recourse to the Court in the first place.

Exclusion bias from overweening majoritarianism might not have been the only sampling issue potentially affecting the poll’s validity. The poll might also have been manipulated through self-selection by individuals who submitted duplicate or multiple responses. Additionally, while there was an opportunity for organizations to self-identify through their representatives, who could input titles such as “founder” and “director”,²²³ individual members of interest groups who banded together to coordinate responses may also have skewed the results. For example, POWER, a pro-

²²¹ JUST Proceedings (10 July 2014) at 1540 (Kyle Kirkup).

²²² JUST Proceedings (10 July 2014) at 1540 (Sandra Ka Hon Chu). Outside of constitutional litigation, courts have been receptive to survey evidence that is both relevant and methodologically sound. However, as Binnie J observed in the trademark dispute over Barbie dolls in *Mattel, Inc v 3894207 Canada Inc*, 2006 SCC 22 at paras 43-50, public opinion surveys have also been excluded for confusion and for problems such as those noted here, including asking the wrong questions and “where the individuals surveyed did not constitute the relevant population”.

²²³ Department of Justice Canada, *Online Public Consultation: Final Results*, *supra* note 206 at 6.

sex work organization, collated survey responses from a dozen women, who completed the poll online at a drop-in centre in Ottawa.²²⁴ Although this organized effort indicates that the perspective of some individuals directly affected by Bill C-36 were included within the sample, POWER publicly posted those individual responses on their organization's website as part of its advocacy campaign.²²⁵ We do not know whether the individual respondents consented to that disclosure before or after completing the poll. Either way, because those respondents availed of the drop-in centre to access the poll, it is possible that completing the poll under the roof of an advocacy organization may have aligned those responses with the normative positions of that larger movement.

Eventually, the poll results were tabled in time for the LCA's Pre-Study in September 2014, which revealed another concern for sampling validity. Twenty-seven of the total 31,172 responses came from outside of Canada.²²⁶ It is quite possible that some of those foreign respondents were simply Canadian citizens abroad. However, it is also possible that the proportion of foreign respondents tainting the sample was actually much higher than twenty-seven. It was only through self-identification by the foreign respondents themselves – not any technical analysis - that the Department of Justice learned that the sample included respondents from outside of Canada.

Unfortunately, it is also impossible to know whether the Department of Justice reliably reported its poll results. Because the Department of Justice did not report any margin of error, we do not know how trustworthy the raw data actually is. One of the key statistics that the Government reported was that a slim majority of 56% supported criminalizing the purchase of sexual

²²⁴ JUST Proceedings (8 July 2014) at 0940 (Emily Symons).

²²⁵ Prostitutes of Ottawa-Gatineau Work, Educate, Resist, *Women of OASIS Respond to Department of Justice Questionnaire on Sex Work* (15 March 2014), online: < http://powerottawa.ca/oasis_responses.pdf > (accessed 5 February 2017).

²²⁶ Department of Justice Canada, *Online Public Consultation: Final Results*, *supra* note 206 at 3, fn 4.

services.²²⁷ Beyond the impossibility of knowing the risk of error, this figure is potentially a false majority because 9% of the 31,172 responses were “unknown” or “missing”, and were excluded from the two-way split that was officially reported. A slightly larger majority of 66% were against criminalizing the sale of sexual services; yet for that question, 14% of the responses were unknown or missing.²²⁸ The potential for a false majority was even higher when it came to whether respondents thought it should be a crime to economically benefit from adult prostitution. The report concluded that a 62% majority was in favour of such an offence, with 38% disagreeing. Yet this time, the report relegated to a footnote the fact that over one in five (21%) of the overall responses were omitted from this figure because they were “left blank or worded in a way that did not allow them to be coded as yes/no”.²²⁹ What this really means is *not* that 62% of respondents were in favour of making it a crime to economically benefit from prostitution. Rather, accounting for the one-fifth of blank or uncoded responses means that the actual majority of respondents – that is, 59% of respondents, had either no discernible opinion on, or were opposed to the criminalization of receiving an economic benefit from adult prostitution.

Setting sampling validity aside, how the Department of Justice interpreted and presented the poll’s results is fallacious. To be accurately and fairly presented, for each question, the Department of Justice ought to have reported all three possible responses – in favour, in opposition, or blank/undecided – instead of collapsing equivocation into two responses: in favour or in opposition. This statistical misrepresentation not only exaggerated the amplitude of majority support, it potentially conveyed the opposite of the actual results: that majority support existed when in fact, it did not.

²²⁷ *Ibid* at 3.

²²⁸ *Ibid* at 4.

²²⁹ *Ibid* at 5, fn 7.

When research cannot be confidently accepted as reliably conducted and accurately reported, it is even more difficult to penetrate the core issues that the research was supposed to investigate. The scurrying required to juggle the pulls and pressures of Parliamentarians' many daily tasks makes it unrealistic to expect them, in their role as legislators, to deeply scrutinize the minutiae of empirical research. When cherrypicked facts from that research tilt an equivocal vote towards new laws that encroach upon constitutional rights, additional sources of social and legislative facts, such as witness testimony, could become more pertinent. Institutional actors whose role in lawmaking is often regarded as subordinate, such as Senators, could become more potent.

We can measure the impact of the Senate's role in lawmaking by visiting the LCA's Pre-Study in September. In seeking out the dose of sober second thought that is the indispensable characteristic of the Senate, we also find multiple witnesses who had appeared previously before JUST in July. Those witnesses now had the opportunity to consider and discuss the online poll's results because at the point of the Pre-Study, the 6-month guideline (which the Minister did strictly abide) for releasing the consultation results had expired. This made for an interesting contrast with newer, nongovernmental polls initiated post-*Bedford*.

On September 9, Senator Baker alluded to one such independent poll, which Senator McInnis later described as a 50/50 tie.²³⁰ It is unclear which self-solicited, nongovernmental poll Senator Baker was referring to in that particular exchange. However, two different surveys published mid-June tapped into the inflamed Parliamentary debate spreading from the First Reading on June 4 into the Second Reading on June 11, 12, and 16. Angus Reid carried out an

²³⁰ LCA Pre-Study (9 September 2014).

Internet-based focus study with 1007 Canadian adults from June 6 to 7, 2014,²³¹ and then the following week, Forum Research undertook a telephone poll with 1433 Canadian adults from June 13 to 14, 2014.²³² Structured from more reliable methodological designs than the Government's online consultation, both of these independent polls employed random selection and reported their margins of error (3.1% and 1.8% respectively), thus enhancing their results' validity.²³³ When the conflict from the contrast between the independent and governmental data was put to Minister MacKay by Senator Baker, the Minister was resolute, and the Senate apparently unfazed by the Minister's following circular argument:

It isn't surprising to me that we have strong differences of opinion on this subject... Again, it's an understatement to say this is an issue that's been around for a long time and people have a tendency to form very fervent views. However, looking at this from a criminal justice perspective, we believe that we have it right in this bill. After looking at the recommendations and advice of the Supreme Court and hearing from an extremely large number of Canadians, some 31,000 who took part in the on-line consultation and face-to-face meetings that were held, we believe, on balance, that this is the direction that the country should be heading when facing this very complex issue.²³⁴

The circularity here suggests that simply conducting a consultation is a sufficient justification a particular policy without addressing the fairness, reliability, and results of that consultation. Within this circularity is also the suggestion that the Government's policy choice was arrived at chronologically and collaboratively, as the final step in a sequence that was only attained after first interacting with the Court in *Bedford*, and then consulting with the citizenry. This attempted justification presumes that neither the Court nor the citizenry would contemplate policy

²³¹ Angus Reid Global, "Gender split reveals deep divide between men, women on issues surrounding the sex trade", *Angus Reid Global* (10 June 2014), online: <<http://angusreid.org/wp-content/uploads/2014/12/2014.06.09-Prostitution-Bill-C36.pdf>> .

²³² Forum Research Inc, "Prostitution Should Be Legal; Supreme Court Decision Correct; Bill C-36 Wrong – Majority", *Forum Research Inc* (15 June 2014), online: <[http://poll.forumresearch.com/data/Fed%20Prostitution%20News%20Release%20\(2014.06.15\)%20Forum%20Research.pdf](http://poll.forumresearch.com/data/Fed%20Prostitution%20News%20Release%20(2014.06.15)%20Forum%20Research.pdf)> .

²³³ Angus Reid Global, *supra* note 230; Forum Research Inc, *ibid*.

²³⁴ LCA Pre-Study (9 September 2014) (Hon George Baker, examining Hon Peter MacKay).

alternatives or additions to criminal justice. While most onlookers would not bat an eye at a Conservative government choosing a tough-on-crime policy to take a stance on a controversial issue, that political expectation does not eliminate the need for reasoned legal justification.

Another methodological issue arising from the online consultation reveals how presumptions of bureaucratic expertise can belie reasoned justification by legislators. Specifically, Senator McInnis read key statistics from the Government's poll into the legislative record when he asked the Department of Justice to comment on the online consultation. After confessing that he presumed Legislative Counsel to be experts in polling, Senator McInnis observed, "[o]ften governments try to bring about legislation that hits the majority of Canadians and, if they don't, it's to their peril. Sometimes you have to bring legislation where the majority is not there, but mostly you do."²³⁵ To reply, Nathalie Levman, in addition to citing *Bedford*, the jurisprudence, and research, cited the 56% figure of majority support for the purchasing offence as a factor informing the Bill's development – a slim and inaccurate figure which we have already seen likely reports a false majority. The Senior Assistant Deputy Minister, Donald Piragoff, remarked that, despite using different techniques, both the Government's research and independent research yielded similar results. However, Piragoff attempted to distinguish the Government's poll (which was generated within the online consultation) from the telephone-based opinion poll by pointing out that the Government had supplied a two-to-three page Discussion Paper outlining various policy options, yet the telephone-based opinion poll was an "uninformed opinion" taken "on the moment".²³⁶

The Assistant Deputy Minister's soft-pedaling of the telephone poll as an uninformed pulse check seems to indicate that the Department of Justice did not actually compare the Government's

²³⁵ LCA Pre-Study (9 September 2014) (Hon Thomas McInnis, examining Natalie Levman and Donald Piragoff).

²³⁶ LCA Pre-Study (9 September 2014) (Donald Piragoff).

research with the independent research. Because as it turns out, although Forum Research's telephone poll was not prefaced with a Discussion Paper, the telephone poll nevertheless did inform respondents about Bill C-36. By explaining Bill C-36's proposed purchasing and advertising offences before asking whether they approved of Bill C-36, Forum Research's telephone poll seems more germane to Bill C-36's overall approach than the Government's own poll. Moreover, as mentioned previously, neither the Government's brief Discussion Paper, nor the questions asked by the Government's poll contained any clue that a new advertising offence would be proposed.²³⁷

Having provided very basic information that Bill C-36 proposed to criminalize purchasing and advertising sexual services, Forum Research's poll discovered considerably different results than the Government's reported poll. When it came to Bill C-36 overall, only one-third of respondents (34%) approved, half disapproved (51%), and the remaining one-seventh (15%) had no opinion on the overall Bill. Solicited in the midst of second reading, these responses almost identically replicated the 35% approval rating for Bill C-36 found by Angus Reid's internet study the week before, which had also outlined Bill C-36's prohibitions.²³⁸ Furthermore, despite the much smaller sample sizes, Forum Research's and Angus Reid's quick turnarounds of one day and three days in collecting and reporting on a greater quantity of questions (including demographics) makes the Government's heel-dragging on disclosure to JUST appear disingenuous.

Interestingly, while the nongovernmental polls did not fully detail Bill C-36's entire statutory model, unlike the Government's polling questions - which implied that the *Criminal Code* was the only legislative option that could regulate prostitution - Forum Research explicitly

²³⁷ Forum Research Inc, *supra* note 231.

²³⁸ Angus Reid, *supra* note 230. The internet poll also asked whether advertising the sale of sex should be illegal and explained the nature of the Bill C-36's prohibitions.

queried whether the *Criminal Code* should be the measure to deal with prostitution. Almost half (46%) of respondents thought the *Criminal Code* was inappropriate to address prostitution, close to one-third thought the *Criminal Code* should apply, while the remaining quarter (24%) had no view.²³⁹ By that measure, less than one third (30%) of respondents supported a criminal approach to prostitution.

As for whether Canadians approved of *Bedford*'s striking down of the former prostitution provisions, Forum Research reported differences in opinion along socioeconomic, political, religious, and geographic lines. Overall, 28% of respondents disapproved of *Bedford*'s strike-down, 21% of respondents were undecided, while 51% approved. Senator Plett, in admitting he had not read the Government's polling questions, let alone the results, was curious if the Government had asked, "how many people agreed or disagreed with the *Bedford* decision?"²⁴⁰ Levman replied that *Bedford* was cited only as part of the background information in the Discussion Paper, as the policy-oriented online consultation "was forward-looking on what respondents felt the law should be, not seeking opinions on court cases."²⁴¹ While of course Bill C-36 was prospective, the profuse references to *Bedford* perforating the Hansard record nevertheless make it clear that the past informs the future, and that the public's opinion on *Bedford* would be conducive to their elected representatives deliberating and legislating that forward-looking policy response. To discount the Court's influence (good and bad) upon the court of public opinion is to decontextualize Bill C-36 from its social and legal setting, because the Court can affect the public's views on what exactly the law should be in the future.

²³⁹ Forum Research Inc, *supra* note 231; Angus Reid, *supra* note 230. The Angus Reid poll distinguished between legal and illegal, but did not distinguish criminalization from different levels of regulation.

²⁴⁰ LCA Pre-Study, (9 September 2014) (Hon Donald Plett, examining Natalie Levman).

²⁴¹ *Ibid.*

One example of how these misapprehensions streamed into legislators' reasons to support Bill C-36 comes from the Senate's Study on October 29, 2014. While examining Professor Edward Herold on the contents of his Brief, Senator McInnis challenged Professor Herold's position by wrongly recapitulating the Government's falsely reported poll results:

*Now, I know that you mention in your paper the Angus Reid poll that came out shortly after, but the Department of Justice had a paper that they put online, and it had direct people who came forward with respect to their views on what we were proposing. **It's been a while since I looked at it, but 65 or 67 per cent were in favour.***

The government has chosen a proven model that they believe will reduce prostitution. After you've listened to the public, then leadership is about taking control. On the other hand, you would have us adopt New Zealand's liberal feminist decriminalization model, where I understand that prostitution is alive, well and flourishing.

Do you really believe that Canadians would support such a direction? [emphasis added]²⁴²

Senator McInnis erroneously reiterated the Government's own misrepresented results at 65-67%, which, in their inaccurate form, did not account for 9% of missing or unknown votes, thus compiling a false 56% in favour of criminalizing the purchase of sexual services. Besides, it may sound trite, but it is worth spelling out that persuasive public reasoning about civic issues, whether expressed in political or legal or social environments, demands hearing from and challenging contested positions.²⁴³ According to a measure of reasoned disagreement, Senator McInnis arguably had a reasoned apprehension to support his position, because there was competing empirical support for both his and Professor Herold's contrary positions. But by grounding his evidence-based justification for Bill C-36 in a false statistic, it seems that Senator McInnis' misapprehension of popular support for Bill C-36 permeated into how open he, as a legislator, was to alternatives advanced by Professor Herold, a citizen. Appealing to popular support alone is not a sufficiently reliable, nor normatively persuasive justification for Bill C-36's policy approach.

²⁴² Senate, *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, 41st Parl, 2nd Sess, No 16 (29 October 2014).

²⁴³ Rawls, *Political Liberalism*, *supra* note 105 at 215-217.

The goal in comparing the methodologies and results of these three polls is not to deny that there was support for Bill C-36. Rather, this comparison demonstrates a more detailed understanding of why, when it comes to justifying legislation, it is dangerous for lawmakers to presume that the bureaucrats who draft legislation possess expertise and authority to critically conduct and assess non-legal research. The interaction between Senators and the Department of Justice around the polls is a cautionary tale for reasoned apprehension by lawmakers. Rest assured, the Department of Justice's testimony did also deal with matters within its specialized knowledge and direct experience – that is, drafting Bill C-36. However, mishandling methodology, misconstruing the Government's poll, and mischaracterizing nongovernmental research all bled into less visible aspects of how Bill C-36 was deliberated and reasoned.

Where the empirical foundation to sustain legislation is meagre and the legal foundation is novel, barriers of epistemology, time, and/or resources, can swerve legislators into politicking. Thus, for legislators to explicitly convey a reasoned apprehension about that uncertain situation and about the legal means that might address it, the evidentiary burden becomes displaced onto a persuasive burden. This potentially heightened persuasive burden is reflected in the reasoned apprehension of harm articulated in *RJR-MacDonald*:

*The question is not whether the measure is popular or accords with the current public opinion polls. The question is rather whether it can be justified by application of the processes of reason. In the legal context, reason imports the notion of inference from evidence or established truths. This is not to deny intuition its role, or to require proof to the standards required by science in every case, but it is to insist on a rational, reasoned defensibility.*²⁴⁴

Misapprehensions of proof in the legislative process can weaken the justification for legislation because conceivably, legislators like Senator McInnis who believe they have empirical support need not resort to justification on non-empirical grounds, like debating the constitutional

²⁴⁴ *RJR-MacDonald*, *supra* note 86 at para 127, McLachlin J.

values and principles with moral reasons. This proposition is also supported by Sopinka J's explanation of the interaction between the evidentiary burden and persuasive burden in civil proceedings. Extrajudicially, his treatise on evidence law expounds that "the persuasive burden does not play a part in the decision-making process if the trier of fact can come to a determinate conclusion on the evidence".²⁴⁵ Applying this logic to Bills post-*Bedford* can support the following proposition: when legislating without evidence, or with conflicting empirical proof, the persuasive burden that legislators carry *ex ante* may be even heavier, especially when we recollect *Bedford*'s appetite for qualitative social science evidence under s 7 and quantitative empirical evidence under s 1. Anticipating and planning for a heavy evidentiary burden in Court may also have a corresponding increase in the deliberative burden at Parliament before that legislation is justified. So, if legislators lack concrete, trustworthy proof to reason from, then what, exactly is it that they are supposed to apprehend?

Deference to Parliament can also be justified when rationality is "rooted in a social or political philosophy that is not susceptible to proof in the traditional sense".²⁴⁶ There is no right to the wisest legislation; only legal legislation.²⁴⁷ Discomfiting as it may be to proponents of evidence-based policymaking, it remains legally acceptable for Parliament to ink social values through criminal legislation. In an ideal world of unlimited time and resources, it may be optimal to conduct new research every time Parliament legislates, but it is legally unnecessary to do so, let

²⁴⁵ Alan W Bryant, Sidney N Lederman & Michelle, K Fuerst, *Sopinka, Lederman & Bryant: The Law of Evidence in Canada*, 4th ed (Markham: LexisNexis Canada, 2014) at 93.

²⁴⁶ *RJR-MacDonald*, *supra* note 86 at para 160, McLachlin J; *Sauvé v Canada*, *supra* note 167 at paras 186-188. See also *Quebec (AG) v Canada (AG)*, 2015 SCC 14 at para 3. But see *R v Sharpe*, *supra* note 87 at para 191, L'Heureux-Dubé, Gonthier and Bastarache JJ; *Lavoie v Canada*, 2002 SCC 23 at paras 12-14, McLachlin CJ and L'Heureux-Dubé J (dissenting), [2002] 1 SCR 769, citing *M v H*, [1999] 2 SCR 3, at paras 78-79, Iacobucci J.

²⁴⁷ Frank Iacobucci, "The Charter: Twenty Years Later" (2002) 21 *Windsor YB Access Just* 3 at 19.

alone to conduct such research by random selection.²⁴⁸ While moral reasons may have been lacking in the above debate between Senator McInnis and Professor Herold, Against all the pitches for proof during Bill C-36's legislative process, overtones of a philosophical attempt to alter social norms and moral views about proper sexual behaviour were loud and clear in the debates.

At the same time though, if the Government intends to rely upon, and indeed holds itself out as relying upon new research as a boon to its policy approach, as it did with its online consultation, it does, at the very least, bear a political obligation to present that research reliably. When the Government fails to fulfil that political obligation, as it did with its shambolic statistical reporting, the democratic legitimacy of the resulting legislation suffers. And when the Court defers its constitutional duty to remedy violations of constitutional rights out of Parliament's presumed expertise, yet Parliament's execution of that expertise proves shoddy, then Parliament's explicit purpose in lawmaking looks camouflaged, and its institutional legitimacy appears counterfeit. If public policy is converted through such a contrived process, it may fall to the courts to redeem legal legitimacy, assuming that the resulting legal form is capable of implementation and enforcement.²⁴⁹ Part III will question that assumption.

Since the public is an integral part of decisions by the legislative, executive and judicial branches, when those institutions interact, it presents an opportunity to strengthen the stability and legitimacy of modern governance, through the contribution and education intrinsic to

²⁴⁸ *BC Freedom of Information and Privacy Association v British Columbia (AG)*, 2017 SCC 6 at para 58: “[T]hough logic and reason, without assistance, can only go so far, they can go far enough. Where the scope of the infringement is minimal, minimal deference to the legislature may suffice and social science evidence may not be necessary.” See also *Mounted Police Association of Ontario v Canada (AG)*, 2015 SCC 1 at paras 144, McLachlin CJC and LeBel J (majority) [*Mounted Police Association*]; *R v KRJ*, *supra* note 198 at paras 142-145, Brown J (dissenting).

²⁴⁹ See eg. *Ewert v Canada (Commissioner of the CSC et al)* 2018 SCC 30 at para 50. Although the case did not involve the use of research in the legislative process, to hold that prison authorities are statutorily obliged to show that actuarial tools are accurate before relying on them to make policy decisions about individual inmates, writing for the majority, Wagner J's criticism (who was not yet Chief Justice when the case was heard) included the apt observation that “...research by the CSC into the impugned tools, though challenging, would have been feasible”.

promulgating reasons for lawmaking. Given that the “great public concern” about “how prostitution is regulated” was one of the reasons cited by the Court to justify deferring to Parliament, a comprehensive approach to surveying public concern – one that contemplated regulatory alternatives to criminalization - could have actualized, and thereby reaffirmed Parliament’s theoretical institutional advantages over the Court, and lend authenticity to the Government’s policy approach.²⁵⁰

What is more, the government-solicited consultations could have significantly enhanced Bill C-36’s democratic legitimacy and coordination among the branches. Responding to *Bedford*, though it may not have been the Government’s only or main objective, was at least the political impetus for Bill C-36, as openly stated by the Minister, and literally enshrined in the long title.²⁵¹ And since the Court in *Bedford* did not have any evidence on the level and direction of public opinion, a stable relationship between the public and the Government could have been collaboratively sustained from Parliament’s versatility to add to *Bedford*’s facts and alter the legal framework. Thus understood, the Government’s post-*Bedford* consultation could have been an occasion to harmonize Parliament’s role as a majoritarian decision-making body to protect the general public interest with the Court’s role as an adjudicative body to protect the rights of individuals. By uniting the Court’s attempt to collaborate with the coordinate branches to remedy the *Charter* violation, a change in the citizenry’s views could have supported a corresponding legislative change.

²⁵⁰ *Bedford*, *supra* note 1 at para 167.

²⁵¹ Hansard (June 11, 2014) at 1645 (Hon Peter MacKay: “This bill is in direct response to the Supreme Court of Canada’s *Bedford* decision, on December 20, 2013, which found three of the prostitution-related offences unconstitutional, based upon the court’s view that the offences prevent those who sell sexual services from taking measures to protect themselves when engaged in prostitution”). Although Bill C-36’s short title is the *Protection of Communities and Exploited Persons Act*, Bill C-36’s long title is *An Act to amend the Criminal Code in response to the Supreme Court of Canada decision in Attorney General of Canada v. Bedford and to make consequential amendments to other Acts*.

C. Social Science Evidence in Parliament

Previously, Section A's anatomization of adjudicative, social, and legislative facts examined a vertical and horizontal shift in institutional labour. Because this two-directional shift tasks judges with facts historically within Parliament's capacity, judges are expected to competently handle those tasks. At the same time, when disposing of litigation, judges are watchful gatekeepers who decide what information is admitted, what role that information plays, and how much weight it carries.

Comparing the use and influence of expert testimony between and across the Court and Parliament graphs the differences between institutional legal processes, which divide into different substantive legal outcomes. It should not go remiss that in her gatekeeping role, Himel J found that much of the evidence proffered as expert opinion did not withstand a strict application of the legal criteria for admissibility.²⁵² However, since the parties opted to target the weight of the expert evidence instead of challenging its admissibility, Himel J opted to grant little weight to such opinions. To adjudicate *Bedford's* application, Himel J ruled on expert evidence tendered via affidavit, *viva voce* testimony, and exhibits. When deliberating and legislating, however, there is no neutral referee calling out for relevance, reliability, and sufficiency of information. Of course, this flexibility and breadth is part of what outfits Parliament with the capacity to respond quickly to national issues involving impossibly imprecise predictions. What information counts as relevant, reliable, and sufficient for Parliament to make law is necessarily a lower threshold than the law of evidence in Court.

²⁵² *Bedford 2010*, *supra* note 1 at paras 106-113, 352, applying *R v Abbey*, 2009 ONCA 624, leave to appeal to SCC refused [2010] SCCA No 125. While practical, this approach may no longer be sound in light of post-*Bedford* jurisprudence on threshold reliability: *Cf R v Bingley*, 2017 SCC 12; *White Burgess Langille Inman v Abbott and Haliburton Co*, 2015 SCC 23.

Along this limber threshold, the two main mechanisms for Parliament to receive social science evidence on Bill C-36 did not entail reading social science studies first-hand, which would be very tedious. First, JUST and LCA heard direct testimony from witnesses in real-time who relayed statistical or qualitative results. Second, JUST and LCA also received general information about nature and extent of the social issues underlying Bill C-36's policy from the Department of Justice's Technical Paper, which the Justice Minister tabled at JUST mid-way through the first day of its study on Bill C-36.²⁵³ In its own words, the Technical Paper "provides an overview of the Supreme Court of Canada's findings in its December 20, 2013 *Bedford* decision and explains the basis for the Government's legislative response".²⁵⁴ Since the Technical Paper was prepared by the public servants who drafted the Bill, it is a selective summary of what those drafters viewed as the most influential and useful information during drafting, and therefore supports the Bill's policy and technique. The Technical Paper was influential in legislators' evidentiary and technical reasons, but often in latent ways.

To deliberate and enact Bill C-36 into law, some of the same experts from *Bedford* (through their own testimony or briefs, or from citations in the Technical Paper) contributed information and opinion to Parliament. Since a key concern here is the interaction between *Bedford* and Bill C-36's legislative process, Section C dwells mainly upon those experts by taking up the demographics of sellers and the location of transactions. Section C then examines new social science evidence that became available after *Bedford*, which was highly relevant to Bill C-36's new advertising prohibition.

²⁵³ JUST Proceedings (7 July 2014) at 1040; Technical Paper: Bill C-36, Protection of Communities and Exploited Persons Act" (2015), online: < <http://www.justice.gc.ca/eng/rp-pr/other-autre/protect/p1.html> > [*Technical Paper*].

²⁵⁴ *Technical Paper, ibid.*

i) Age of Entry

At both the House of Commons and Senate, witnesses and parliamentarians alike claimed it was empirically proven that 14 years-old is the average age for entering prostitution. Yet at *Bedford's* application, Himel J had rejected precisely the same alleged age of 14 as incorrect.²⁵⁵ Dr. John Lowman spoke to that erroneous empirical claim at Parliament. Though his affidavit evidence in *Bedford's* application had been poorly drafted, his *viva voce* testimony was credible, and he was qualified by Himel J to testify on the criminological and sociological aspects of prostitution.²⁵⁶ He brought this knowledge to the legislative process, where he pointed out a gross sampling overrepresentation. Only one study, which only examined youth prostitution, had found 14-years-old to be the average age of entry, while research that had sampled both youth and adults found 18-years old to be the average age of entry.²⁵⁷

Other testimony evinces that in reality, the age at which individuals report to have begun selling sex varies according to geographic region, and by the nature of the organization collecting the data. At LCA, Megan Walker, the Executive Director of the London Abused Women's Centre (who eschewed statistics in general as controversial) did not know the mean age of women using the Shelter's services, but she did give a vast range from 12 to 60 years old.²⁵⁸ Earlier at JUST, the York Regional Police claimed that during December 2013 (the month that *Bedford's* final

²⁵⁵ *Bedford 2010, supra* note 1 at para 357.

²⁵⁶ *Bedford 2010, supra* note 1 at para 129; 341-343, 357- 358. At first instance in *Bedford*, the affidavit evidence from Dr. John Lowman was problematic. As drafted, the affidavit inaccurately presented a direct causal relationship between the impugned prostitution provisions and violence experienced by prostitutes, yet Dr. Lowman's own empirical observations supported only an indirect causal relationship. At the hearing, Himel J was satisfied that Dr. Lowman had taken responsibility for the sloppy drafting, and then found that Dr. Lowman's *viva voce* testimony was "nuanced and qualified" to "accurately reflect his research". This clarification was important because it sustained the final holding on a key issue, as *Bedford* held that indirect causation suffices to prove a *Charter* violation.

²⁵⁷ JUST Proceedings (7 July 2014) at 1340 (John Lowman). Other witnesses opposing Bill C-36 subsequently pointed this out. See e.g., (8 July 2014) at 1100 (Emily Symons, examined by Hon Stella Ambler).

²⁵⁸ Senate, *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, 41st Parl, 2nd Sess, No 16 [LCA Pre-Study] (10 September 2014) (Megan Walker, examined by Hon Don Plett).

judgment was released), prostitution investigations in their jurisdiction generated an average age of 14.8 years-old.²⁵⁹ Yet before that, a sex work support group in Edmonton found the average age of entry for their members to be 26.5 years old, almost twice that of the York Region's figure.²⁶⁰ Since two municipalities with similar population sizes were so far apart on a fact heavily weighted and debated by legislators, it would have been prudent to enfold regional diversity into the record of legislative facts.

Now, it would be foolish to argue that legislators were irrational simply because a sampling or generalization error may have spilled into their understanding of who was most affected by the legislative situation. Furthermore, since adults were the population litigated in *Bedford*, expanding the facts to compare adults with youth and children is both democratically desirable and constitutionally defensible. Even if that comparison was inaccurate or exaggerated, it certainly would not delegitimize the factual basis for converting Bill C-36 into law. Parliament has to make generally applicable laws, so it needs to consider the general population at a level of abstraction, not perfection. In the past, newly enacted sexual offences have yielded deference from the Court when Parliament has clearly articulated how it considered and compared different populations with competing needs and interests in the criminal justice system, such complainants and accused.²⁶¹

However, counting and collapsing exploited children, trafficked persons, and adults into one class of vulnerable victims - as a single fact - could have distorted not only the extent of the problem (evidentiary reasons), but also the form and reach of the solution (technical reasons) to

²⁵⁹ JUST Proceedings (9 July 2014) at 1005 (Eric Joliffe).

²⁶⁰ JUST Proceedings (8 July 2014) at 1345 (Elizabeth Dussault).

²⁶¹ Kent Roach, *Due Process and Victims' Rights: The New Law and Politics of Criminal Justice* (Toronto: University of Toronto Press, 1999); Choudhry, "Proportionality Analysis", *supra* note 38 at 519-220 (citing legislative replies to sexual offence laws to observe that criminal justice as a policy category is problematic for determining deference "since crimes are not victimless, criminal laws necessarily and inescapable balance the competing interests of victims and the accused... the criminal law is a form of protective legislation which is designed to protect vulnerable groups, and indeed, the *Charter* interest (eg. bodily integrity) of those groups).

support a particular way of imposing liability and choose a fitting penalty. For example, legislators distinguished between coercive and exploitative circumstances as a formula for exempting sellers from the new laws. But the problems experienced by each group – exploited children and autonomous adults (and all of those groups in between) - cannot necessarily be solved by applying the same formula. Moreover, the Technical Paper was silent on age, despite its drafting technique of treating children as victims in all circumstances, while distinguishing adult sellers as either victims or perpetrators depending on the situation and the offence.²⁶²

ii) Location and Jurisdiction of Transactions

Remember also another fiercely fought finding from *Bedford*: indoor transactions are *safer* than street work. Despite disagreeing on the relative safety risk between locations, both the applicants and the Attorney General agreed that indoor prostitution was more *prevalent* than street prostitution at an estimated rate of 80% indoors.²⁶³ Yet, since the majority of studies had only looked into street work, it meant that indoor work – i.e, the vast majority of prostitution – was under-researched.²⁶⁴ At *Bedford*'s application, this under-researching necessarily fenced how far the conclusions from social science evidence could extend. With street prostitution encompassing only 20% of prostitution at large, Himel J received studies of street prostitution as evidence, but kept the studies' conclusions confined to the specific samples studied, and also assigned that evidence little or no weight.

Expectedly, Parliament's two mechanisms for receiving social science evidence (directly to JUST and LCA, and indirectly through the Technical Paper) were uninhibited by high curial

²⁶² *Technical Paper*, *supra* note 253. Penalties vary according to whether the victim is a child or adult. See eg. the material benefits offence ss 286.2 (1) (maximum of 10-year imprisonment), 286.2 (2) (mandatory minimum of 2-years imprisonment up to a maximum of 14-years).

²⁶³ *Bedford 2010*, *supra* note 1 at paras 89, 119.

²⁶⁴ *Bedford 2010*, *supra* note 1 at para 98.

bars for admissibility, weight, and credibility; but on the location and jurisdiction of transactions, Parliament hurtled over basic standards for statistical validity. What in Court had amounted to the empirical conclusion that indoor transactions are *safer* than street work then became a contested proposition at both Committees, particularly through first-hand accounts of women no longer in prostitution. Consider Trisha Baptie, an activist from Exploited Voices Now Educating, who aired her disagreement with those still working, and with the Court too:

*I want to make it very clear that it was never the laws that beat and raped and killed me and my friends, it was men. It was never the location we were in that was unsafe, it was the men we were in that location with who made it unsafe.*²⁶⁵

After diluting the hyperbole here, in essence, assertions like this one shuffled the issue from sellers to buyers, which spurred into confusion from generalizing research from the street to transactions behind closed doors. Vancouver’s Downtown Eastside was the site where much of the data on Canadian street prostitution was collected, yet as Dr. Lowman stressed to JUST, the urban street population on the Downtown Eastside is not representative of prostitution at large.²⁶⁶ Professor Janine Benedet, who had represented a coalition of interveners on equality rights in *Bedford* (and supported Bill C-36) forthrightly agreed that Dr. Lowman was correct. Adding that it was likely street-based research which had generated such a tender age of entry, Benedet agreed that Canadian research had predominantly studied street workers as a population, and not much was empirically known on those working from fixed places inside.²⁶⁷ However, when Bob Dechert, Parliamentary Secretary to the Justice Minister, asked her if she concurred with the Court that “street prostitution is the most dangerous form of prostitution”, Benedet also deflected: “[i]t’s not the location that is dangerous; it’s the men who seek out those women”.²⁶⁸

²⁶⁵ JUST Proceedings (9 July 2014) at 1550 (Trisha Baptie).

²⁶⁶ JUST Proceedings (7 July 2014) at 1340 (John Lowman).

²⁶⁷ JUST Proceedings (7 July 2014) at 1425 (Janine Benedet).

²⁶⁸ JUST Proceedings (7 July 2014) at 1455 (Janine Benedet).

Having heard an excerpt of what the experts attested to at Parliament, we can turn to see whether the Technical Paper contributed to the social science evidence on indoor transactions and street work. Spread throughout the footnotes and works cited are articles penned by three witnesses who had been called as experts by the Attorney General in *Bedford*, though they did not testify before the Committees. Nevertheless, the following three individuals, all of whom advocated for abolishing prostitution, found their way into the Technical Paper as authorities for Bill C-36's policy: Dr. Janice Raymond and Dr. Melissa Farley, both from the United States, and Dr. Richard Poulin, a Canadian sociologist. Dr. Raymond had studied European human trafficking and conducted research on indoor and outdoor prostitution in Chicago, while Dr. Farley was fixated with Nevada's brothels. Consequently, their research lacked direct relevance, as it did not specifically address prostitution in Canada.²⁶⁹ Dr. Raymond claimed that any difference between indoor and outdoor prostitution was illusory, but without having carried out any empirical research to support that claim.²⁷⁰ For Dr. Farley's part, she opined that working indoors did not reduce rates of forced prostitution for Nevada prostitutes.²⁷¹ According to Himel J, however, the ways in which Dr. Farley's "advocacy appear[ed] to have permeated her opinions" included conflating correlation between prostitution and post-traumatic stress into causation, asserting without qualification that "prostitution is inherently violent" - despite her own research having demonstrated that "prostitutes who work from indoor locations generally experience less violence", and suffering from confirmatory bias - having preconceived opinions on prostitution before carrying out her research.²⁷² Dr. Richard Poulin, like his American colleagues, did not offer an independent opinion

²⁶⁹ *Bedford 2010*, *supra* note 1 at paras 131, 344.

²⁷⁰ *Bedford 2010*, *supra* note 1 at para 322.

²⁷¹ *Bedford 2010* at para 181.

²⁷² *Bedford 2010* at paras 353-356.

to the Court.²⁷³ His credibility deteriorated from testifying that it was unimportant for scholars to present adverse findings, and two significant conclusions he presented – first, that 14 years old was the average age of recruitment, and second, that prostitutes working indoors had been targeted by serial killers – were unsupported by the sources he cited.²⁷⁴

Condensing what the Committee testimony and Technical Paper presented on the relationship between violence and location can clarify some impacts on legislative reasoning, especially if we track where *Bedford* hovers over the evidence. To a spectator in the gallery, testimony on the connection between location and safety played out like a rematch of *Bedford*'s battle of the experts: consensus on the predominance of work indoors over outdoors, and controversy on the safety of transactions inside versus outside. With a paucity of research on the majority of prostitution boiling down to empirical uncertainty, and the irreconcilable clash of opinions on the reducibility of violence stacking up to empirical conflict, impassioned anecdotes from people such as Trisha Baptie carried all the more sway over legislators.

The sway of this anecdote samples Part I's description of moral reasons as a "tie-breaker". After informing Parliament "that 75% to 80% of those involved in prostitution are women", the Justice Minister stated on Second Reading, "the government would send a clear message to those who exploit vulnerable persons and, in particular, inflict trauma and revictimization on women and children".²⁷⁵ Thus, castigating men who buy sex "serves to deliver a message to both the community and the offenders themselves" of "a commitment to social justice and equality",²⁷⁶ on behalf of women who might be identified as discrete and insular victims, who, though prejudiced,

²⁷³ *Bedford 2010* at paras 351, 357.

²⁷⁴ *Ibid.*

²⁷⁵ Hansard (11 June 2014) at 1715 (Hon Peter MacKay)

²⁷⁶ *Sauvé v Canada*, *supra* note 167 *supra* note 166 at para 119, Gonthier J, (dissenting); *R v Oakes*, *supra* note 82 at para 64.

nevertheless possess greater legislative bargaining power than anonymous, diffuse accused.²⁷⁷ Offering moral reasons to justify legislation may very well be an adequately reasoned apprehension, depending on who and which right(s) are impugned, and the impugned measure.

Prevailing upon constitutional values to break the tie exemplifies why legitimacy, fully defined, needs an institutional facet, as much as (and for) its democratic and legal facets. Insofar as popularity abbreviates democratic legitimacy, public support for amplifying a public service announcement through the *Criminal Code* is easier to garner if empirical evidence is lacking, instead of conflicting. For Parliament to use its capacity to develop policy and competently convert that model into law, it cannot shut its eyes at sore spots if looking closely might upset what the Government has proposed. Otherwise, there is a perverse temptation for Parliament to ignore consequences that are *capable of proof*.²⁷⁸ If Parliament cannot be persuaded to rake up the entangled empirical factors necessary for grasping the problem before it, then Vanessa MacDonnell's astute forecast that "the government is constitutionally barred from ignoring evidence in making policy" may come to pass.²⁷⁹ As Section A posited, enforcing s 7 in the Courts may allocate even more legislative labour to judges with an evolving capacity to handle social and legislative facts ordinarily within Parliament's remit. And as the rest of Part II reports, the most timely and pertinent social and legislative facts might not be produced through government-sponsored research, but from innovations of sophisticated social organizations, publications in the private sector, and independent studies conducted at universities. Taming a temptation to blindly

²⁷⁷ I draw here from the distinctions of legislative bargaining power in Bruce A Ackerman, "Beyond Carolee Products" (1985) 98:4 Harv L Rev 713. Although Ackerman defines women at large as a discrete and diffuse group, on his definition, those who are part of the abolition lobby would be closer to the insular end of the spectrum.

²⁷⁸ *R v Bryan*, *supra* note 87 at para 103, Abella J, dissenting with four others: "But while scientific proof may not always be necessary or available, and social science evidence supported by reason and logic can be relied upon, the evidence must nonetheless establish the consequences of imposing or failing to impose the limit."

²⁷⁹ Vanessa MacDonnell, "Developments in Constitutional Law: The 2011-2012 Term" (2012) 59 SCLR (2d) 52 at 52-53, 82. See also Klein, "Principle and Democracy in Section 7", *supra* note 78.

legislate ambitious policy does not, however, mean encumbering Parliament with a positive duty to launch research on empirical uncertainties or conflicts. To maintain its institutional legitimacy in a pragmatic and principled way, if Parliament has already taken responsibility to enact means that impair rights, and if the effectiveness of those means depends upon empirical unknowns or disparities, then Parliament should not deserve deference for failing to use its capacity to address an issue that is “empirically measurable” *and* “susceptible to proof in the traditional manner”.²⁸⁰

Reflexivity in democratic and institutional legitimacy is reinforced here by formulating this politically and juridically contested fact into an evidentiary reason. As a premise, “indoor transactions are *safer* than street work,” goes to understanding the nature and extent of the present and prospective legislative situation, which could differ from the narrower, retrospective adjudicative issue. If Parliament wanted to respond to adjudication’s limitations using its own institutional advantages, it would have been effective to fill this factual vacuum with fresh, relevant information about the vast majority of prostitution – such as striking a Subcommittee on Prostitution, as had happened in 1985 and 2006,²⁸¹ or, given the short time window, a Special Joint Committee of both chambers, as it soon would for medically-assisted death in 2015.²⁸² Since there was already a saturation of information about prostitution in its less prevalent form on the urban streets, and especially since Parliament only had 12 months to deploy its resources to excavate the legislative situation, exercising its strengths to discover what was unknown and unresolved would have been efficient. Canvassing the public’s concern in light of new information could sharpen the

²⁸⁰ *R v Sharpe*, *supra* note 87 at para 160. See also *R v KRJ*, *supra* note 198 at para 60, where the Court dealt with s 1 as a matter of first instance with fresh social science evidence on recidivism of offenders .

²⁸¹ Special Committee on Pornography and Prostitution, *Pornography and Prostitution in Canada* (Ottawa: Minister of Supply and Services Canada, 1985); Standing Committee on Justice and Human Rights and Subcommittee on Solicitation Laws, *The Challenge of Change: A Study of Canada's Criminal Prostitution Laws* (Ottawa: Communication Canada, 2006) [2006 Subcommittee, *Challenge of Change*].

²⁸² Special Joint Committee on Physician-Assisted Dying, *Medical Assistance in Dying: A Patient-Centred Approach* (Ottawa: Parliament of Canada, 2016).

debate as a potentially effective way to clearly differentiate the legislative situation from the past adjudicated issues in *Bedford*, and hence enhance the political warrant for Bill C-36.

While maintaining and exercising institutional legitimacy means Parliament cannot wither and dither away its role in policy development and study, it is not the only branch responsible for that chore. Policy research is also under the Department of Justice's bailiwick. Consequently, when an unanticipated issue lands on the Government's agenda, apolitical staff may have to assume an even greater research role, but often without direct and open accountability for their performance. How this research is selected and represented, particularly when it comes to recycling discredited data, raises a risk of re-legislating the same harms on top of new ones. This suggests that the Technical Paper's latent incorporation of *Bedford*'s untrustworthy expert evidence obscures its own reliability and accuracy as a source to inform legislative intent when Bill C-36 is litigated. Because we spotted this latent untrustworthiness by untucking the Technical Paper's citations and then packing them alongside *Bedford*'s application record, Parliament was likely unconscious of the subliminal ways in which this ostensibly benign extrinsic aid exerted influence on what and how legislators reasoned about what *Bedford* did and did not decide, and what Parliament itself indeed decided when it had the opportunity to add or alter *Bedford*'s facts and law. Moreover, the two above empirical claims that 14-year olds were the average recruits and that violence indoors was irreducible were also products of the experts' aggregation of prostitution with child exploitation, sex tourism, and human trafficking.²⁸³ Himel J sifted this aggregate out of the central dispute involving adult Canadian prostitutes, as such tangential topics were not directly relevant to determining that narrower adjudicative issues.²⁸⁴

²⁸³ *Bedford 2010* at paras 182-184.

²⁸⁴ *Ibid.*

Nevertheless, this rejected research and these aggregated issues were blended together into Bill C-36's debate at Parliament.²⁸⁵ Undeniably, child exploitation and human trafficking are serious issues that do (but do not always) coincide with prostitution, so expanding the matrix to consider how new policy and legislation could affect those ancillary issues is democratically worthwhile and instrumentally efficacious. Although Courts must wait for litigants to file claims to be adjudicated, Parliament should not have to wait for the Courts to prescribe when and what issues ought to be legislated. Enhancing debate on the mainstage, however, is critically different from relegating reasoned consideration on core issues to a sideshow. Botching together all of these social problems amasses new ones: the distinctiveness and seriousness of harms in adult prostitution, child exploitation, and human trafficking are deserving of separate and significant attention. Twelve months may have been long enough to alleviate the harms created by the three prohibitions litigated in *Bedford*, but is hardly adequate to invent a panacea for all issues incidental to the sex industry.

iii) Advertising to the New Advertising Offence

Despite the foregoing critique of Parliament's weak grip on social science, and despite the untrustworthy evidence sprinkled throughout the Technical Paper, there is nothing *a priori* objectionable about rewinding *Bedford*'s expert evidence for Parliament. If legislators are to avoid re-legislating the same harms, replaying *Bedford*'s record could be desirable by first fostering a deeper understanding of how and why the pre-*Bedford* laws harmed individuals in predicaments analogous to the applicants. Relevant as *Bedford* was to constitutional considerations, however, *Bedford* did not create an unlimited right to sell and buy sex, nor did it set out a stencil for

²⁸⁵ See especially interventions of Hon Joy Smith. The following selections are illustrative: Hansard (12 June 2014) at 1321, 1346, 1538. Significantly, combating human trafficking was the aspect emphasized at Third Reading before the House of Commons passed the Bill: Hansard (3 October 2014) at 1005, 1026, 1030. See also interventions of Hon Stella Amber, for example: JUST Proceedings (9 July 2014) at 1406-1415.

lawmaking. Much as Parliament was transfixed by *Bedford*, the case's record was not a compendium of all research on prostitution, and it turns out that some interesting new research later became available for Parliament to contemplate.

To dissect the new research that was accessible within the legislative process, we can examine how evidence (and lack thereof) of means-testing from Sweden's Nordic model compacted into support for Bill C-36's immunity model.²⁸⁶ To curtail the harms of prostitution, in 1999, Sweden added a criminal prohibition on purchasing sex to its *Penal Code*, which supplemented its pre-existing prohibition on promoting or financially exploiting the sexual relations of another.²⁸⁷ The Swedish experience thus provided an initial basis to inform Bill C-36's new purchasing prohibition, as well as the material benefits prohibition, which replaced the former living on the avails offence. Information drawn from studies of the Nordic model was presented to legislators in the Technical Paper,²⁸⁸ which indicated that Nordic model's purchasing offence was effective in attaining the Swedish legislature's objective to reduce prostitution.²⁸⁹

While the Nordic model may have inspired and informed Bill C-36's purchasing offence, whether Canada's own purchasing offence attains Bill C-36's objectives also depends on how it functions in concert with the other measures included in Bill C-36. Canada added new offences unknown and foreign to Sweden, including a prohibition on advertising sexual services. Perhaps then, much like it did to inform the purchasing offence, the Technical Paper also sought to compare

²⁸⁶ *Technical Paper*, *supra* note 253 at "III: International Context". For an analysis of procedural difficulties with Bill C-36's immunity-based approach, see Stewart, "The New Sex Work Law", *supra* note 20 at 74-76.

²⁸⁷ *Penal Code*, SFS 1962:700 Brottsbalk at Ch 6, ss 6.11 (purchasing offence) 6.12 (third party offence). For an overview of the Nordic Model's philosophy, policies, and laws, see Gunilla S Ekberg, *Swedish Laws, Policies, and Interventions on Prostitution and Trafficking in Human Beings: A Comprehensive Overview* (Stockholm, Sweden, 22 November 2017), online: < <https://www.researchgate.net/publication/321254711> > and for issues with importing it to Canada, see: Sandra Ka Hon Chu & Rebecca Glass, "Sex Work Law Reform in Canada: Considering Problems with the Nordic Model" (2013) 51:1 *Alta L Rev* 101.

²⁸⁸ JUST Proceedings (7 July 2014) at 1040; *Technical Paper*, *supra* note 253.

²⁸⁹ *Technical Paper*, *supra* note 253 at pp 12-13.

Canada's new advertising prohibition with research from another jurisdiction that already prohibited advertising sexual services. Not so. Unfortunately, the sole source that the Technical Paper cited to support the advertising prohibition was not research, but a simple recommendation from the European Council - as if there were no jurisdictions with existent advertising prohibitions in force.²⁹⁰

Curiously, Northern Ireland, which the Technical Paper *did* cite for recently enacting a purchasing offence, has prohibited advertising sexual services since 1994.²⁹¹ Given Northern Ireland's proximity to Canada both geographically and constitutionally (as a former Commonwealth nation), this omission is strange. That said, it may be persnickety to fuss over this omission, since the Technical Paper itself humbly purports to provide a general overview of *Bedford* and outline the basis for Bill C-36.²⁹² Besides, since the possibility of an advertising prohibition was not offered up as food for thought in the Government's consultations held prior to Bill C-36's introduction, and since supportive experts such as Professor Benedet had not expected the Government to set its sights on advertising,²⁹³ it is possible that the advertising prohibition was, for the Department of Justice, an afterthought.

Witnesses testifying at Parliament, however, did have the forethought to address the advertising prohibition at the Committee Hearings. Though the Technical Paper missed research on the advertising prohibitions, Frances Mahon, who assisted Terri-Jean Bedford's legal team, did not. Were it not for the new prohibition on advertising, Mahon was "tempted to approve" of Bill C-36's attempt to allow indoor work.²⁹⁴ Arguing that the advertising prohibition would be grossly

²⁹⁰ *Ibid* at fn 53 and 54.

²⁹¹ Criminal Justice (Public Order Act), 1994 (UK), s 23; *Technical Paper*, *supra* note 253 at fn 50.

²⁹² *Technical Paper*, *supra* note 253.

²⁹³ Department of Justice Canada, *Online Public Consultation: Final Results*, *supra* note 206; JUST Proceedings (7 July 2014) at 1450 (Janine Benedet, examined by Hon Craig Scott).

²⁹⁴ LCA Pre-Study (10 September 2014) (Frances Mahon, examined by Hon Paul McIntyre on similarities and differences with Nordic Model).

disproportionate, Mahon invited Senators sitting on the LCA to consider timely research published by The Economist one month before the LCA began its Pre-Study in September 2014. In August 2014, The Economist had reported a large-scale analysis of 190,000 online profiles of female sex workers in predominantly heterosexual transactions.²⁹⁵ During the period when online advertisements proliferated, a decade-long study (which tracked an American review site) tabulated an increase in the number of sellers self-identifying as independent, un beholden to exploitative pimps or madams.²⁹⁶ Along with websites devoted to advertising, The Economist examined websites dedicated to front-end oversight and risk assessment through client verification tools and health checks, as well as websites aiming for back-end accountability through reviews and blacklists.

Whether any Senator directly apprised themselves of this research series is indiscernible from the legislative record. What is discernable, though, is at least one example of how reasoned justification can be bypassed when legislators do not receive research first hand. Look at how in the following exchange, Senator Frum, without assessing the data for herself, dismissed Mahon's reporting of online client verification out of an avowed preference for anecdotes:

Ms. Mahon: One of the things this bill does that the Swedish model doesn't is the prohibition on advertising...there was a series of articles last month in The Economist on this very issue... There are websites where a client can go and select a person they wish to engage in sexual services with. The sex worker herself can verify the identity of that client on those websites. There's some information sharing that can enhance the safety of that relationship. The issue with the advertising provision is that it would effectively prevent websites like this from occurring.

... As Ms. Benedet has already mentioned, it is already the most marginalized sex workers who are on our streets today, including First Nations women, transsexual women, impoverished women and drug-addicted women. My answer to you, senator, is that it is this advertising prohibition that makes it especially insidious to me....[Exchange Between Senator McIntyre and Janine Benedet Omitted]

²⁹⁵ "More bang for your buck: Prostitution and the internet", *The Economist* 412: 8899 (9 August 2014), online: <<https://www.economist.com/news/briefing/21611074-how-new-technology-shaking-up-oldest-business-more-bang-your-buck>>

²⁹⁶ *Ibid.*

*Senator Frum: I was going to ask a question to you, Ms. Mahon, but I think you've answered it a few times already. You've asserted more than once that you think this bill will make prostitution less safe after it's passed than it is today. I'm not persuaded by the case. In fact, in the example you just gave about the Internet exchange, we heard from at least six or seven witnesses earlier today that having an Internet exchange with a total stranger about his intentions is completely useless if his intentions are to hurt you. I'm not sure I'm persuaded by that.*²⁹⁷

It is one thing to fail to be persuaded after actually assessing facts that question the basis for your belief. It is quite another thing to fail to engage with facts that challenge your political position. Debating empirical evidence about potential safety enhancements from accessing online websites could have elevated legislators' ability to reason about the contending harms to protected interests. Reasoning about how information-sharing proliferates on online advertising platforms and mobile mediums could have strengthened or weakened legislators' inferences about the advertising prohibition's effectiveness and enforcement practicalities. Similar to the manner for fashioning exemptions for the material benefit offence, legislators might reason technically from this pertinent information to exempt websites that are safety-enhancing or non-commercial in nature. Purposively, there is a distinction between "The No List", a searchable client database "for time wasters and bad dates",²⁹⁸ and "Backpage", "the 'current market leader in sex advertising'".²⁹⁹ With this type of distinction, the advertising offence might interlock with Bill C-36's other provisions as a synchronized scheme, instead of working at cross-purposes.

A single provision is one piece within an intricate puzzle in which multiple provisions, fulfilling their distinct roles, adjoin and adhere for an entire scheme to work as a coherent whole.³⁰⁰

²⁹⁷ LCA Pre-Study (10 September 2014) (Frances Mahon, examined by Hon Linda Frum).

²⁹⁸ Maggie's: Toronto's Sex Workers Action Project, "The No List: Time Wasters and Bad Dates", online: <<http://maggiestoronto.ca/no-list>> (accessed 17 June 2018).

²⁹⁹ *R v Bright*, 2016 ONSC 7641 (CanLII) at para 20. See also *R v Esho and Jajou*, 2017 ONSC 6152 (CanLII). The facts of *R v Esho and Jajou* also could have sustained charges against one female seller, who was a key witness.

³⁰⁰ See e.g. *R v Chartrand*, [1994] 2 SCR 864, L'Heureux-Dube J (analyzing the distinct roles of criminal offences involving taking possession of another person).

To impose liability for purchasing or exploiting the sexual services of another, the two primary provisions of the Nordic model, which were enacted at separate times, use a drafting technique composed from the premise of decriminalization, and are glued together by a comprehensive social welfare policy executed by municipalities.³⁰¹ Unlike Bill C-36, the Nordic Model does not contain any prohibitions on advertising sexual services and communicating, and Bill C-36's drafting technique imposes liability first through criminalizing all parties involved in a transaction, and then purporting to immunize sellers from prosecution in some scenarios, or offer exemptions. These differences are not merely facial; technical reasons that compare and contrast means and models are essential features of reasoning about criminal legislation in general, constitutionality aside. Where Canadian legislation has been modeled after jurisdictions abroad, the Court has been wary of differences between concordant provisions to impute legislative intent.³⁰² Those differences are magnified further if we try to plug in components of any one model without adjusting for the broader social and legal systems in which a criminal prohibition forms just one part.

To be sure, it would be imperious to demand legislators to impersonate judges and the exactitude of judicial reasoning. That is why it is especially puzzling that the unexpected advertising prohibition popped into Parliament like a jack-in-the-box. Advertising restrictions are actually features of legalization and decriminalization models, so the paradox was clear without even boring into the technicalities of Bill C-36's clauses. Indeed, Professor Benedet informed Senators of that paradox immediately after the above remarks by Mahon. Focusing on the

³⁰¹ Ekberg, *supra* note 287.

³⁰² See e.g. *R v McIntosh*, [1995] 1 SCR 686 at 700-701 (to support the conclusion that Canada's Parliament did *not* intend to exclude provocation from its enactment of self-defence in s 34(2) of the *Criminal Code*, Lamer CJ observed that New Zealand had expressly codified non-provocation as an element of self-defence).

commercialization and commodification of women, Benedet advised that advertising could affect whether individuals are treated as equals.³⁰³ Thus, deliberating about empirical results depicting those models' successes or failures with limiting advertising could also have led legislators to consider how a Canadian prohibition on advertising sexual services could affect rights and freedoms in conjunction with, or in addition to s 7, such as freedom of expression and equality – which were two rights asserted but never adjudicated in *Bedford*. The paradoxical defect in rationality here more than just an inadvertent oversight, and more than just an insufficient notice of an eleventh hour addition by drafters. When resistance to addressing relevant evidence fractures the ability to see the technical defects in the policy, the measures converted into law may undercut not only their instrumental purposes, but also undermine constitutional values.

Consider also that among the proposed amendments during JUST's clause-by-cause, there was a narrowly negated five-to-four motion to delete the advertising prohibition from Bill C-36 altogether.³⁰⁴ When that deletion motion was debated during clause-by-cause, Bob Dechert (the Parliamentary Secretary to the Justice Minister) attempted to pacify Vice-Chair Françoise Boivin by paying tribute to *Bedford*, stating that the new advertising prohibition “falls squarely within the test set out by the Chief Justice”.³⁰⁵ It is unclear which test the Parliamentary Secretary was thinking of in that creative interpretation. *Bedford* did not and could not have set out any test for advertising, since no prohibition on advertising sexual services existed in Canadian law at the time. Now, on Boivin's construal, the advertising prohibition would not meet *Bedford's* qualitative test under s 7, but no one thought to question it at clause-by-cause under the directly applicable freedom of expression test. Engaging with s 2(b) of the *Charter* would have layered and refined

³⁰³ LCA Pre-Study (10 September 2014) (Janet Benedet, examined by Hon Paul McIntyre).

³⁰⁴ JUST Proceedings (15 July 2014) at 1258 (NDP Motion by Hon Françoise Boivin).

³⁰⁵ JUST Proceedings (15 July 2014) at 1259 (Hon Bob Dechert).

the reasons underlying JUST's vote by entailing finer distinctions between the purposes and platforms for commercial and protective speech. Perhaps engaging with s 2(b) would have dusted off the *Prostitution Reference*, which surfaced only when a drafter was called upon to advise why it was unnecessary to define "prostitution" in the bill.³⁰⁶ If *Bedford* was a sitting duck for truncating debate to catapult Bill C-36 to JUST, then at JUST, it was now the golden goose of constitutional comfort. *Bedford's* double-edged use, not only to deafen the democratic debate, but also to blindfold the legal analysis from other rights irresistibly suggests that the early loss to democratic legitimacy in the legislative process was later accompanied by a weakened legal warrant for its enacted substance.

On a positive note, so far as technical reasons are concerned, the Parliamentary Secretary did connect the advertising offence to the *objective* of the main purchasing offence. In the Government's view, these objectives were complementary because both offences targeted third parties who profit from promoting sexual services.³⁰⁷ But unlike the purchasing prohibition, for which there was at least empirically conflicting international evidence on whether the *means* reduced demand,³⁰⁸ neither the Department of Justice's Technical Paper, nor the Government's consultation gave empirical support for the advertising prohibition as a means to the demand reduction end. Seen this way, sufficient technical reasons ought not to begin with the end in sight. Without premising those ends with a connection (even a prediction) to efficacious means, the House of Commons was deliberating about the brand new advertising offence (and voting on its deletion) in the dark.

³⁰⁶ JUST Proceedings (15 July 2014) at 1000-1002 (Nathalie Levman, examined by Hon Françoise Boivin).

³⁰⁷ JUST Proceedings (15 July 2014) at 1259 (Hon Bob Dechert).

³⁰⁸ See especially the discussion between drafters and Senators on this issue and the Technical Paper's reporting of it: LCA Pre-Study, (9 September 2014) (Nathalie Levman, examined by Hon Mobina Jaffer).

Possibly, in different conditions, this loss might have been regained at the later stage of the legislative process when the Economist's study was raised at Senate. At any realistic rate, missing the unexpected arrival of one international study mid-way through the legislative process should not in itself rally cries of unconstitutionality, nor reverse the Government into redrafting. Rather, there are two subtler significances here. Leaving aside the provenance of the Technical Paper in the public service, the first subtlety is that its relevance and utility (to Parliament's deliberations and to courts' interpretations) diminishes as the legislative process moves towards Royal Assent. That is because the inorganic, external nature of the Technical Paper is unadaptable to the iterative, incremental expression of legislative intent. And yet, when opposing the deletion of the advertising offence, the Parliamentary Secretary simply paraphrased the Technical Paper's explanation of the legislative objective, without any independent thought, and without any actual means-testing to support that objective.³⁰⁹ However, if the Government were challenged not just by speculative opinion, but by researched evidence of the safety-enhancing benefits from negotiating sexual transactions online, then that challenge could have advanced legislative intent beyond what the Department of Justice expressed in the Technical Paper, as it would have prompted legislators to reckon with patently incompatible objectives and possible overbreadth. If there were concrete grounds (not unsubstantiated ideological claims) to believe that the means of prohibiting advertising was not only potentially futile for its specific demand reduction objective, but also potentially at odds with Bill C-36's "first and foremost" objective to ensure safety, then the level of persuasion required to survive the motion to delete ought to have been higher. It also would have distinguished and ramified the factual and legal context beyond *Bedford's* and the Technical Paper's analysis of s 7, because on these fresh facts, freedom of expression was raveled with the

³⁰⁹ Cf JUST Proceedings (15 July 2014) at 1259 (Hon Bob Dechert); *Technical Paper*, *supra* note 253 at 6.

right to security through protective communication. Moderating between access to safety-enhancing platforms and profit-driven mediums in a way that aligned the values underpinning the right to security and equality would have summoned the moral reasons that can sustain a justification when the facts and law are unclear. Again, the Department of Justice's explanation of what it considered while drafting the Government's Bill is not Parliament's justification for enacting the Bill, especially in light of facts raised to legislators within the democratic process – facts which were unconsidered by (or unavailable to) the Department of Justice.

This diminishing relevance and use of the Technical Paper against the dynamic development of deliberations spills into the second subtlety. In ordinary, natural conditions, legislative intent consumes shreds of information to subsume more sweeping concerns raised through testimony and information from experts and citizens. If legislators are rational, thinking individuals, the thoughtworthy new study, landing into Senate, would elicit legislators to adapt their speculation about a legislative solution to meet or distinguish concrete facts which taxed the viability of that solution. Possibly, institutional capacity and fears for democratic legitimacy may have interfered with their ability to debate rationally, complexly, and carefully. That the first crop of empirical information on the advertising prohibition did not arise until the LCA's Pre-Study signals a backwards shift in intra-institutional labour. In a contracted legislative process, be it from a court order or political promise,³¹⁰ instead of the Senate complementing the House of Commons a legislative chamber of sober second thought,³¹¹ the Senate may instead find itself as the forum of first impression. Considering that the Senate does possess the power to amend Bills, this shift

³¹⁰ For example, the race to meet the Prime Minister's promise to legalize marijuana before July 1, 2018 by enacting Bill C-45, *An Act respecting cannabis and to amend the Controlled Drugs and Substances Act, the Criminal Code and other Acts*, 1st Sess, 42nd Parl, 2017 (consideration of Senate amendments, 13 June 2018).

³¹¹ *Reference re Senate Reform*, *supra* note 168.

may not be overly consequential, as anything blatantly problematic might be subject to a Senate amendment. Customarily, however, Senate amendments are confined to drafting technicalities and administrative practicalities.³¹² If the Senate's failure to amend Bill C-36 is any indication,³¹³ when the majority of Senators fall into line with the majority in Government, as played out with the political roster for Bill C-36, the Senate is all the more unlikely to depart from its custom.³¹⁴ So, despite possessing the factual and legal impetus to make substantive amendments, the Senate's political impotence is part of what is so vexing when detailed deliberations are rode roughshod by the pressure to plow Bills through Parliament.

Placing the House of Commons' and Senate Committees side-by-side can pin these subtleties of time and place in the political layout. For us, the point of the Economist's research on advertising is not its findings, but what its treatment in the legislative process reveals about Parliament's capacity. Research flagged at the Senate's LCA was unavailable to the House of Commons for JUST's Study – the location where it would be most likely to have any substantive impact at a critical time. Even if a fuller picture of how the advertising prohibition could fare would not have tipped the vote towards eliminating the offence, a more detailed understanding could have tailored its breadth. For practice, informed debate could have assisted law enforcement and courts to later interpret and apply the advertising offence, which is especially important when legislation forges history with offences unknown to Canadian law. And for principle, when untried offences are subsequently challenged, the democratic legitimacy from openly airing citizens' concerns and

³¹² Parliament of Canada, *House of Commons Compendium of Procedure* (Ottawa: Parliament of Canada) at Legislative Process, House Consideration of Senate Amendments to Bills, online: < https://www.ourcommons.ca/About/Compendium/LegislativeProcess/c_d_houseconsiderationsenateamendmentsbills-e.htm >.

³¹³ *Debates of the Senate*, 41st Parl, 2nd Sess No 149 (4 November 2014).

³¹⁴ Peter W Hogg, *Constitutional Law of Canada*, *supra* note 112 at 9.5(c) (observing that generally, “the Senate has not been a major obstruction to important government policy, even when its majority has been controlled by the opposition... The restraint by the Canadian Senate is caused by its recognition that, as an appointed body, it has no political mandate to obstruct the elected House of Commons”).

explicitly addressing evidence for and against those concerns would ensconce the outcome of that challenge with robust legitimacy. The advertising offence therefore demonstrates that when and which chamber receives what evidence can impact the extent and depth of reasons that legislators articulate for and against a legislative decision.

Realistically appraising Bill C-36 does, however, require noting that the Government is not entirely to blame for some of the problems of proof within Bill C-36's legislative process. Political viability aside, the compressed time and resources ensuing from the Court's 12-month suspended declaration might have made it impractical for Senators to halt Bill C-36's steamroll through Parliament to consider research that did not exist when the Department of Justice was constructing Bill C-36 - especially with only three months left until the declaration of invalidity would come into effect. It would be immensely difficult to produce, propose, then pass amendments unless the Court extended the suspension – an option that the Government did not appear to seriously consider. But acknowledging that Parliament is legislating with difficulties does not eliminate the need to inform Parliament's legislative decisions.

Hence, legislative decisions that are afflicted with difficulties of proof that are instantiated internally within the legislative process (such as bypassing salient evidence) and are realistically within Parliament's ability to control, should not deserve deference. Analogously, this proposition gains traction from *RJR-MacDonald*, when a plurality of the Court denied deference to the Government's enactment of a total prohibition on tobacco advertisements. When the Government skidded over research, having withheld a study that compared alternative means, the "simple assertion that Parliament has the right to set such limits as it chooses", did not count as reasoned argument, but was instead a "glaring" omission.³¹⁵ Thus, to attempt to justify limitations on rights,

³¹⁵ *RJR-MacDonald*, *supra* note 86 at paras 165-167.

it seems equally unsound for the Government to neglect evidence of means-testing as a political tactic as it did to deprive the Court of the same type of evidence as a litigation tactic. If the Government is the maker of its own factual vacuum, then it ought to be treated with skepticism and paid no deference, regardless of venue. If anything, factual vacuums concocted in Parliament are especially dangerous, because they obscure the publicity essential for citizens to be informed about and contribute to the laws that affect them *before* those laws are made.

D. Beyond *Bedford*: New Perspectives

Germane as social science is to policy development, ordinary facts from engaged citizens are also the bread and butter of legislative information gathering. Section D now asks whether and in what ways the democratic debate became sharpened by moving past *Bedford*. Returning to ordinary methods of information gathering at Parliament will also reorient us to the growing capacity of the Court to engage the public, which will nevertheless impress the need to preserve and rejuvenate Parliament's function.

i) Limits of Public Interest Standing and Intervention

Until now, this analysis has progressed under the assumption that democratic legitimacy flourishes from citizens' input to legislators through participation in policymaking and lawmaking. On first sight, this might imply that the Court has no business soliciting the public's opinion on the issues at bar. This section will acculturate that assumption. Peering into how the Court has cushioned its countermajoritarian structure will situate Parliament as the prototypical destination for democratic decisions, yet also demonstrate that Parliament may no longer be the first or last stop on the itinerary of concerned citizens and groups.

In the contemporary *Charter* era, constitutional adjudication is a path for the citizenry's democratic participation. Concerned citizens can bypass Parliament altogether when the Court grants access to justice via intervention and public interest standing. Through these two procedural routes, not only can the public engage with the Court, the public can also capture the Government's attention. In this way, the democratization of the Court has carried concomitant democratizing effects to all branches of power. Sensitivity to this democratization is reflected in the following

remarks of former Justice Frank Iacobucci, who shared how two decades of *Charter* enforcement changed his own understanding of the *Charter*'s influence on democracy:³¹⁶

*[I]ncreasing the capacity of individuals to participate in constitutional adjudication can make a positive contribution to the effectiveness of the Charter as a democracy enhancing document by holding government accountable for its actions. Accordingly, we must be vigilant in ensuring that members of the public have the opportunity to assert claims before the courts.*³¹⁷

Along with an openness to receive and apply social science and legislative facts, in Iacobucci J's acumen, the broad adjudicative participation promoted by public interest standing and intervention is infixed within the *Charter*'s larger fortification of democratic participation.³¹⁸ This fortification is especially empowering for those isolated from the ordinary political process for want of organization and capital, or whose issues are marginal or particularly onerous. On Aileen Kavanagh's qualitative distinction between formal and effective participation, adjudication may be the only effective process to access democratic participation as a mode of self-protection.³¹⁹ Projecting the democratic potential of constitutional litigation onto *Bedford* and Bill C-36 may therefore model the gap between the Court's hearing and Parliament's debate as part of the *Charter*'s democratic work in progress.

We can closely examine that work in progress by watching the public interest in prostitution accelerate from and beyond *Bedford* in Parliament. On top of the 24 organizations and associations who intervened in *Bedford*'s final appeal, the broader public engagement in the issues at stake was also boded by the parallel public interest standing granted in *Canada (AG) v*

³¹⁶ Lorraine E Weinrib, "'This New Democracy...': Justice Iacobucci and Canada's Rights Revolution" (2007) 54 *UTLJ* 399 at 402.

³¹⁷ Iacobucci, *supra* note 247 at 6, 15, 18, 21.

³¹⁸ *Ibid* at 6-7.

³¹⁹ Aileen Kavanagh, "Participation and Judicial Review: A Reply to Jeremy Waldron" (2003) 22 *Law & Phil* 451 at 479-480.

Downtown Eastside Sex Workers United Against Violence Society.³²⁰ Standing to litigate *Bedford* had been a live issue at first instance. Despite only one of *Bedford*'s three applicants being actively engaged in prostitution when they brought their application, the case proceeded under private, direct interest as of right.³²¹ While *Bedford* was litigated in Ontario, the *Downtown Eastside* litigation not only was initiated in a different jurisdiction of urban Vancouver, it was also grounded in a different evidentiary record focused on street-work, impugned additional *Criminal Code* provisions including procurement, and advanced additional, distinct *Charter* arguments under the freedom to associate and equality guarantee.³²² Although the *Downtown Eastside* challenge never proceeded beyond the door opened by public interest standing, the plaintiffs in *Downtown Eastside* were among the two dozen interveners in *Bedford*. Had the merits of *Downtown Eastside* vaulted to the apex Court in *Bedford*'s stead, the headlines might have recounted a collective narrative of the labour, economic, and discriminatory dimensions of sex work as a group and cultural phenomenon – a normatively distinct story than that of the individual narrative of a struggle for autonomy and personal security. Section C's comparison of the litigation context and legislative situation was nuanced by the new witnesses we shall now hear from in Section D, did not have the opportunity to testify in *Bedford*, but did appear before Parliament.

Bedford's private interest standing had implications for presentations and rulings of evidence, as all three forms of facts – adjudicative, legislative, and social – were molded through

³²⁰ *Downtown Eastside*, *supra* note 65.

³²¹ As noted in Moulard, *Remedying the Remedy*, *supra* note 10 at 61, fn 327: "Since Amy Lebovitch was actively engaged in sex work when the application was initiated, she had direct, private interest standing. Terri-Jean Bedford and Valerie Scott were not working in the sex industry then, but because they planned to return, Himel J concluded there was no meaningful difference for assessing standing under s 52(1): all three had standing as of right (*Bedford*, *ONSC*, *supra* note 1 at para 55). Alternatively, she found that Bedford and Scott would not have public interest standing (*Bedford*, *ONSC*, *supra* note 1 at paras 60-62). The Court of Appeal declined to address the issue. Lebovitch's private standing made Bedford and Scott's standing irrelevant (*Bedford*, *ONCA*, *supra* note 1 at paras 48-50). Standing was not revisited in *Bedford*'s final appeal."

³²² *Downtown Eastside*, *supra* note 65 at para 64.

the adverse, bipolar structure of litigation.³²³ Since standing is located from the particular violation alleged on the specified facts, for public interest organizations who sought legal and social change on the issues surrounding prostitution, intervening in *Bedford* may have been more of a stepping stone than a substitute.³²⁴ That is because as a general matter, interveners' legal submissions take place within the established facts, without the right to raise their own evidentiary points, which would otherwise pull information into the proceeding from outside of what the principal parties adduced at trial.³²⁵

For *Bedford*'s individual applicants, the Court was an effective step forward for democratic participation, while for organized interveners, the Court was an intermission to strengthen their political strategy. From the standpoint of Daniel Sheppard, who was on the applicants' legal team on both appeals, the advocacy by interveners for asymmetric criminalization did not find footing in Court, but made headway when those advocates participated in Parliament. Noting that "even shallow engagement by the court could still benefit them in achieving their ultimate objectives", Sheppard also observed that adjudicative participation alone can adorn social activists with authority in Parliament and cloak them in credibility; and more provocatively, the real token of success may also be whether those activists' policy preference aligns with the majoritarian preferences of the political party in power.³²⁶ If that is true, then Section C's qualms about Parliament's incapacitation by *Bedford*'s evidence are all the more concerning for institutional and democratic legitimacy by implicating more than just judicial competency with social science in

³²³ Chayes, *supra* note 68 at 1282-1283; Fiss, *supra* note 73 at 18.

³²⁴ Before the Court relaxed public interest standing in *Downtown Eastside*, *supra* note 65, its recalcitrance to public interest standing stemmed from the possibility of granting intervenor status instead. See *Canadian Council of Churches v Canada (Minister of Employment and Immigration)*, [1992] 1 SCR 236 at 256.

³²⁵ *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at para 40. A factor supporting leave to intervene in *Bedford*'s application was that that the moving organizations would not supplement the factual record: see *Bedford v Canada (AG)*, 2009 ONCA 669. The Federal Court of Appeal has been quite emphatic on this point. See e.g., *Canada (Citizenship and Immigration) v Ishaq*, 2015 FCA 151.

³²⁶ Sheppard, *supra* note 65 at 34-36.

the shift of institutional labour. Over and above its expertise and skill with evidence in the issues before it, the Court's *discretion* on whom it hears from may not only undercut its own role to protect minority interests by giving a foothold to majoritarian power in a way that is less than transparent,³²⁷ it may also invisibly influence Parliament's privilege to choose who legislators hear from.

ii) Ethnic and Cultural Minorities

Bedford was decided inside the contained context of the applicants' circumstances, whose interests, background, characteristics, and past experiences fit into the evidence placed before the Court. *Bedford*'s legal dispute about some (but not all) of the *Criminal Code*'s prostitution prohibitions emerged under s 7's security interest, and from facts about adult transactions that took place indoors between homogenous female sellers and male buyers. And yet, proverbial as it is to say, prostitution involves diverse people and distinct communities. To therefore optimize the democratic potential for good policymaking post-*Bedford*, it would be desirable to lift the lid from the adjudicative facts. Opening up the legislative record to assimilate wider facts could acclimate legislators to other interests and additional scenarios that could be caught under new proposed measures.

The widened Parliamentary record was contributed to by multiple cultural and religious organizations which had intervened in *Bedford*. After participating in *Bedford*, the *Asian Women Coalition Ending Prostitution* accomplished in the legislative process what they could not add to adjudication. Importantly, their subsequent participation in Parliament added new facts which conflicted with a central factual finding examined above in Section B(ii). Recollect that the

³²⁷ The stir over intervention in *Trinity Western*, *supra* note 107 seems to suggest as much. See eg. Barry Bussey, "The Law of Intervention after the TWU Case: Is Justice Seen to be Done?" (Paper delivered at the David Asper Centre Public Interest Litigation Conference, University of Toronto Faculty of Law, Toronto, 2 March 2018).

principal parties in *Bedford* (the applicants and the Government) agreed that indoor prostitution remained under-researched and largely inaccessible to social science studies.³²⁸ All three of *Bedford*'s applicants, plus police witnesses, had also testified that indoor sex work was safer.³²⁹ However, none of *Bedford*'s applicants were visitors from abroad, nor immigrants to Canada, as is the situation for many women of Asian ethnicity who end up selling sex in Canada.

Bedford only lightly touched upon minority concerns. While Himel J had found as a fact that Aboriginal women, especially those on the street, were disproportionately affected by the impugned provisions,³³⁰ other ethnicities and cultures were not the subject of factual findings. Procedural rules limiting the participatory rights of interveners in *Bedford* had precluded the *Asian Women Coalition* from adducing evidence of the detrimental impact of indoor sex work upon their unique segment of racialized prostitution. At Parliament, they spoke to the overrepresentation of Asian women in advertisements that capitalize upon racialized stereotypes, as well as the dangers of Asian massage parlours, where citizenship status and language training entice newcomers to Canada to work without complaint, for fear of retaliation.³³¹

By attesting to how Asian women are treated indoors, particularly in massage parlours, the *Asian Women Coalition* opened the parameters of the democratic debate, and also complexified the balancing equation that legislators were tasked with solving. Legislators could no longer simply premise their reasons on the social fact that “indoor work is *safer* than street work”. Of the many possibilities this additional information brought, the proposition that “indoor transactions carry different risks than street work”, would stream into further reasoning to identify those risks, which could then allow for more tailored and technical legislative means. Nonetheless, given the

³²⁸ *Bedford 2010, supra* note 1 at para 98.

³²⁹ *Bedford 2010, supra* note 1 at paras 26, 35, 37, 39, 43, 50-53, 86, 94.

³³⁰ *Bedford 2010, supra* note 1 at paras 90, 165, 174.

³³¹ JUST Proceedings (7 July 2014) at 0930-0940 (Suzanne Jay, Alice Lee), 1040-1045 (Alice Lee).

short time frame legislators were working under, this new information would also clearly support the proposition that, “we do not know if or how indoor work is safer than street work, but we know there is a risk of violence in both locations”. Standing alone, a ban on purchasing sex seems like a sustainable conclusion that would follow from that uncertainty, but it is a conclusion that, when considered with other interests, runs into complications.

iii) Purchasers

Of the multiple other interests to be balanced were those possessed by purchasers of sex. Their interests went against the grain of the two contending narratives that dominated the legislative debates. The imaging of female prostitutes as victims subjugated by patriarchal violence from pimps and johns jostled against the depiction of sex workers as a self-empowering, mutually-supportive community capable of exercising meaningful choices. What could not be seen nor heard from either of these vantage points were alternative, first-hand accounts from buyers, who became the primary enforcement targets under Bill C-36.

Bedford had shaped this public debate simply by the manner in which the proceedings were initiated in the first place. Commenced as a civil application by women who sought to sell sex safely, not through criminally charging and trying clients who wanted to buy sex freely, *Bedford* had absolutely no direct evidence from many individuals whose motives and behaviour Bill C-36 endeavoured to transform. That there was no direct evidence on the rights and interests of one-half of the transaction is a democratic deficit that some opponents to Bill C-36 tried to mitigate, as well as a few researchers and lawyers who offered positions based on research and law.

During the LCA’s Pre-Study at the Senate in September, Jean MacDonald of *Maggie’s Toronto’s Sex Work Action Project* testified about a colleague who had a regular, longstanding client in a wheelchair. Their relationship allowed the client to simply enjoy the care and intimacy

which he could not find through the orthodox channels that able-bodied people take for granted.³³² More controversially, when the LCA began its regular Study in October, Professor Edward Herold advanced the rights of disabled individuals, who, for physical or social limitations, do not have meaningful access to ordinary opportunities to participate in sex.³³³ He relayed the story of a severely disabled man whose parents sometimes brought him to visit a sex worker. They claimed that their son should not be deprived of intimacy and pleasure because he was unable to attract a female partner. Professor Herold invited Senators to ask themselves the difficult question of who, if anyone, should “we see punished” for such an arrangement.

Obviously, encouraging equal opportunities for human sexuality to flourish was not an end pursued in Bill C-36, nor a claim adjudicated in *Bedford*. Nevertheless, these two short stories about purchasers with disabilities were counternarratives to the portrayal of purchasers as forsaken abominations of Canadian society. Even accepting that persuasive reasons were offered for and against Bill C-36 in the average scenario of male purchasers and female sellers, the complex moral reasoning required to contemplate and debate how the laws would affect the dignity, autonomy, freedom, and equality of anonymous, diffuse minorities may really have exceeded legislators’ faculties and the legislative facilities. When this marginal issue is seen in isolation, the political and legal warrants for Bill C-36 are hard to assail. Yet when we view it in contrast to the courage Parliament displayed on other peripheral (but no less difficult) questions, there is a hint of a politically inconvenient truth. How can it be that legislators could keep their awkwardness at bay to create a welcome space for sharing the horrors of human trafficking and child exploitation, yet

³³² LCA Pre-Study (11 September 2014) (Jean MacDonald, examined by Hon George Baker).

³³³ Senate, *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, 41st Parl, 2nd Sess, No 16, Study of Bill C-36 [LCA Senate Study] (29 October 2014) (Edward Herold, examined by Hon George Baker), online: <<https://sencanada.ca/en/Content/Sen/committee/412/lcjc/51683-e>>.

they could not curb their embarrassment to even acknowledge the basic truth that human beings of all capabilities and characteristics have sex?

As for the majority of purchasers, a rare peek into their motives and behaviour was presented to JUST by Chris Atchison, a sociologist who had studied prostitution for over 18 years.³³⁴ Succinctly summarized, the evidence he submitted from having interviewed and surveyed more than 3,000 purchasers established two key insights. First, Atchison's analyses refuted the claim that "prostitution is inherently exploitative" – a claim that *Bedford* had rejected, yet was reprised as a basis for Bill C-36.³³⁵ Having found that "an insidious portion" of buyers behaved cruelly and exploitatively, that portion was small, as Atchison had also discovered that most transactions were "peaceful" and did not involve physical violence, nor verbal aggression. Within the 5% of buyers who disclosed offences against sellers, it was verbal aggression that was more prevalent than physical violence.³³⁶ Atchison's research also revealed a peculiar protective factor: regular clients help reduce violence at the hands of bad clients, and also prevent coercion from third parties with pecuniary interests in the fee. Concerningly, because the new offences would eliminate the impactful way that Atchison discovered clients reduced the risk of violence in all of his studies – namely, detecting and reporting abuse – Bill-36's express objective "to encourage those who engage in prostitution to report incidents of violence" would be undercut by its legislative means.³³⁷

Second, Bill C-36's goals of deterring and eliminating prostitution presumed that reducing demand was possible. Atchison's results indicated that demand would not be reduced by criminalizing one half of the transaction, but would simply be dislocated and isolated underground,

³³⁴ JUST Proceedings (9 July 2014) at 1310-1325 (Chris Atchison).

³³⁵ Cf Bill C-36, *supra* note 3 at Preamble; *Bedford 2010*, *supra* note 1 at paras 344, n 9.

³³⁶ JUST Proceedings (9 July 2014) at 1500 (Chris Atchison, Hon Mike Wallace).

³³⁷ Bill C-36, *supra* note 3 at Preamble.

and hence be harder to detect and enforce. Plus, criminalizing only one half of the transaction could wedge opportunities for more crimes by incentivizing sellers to extort and defraud buyers. MP Stella Ambler wrongly assumed he had no results to share on underage prostitution, but when Atchison tried to elaborate an additional correlation from the result that “fewer than 1% of clients I have spoken to indicate a preference for somebody under the age of 18”,³³⁸ Ambler interrupted him with disbelief, “Do you really think they are going to tell you?”, and the Chair, Mike Wallace, mindful of the time, cut off the examination before Atchison could finish his answer. In a detailed examination by Chair Mike Wallace, Atchison acknowledged that his research relied on his sample of buyers reporting to him honestly, and explained the measures his methodology incorporated to ensure privacy and confidentiality.³³⁹ Unfortunately, going forward, the new prohibitions on communicating and advertising would also make understanding Bill C-36’s influence on supply and demand increasingly difficult.³⁴⁰

Synopsized, Atchison’s research contradicted two basic evidentiary and technical premises upon which the Government predicated Bill C-36, and Bill C-36 would now make it even harder to test those premises. Beginning from the presumption that prostitution is inherently exploitative would relieve legislators from having to distinguish between physical violence and verbal aggression, and between indoor and outdoor venues. Starting with the formula that demand could be curtailed while omitting the supply factor would avoid riling radical feminist factions (in addition to the pro-labour socialist camps) to rage against a tough-on-crime approach, which would have also criminalized women if both sides of the transaction were targeted. Given how critically relevant these empirical insights were to Bill C-36’s policy, we would expect legislators, taking

³³⁸ JUST Proceedings (9 July 2014) at 1415 (Hon Stella Ambler, Chris Atchison).

³³⁹ JUST Proceedings (9 July 2014) at 1457-1502 (Hon Mike Wallace, Chris Atchison).

³⁴⁰ JUST Proceedings (9 July 2014) at 1423 (Hon Sean Casey, Chris Atchison).

their duties as *lawmakers* seriously, to respond to these significant challenges cogently, especially given the empirical uncertainty and conflict during the suspended declaration. So, it is lamentable indeed that instead of asking Atchison questions about his actual findings that not all purchasers are perverts and predators but might even be allies against violence or even new victims themselves, Atchison was interrupted with incredulity. If we ask who was the most politically disempowered from the legislative process and prejudiced within it, it was not rivalling feminist groups clashing over exiting and maintaining the sex trade - it was their past, present, and future clients.

Frankly, the Chair's comprehensive examination of Atchison's research methods was quite proficient. But the skepticism with which Atchison's evidence was treated should also have been applied to all of the empirical research received, regardless of whether that research challenged or supported the Government's position. Furthermore, the way Atchison's submissions were received – that is, the *only* testimonial empirical evidence that came from the targets of the legislation -³⁴¹ should also be contrasted with way that legislators swallowed an abundance of inflamed anecdotes without a shadow of a doubt. Is there not another form of objectification occurring when politicians single out victims of human trafficking on the record and tell them, “[y]ou are beautiful”, and call activists “angels”?³⁴² Is there not a semblance of bias when elected representatives gush over how much they have “loved” working with particular organizations whose positions bolster their political stance, while failing to even ask a question of *anyone* who opposes the Government's

³⁴¹ For an insightful submission by one self-avowed “john” who wrote a brief to the Senate, see Jim Wiggins, “Brief to the Senate Standing Committee on Legal and Constitutional Affairs”, (9 September 2014), online: < https://sencanada.ca/content/sen/committee/412/lcjc/briefs/c-36/c-36_brief_jim%20wiggins_e.pdf >.

³⁴² JUST Proceedings (10 July 2014) at 1412 (Hon Joy Smith, examining Marina Giacomini: “Marina, you are beautiful. Servants Anonymous is an amazing organization); (9 July 2014) at 1647 (Hon Joy Smith, examining Linda and Jeanne Sarson: “You two are angels”).

policy?³⁴³ Is it not degrading to the intrinsic worth of citizenship when the level of respect and fairness a citizen receives (when present in and speaking directly to Parliament itself) coincides with whether that citizen's ideology aligns with that of the political party in power? At the heart of all of these exasperated questions is a loss incurred by legitimacy on all three fronts. To all outward appearances, the democratic, normative, and moral value of what each citizen contributed to the legislative process was reflected in whether and how legislators responded to the substance of the citizenry's concerns, and whether they could even, as a matter of procedure, submit them in the first place. Therefore, what it means for Parliament to offer reasons is not only to enable the administration and enforcement of its decisions, but to also accord respect for and enable the citizenry to meaningfully participate in that broader constitutional project.³⁴⁴

iv) Non-Binary Transactions

Before *Bedford* was litigated, the House of Commons' own 2006 Subcommittee Study on prostitution had found that one-fifth of individuals involved in street prostitution were transsexual or transgendered.³⁴⁵ The Subcommittee's study was subsequently referenced in *Bedford*, as well as in Bill C-36's Technical Paper; however, the 125-page report itself contains a mere two paragraphs on "Males, Transvestites and Transgendered Persons."³⁴⁶ The dearth of government information outside of the mainstream subsisted with the Attorney General's experts at first instance, whose testimony largely omitted any discussion about male, transgendered, and

³⁴³ Cf JUST Proceedings (10 July 2014) at 1040 (Hon Joy Smith, examining Keira Smith-Tague: "I've just loved partnering with you in so many ways"); JUST Proceedings (9 July 2014) at 1345 (Elizabeth Dussault: "I have not heard MP Joy Smith ask sex workers questions regarding the comments they have shared here. I would like to extend MP Smith an invitation to ask me anything she likes, and I will answer honestly.") Unfortunately, Smith did not take up the invitation.

³⁴⁴ Dyzenhaus, "Process and Substance", *supra* note 23 at 303.

³⁴⁵ 2006 Subcommittee, *Challenge of Change*, *supra* note 281 at 14 – 15.

³⁴⁶ *Bedford 2010*, *supra* note 10 at paras 165, 174; *Technical Paper*, *supra* note 253.

transsexual prostitutes.³⁴⁷ One of the applicants' experts, Dr. Shaver, had contributed research to *Bedford* and to the 2006 Subcommittee study on the issue of male and transgendered prostitutes. Dr. Lowman (who we heard from in Section C) was an expert not only for the applicants, but had also been retained by the Government as a principal researcher on the 2006 Subcommittee Study.³⁴⁸

During *Bedford's* appeals, however, even with the broad participation of civil society as interveners, the perspectives of female purchasers and male sellers went largely unnoticed. This factual void then went unfilled during JUST's Study in the House of Commons, where no male sellers, past or present, testified. Fortunately, during the LCA's Pre-Study in the Senate, two witnesses provided insight into the perspectives of men who sell sex, whose interactions with clients of diverse gender identities and sexual orientations raise needs distinct from the heterosexual arrangement of both *Bedford* and Bill C-36.³⁴⁹

Maxime Durocher spoke of the stigmatization endured from self-identifying as an escort for women. As a university-educated man who left behind a decade-long year career in computers to enjoy his work in the sex industry, Maxime experienced financial insecurity when Bill C-36 was introduced. He also explained some different ways in which his female clients would be affected by the new regime. When questioned by the Senators, Maxime highlighted how access to male sellers allowed women to comfortably explore their sexuality. He explained how male sellers present their services differently from stereotypical advertisements for prostitution. His testimony supported the Economist's research that Frances Mahon had alerted Senators to just the day before, with female purchasers relying upon informed advertising as a precursor to comprehensive

³⁴⁷ *Bedford 2010, supra* note 1 at note 10.

³⁴⁸ *Bedford 2010, supra* note 1 at para 315; 2006 Subcommittee, *Challenge of Change, supra* note 281.

³⁴⁹ LCA Pre-Study (11 September 2014).

negotiations. The details of Maxime's transactions were negotiated through a longer process of vetting, familiarization, and clarification across a series of emails.³⁵⁰

Another circumstance absent from *Bedford* was homosexual transactions. Some female sellers did mention homosexual encounters at the House of Commons, but as noted, no male sellers appeared before JUST. Before the Senate, Tyler Megarry, a front-line worker from Montreal, aired unique health and safety concerns facing male sex workers.³⁵¹ Arrest and incarceration would interfere with the ability to maintain the necessary daily treatment regimen for male sellers afflicted with HIV and Hepatitis C. Because the health of sellers is directly impacted by the health of clients, keeping homosexual sex work hidden in the dark would exacerbate this risk. In striving to educate legislators about the law's distinct impact upon male sellers, Tyler testified that criminalizing sex work would reduce access to medical and social services, and further dislocate their lives into dangerous areas without control or security, and without the ability to screen or negotiate. He also underscored that access to online advertising was important for safe, respectful negotiations, and explained that establishing good client relationships had led clients to report violence against sex workers from third parties. More profoundly, Tyler pointed out that male sex work plays an important role in reducing homophobia by providing a judgment-free space for individuals to discover and express their sexual identities.

Together, the testimony of Maxime and Tyler presented a new opportunity for legislators to turn their minds to potentially disproportionate effects for individuals on either side of the transaction who identified as homosexual or transgendered, beyond the adjudicative facts in *Bedford*. They enriched the knowledge necessary to clarify how and whose rights would be altered.

³⁵⁰ LCA Pre-Study (11 September 2014) (Maxime Durocher, examined by Hon George Baker and Hon Bob Runciman).

³⁵¹ LCA Pre-Study (11 September 2014) (Tyler Megarry, examined by Hon Linda Frum, Hon Mobina Jaffer, and Hon Paul McIntyre).

By adding to the novel knowledge shared about disabled purchasers that the exchange of sexual services for consideration can serve a beneficial social end - an end regarded by many as morally oblique – their submissions called attention to the myriad ways in which Bill C-36 might discriminate against individuals – separate ways that surpassed the popularity of prevailing feminist chapters. Similar to how Chris Atchison’s research challenged the sufficiency of evidence for obtaining the political warrant to criminalize male purchasers, their attestation to the gradations of sexuality within sexual transactions should have contoured how legislators apprehended the legislative problem and solution, and ought to have elevated the rigour of reasoning from constitutional values.

Without adjudication’s procedural strictures of evidence and participation, these new facts were able to be adduced at Parliament, and lend some corroboration to Sheppard’s sharp observation about the normative ramifications that intervention can bring. With these ramifications, the Court’s institutional legitimacy is implicated in having a hand in maintaining both the legal and democratic legitimacy of legislation. For if the Court is alive to its own democratization and capacity to share resources to that democratic work-in-progress, then in performing its own role to protect minorities, it might now regard the sophistication of a recurring interest group as a complicating factor in granting leave to intervene. In other words, participation in adjudication may fuel the political warrant for paradigm shifts to occur in the aftermath of judgments. Notice how the facts and position presented by a discrete and insular minority, the *Asian Women Coalition Ending Prostitution*, tracked with the governing ideological and policy position (particularly by keeping the human trafficking theme steady), yet the stories of anonymous and diffuse buyers and sellers pushed in the opposite direction. Hearing the perspectives of individuals who do not fit the stereotypical picture of prostitution affirms that for

citizens, Parliament is more than just a pulpit for experts, busybodies, or social justice warriors. That vulnerable and unpopular individuals voiced their concerns at Parliament should not be missed among all of the democratic deficits. But were those voices heard? The difficult task facing Parliamentarians who considered Bill C-36 was not just balancing the public interest with minority interests. Reconciling the perspectives, interests, and rights of these minorities within minorities could jump legislators onto the third rail.

Summary: Part II

Reorienting ourselves at this juncture requires paying attention to more than just facts. After all, facts form only part of the foundation for decisions to make or unmake law. Unless fresh, independent research on the policy approach already exists, or some Department is already actively and reliably collecting data that could be put to legislative use, there may be additional resources, time, and attendant expenses required to legislate. Given *Bedford's* analytical appetite for quantitative evidence, the quotidian and anecdotal methods of legislative fact gathering (eg. receiving letters and briefs, consulting constituents, and hearing witnesses) may no longer be adequate – at least not for legislators endeavouring to perform their *Charter* obligations prudently by reducing the zone of constitutional risk. Even if social science surpasses adjudication's rigorous evidentiary standards of admissibility and weight, is it possible to conclude that the judge or legislator or policymaker is better at such inevitable guesswork?

We might suppose that all government actors are equally agile at handling social facts, and appreciating the legal framework in which those social facts operate. Take the fumbling over the evidentiary record in *Malmo-Levine*.³⁵² After the parties had filed their facts, the Court was persuaded to adjourn the hearing when the Justice Minister signalled that Parliament might

³⁵² *Malmo-Levine*, *supra* note 86.

decriminalize the impugned prohibition on marijuana possession. The Court adjourned, expressing its expectation that a full, fair hearing would be fostered from the legislative process because “the underlying basis for the criminalization of marijuana possession and use will be taken up in Parliament and widely discussed”.³⁵³ When the appeal resumed without decriminalization, the Court’s longing for “ample” legislative facts lingered unsatisfied.³⁵⁴ Without citing social science evidence to signal any public consensus about criminalizing simple possession of marijuana, in holding that harm is not required to criminalize behaviour, the Court looked to the existing range of criminal offences.³⁵⁵ For the principle of explicit lawmaking, *Malmo-Levine* thus reminds us that to guide the direction of legal change, legislation must be grounded within the existing legal landscape.

Furthermore, given that humans, with all of their idiosyncrasies are the research subjects in the uncontrollable laboratory of society, acknowledging that it is humans too, who make government decisions means that there must be other institutional differences – differences other than how adjudicative and social facts are gathered and analyzed - that can help assess each institution’s capacity and competency to respond to *Charter* violations. *Bedford* and Bill C-36 signal that this answer may differ depending on the legal and political context. In shutting the door on social science evidence and facts collected and cut from *Bedford* that consolidated into Bill C-36, we can open our minds to ask how larger features of Canadian law might have affected the Government’s production of policy and Parliament’s promulgation of Bill C-36.

³⁵³ *R v Malmo-Levine*, [2002] SCJ No 88 (QL) at para 2.

³⁵⁴ The judge who tried *Malmo-Levine* (one of the three appellants) had erred in refusing to admit expert evidence of legislative and constitutional facts. Fortunately, there were four different sources to build a record for appeal: admitted, agreed upon facts from the joinder of three appeals; a comprehensive, independent Commission report, factual findings from expert opinion at the trial of one of the three appellants, and fresh Parliamentary reports produced after all the trials of all three appellants, which were received by judicial notice. Despite only one of these four sources having withstood the strenuous scrutiny of trial, all four were treated with equal deference from the Court.

³⁵⁵ *Malmo-Levine*, *supra* note 86 at paras 115-126. For commentary on how this approach affected the development of substantive principles of justice under s 7, see Stewart, *Fundamental Justice*, *supra* note 15 at 121.

Part III: Legal Misapprehensions

Though we are coming up from the factual apprehensions underlying Bill C-36 to go towards legal apprehensions, our subject nevertheless stays the same: the reasons expressed by legislators during deliberations. Until now, we tried to unscramble legislators' reasoning about the evidence included and excluded from the legislative process. After Part I framed the theoretical basis for using legislative reasoning to pursue questions of institutional, democratic, and legal legitimacy, Part II began applying the analytical devices of evidentiary, technical, and moral reasoning throughout the conversion process. By diagnosing defects in the Government's poll and how legislators misapprehended social science evidence and testimony, Part II discovered areas where democratic legitimacy – the political warrant for legislative decisions - were strained, as well as institutional legitimacy – the capacity and competency to acquire both the political and legal warrants for authority. Parliament's legal legitimacy, however, has not yet been fully broached, because policy has to become organized and rendered with normative content to acquire legal legitimacy.

Forward from here, we will decipher legislators' reasoning about the legal framework for Bill C-36, and their understanding of what Bill C-36's statutory language could accomplish. To move into this intersection of democratic concerns and constitutional interpretation, we can use Bill C-36's Preamble to mark our bearings in Section A, which ends by dipping into the debate about Bill C-36's objective(s). Moving out then into the legislative text itself, Section B then tries to sort out what purpose legislators had in mind when they refurbished s 213 - the unconstitutional communicating prohibition that *Bedford* struck down - into the new s 213(1.1). Before concluding, Section C links s 213(1.1) to its predecessor s 213 to hold legislators and police accountable for a glaring misapprehension about criminal records.

A. Statutory Interpretation

i) Preamble

Admittedly, it may feel counterintuitive to introduce this discussion of apprehensions about a statute's legal consequences with a discussion about prefatory language that does not impose any legal right or duty. However, the *Interpretation Act* mandates a role for Preambles in helping courts understand why legislation was passed in Parliament: “[t]he preamble of an enactment shall be read as a part of the enactment intended to assist in explaining its purport and object.”³⁵⁶ Before Preambles ever step into their interpretive role in courts, they also deliver political marketing to garner popular support for making policy into law. To the extent that Preambles lure lobbyists and constituents to pressure legislators to vote in favour of new legislation, the pull of Preambles within the legislative process can exert a normative push on the legislative result. To discern the subliminal appeal and overt appeasement in Bill C-36's Preamble, it is worthwhile to reproduce it in full form:

Whereas the Parliament of Canada has grave concerns about the exploitation that is inherent in prostitution and the risks of violence posed to those who engage in it;

Whereas the Parliament of Canada recognizes the social harm caused by the objectification of the human body and the commodification of sexual activity;

Whereas it is important to protect human dignity and the equality of all Canadians by discouraging prostitution, which has a disproportionate impact on women and children;

Whereas it is important to denounce and prohibit the purchase of sexual services because it creates a demand for prostitution;

Whereas it is important to continue to denounce and prohibit the procurement of persons for the purpose of prostitution and the development of economic interests in the exploitation of the prostitution of others as well as the commercialization and institutionalization of prostitution;

³⁵⁶ RSC 1985, c I-21, s 13.

Whereas the Parliament of Canada wishes to encourage those who engage in prostitution to report incidents of violence and to leave prostitution;

*And whereas the Parliament of Canada is committed to protecting communities from the harms associated with prostitution...*³⁵⁷

While the goal to protect prostitutes from exploitation was accepted as the aim of the living on the avails prohibition in *Bedford*, on the whole, the Preamble's broad objectives rhyme by rote the same purposes that all three courts rejected when proffered by the Attorneys General to sustain the old unconstitutional laws. The Attorneys General argued that the living on the avails prohibition aimed "to target the commercialization of prostitution, and to promote the values of dignity and equality".³⁵⁸ Added to the bawdy house and communicating prohibitions, which in themselves purported to prevent prostitution, overall, the three prostitution prohibitions aimed to deter prostitution.³⁵⁹ Although the legislative record for the former prohibitions did not bear out these claims, there was no Preamble to aid the judges in *Bedford* with their constitutional interpretation. When it comes to Bill C-36's legislative record, however, much air was expended at Parliament by politicians and numerous social organizations to praise the Preamble.³⁶⁰ Much hope was also placed in the Preamble as a beacon of constitutionality.

Despite the astute studies of Preambles to Federal legislation by Kent Roach in 2001 and Janet Hiebert in 2002,³⁶¹ scholars of law and political science have neither empirically inventoried nor normatively critiqued the use of Preambles since the early 2000s. Nevertheless, from Roach's and Hiebert's inspections, we can track a correspondence between Preambles and the principle of

³⁵⁷ Bill C-36, *supra* note 3 at Preamble.

³⁵⁸ *Bedford 2013*, *supra* note 1 at paras 131.

³⁵⁹ *Bedford 2013*, *supra* note 1 at paras 131, 137-138, 146-147.

³⁶⁰ See eg. LCA Pre-Study (10 September 2014) (Trisha Baptie, examined by Don Plett: "I don't want to give a percentage on how much we support the bill or not. I think we definitely support the preamble, and we like, I guess, the spirit, if you will, or the intent, if you will, of the bill, which is to go after and criminalize and change male behaviour").

³⁶¹ Kent Roach, "The Uses and Audiences of Preambles in Legislation" (2001) 47 McGill LJ 129 [Roach, "Uses and Audiences of Preambles"]; Hiebert, *Charter Conflicts*, *supra* note 111;

explicit lawmaking. In excavating the legislative reply to the ss 7 and 11(d) decision on sexual history evidence in *R v Seaboyer*, Hiebert derived two uses - didactic and dialogic - for Preambles when she wrote:

One can think of a preamble as representing a stage in a conversation between elected and judicial officials on how the Charter should be interpreted and applied to the particular case at hand. What is attractive about the use of the legislative preamble is that it makes explicit the concerns and intents animating legislative decisions and leaves less room for courts to ascribe objectives to Parliament. This is a more honest and forthright way of attempting to justify a legislative objective than relying on government lawyers to speculate, after the fact, about the reasons behind a legislative decision.³⁶²

Teaching judges how Parliament wanted sexual assault trials to be conducted and telling judges precisely what goals were to be attained by conducting trials thus unified these didactic and dialogic uses of Preambles into two positive qualities: first, clear intent can produce consistent enforcement; and second, Parliament can assert an independent statutory or constitutional construction.

When the 1994 “public relations disaster” of *R v Daviault* ricocheted into the enactment of s 33.1 of the *Criminal Code*, Parliament reasoned its disagreement with the Court’s introduction of a common law defence of extreme intoxication from both facts and law.³⁶³ In doing so, there was a collaborative constitutional project at work. Parliament assumed an error-correcting role, having heard experts testify at Committee that the Court misconceived the evidence on automatism, such that there was no scientific basis for the Court’s lawmaking of a new defence. With new legislative facts correcting wrong adjudicative facts, in this “in-your-face” reply to the

³⁶² Hiebert, *Charter Conflicts*, *supra* note 111 at 94-95, discussing [1991] 2 SCR 577 and *An Act to amend the Criminal Code (sexual assault)*, SC 1992, c 38.

³⁶³ Cameron, “The Future of Section 7”, *supra* note 78 at 125, discussing *R v Daviault*, *supra* note 36 and *An Act to amend the Criminal Code (self-induced intoxication)*, SC 1995, c 32. For comprehensive accounts of Parliament’s response to the Court, see Hiebert, *Charter Conflicts*, *ibid* at 96-107; Roach, *The Supreme Court on Trial*, *supra* note 38 at 308-312.

Court, Parliament punctuated the principle of explicit lawmaking in the Preamble, declaring not only Parliament's awareness of scientific evidence and its holding the Court to account, but also its divergent view on moral culpability.³⁶⁴ However, whether Parliament's justifications are engraved with honesty and forthrightness is a more complicated question – one which, for Bill C-36, depended upon whether and how some proposed amendments were negated – that is, amendments which would have executed and enlivened the Preamble's proclaimed purposes.

It is by attending to additional audiences of Preambles that we can appreciate their subliminal sway. Like Hiebert, Roach has also underlined the professional, instrumental use of Preambles to guide those who apply the law, however, Roach has also located citizens and policymakers as pupils eager to engage in deliberative democracy.³⁶⁵ Both the contributory and educational elements of the Fullerian principle of publicity can be facilitated if Preambles narrate the plural perspectives and competing interests that jumble into the legal text. Citizens can then call to have their own perspectives included within that plural narrative, and nongovernmental policymakers can then contemplate whether their work flows with changing social and legal tides. For example, the Asian Women Coalition Ending Prostitution (which supported Bill C-36's targeting of men) requested that the Preamble be amended to acknowledge prostitution's disproportionate impact on racialized women.³⁶⁶ Comparatively, Aboriginal Legal Services (which objected to Bill C-36) observed that the Preamble's fixation on women missed the inordinate effects on male and transgendered Aboriginal people.³⁶⁷ Nonetheless, the Preamble

³⁶⁴ Roach, *The Supreme Court on Trial*, *ibid* at 310-311. See also Hiebert, *Charter Conflicts*, *ibid* at 102-105.

³⁶⁵ Roach, "Uses and Audiences of Preambles", *supra* note 361.

³⁶⁶ JUST Proceedings (10 July 2014) at 0930 (Suzanne Jay); LCA Pre-Study, (September 9) (Suzanne Jay).

³⁶⁷ JUST Proceedings (10 July 2014) at 1010 (Christa Big Canoe).

stayed unaltered, also in spite of further recommendations to reference Canada's international treaty obligations to eliminate racial and gender discrimination and combat human trafficking.³⁶⁸

In light of this resistance to changing the Preamble, it is unsurprising that during clause-by-clause, the following proposed amendment to the Preamble was negated five-to-four, which would have expressly recognized *Bedford*'s holding:

*Whereas the Supreme Court of Canada decided in Attorney General of Canada v. Bedford that certain provisions of the Criminal Code have a grossly disproportionate effect on persons who engage in prostitution by putting their health and safety at risk and making them more vulnerable to violence.*³⁶⁹

Of course, this prosaic proposed amendment lacks the aspirational loft of the provisions it sought to join. More than that, citing the physical violence at the crux of *Bedford* would be incompatible with the different interpretation of violence asserted by the Preamble – that is, violence not from physical or psychological harm, but violence from a systemic power imbalance.³⁷⁰

Something ugly lurks beneath romantic Preambles that dominate debate. There is a danger that rights claims and democratic discourse will mutate into identity politics, which can alienate both narrower and broader segments of the citizenry.³⁷¹ When citizens and policymakers have ears primed to hear preludes that resound with impossibly ambitious and unenforceable political ideals, Kent Roach worries that unreasonable, unbalanced legislation will follow:

³⁶⁸ JUST Proceedings (8 July 2014) at 1335 (Kim Pate); (9 July 2014) at 1015 (Gunilla Ekberg).

³⁶⁹ JUST Proceedings (15 July 2014) at 1340-1345 (NDP Motion by Françoise Boivin).

³⁷⁰ *Bedford 2010*, *supra* note 1 at n 9: “The way violence towards prostitutes was characterized by the various experts had an impact upon their opinions as to whether violence was inherent to prostitution or whether there were ways that prostitution could be made safer. For example, one view is that violence means a systemic power imbalance. Another view is that violence includes physical and psychological violence. When referring to violence, I am referring to physical violence, unless stated otherwise.”

³⁷¹ Here, I am referring to the political strategy for mobilizing political power by identifying as a member of collective group defined by one or more minority characteristics, so as to contest government action or seek government resources which affects that group's interests. On how identity politics can jeopardize the democratic process, see Daniel Weinstock, “Is Identity a Danger to Democracy” in Igor Primoratz and Aleksandar Pavkovic, eds, *Identity, Self-Determination and Secession* (London: Ashgate 2006) 15.

.. [P]reambles..may have degenerated into a form of political advertising for statutes that promise much more than they deliver. Preambles can make extravagant claims about what legislation achieves or hopes to achieve that are not supported by the text of the law. The appeal to the heart of the evocative narratives, aspirations, and symbols used in preambles may also lead to legislation that is unreasonable and unbalanced in its passion.³⁷²

The unbalanced passion in Bill C-36's grandiose Preamble is foreshadowed by the above-noted absence of *Bedford*'s theme of health and safety. Indeed, Senator Jaffer asked drafter Nathalie Levman to answer for that absence, but Levman's explanation that such concepts were implicit in the inherent exploitation explicitly spoken to by the Preamble adds insult to *Bedford*'s Charter injury.³⁷³ The Preamble begins a pendulum swing from repelling sellers as wretched streets responsible for their own destitution, towards welcoming them as wayward waifs in need of protection, so long as they stay out of sight.³⁷⁴ Yet by then purporting to regard sellers as worthy of dignity and equality, the pendulum swings back again with a two-faced policy that runs in the complete opposite direction from Canada's and Ontario's defence in *Bedford* – that sellers' "choice — and not the law — is the real cause of their injury."³⁷⁵

As for what other consumers of Bill C-36's Preamble wanted to receive, submissions from stakeholders revealed what social programming civil society wanted help with, the protections and freedoms competing groups of rights-claimants strove to receive, and the enforcement tools that police sought to possess. Regardless of whatever policy the Government selected, it would have been eminently sensible for the Government to consult with police and prosecutors about how enforcement would change along with the law, especially because enforcement practicalities (such as the rare and ineffective enforcement of the living on the avails and bawdy house prohibitions³⁷⁶)

³⁷² Roach, "Uses and Audiences of Preambles", *supra* note 361 at 132.

³⁷³ LCA Pre-Study, (2014 September 9) (Hon Mobina Jaffer, examining Nathalie Levman).

³⁷⁴ Campbell, "Sex Work's Governance", *supra* note 16 at 33 (through the lens of feminist legal studies, describing this shift from its origins in vagrancy law).

³⁷⁵ Bill C-36, Preamble, *supra* note 3; *Technical Paper*, *supra* note 253; *Bedford*, *supra* note 1 at paras 79-84.

³⁷⁶ *Bedford 2010*, *supra* note 1 at paras 521, 536.

grounded the conclusions in *Bedford*. Consulting with administrative officials who are obligated to apply the new law would also be sound because practicalities unapparent in *Bedford* likely also obstructed prior prostitution investigations. For example, it was from the Government's consultation with police that Bill C-36 included additional guidance to officers about what reasonably and probably could qualify as a weapon, which was accomplished by legislatively elaborating the definition of weapon to include restraints.³⁷⁷

Similarly, as part of the new policy aim to eradicate prostitution, the Government enlisted social organizations to the frontlines of sexual transactions. Administrators allotted funding for support services to social organizations subscribing to abolitionist ideology,³⁷⁸ with whom many sellers now must bargain with to access beneficial services, and where buyers who are convicted may have to attend for rehabilitation and diversion programs. Worryingly, this deferral of state responsibility may ossify the disadvantages of all individuals involved who seek support and safety-enhancing benefits, yet resist victimization and demonization. Regardless of normative ramifications, it would at least be positive for efficacy and accountability to include groups who bear the burdens of implementation in the debate.

Alas, when the Preamble instead ratchets up the bombast to rack up political popularity and commend proponents, the detour distracts from deliberating the merits of the policy and its

³⁷⁷ Bill C-36, *supra* note 3 at s 2, amending s 2(b) of *Criminal Code*, *supra* note 2. See also Canada, Parliamentary Information and Research Service, *Legislative Summary of Bill C-36* (Ottawa: Library of Parliament, 18 July 2014) online: < https://lop.parl.ca/About/Parliament/LegislativeSummaries/bills_ls.asp?ls=c36&Parl=41&Ses=2 >

³⁷⁸ *Bedford 2013*, *supra* note 1 at para 165; Department of Justice Canada, "Measures to Address Prostitution Initiative", Call for Proposals - NGOs & Governmental Organizations" (Ottawa, DOJ, deadline January 30, 2015) online: <<http://www.justice.gc.ca/eng/fund-fina/cj-jp/fund-fond/ngo.html>>. Selection criteria to receive funding included having "existing networks with various support services for individuals wishing to exit prostitution". See also Public Safety Canada, Crime Prevention Action Fund, "Measures to Support Exiting Prostitution", Call for Letters of Intent (Ottawa: PSC, deadline January 30, 2015) online: <<https://www.publicsafety.gc.ca/cnt/cntrng-crm/crm-prvntn/findng-prgrms/crm-prvntn-ctn-fnd-eng.aspx>>. Funding was available to "support a range of tailored and comprehensive approaches to assist individuals who want to exit prostitution". For an extension of this point, see Moulard, "Remedying the Remedy", *supra* note 10 at 45-47.

proposed legal form. Take Georgiale Lang, a lawyer who formerly represented the Evangelical Christian Fellowship during its intervention in *Bedford*. Lang was unshaken in her faith that the Preamble would be instrumental for upholding Bill C-36's constitutionality, even after the Opposition Critic pressed her that the Preamble, while useful for resolving ambiguity, would not appear in the *Criminal Code*.³⁷⁹ What is more, the magnetism of the Preamble also gravitated into the substance of Bill C-36's provisions, though without the gravitas of deep deliberation. Though Lang agreed with the Opposition Critic that the revised communicating prohibition could be clarified, when she was asked for advice on how to clarify it, Lang admitted, "I haven't given any thought to that aspect of the law because I'm in favour of the entire law".³⁸⁰ As the forthcoming scrutiny of the communicating prohibition will soon show, the trump of symbolism over substance from pandering can gloss over legal defects, as well as democratic deficits.

To be sure, civil society's cooption of both litigation and politics to direct social change is unremarkably commonplace in civic affairs. But in the aftermath of change that blends social justice with criminal justice, well-meaning groups (of all ideological bents) that sincerely aspire to ameliorate disadvantage will be mobilized to the trenches, with assumed or delegated responsibility for implementing and executing programs and services. If parlaying legal advocacy into political activism leads civil society to overlook the legal consequences of reform, then this myopia is a problem worth remarking upon and bringing into clearer focus.³⁸¹

Failing to apprehend Bill C-36's legal repercussions is compounded by an overlapping problem: misapprehending the law informing Bill C-36. It is one thing for civil society, with its indirect influence on legislative input, to have illusions about what aspirations the law can achieve.

³⁷⁹ JUST Proceedings (9 July 2014) at 1338 (Georgiale Lang), 1359-1405 (examined by Hon Françoise Boivin).

³⁸⁰ *Ibid* at 1359-1405 (Georgiale Lang, examined by Hon Françoise Boivin).

³⁸¹ For an argument as to how this can be addressed by the Court's remedial powers, see Mouland, "Remedying the Remedy", *supra* note 1.

It is quite another for government actors, with direct influence on legislative output, to be deluded about what effects the law can produce. If politicians misapprehend the law contributing to and created by Bill C-36, then when it comes time for those politicians *qua* legislators to cast their votes, the form of Parliament's legislative intent recorded in the Preamble may be distorted.

ii) Bill C-36's Objective(s): One or Two?

Disambiguating this hybrid problem also matters for the principles and practices of interpretation that will be applied to enforce and challenge Bill C-36. Since all of the arguments in *Bedford* will have to be reframed and analyzed afresh, how a Court defines Bill C-36's objective(s) will be critical to upholding or invalidating Bill C-36.³⁸² Needless to say, Bill C-36's objectives have attracted lawyerly and scholarly intrigue.

During the now nearly four years that Bill C-36 has been in force, the academy has produced two different positions on Bill C-36's objective(s). In the year following Bill C-36's enactment, Hamish Stewart located two mutually inconsistent objectives - a primary objective of "discouraging sex work", and a secondary objective of "reducing the danger of sex work to sex workers"- within the legislation's structural and linguistic components, interpreted according to principles of criminal liability.³⁸³ With fresh cases of early enforcement to consider two years after Stewart, Debra Haak looked outside the text to read the Technical Paper's explanation of Bill C-36's objectives along with the Minister's subsequent reiteration of that explanation in Parliament. In disputing Stewart's secondary objective, Haak vouched that the overall and only objective of Bill C-36 is "denouncing and deterring prostitution".³⁸⁴ Summarily stated, Haak and Stewart disagree about whether Bill C-36's fragmentary attention to reducing danger to sellers is an end in

³⁸² Stewart, "The New Sex Work Law", *supra* note 20 at 71, 82-84; Haak, *supra* note 19 at 690-692.

³⁸³ Stewart, "The New Sex Work Law", *supra* note 20 at 88.

³⁸⁴ Haak, *supra* note 19 at 660.

itself, or simply a means to attain the ultimate end of deterring the whole transaction. This disagreement possibly arises in part from different methodologies applied at different times: Stewart's detailed exercise of statutory interpretation steeped in text and principle early on yields different objectives than Haak's panoramic perspective, which looks to the Technical Paper and Minister's explanations, as well as post-enactment practice and enforcement.

Both Haak's and Stewart's proposals find traction in the Parliamentary record. Which objective(s) are eventually ascribed in a constitutional challenge might therefore depend on how deeply judges can be persuaded to wade into the legislative record. Neither the jurisprudence nor the *Interpretation Act* have prescribed how to sort out the miscellany of extrinsic aids, which include the records of debate, briefs, and testimony at Parliament, as well as the Technical Paper, which we have already seen to be misleading.³⁸⁵ On one hand, the jurisprudence³⁸⁶ and the *Interpretation Act*³⁸⁷ may have a penchant for prioritizing the Preamble as the first and foremost authority above the extrinsic sources that document the very deficits which strike at the core of legislative intent. On the other, the Court also has demurred about relying on statements of purpose within legislation, which "may be vague and incomplete and inferences of legislative purpose may be subjective and prone to error".³⁸⁸

These concerns for imprecision and shortsightedness necessitate recourse to a second source of legislative intent beyond the Preamble: the title, the text, the context, and overall

³⁸⁵ Ruth Sullivan, *Statutory Interpretation*, 3rd ed (Toronto: Irwin, 2016) at 260-261. For a very recent use of legislative history that seems to treat Hansard debates and a White Paper on equal footing - without attending to issues of admissibility or use, see the majority opinion in *Ewert v Canada*, *supra* note 249 at paras 55-56.

³⁸⁶ *R v Appulonappa*, *supra* note 188 at para 49: "The first, "most direct and authoritative evidence" of the legislative purpose of a provision is found in statements of purpose in the legislation itself — whether at the beginning of a statute, in the section in which a provision is found, or in sections providing interpretive guidelines".

³⁸⁷ *Interpretation Act*, *supra* note 356.

³⁸⁸ *R v Moriarity*, 2015 SCC 55 at para 31, citing Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Markham: LexisNexis Canada, 2014) at 9.90.

scheme.³⁸⁹ Despite JUST's vote against incorporating *Bedford* into the Preamble, Bill C-36's long title - and the jurisprudential context makes responding to *Bedford* an indelible part of Bill C-36's goals. Although Bill C-36's short title is the *Protection of Communities and Exploited Persons Act*, Bill C-36's long title is *An Act to amend the Criminal Code in response to the Supreme Court of Canada decision in Attorney General of Canada v. Bedford and to make consequential amendments to other Acts*. As Senator Baker appreciated, the long title seemed misleading by conveying "that's what the Bill is supposed to be about...But that's only a minority of what's in this bill."³⁹⁰ Apparently, the identity conflict manifested in the variance from long title to short title is emblematic of the issues in identifying Bill C-36's objective(s).

Ministerial statements have especial utility as *part* of the extrinsic evidence, and thereby serve as a third source of legislative intent which might reduce this conflict. This prospect has promise in light of recent s 7 jurisprudence that has raised the bulk of the legislative record to overcome the rhetorical imprecision in what a Bill's sponsor markets as its advantages and aims.³⁹¹ The Court dove into the legislative record in *R v Appulonappa*, as discussed in Part II, where, in addition to a Ministerial statement, the Court picked apart a flimsy defence advanced by General Counsel and Assistant Deputy Minister during Committee examination by a Government member.³⁹² Another successful overbreadth case that followed soon after *R v Appulonappa* also supports a wider import of the Parliamentary record. To strike down the restriction on enhanced credit for pre-trial custody of previously convicted offenders, in *R v Safarzadeh-Markhali* the Court tightened the approach to statutory interpretation for overbreadth claims under s 7. After

³⁸⁹ *R v Safarzadeh-Markhali*, 2016 SCC 14 at paras 31-35.

³⁹⁰ LCA Pre-Study (9 September 2014) (Hon George Baker, examining Katrina Pacey).

³⁹¹ *Ibid* at paras 36, 41.

³⁹² *R v Appulonappa*, *supra* note 188 at paras 64-69.

first placing weight on its own precedent as part of the interpretive context, and then inferring what was theoretically possible from the legislative provision itself, the Court rejected three of the Minister's desired aims because "[t]hose comments must be considered in context".³⁹³ Thus, "the weight of the legislative record" suggested otherwise, along with "the text, context, and scheme".³⁹⁴

In this doctrinal footing, the Court is watching whether Ministerial statements are consonant with what else transpires on the Parliamentary record *after* those statements are expressed. So, if we take this cue to move beyond the Justice Minister's statements, then JUST's vote against enumerating *Bedford's* embrace of health and safety in the Preamble could support Haak's assertion that Bill C-36 does not aim to make the sale of sex safer. This, however, could be a bit impulsive, because context and scheme counsels us to consider the time and place of the vote, and the role of the Preamble within the legislative scheme. The refusal to incorporate *Bedford* was a vote on the Preamble, an inoperative part of the statute, while Bill C-36's overall scheme attempts to incorporate *Bedford* throughout the offence provisions.

This direction also circles back to what Part I ventured from conversion. To defer to the Technical Paper and the Justice Minister's explanation of the Bill's policy when introducing the Bill to each chamber and each committee³⁹⁵ is to shortchange the "legal surplus value" that is added as the legislative process unfolds.³⁹⁶ There are pragmatic grounds to distinguish between policy choice by the Executive and policy development by Parliament, especially for refining and testing the chosen policy, as transparent and effective governance is facilitated when Parliament

³⁹³ *R v Safarzadeh-Markhali*, *supra* note 389 at paras 41, 47, rejecting the goals of "providing adequate punishment, increasing transparency in the pre-sentence credit system, and reducing manipulation" for the impugned provision, and holding instead that the purpose was "to enhance public safety and security by increasing violent and chronic offenders' access to rehabilitation programs" [emphasis in original].

³⁹⁴ *Ibid* at paras 41-49.

³⁹⁵ Haak, *supra* note 19 at fns 110, 115, 116, 123, 142.

³⁹⁶ See Part I, especially 13-15.

exercises its functions to deliberate, account, and legislate. There are principled bases to pay attention to the time and place where legislative statements are made - particularly at the time of voting, after experts have offered evidence, after citizens have had the opportunity to contribute, and after the legislators have had time to contemplate and debate what they have heard.

With these pragmatic and principled concerns top of mind, the legislative record suggests that the following claim by Haak is inaccurate: “[n]owhere in the record does it appear to have been an expressed objective of [Bill C-36] to make sex work safer for sex workers.”³⁹⁷ Methodologically, I should caveat here that other than pinpoints to those portions supportive of Bill C-36’s ultimate deterrence and denunciation objective, Haak did not disclose which parts of the record her article reviewed to claim that safety was not an expressed objective. So to be fair, we should first look at an excerpt from Minister MacKay’s Introduction, a speech which is indeed cited in Haak’s article. Five to ten minutes after those portions pinpointed by Haak, Minister MacKay expressed the below:

*This approach affords some room for sellers of their own sexual services to take steps to protect themselves in response to the concerns raised by Supreme Court of Canada in Bedford, while also ensuring that the criminal law holds to account the pimps or anyone else in an exploitative relationship, working through prostitution [emphasis added].*³⁹⁸

To be fair again, Minister MacKay did not literally utter the nouns “sex work” and “sex workers”. But it would split the syntactical and semantical hairs of statutory interpretation to think that “sex workers” do not qualify as “sellers of their own sexual services” and that “room” to “take steps to protect themselves” is not synonymous with “make sex work safer”.³⁹⁹

However, before hastily hazarding too much from the record, I need to also follow through on my own claim that it is principled and pragmatic to heed the conversion process. This requires

³⁹⁷ Haak, *supra* note 19 at 692, paraphrasing Stewart, *supra* note 20.

³⁹⁸ Hansard (11 June 2014) at 1705 (Hon Peter MacKay). *Cf* Haak, *supra* note 19 at fns 115, 123, 142.

³⁹⁹ Haak, *supra* note 19 at 692, paraphrasing Stewart, *supra* note 20.

attending to the temporal dynamic of bicameralism to consider not only what the Minister said to JUST in the House of Commons in June, but also months later to the LCA in Senate on the first day of their Pre-Study in early September. After admitting at the LCA's Pre-Study that "[t]here has been much confusion about what Bill C-36 does and what it does not do", Minister MacKay attempted to clear up everyone's misunderstanding by finally stating the *de facto* unlawful status of prostitution, and pledging the Government's *ultimate* aim as the abolishment of prostitution:

*Bill C-36 proposes asymmetrical treatment of purchasing and selling. It does so not because it authorizes or allows selling but, rather, because it treats sellers as victims of sexual exploitation, victims who need assistance in leaving prostitution and not punishment for the exploitation that they have endured. **Bill C-36, in essence, provides a legal immunity and respects the Bedford decision and the concerns raised for safety.** [emphasis added].⁴⁰⁰*

Yet we should also track conversion a little further down the legislative process, and pay attention to other key contributors. Confoundingly, over seven weeks later, when drafter Nathalie Levman testified at the LCA's Regular Study in October, there was not one mention of immunity from prosecution on the record of testimony from that day. Rather, Levman seemed to contradict what the Justice Minister had said:

*The reason why **the other half is not criminalized** is because Bill C-36 recognizes that there is an inherent power imbalance in that transaction, and the person who sells is considered or treated as a victim of that transaction.⁴⁰¹*

Although Lemman's testimony was similar to the Minister's in that both evoked the idea that sellers were morally innocent victims with diminished autonomy, the contradiction appears from Levman expressing that sellers were not criminalized. What makes this more confusing is that Levman's superior, Director General and Senior General Counsel, Carole Morency, also presented Levman

⁴⁰⁰ LCA Pre-Study (9 September 2014) (Hon Peter MacKay).

⁴⁰¹ LCA Study (30 October 2014) (Nathalie Levman).

as attesting to “what Bill C-36 does and does not criminalize and the impact that that would have on the future Charter challenges based on the *Bedford* decision.”⁴⁰² Nevertheless, in distinguishing between facilitating sex work and “not preventing the implementation of certain safety measures” Levman’s testimony did match the Minister’s.

The objective-perceptual approach to legislative intent signals that we should scan not just what was submitted to legislators (each fragment within the kaleidoscope) but also scrutinize how legislators received and interacted with the consistencies and contradictories from the Department of Justice. Likewise, to reinforce conversion as the incremental, iterative generation and uptake of legal surplus value – a value that gives due credit to bicameralism – the final vote which sends a Bill off to Royal Assent might bear the most fruitful reasons that have grown since the Bill was originally introduced, and reflect the intent refined from the evidence and deliberations gathered in response to and after the Minister’s and Department of Justice’s statements. That penultimate stage before Royal Assent also takes place at the Senate, where Senator Denise Batters championed Bill C-36 before it was passed without amendment on November 4, 2014. After acknowledging the work of both Committees and the fast-approaching expiration of *Bedford*’s one-year suspended declaration, on that Third Reading, Senator Batters stated:

Bill C-36 responds directly to the safety concerns raised in the Bedford case ...

At the same time, one of the objectives of the legislation is to significantly decrease and ultimately work toward the abolition of the demand for sexual services, because that is the only real way to guarantee the safety of the vulnerable in prostitution, an inherently risky activity...

Therefore, Bill C-36 respects the need for increased safety for prostitutes, as identified in Bedford, while recognizing that prostitution is an affront to equality rights and the safety of our communities as a whole...

Much of the discussion around the Bedford judgment assumes that prostitution that is indoors is safe. It might be safer on the whole, honourable senators, but it is not safe.

⁴⁰² LCA Study (30 October 2014) (Carole Morency).

*[Bill C-36] protects the safety of those prostitutes who are exploited by allowing them to hire protection and work from a fixed location, while largely freeing them from the threat of criminal prosecution [emphasis added].*⁴⁰³

Viewed objectively, we can infer that the apparent contradiction between immunity and “not criminalizing” was somewhat reduced when Senator Batters reasoned that Bill C-36’s policy technique eliminated the prospect of prosecution. Moreover, the ability to work safely, without condoning the nature of the work itself, was the salient feature that Senator Batters absorbed from both the drafter Levman and Minister MacKay.

Now, as for the conflict between whether Bill C-36 has one legislative objective or two, I confess that I am also guilty of splicing speeches for brevity’s sake. However, the thrust of Senator Batters’ entire speech on Third Reading is that the safety of “prostitutes”, so long as they remain working, is a precursor to eventually guaranteeing the safety of communities where they work. This spins Stewart’s construal of two objectives somewhat differently. Stewart’s article appreciates that the *main* objective is “to denounce and deter sex work itself”, while also seeing an *ancillary* objective to “improv[e] sex workers’ safety”. The frustration Stewart ascertained between a “generally punitive approach” and “ameliorat[ing] the legal situation of sex workers” rings through the plural objectives spoken to by Senator Batters.⁴⁰⁴

Yet, there is also a temporal dimension evoked in Senator Batters’ above speech, as if these objectives are not intended to operate simultaneously, but in a two-tiered, transitional fashion. In other words, by acquiescing to the norms of *Bedford*’s judgment (without deploying the *Charter*’s

⁴⁰³ *Debates of the Senate*, *supra* note 313 at 1500-1520. This was also reflected in questions during the LCA’s Study. See eg. LCA Study (29 October 2014) (Hon Denise Batters, “Do you feel that this bill strikes an appropriate balance between the safety of prostitutes and the safety of communities? As a law enforcement officer, what tools would you say that Bill C-36 gives you to achieve both of those goals?”; Hon Don Plett, “I do believe that that is the intent of the bill, to take away the customers and over a period of time the business will go away.”)

⁴⁰⁴ Stewart, “The New Sex Work Law”, *supra* note 20 at 71.

notwithstanding clause),⁴⁰⁵ by realizing the political reality of the suspended declaration, and by caving under the empirical difficulties of uncertain and conflicting evidence on indoor work, Parliament accepted it was impossible to abolish prostitution at that moment in time, and therefore recognized it had to first reduce danger - an initial practical objective – before it could fully embark on its ultimate ambitious aim.⁴⁰⁶ This transitional, tiered interpretation of two objectives is also supported by an important non-punitive provision for reviewing and reporting to the House, which was initially proposed at JUST by the Opposition, and then unanimously passed.⁴⁰⁷ The Conservative, NDP, and Liberal members who spoke to the amendment all regarded it as a prudent commitment to strive for future improvement, since Bill C-36 was a “brand new approach” and the review would require “a reasonable time for evidence to be accumulated”.⁴⁰⁸ Next, however, I will undertake a review of one prohibition for which ample evidence of constitutional concerns had *already* accumulated before Bill C-36 had even entered into force.

⁴⁰⁵ *Charter*, *supra* note 5, s 33. Section 33 empowers the Federal Parliament and Provincial Legislatures to declare that an “Act or provision shall operate notwithstanding a provision included in section 2 or sections 7 to 15”. The declaration lasts for a renewable period of 5 years.

⁴⁰⁶ And in this respect, Senator Batters’ speech is consistent with the aforementioned speech by Minister MacKay. See LCA Pre-Study (9 September 2014) (Hon Peter MacKay: “Let us be clear about Bill C-36’s ultimate objective, and that is to reduce the demand for prostitution with a view to discouraging entry into it, deterring participation in it and ultimately abolishing it to the greatest extent possible. The enormity of that challenge is not lost on anyone, yet this should not dissuade this laudable goal of eliminating this inherently degrading and dangerous activity.”)

⁴⁰⁷ Bill C-36, *supra* note 3 at s 45.1; JUST Proceedings (15 July 2014) at 1320-1330.

⁴⁰⁸ JUST Proceedings (15 July 2014) at 1325 (Hon Bob Dechert).

B. Section 213 (1.1) of the *Criminal Code*

It would exceed the scope of space that remains to conduct a wholesale legal or policy analysis of Bill C-36 in its entirety. In any event, an opinion on constitutionality would not stay true to this project's original plan: investigating the rationality and legitimacy of Bill C-36's legislative process. These concepts can be woven together more tangibly now that we have broached the final stage of converting policy into legal form. As I promised before, I will now turn to s 213(1.1) as that tangible example. In conveying how a policy moves through the legislative process to acquire normative content, I will try to unearth the subterranean type of wrong alerted to in Part I – a wrong which may not yet have ripened into juridical form, but is buried by and in a malfunctioning legislative process. Since we are now abreast of Bill C-36's Preamble and overall objectives, this narrower analysis will proceed by first outlining the amendments to the text of s 213, by then applying the analytical devices of practical reasons to the purposes of s 213(1.1) expressed by legislators, and by finally taking those misapprehended reasons and measuring them against rejuvenated constitutional doctrine: the purpose test.

i) Amendments

In its unconstitutional form, the old section 213(1)(c) stated:

Offence in relation to prostitution

213. (1) Every person who in a public place or in any place open to public view. . .

(c) stops or attempts to stop any person or in any manner communicates or attempts to communicate with any person

for the purpose of engaging in prostitution or of obtaining the sexual services of a prostitute is guilty of an offence punishable on summary conviction.

Recall that the Court in *Bedford* struck down s 213(1)(c) of the *Criminal Code* because its effects were grossly disproportionate to its purpose to abate neighbourhood nuisances.⁴⁰⁹ Those

⁴⁰⁹ *Bedford* 2013, *supra* note 1 at paras 13, 68-72, 146-149.

unconstitutional effects included displacing prostitution to transient, remote locations outside, and impairing elementary security measures such as screening prospective buyers for propensity to violence, and negotiating conditions for healthy and safe sex.

Like its predecessor, the new s 213(1.1) is a summary conviction offence.⁴¹⁰ Initially, in the original version of Bill C-36 first introduced into the House of Commons, the former s 213(1)(c) was amended with a new heading and a narrower scope. The initially proposed version of s 213(1.1) aimed at public places where children might be present:

Communicating to provide sexual services for consideration

213 (1.1) *Everyone is guilty of an offence punishable on summary conviction who communicates with any person — for the purpose of offering or providing sexual services for consideration — in a public place, or in any place open to public view, that is or is next to a place where persons under the age of 18 can reasonably be expected to be present.*

In the version above and below, s 213(1.1) was mired in controversy at JUST because it would criminalize sellers – those individuals whom Bill C-36 purports to treat as victims. At JUST’s first meeting, Justice Minister MacKay was led through testimony by his Parliamentary Secretary, Bob Dechert. Dechert asked Minister MacKay whether he was concerned about how law enforcement would interpret “reasonably be expected to be present”. Minister MacKay’s response is a light example of technical reasons, as he sketched Bill C-36’s policy solution around legal norms. He concluded that law enforcement could be guided by similar language from past judicial interpretation of existent *Criminal Code* provisions and offences against children. As for when and where s 213(1.1) could be enforced, Minister MacKay surmised that “[i]t wouldn’t be in an after-hours bar at 3 a.m., but it would be in a schoolyard. It would be leaving church, or a shopping mall, or a ball field, or a rink. It could be leaving a hotel at certain times of the day.”⁴¹¹ To some witnesses, such guesswork was at best incomplete and unsatisfactory, or worse still, the

⁴¹⁰ On the history of the former s 213, see Campbell, *supra* note 16.

⁴¹¹ JUST Proceedings (7 July 2014) at 1010 (Hon Peter MacKay, examined by Hon Bob Dechert).

Justice Minister's attempted justification was fated to unconstitutionality. There were other norms that the Minister ought to have addressed to tighten his reasons. Vagueness and overbreadth were floated about at both Committees.⁴¹² Although the Justice Minister had latched upon time of day as part of the gravamen of the offence, time was not used as a basis to narrow s 213(1)(c) when it was subsequently amended at the conclusion of JUST's study. All sorts of hypotheticals abounded: if an officer patrolling a public park at 3 a.m. overheard someone speaking into their phone "\$40 for a blow job", then should the officer use discretion to stop the speaker?⁴¹³

What if that speaker looked like a teenager, but there were clearly no other children or youth present at 3 a.m.? One way that s 213(1.1) became convoluted was in its application to minors. When questioned further on the phrase "reasonably expected to be present", this time by Vice-Chair Casey, Minister MacKay conceded that minors would be present in situations where s 213(1.1) would (and now does) apply:

I'm loath to be drawn into these hypotheses because there will be judicial interpretation, without a doubt—do persons under the age of 18 deserve, and should the public expect, special protection? Yes. That's why we have specific sections of the Criminal Code that were not affected by the Bedford decision that are designed to protect particularly vulnerable persons under the age 18.

I don't agree with your scenario that anybody under the age of 18 engaging in prostitution will always be subject to criminal charges. I don't think that's correct. But it's reasonable to expect that a person under the age of 18 could be present in certain factual scenarios in certain locations, yes.⁴¹⁴

During JUST's clause-by-clause, s 213(1.1) was amended to specify three places where children might be present.⁴¹⁵ The amended version was ultimately enacted, despite still criminalizing sellers. Now in force, it reads:

⁴¹² See eg. JUST Proceedings (9 July 2014) at 1650 (Josh Paterson, examined by Hon Sean Casey); LCA Pre-Study (10 September 2014) (Frances Mahon, examined by Hon Serge Joyal).

⁴¹³ This hypothetical adapts a prosecution under the former s 213(1)(c) See *R v Khalil*, 2012 ABPC 93 (CanLII) to the testimony cited above. See especially Mahon and Paterson, *ibid*.

⁴¹⁴ JUST Proceedings (7 July 2014) at 1017 (Hon Peter MacKay, examined by Hon Sean Casey).

⁴¹⁵ JUST Proceedings (15 July 2014).

Communicating to provide sexual services for consideration

213(1.1) Everyone is guilty of an offence punishable on summary conviction who communicates with any person — for the purpose of offering or providing sexual services for consideration — in a public place, or in any place open to public view, that is or is next to a school ground, playground or daycare centre.

Despite the substitution of “reasonably be expected to be present” with “a school ground, playground or daycare centre”, given the putative objective to protect children, it was still a blunder to fail to provide *any* exception for persons under age 18 from s 213(1.1). Exploited underage sellers would still foreseeably be criminalized simply from being recruited from their schools. Even accepting it was possible and logical to reconcile conflicting interests of two competing vulnerable groups (innocent minors at risk of recruitment versus parties to criminal offences at risk of violence)⁴¹⁶ - by criminalizing sellers based on where they happened to communicate their transactions, it is difficult to see the logic in criminalizing children as a means to prevent child exploitation. In this contradiction, s 213(1.1) is externally inconsistent with the procuring prohibition, which, logically, exempts those whose sell their own sexual services from party liability if the offence relates to their own sexual services.⁴¹⁷

According to the drafters’ explanation in the Technical Paper’s most recent version (published after Bill C-36 received Royal Assent), despite the amendment by JUST, s 213(1.1)’s purpose to protect children was preserved:

The main objective of the offence, as enacted, remains the same – to protect children from exposure to prostitution, which is viewed as a harm in and of itself, because such exposure risks normalizing a gendered and exploitative practice in the eyes of impressionable youth and could result in vulnerable children being drawn into a life of exploitation. The offence also protects children from additional harms associated with prostitution, including from being exposed to drug-related activities or to used condoms and dangerous paraphernalia. In not criminalizing public communications for the purposes of selling sexual services, except in these narrow circumstances, Bill C-36 recognizes the different interests at play, which include the need to protect from violence those who sell their own sexual services,

⁴¹⁶ For an argument that it is socially and politically unsound to do so, see Campbell, *supra* note 16.

⁴¹⁷ *Criminal Code*, *supra* note 2, ss 283.3(2), 286.5(2).

*as well as the need to protect vulnerable children from prostitution's harms.*⁴¹⁸

In and of itself, this purpose incited the ire of abolitionists, lawyers, academics, and sex work activists. While there is much to analyze by taking this purpose at face value,⁴¹⁹ I will not defer to the initial message presented by the Justice Minister before s 213(1.1) was amended, nor to the purpose professed by the Technical Paper. Instead, I will offer an unsettling alternative from the reasons expressed by multiple legislators as the legislative process converted Bill C-36's policy into law.

ii) Potential Purposes

This alternative account of s 213(1.1)'s purpose has one overarching theme: legislators did *not* intend to enact a criminal *prohibition*. Tied together by aspects of discretion, this theme has two connected strands: police needed an investigative power, and/or a detention power. Put inversely, by enacting s 213(1.1), legislators intended to enact a *provision* of powers for enabling police action, not for convicting sellers of a criminal offence. The idea that s 213(1.1) should not be employed as a criminal offence wafted into the statements expressed and questions asked by at least six legislators (including the Parliamentary Secretary to the Justice Minister and Senate Sponsor) who sat on the Committees, and then voted to pass Bill C-36 into law.⁴²⁰

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Manitoba was the sole province whose Minister of Justice and Attorney General, Andrew Swan, testified before Parliament. Although Minister Swan expressed Manitoba's support for both

⁴¹⁸ Technical Paper, *supra* note 253 at 10.

⁴¹⁹ See eg. Stewart, *supra* note 20 at 82-84, questioning what the Court meant by "face value" in *Bedford 2013*, *supra* note 1 at para 125.

⁴²⁰ Those six legislators were the Hons Robert Goguen, David Wilks, Joy Smith, Bob Dechert, Denise Batters, and Donald Plett. For brevity, I have not reproduced any of Bob Dechert's reasons in this section, see eg. JUST Proceedings (15 July 2014) at 1108 – 1115 (Hon Bob Dechert, Government Motion to Amend s 213(1.1)). Query whether those questions asked by Senators Linda Frum and Jean-Paul Dagenais would bring the tally up to eight: See eg. LCA Pre-Study (17 September 2014) (examining Tom Stamatakis).

restorative justice and the Nordic model, he testified that s 213(1.1) would be challenged. The below examination of Minister Swan by Robert Goguen at JUST suggested that Goguen, as a legislator, wanted to give police the ability to extract and divert sellers away from and out of work:

*Now, we all know that when a prosecution is undertaken, it's done in a couple of steps. Basically, the police have enforced their discretion. The Crown has enforced its discretion. We know from discussions with other police forces that **prior to Bedford, what the police forces would do is they would actually arrest the prostitutes, because they'd have a legal authority to do so; would question them; and would inquire as to whether or not they were victimized or whether there was some way that they could get information about the pimps, those who were victimizing them. They would not charge them, but would then direct them to services that might extract them from the industry. So if you're not charging the prostitutes, you're sort of taking away that possibility—although ultimately they're not charged.***

If this bill were amended to require the Attorney General to consent to the charges going forward, would that change your point of view?[emphasis added]⁴²¹

In the technical reasons he articulated, Goguen viewed the legislative problem as one solvable through the criminal process, and with police discretion as the primary legal solution. From that presumption, he reasoned that the police needed a conversation prompt. Goguen took it for granted that s 213(1.1) will authorize that prompt, and then assumed that in the resulting conversation, police will gather information from sellers to use for investigating pimps. Never mind that this solution presumed (or is only available when) sellers are beholden to pimps and not working independently or with other sellers; when it comes to apprehending the legal consequences, he presumed that sellers will comply and abide the police's benevolent directions to exit. In short, Goguen's reasons attempted to leverage space within the criminal process for s 213(1.1) to operate, but without charges ever landing before a judge. More is to come on Goguen's idea to require the Attorney General's consent to charges, which, for better or worse, never did become part of Bill C-36.

⁴²¹ JUST Proceedings (7 July 2014) at 1730 (Hon Robert Goguen, examining Hon Andrew Swan).

Plenty of Bill C-36's supporters stood sturdy in their stance that s 213(1.1) was unnecessary, unwise, and unsavoury. Minister Swan was one such witness. Urging that the threat of criminal prosecution was no good way to assist victims, Minister Swan responded that being "picked up for communicating" would hang "the sword of Damocles over your head". Goguen picked up on the Minister's postulation that to avoid being personally charged, sellers would have to "give up information on somebody else" with the following rejoinder:

*But there's more than anecdotal evidence that the prostitutes who do exercise their profession in public places are the most vulnerable, the most inclined to be victimized. Letting alone the extraction of information, as you might have said, what about the possibility of taking them into your confidence, of finding out a little bit more about them, of introducing them to a social worker, of introducing them to a victims group and somehow opening the door of getting help from them? You know, you can't help those who don't want to help themselves, and if there's no legal authority to apprehend them and to somehow incite them to get the help, where do you go? [emphasis added]*⁴²²

Enjoining Goguen in debate, Minister Swan applauded Manitoba's prostitution diversion program, which his Province intended to continue, with or without an amended Bill C-36. Programs provided by provinces and civil society held much promise for legislators who thought about how Bill C-36 would run on the ground. The debate between Minister Swan and Goguen is an important example of the organic mix of evidentiary, technical, and moral reasoning produced by and within deliberations. Minister Swan challenged Goguen's apprehension of the policy technique (the threat of arrest and charge) and legal context (criminal investigations) with facts (diversion as a policy alternative) and legal principles, while both also resorted to different moral reasons: For Goguen, protecting vulnerable people and deterring crime through punitive processes; for Swan, exercising restraint in curtailing liberty and facilitating rehabilitation to change behaviour.

That same afternoon, however, JUST heard a story that might have challenged both Goguen's and Swan's evidentiary, technical, and moral reasons. Monica Forrester, who had

⁴²² JUST Proceedings (7 July 2014) at 1730 (Hon Robert Goguen, examining Hon Andrew Swan).

participated in a diversion program, was the only Indigenous transgendered person scheduled to testify at the House of Commons. As it regrettably turned out, Monica was unable to travel to Parliament to tell her own story.⁴²³ To appreciate the broader implications of her absence, recall from Part II that it was proven as a fact in *Bedford* that prostitution disproportionately affects Indigenous people, and the record was very sparse on transgendered individuals, who are also an understudied population.⁴²⁴ Hence, Monica's testimony, by enhancing the informational basis for evidentiary reasoning, might have strengthened how legislators understood the nature and scope of the legislative situation to both distinguish and overcome the limitations of *Bedford's* record. And if legislators genuinely appreciated how their proposed laws would affect her, they would have to also reconcile their reasons and adapt their solution to her problem, which could in turn strengthen Bill C-36's legal efficacy. In fact, Monica was serving as a surety for a colleague - who had just been arrested under s 213, the unconstitutional communicating prohibition that *Bedford* had invalidated but kept in force, and that s 213(1.1), Bill C-36's proposed new communicating prohibition, would replace. The words Monica had written to tell Parliament included how she was sexually assaulted during a diversion program:

*Right now, if we face violence, we can't call the police because it will be recorded in the system. I have never been able to call police for help, even after I was sexually assaulted. At the time I had been through the mandatory diversion program after an arrest for prostitution and knew that I faced incarceration if my sex work was discovered, so even though I was raped, I did not call police. Bill C-36 would not have helped me then, and it won't help me now.*⁴²⁵

Monica's words communicated more than just a practical enforcement problem. For her, restorative justice became destructive to justice when diversion resulted not only in reversion, but

⁴²³ JUST Proceedings (7 July 2014) at 1627 (Chanelle Gallant). For further consideration of Monica's absence, see Mouland, "Remedying the Remedy", *supra* note 10 at 29-30.

⁴²⁴ *Bedford 2010*, *supra* at paras 90, 165, 174; 2006 Subcommittee, *The Challenge of Change*, *supra* note 281 at 14-15.

⁴²⁵ JUST Proceedings (7 July 2014) at 1630 (Chanelle Gallant).

also the generation of new violence against her. Surely, it would be fanciful to imagine that hearing from Monica directly would have demystified the unworkability of s 213(1.1) as a social intervention, especially if legislators did not attune to a provincial Justice Minister's providential advice and legal expertise. Beyond that instrumental value though, Monica's act of testifying might have also strengthened democratic legitimacy, were it not for her absence. What makes the irony of Monica's absence abiding in duration and biting in impact is that the collision between the law's past (*Bedford's* striking of s 213), present (serving as a surety for a colleague currently arrested under s 213), and future (the reenactment of s 213(1) into the new s 213(1.1)) is driven by the interaction among the judicial, administrative, and legislative functions.

While many sellers felt they had not been heard on the heels of *Bedford* during pre-legislative consultations, nor during the ensuing legislative process,⁴²⁶ the Canadian Police Association expressed appreciation that the Government had listened to them. Appearing in his capacity as President of Canadian Police Association, Tom Stamatakis of the Vancouver Police Department was grateful to the Government at both JUST and the Senate for consulting with frontline officers during drafting.⁴²⁷ Observing that "when it comes to prostitution", officers had exercised, and would continue "to exercise a tremendous amount of discretion", the Canadian Police Association fully endorsed Bill C-36.⁴²⁸

This remark about the level of enforcement discretion required to address prostitution scratched the surface of a troubling perception about the proper boundaries of police power that was ingrained in the reasons expressed in the legislative process. When JUST Committee Member David Wilks (himself a former police officer) followed up on Stamatakis' remark about

⁴²⁶ Mouland, "Remedying the Remedy", *supra* note 10 at 24-33.

⁴²⁷ JUST Proceedings (10 July 2014) at 1610 (Tom Stamatakis); LCA Pre-Study (17 September 2014) (Tom Stamatakis).

⁴²⁸ JUST Proceedings (10 July 2014) at 1615 (Tom Stamatakis).

tremendous discretion, Wilks noted that although the York Regional Police had not laid charges under the unconstitutional s 213 in five years, other police units had utilized it for diversion. Sharing his curiosity “from the perspective of discretionary powers from a police officer because it’s a summary conviction offence”, Wilks solicited comments on whether the refreshed s 213(1.1) could help “get a person out of trouble”.⁴²⁹ No one acquainted Wilks, nor any other legislators present at the meeting (at least not on the record) with the fact that the unconstitutional s 213 was also punishable on summary conviction only.⁴³⁰ If this common classification had been mentioned, perhaps Wilks would have cautioned to take some smaller steps before he took the causal leap from the means (discretionary powers) under s 213(1.1) as a basis for action from which (in his view) minimal (if any) criminal liability (“out of trouble”) would follow.

Stamatakis briefly acknowledged the complexity, controversy, and value of using s 213(1.1) “as an opportunity to engage with someone who might be in a vulnerable situation.” But when asked to unpack this further by Vice-Chair Sean Casey, Stamatakis’ reasons also contained an investigative purpose: s 213(1.1) would help confirm “if that person is in fact being exploited”.⁴³¹ If so confirmed, Stamatakis speculated that the next step (which Casey disagreed with as “bizarre”) could then be “simply a case of getting them to a place where they can have some food, maybe some shelter, or where they can get some rest”.⁴³² This line of questioning tracks discretion in both its investigative and detention strands not as means to criminal charges, but as ends in themselves.

⁴²⁹ JUST Proceedings (10 July 2014) at 1633 (David Wilks).

⁴³⁰ JUST Proceedings (10 July 2014) at 1530-1730.

⁴³¹ JUST Proceedings (10 July 2014) at 1637-1640 (Tom Stamatakis, examined by Hon David Wilks and Hon Sean Casey).

⁴³² JUST Proceedings (10 July 2014) at 1640 (Tom Stamatakis, examined by Hon Sean Casey).

The detectable detritus and depravity of selling sex outdoors was vented openly and forcefully as a mischief requiring apprehension in the eyes of Calgary’s Chief of Police, Rick Hanson. Vouching for abolition at JUST, he submitted that in lieu of criminal charges, “apprehension powers should be used to remove sex trade workers from oppressive situations and connect them to counselling and support services.”⁴³³ Plus, for a national strategy to improve the lives of all involved, Hanson advocated that “law enforcement requires legislative authority to interdict and intervene in attempts to reduce the inherent harms associated with the sex trade, and to address the resultant community harm”.⁴³⁴ Despite affirming that individuals should not be discouraged from reporting violence or seeking assistance, Chief Hanson defined community harm as “reduced perception of safety within communities; and increased perception of social disorder; public nuisances such as condoms and needles in public parks, parking lots, and sidewalks; increased noise and vehicle traffic; public sex; the unwanted sexual proposition of citizens, and public health concerns”.⁴³⁵

In conferring with Chief Hanson, David Wilks likened the language of 213(1.1) to conditions imposed under a recognizance provision, since it is “similar to when a person who’s arrested, for argument’s sake, for a sex assault being put on a recognizance that says they cannot go near schools, playgrounds, etc”. Chief Hanson agreed, “it allows us the opportunity to address issues where there are serious risks to kids associated with the provision of a particular service like this...we do get a lot of concerns....around schools, playgrounds, day care centres, and you can go on and on. We need the authority to be able to do something”.⁴³⁶ By employing analogies to other legal tools (but tools with post-arrest oversight), this deliberation between Wilks and Hanson

⁴³³ JUST Proceedings (8 July 2014) at 0950-955 (Rick Hanson).

⁴³⁴ JUST Proceedings (8 July 2014) at 0950-955 (Rick Hanson).

⁴³⁵ JUST Proceedings (8 July 2014) at 0950-955 (Rick Hanson).

⁴³⁶ JUST Proceedings (8 July 2014) at 1115 (Rick Hanson, examined by Hon David Wilks).

typifies technical reasoning. Something is missing though. There is no additional layer of moral reasons to cushion the solution in constitutional values and principles. If analogizing sellers of sex to perpetrators of sexual assault is not discomfiting enough for the stereotypical inferences it invokes, then consider next how this argument led into another democratic deficit we already found in Part II: the conflation of adult sex, child exploitation, and human trafficking.⁴³⁷

The day after Chief Hanson's testimony, JUST went *in camera* so that undercover Detective Thai Truong of the York Regional Police's Drugs and Vice Unit would share his intimate knowledge of sexual exploitation. From an organized crime perspective, Detective Truong predicted that Bill C-36 would hinder his mandate to rescue exploited girls and women. He stressed that Bill C-36 did not empower the police enough. He rejected the idea that the combined effect of the purchasing offence and exit strategies would allow sellers to walk away from the sex trade. In his view, rescue was the first step, and the sole way to "separate prostitutes from their abusers and end their isolation" was "if police have the power to intervene".⁴³⁸ What Detective Truong needed to do his job was "the legal tool and the legal right to take a young woman away from her pimp and enable a serious conversation with that young woman – not arrest her, not charge her or put her in jail".⁴³⁹ Once again, as with Goguen, Stamatakis, Hanson, and Wilks, we catch wind of the notion that the solution is a legally-authorized conversation prompt, without imposing criminal liability.

⁴³⁷ LCA Pre-Study (17 September 2014) (Hon Linda Frum, examining Georgiale Lang). Senator Frum's effort to address this criticism while examining Lang seemed to simply affirm the conflation. Lang replied that her submission in *Bedford's* final appeal was "solely related to human trafficking...I've heard the argument that they're conflated. The fact of the matter is that prostitutes are trafficked. We know that".

⁴³⁸ JUST Proceedings (9 July 2014) at 1135 (Thai Truong).

⁴³⁹ *Ibid.*

Detective Truong also rejected *Bedford*'s relevance and utility, partly due to his fear that pimps would disguise themselves as bodyguards to hide behind Bill C-36's new exemptions to the material benefit offence. According to Detective Truong, its precursor, the unconstitutional living on the avails provision "was a very important tool because it criminalized everybody around the victim".⁴⁴⁰ To help JUST understand how he believed the old regime worked better than Bill C-36, including the bawdy house provision, Detective Truong elaborated with the following scenario, reproduced in part:

...Under the new regime, there will be some issues with that—i.e., that they'll mask themselves as security bodyguards and that she will go. Under the old regime, I could say, "You know what? I'm not leaving. You're coming with me. He's under arrest for living on the avails of prostitution." I could separate them. I could tell her, "Listen, I don't want to criminalize you in any way, but I need time to talk to you."

The discretion that we used was time, because you cannot try to help a girl in 10 minutes. You need a good solid one or two hours to sit down, explain the situation, and offer resources. If she accepts it, great. We've been very successful in that extraction and accepting.⁴⁴¹

When Vice-Chair Casey synthesized what powers Detective Truong sought, to remind the Detective of the duties imposed upon officers by the *Charter* and the corollary rights granted to individuals, Casey cast the right to intervene as the right to detain. Casey then reminded the Detective that the old regime "runs afoul of the supreme law of the land".⁴⁴² To summon up the powers that Detective Truong wished for, there were, in Vice-Chair Casey's view, only two things Parliament could do: invoke the *Charter*'s notwithstanding clause, or amend the *Charter*.⁴⁴³

Nothing on the record indicates that the dramatic option of amending the *Charter* was deliberated. However, at the critical stage of clause-by-clause consideration, Vice-Chair Boivin

⁴⁴⁰ JUST Proceedings (9 July 2014) at 1150 (Thai Truong, examined by Hon Françoise Boivin).

⁴⁴¹ JUST Proceedings (9 July 2014) at 1155 (Thai Truong, examined by Hon Françoise Boivin).

⁴⁴² JUST Proceedings (9 July 2014) at 1200 (Hon Sean Casey).

⁴⁴³ *Ibid*; *Charter supra* note 5 at s 33.

was flummoxed from trying to understand the Government's logic, having received no answer as to whether the Government had considered enacting Bill C-36 notwithstanding the *Charter*:

Also, has your department thought of maybe using the notwithstanding clause based on section 7 of the Charter of Rights and Freedoms to say the whole thing is illegal, that we don't want prostitution?

That's what I heard from the parliamentary secretary, that we want this done and over with, so no selling and no buying at some point in time, because what good is it to sell something that cannot be bought by anybody?⁴⁴⁴

The oxymoron of treating the same individual as both the perpetrator and victim of the same criminal offence was not lost on the Official Opposition, who moved to delete s 213(1.1) from Bill C-36 during clause-by-clause. On debate for this motion, Government member Joy Smith, who was influential in deflecting the debate to human trafficking and child exploitation,⁴⁴⁵ had the following to say about the wisdom and balance of the new s 213(1.1):

It is a very wise, balanced move for this bill to say, very specifically, that schoolyards and places where children are, are just off limits. Nobody can do that. It's not harming the prostitutes at all. In fact, very few police forces today arrest prostitutes because they recognize them as victims. They ask them to move along.⁴⁴⁶

Joy Smith's expressed intent might sound like it conflicted with the objective Robert Goguen and David Wilks had mooted about with the police and Minister Swan - that is, to use the power to arrest and detain prostitutes as perpetrators as a means to apprehend them as victims. But if anything, Smith's sugarcoating of s 213 (1.1), as though it would easily delineate boundaries and coax sellers to exit into social services as simply and peaceably as a fence with a 'No Entry' sign is even farther afield from the purposes of the criminal law. And reasons to justify enacting criminal legislation, at least generally ought to resonate with those purposes of criminal law: "identifying, deterring and punishing criminal conduct, defined by a wrongful act and guilty

⁴⁴⁴ JUST Proceedings (15 July 2014) at 1155 (Hon Françoise Boivin).

⁴⁴⁵ See fn 285, *supra*.

⁴⁴⁶ JUST Proceedings (15 July 2014) at 1025 (Hon Joy Smith).

and....wrongdoing which violates public order and is so blameworthy that it deserves penal sanction”.⁴⁴⁷ If police recognize sellers as morally blameless “victims” and therefore will not arrest or charge them (because morally innocent victims do not deserve to be penalized) - then all three of those Committee Members ploughed over some elemental principles of criminal law.⁴⁴⁸

Senate Committee on Legal and Constitutional Affairs

Although Detective Truong, who testified only at JUST, not at the LCA, clearly understood that Bill C-36 did not explicitly fashion a specific power to investigate or detain without arrest or charge, at Senate, the argument resurged in support of a discretionary power under s 213(1.1). That argument lodged a serious discrepancy underlying not only each of the various uses that the police might have in mind for investigating and detaining a seller, but also between the potential ends and the hulky means trusted to delicately discriminate between victims and perpetrators only through tremendous discretion.

The means provided by s 213(1.1) seemed like valuable opportunities for some Government members in the Senate to achieve their ends. When Stamakatis returned to Parliament to testify at the LCA’s Pre-Study, Senator Batters observed that the old unconstitutional s 213(1) had “allowed police an opportunity to intervene”, and asked Stamatakis whether “Bill C-36 will afford you that same opportunity?” Stamatakis propped up his position on the need to intervene more firmly:

*Yes, I do. When we were canvassed for input as the legislation was being drafted, that was one of the key pieces from our organization. **We needed to have the legislative authority to insert ourselves into situations lawfully so that we could determine what was happening in a particular situation.** I think with the provisions contained within this proposed legislation, we are able to do that. **This is where police officers will use their***

⁴⁴⁷ *R v Mabior*, 2012 SCC 47 at para 23.

⁴⁴⁸ Query also whether Bill C-36’s technique of immunity from prosecution (or at least the way it was represented by the Department of Justice) is consistent with moral innocence. See eg. LCA Study (30 October 2014) (Natalie Levman).

*discretion to make decisions around how to proceed after that. particularly when you're talking about the most marginalized people who become involved in the sex trade, whether it's women or men — and I know it's predominantly women — **without the lawful authority to intervene, how are the police ever able to determine whether someone is being exploited or if they're engaged in an activity because they voluntarily, on their own, choose to do so without being coerced in any way?** [emphasis added]⁴⁴⁹*

With puzzlement, Senator Serge Joyal remarked, “[t]hat's not exactly what the bill says”. Resourcefully, Senator Joyal then read aloud the words of s 213(1.1) for Stamatakis, who did not have a copy of the Bill with him to inform his submissions. Stamatakis then admitted that s 213(1.1) clearly created a criminal offence.⁴⁵⁰ Yet after that admission, Senator Plett queried if “the ability of the police to arrest the prostitutes in these limited circumstances is a valuable tool”, as opposed to decriminalization or legalization. In the below response, Stamatakis resuscitated the nuisance prevention purpose from the old unconstitutional s 213 – a purpose which could also orchestrate whether and how the new s 213(1.1) would be used:

*... I can give you specific examples of where prostitutes have engaged in their trade at schools, at daycare facilities or other places where children congregate that have caused harms. **Those harms aren't always caused by the prostitute herself. Often those harms are caused by the people who are either purchasing the services of the prostitute or the people who are exploiting the prostitute and perhaps forcing her to engage in those kinds of activities.***

*In Vancouver, **parents have to get together before the school day starts so they can sweep the playground for discarded syringes** being used by prostitutes and others who are intravenous drug users using those locations to engage in that kind of activity... I don't think legalizing it or decriminalizing it would really reduce the harms... **there are too many men out there who are interested in engaging in abhorrent behaviour.** ⁴⁵¹*

Relating back this examination to what happened at the House of Commons two months earlier can help uncover what exactly is so problematic about the deliberations between Senators and Stamatakis, who was speaking as the voice of over 160 police services across Canada, no less.⁴⁵²

At JUST, we noticed that Bill C-36’s policy varnishes sellers with moral innocence, and that using

⁴⁴⁹ LCA Pre-Study (17 September 2014) (Tom Stamatakis, examined by Hon Denise Batters).

⁴⁵⁰ LCA Pre-Study (17 September 2014) (Tom Stamatakis, examined by Hon Serge Joyal).

⁴⁵¹ LCA Pre-Study (17 September 2014) (Tom Stamatakis, examined by Hon Don Plett).

⁴⁵² LCA Pre-Study (17 September 2014) (Tom Stamatakis).

s 213(1.1) as a criminal means was at odds with Bill C-36's shellac of victimization. Now, in the above excerpt at LCA, there was a conspicuous recognition that sellers are not just morally innocent for the harms surrounding them, but they are also often factually innocent in the actual scenarios where police would call upon s 213(1.1) to intervene. It might be fatuous and unsuitable to positively demand even a specialist body of lawmakers and law enforcement to literally enunciate *mens rea* and *actus reus* when debating how a policy will function; but when those basic elements of criminal liability are absent from the uses legislators devise for laws which, on their face, appear to impose criminal liability, there is an enticing suspicion that something fundamentally unjust is afoot.⁴⁵³

And it was fundamental justice that Senator Mobina Jaffer appealed to when she moved to delete s 213(1.1). To her, it could not be denied that "Bill C-36 suffers from a disconnect between its purposes and likely effects":

The government's insistence on criminalizing communication is entirely unresponsive to the Supreme Court's Bedford decision and flies in the face of a massive evidentiary record establishing that sex workers communicate in public in order to manage the risk of physical harm.

*The Minister of Justice himself has acknowledged that the government has a responsibility to the safety of those who choose to remain in the sex industry. Criminalizing sex workers, regardless of the circumstances of the transaction, will prevent us from fulfilling our responsibility to Canadians.*⁴⁵⁴

If Parliament enacted Bill C-36 despite serious concerns that it violated s 7, and without invoking the notwithstanding clause, then the legal warrant necessary for s 213(1.1)'s legal legitimacy was lacking. To others, like Senator George Baker, that disconnect between purposes and effects was so blatant that:

⁴⁵³ See eg. *R v Beatty*, 2008 SCC 5 at para 34, Charron J (it is "a principle of fundamental justice that the morally innocent not be deprived of liberty").

⁴⁵⁴ *Debates of the Senate*, *supra* note 313 (4 November 2014) (Hon Mobina Jaffer, Motion to Delete s 213(1.1)).

...[T]he general public watching these proceedings would be confused as to what this bill does. Wouldn't you agree that most Canadians would say that if you're going to make it illegal, then make it illegal, and if you're going to make it legal, then make it legal; but don't make it so confusing that nobody really understands what this bill does?⁴⁵⁵

The pith of Senator Baker's observation was that the principles of publicity and explicit lawmaking were diminishing. Waning side-by-side with that diminishment was the political warrant for converting Bill C-36's policy into democratically legitimate law. For even if most of Senator Jaffer's fellow Senators disagreed with her interpretation of the law, enacting s 213(1.1) would apparently flout Parliament's democratic mandate. Her motion was buttressed by the near unanimous support of witnesses that had amassed from JUST's study in July until her motion on November 4, the day Bill C-36 was passed:

At the very least, we should listen to the vast majority of witnesses who appeared before the House Justice Committee deliberations, the Senate pre-study and last week's committee meetings. They said that whether they supported the bill or not, any clause that criminalizes the sex worker in any way should be removed.⁴⁵⁶

What this last-ditch effort demonstrates is a coalescence of evidentiary, technical, and moral reasons. Drawing from the body of conflicted and uncertain evidence about the legislative situation (the harms of different forms of prostitution to diverse individuals and to complex communities) to respond to her interpretation of what the s 7 jurisprudence (per *Bedford* and *Insite* (both of which she cited))⁴⁵⁷ required meant that the solution had to also be justified on moral grounds – the tie-breaker. And those moral grounds included a richer conception of constitutional democracy. For

⁴⁵⁵ LCA Pre-Study (29 October 2014) (Hon George Baker).

⁴⁵⁶ *Debates of the Senate*, *supra* note 313 (4 November 2014) (Hon Mobina Jaffer, Motion to Delete s 213(1.1)). See also comments of Hon George Baker in support of the amendment: “Of all the witnesses who appeared before the Senate committee that I can recall, and there must have been 60 witnesses, groups and so on, not one of them asked for the retention of this clause 213 that Senator Jaffer wishes to amend. In other words, there was unanimity among those who appeared. I also have to point out that the vast majority of those who appeared supported the bill but wished to remove this particular section.”

⁴⁵⁷ *Ibid*, citing *Bedford*, *supra* note 1 and *Insite*, *supra* note 71.

Senator Jaffer, the Senate “is a chamber that was specifically created to protect rights of minorities.”⁴⁵⁸ Because Canada thrives on principles beyond just majority rule, the Senate had to respect the dignity and autonomy of a minority whom she believed were capable of free choice, and did not deserve to be criminalized.

That s 213(1.1) survived the deletion motion on Third Reading may simply show that Senator Jaffer’s reasons were not convincing enough to overcome a contrary interpretation of fact and principle vehemently voiced by Senator Batters - that the “cost” of protecting the minority was too much for the Senate to exact on “the vast majority of prostitutes”, whose equality rights as women ought to be protected.⁴⁵⁹ In rebuttal, Senator Batters also attempted to assuage anxiety about s 213(1.1) by reasoning from law. She not only recapped the testimony of Stamatakis, as well as a Detective from Quebec,⁴⁶⁰ but also parroted a technical point she herself had put to the LCA during the Pre-Study: prosecutors and judges were also formidable fonts of discretion.⁴⁶¹ Senator Batters (who had worked as the Chief of Staff for Saskatchewan’s Justice Minister) took comfort in all three fonts of discretion in what was her final exhortation to enact Bill C-36 on Third Reading:

*Police and prosecutors have discretion when choosing whether to charge prostitutes under the clause, and judges always have discretion when sentencing.*⁴⁶²

⁴⁵⁸ *Ibid.*

⁴⁵⁹ *Debates of the Senate, supra* note 313 (4 November 2014) (Hon Denise Batters, Speech on Third Reading).

⁴⁶⁰ LCA Study (29 October 2014) (Bernard Lerhe, examined by Hon Denise Batters): In response to Batters’ question to describe how charging discretion operates, Lerhe relayed declining statistics from 2011-2013 and stated, “charging prostitutes is not a priority for police officers right now and, with this bill, it will be even clearer that they are victims. Police officers will be more inclined to help them.”

⁴⁶¹ LCA Pre-Study (11 September 2014) (Keira Smith-Tague, examined by Hon Denise Batters). During the Pre-Study, Senator Batters had invited Smith-Tague (an antiviolence worker with the Vancouver Rape and Women’s Shelter) to refute the empirical claim that the Vancouver Police Department had adopted a Nordic model to simulate asymmetric enforcement of the former s 213 against purchasers. Smith-Tague seemed to use low conviction rates to object to the claim that the Vancouver Police Department had been executing the Nordic model: “As a woman who answers the crisis calls every day from prostituted women, you can't even get police to respond and actually take them seriously and get a charge or a conviction. That's across the board for all violence against women. There are very low conviction rates, and I think it's especially true for prostitution.”

⁴⁶² *Debates of the Senate, supra* note 313 (4 November 2014) (Hon Denise Batters).

What is partly misleading about this claim, is that as a matter of fact, mandatory minimum sentences mean judges do not *always* have sentencing discretion. But since as a matter of law, s 213(1.1) does not impose a mandatory minimum sentence, that is a tad bit moot. What is more concerning, and not at all moot, is how misplaced s 213(1.1) is as a matter of broader principles, which I will now consider.

iii) The Purpose Test

If multiple legislators meant what they said (and said what they meant) about the ends to which they desired s 213(1.1) to be used, then I want to argue that it is wrong for Parliament, which acts from more than just the sum of subjective motives of individual legislators, to pretend that sellers are to be prosecuted and convicted under s 213(1.1) if it really instead intended to provide investigative and intervention powers. Visiting some classic jurisprudence from both before and after the *Charter* will help elaborate why it is wrong for s 213(1.1) to masquerade as an investigative or detention provision instead of a criminal prohibition.

In the dawn of *Charter* litigation, two separate tests were crafted to analyze whether a *Charter* right was infringed by legislation. Although the first test, which examines only legislative purpose, has largely fallen into disuse, it has not been rendered obsolete. In *R v Big M Drug Mart*, legislation that compelled retail stores to observe the Sunday Sabbath was successfully challenged for an invalid purpose.⁴⁶³ The case instructed that if, and only if, the impugned legislation has a valid purpose, does the determination of constitutionality turn to the second test of measuring the provision's effects.⁴⁶⁴ My aim in applying the purpose test to s 213(1.1) is not to model a *Charter* challenge. Instead, I will attempt to demonstrate why, for legitimacy's sake, the face of a

⁴⁶³ *R v Big M Drug Mart*, *supra* note 188. See also *R v Edwards Books and Art Ltd*, [1986] 2 SCR 713.

⁴⁶⁴ *R v Big M Drug Mart*, *ibid* at paras 80-88. This would have been one basis upon which Bill C-36 could have been referred to the Court since it would not require evidence of enforcement effects.

prohibition should reflect the reasons expressed for enacting that prohibition. To my knowledge, the purpose test has never been applied to invalidate an ersatz piece of criminal legislation.

In the context of s 213(1.1), by an “ersatz piece of legislation”, I mean a prohibition that appears to ban A (a seller) from doing X (communicating to sell sexual services), but in reality, at the time the prohibition was enacted, the purpose it was contrived for was instead to provide P (the police) the ability to do Y (detain or apprehend A, or to investigate B), all while hidden out of sight from J (the judge). J’s role is to ensure that P has sufficient legal reasons to do Y, and if P does indeed have sufficient legal reasons to do Y, then J will watch that P treats A (and B) fairly and lawfully, and J will provide redress if P treats A unfairly or unlawfully. Translated into Dyzenhaus’ interpretation of Fuller, in enacting s 213(1.1) with a purpose that is entirely different from what the text creates, Parliament failed to fully convert a policy into a legally enforceable form of public law. Three interlocking planks structure this argument: first, the proper use of discretion; second, access to justice; and third, principles of statutory interpretation.

Discretion

Mingling and muddling four types of discretion into a saving grace – that is, discretion by the police to arrest, detain, and investigate; by the Attorney General to consent to charges; by Crown counsel to continue to prosecute; and by judges to impose fit sentences – could have obscured what Parliament was really angling after in clinging onto s 213(1.1). Even if, as Goguen suggested at JUST, requiring the Attorney General’s consent to charge would in effect clarify the circumstances in which s 213(1.1) should be enforced, *R v Appulonappa* has since established that consent to charges is no antidote to a constitutionally defective provision:

...Ministerial discretion...does not negate the fact that s. 117(1) criminalizes conduct beyond Parliament’s object, and that people whom Parliament did not intend to prosecute are therefore at risk of prosecution, conviction and imprisonment...If the Attorney General were to authorize prosecution of such an individual... nothing remains in the provision to prevent conviction and imprisonment. This possibility alone engages s. 7 of

the Charter. Further, as this Court unanimously noted in R. v. Anderson,... “prosecutorial discretion provides no answer to the breach of a constitutional duty”.⁴⁶⁵

To be evenhanded here, the appeal in *R v Appulonappa* had not even been heard until after Bill C-36 became law, but *R v Anderson* – the first precedent which *R v Appulonappa* drew from to hold that discretion to prosecute cannot save an overbroad provision – had just been released the month before.⁴⁶⁶ Even if all of Parliament was unaware of the Court’s decision in *R v Anderson* at the time of Goguen’s suggestion, if ignorance of the law is no excuse for criminal liability,⁴⁶⁷ it certainly is no excuse for unconstitutional lawmaking.

However, we might chalk up this omission not to incompetency, but to institutional incapacity. Parliament simply does not have the institutional memory and resources as the Court does to recollect and keep pace with case law. Yet one decade before Bill C-36, the risk of unchecked discretion posed by indefinite restraints on liberty had also spurred Parliament to revise legislation in response to *R v Demers*.⁴⁶⁸ For people permanently unfit to stand trial who posed no risk to public safety, like the accused (who was diagnosed with Down Syndrome), “the entire criminal process” rested on the assessment of a psychiatrist.⁴⁶⁹ When the legislation operated in the way Parliament had intended, it was impossible for independent oversight of that indefinite constraint on liberty. The Crown had argued that prosecutorial discretion was a sufficient safeguard for constitutionality, but in striking down the unconstitutional provisions for overbreadth, the Court concluded “the constitutional validity of the impugned scheme in this case cannot depend on such discretion”.⁴⁷⁰

⁴⁶⁵ *R v Appulonappa*, *supra* note 188 at para 74 (citations omitted).

⁴⁶⁶ 2014 SCC 41.

⁴⁶⁷ *Criminal Code*, *supra* note 2 at s 19; *R v Pontes*, [1995] 3 SCR 44.

⁴⁶⁸ *An Act to Amend the Criminal Code (mental disorder) and to make Consequential Amendments to Other Acts*, SC 2005, c 22, enacted following *R v Demers*, 2004 SCC 46.

⁴⁶⁹ *R v Demers*, *ibid* at para 52.

⁴⁷⁰ *R v Demers*, *ibid* at paras 54-55.

Analogously, for sellers who are believed to be communicating with prospective clients near schools, playgrounds, or daycares, the “entire criminal process” rests on the assessment of police officers. Thus, for Senator Batters to hold up prosecutorial as well as judicial sentencing discretion as assurances against overzealous (albeit benevolent) policing is to presume not only that a conviction will be entered, but that charges will be laid in the first place. Short of the rare *habeas corpus* and strenuous pursuit of Charter damages for civil claims against the Crown, access to traditional remedies of staying proceedings, excluding evidence, or reducing sentences for misconduct such as threatening charges, improperly obtaining evidence, or other rights violations during arrest or detention can only be sought from within the criminal process, which is only engaged when and if charges are laid - and yet if s 213(1.1) is in fact applied for the uses which law enforcement expressed on the record, the criminal process will never be triggered. This misapprehension indicates how institutional legitimacy is an interactional concept. Parliament’s competency and capacity to remember and reckon with jurisprudence prompting its own revisions interacts with the Court’s ability and availability. We cannot rely on judges to see that justice is done if there are no charges before them to adjudicate.

Access to Justice

The proper use of discretion, ensured by the availability of judicial review, is also affixed to access to justice and fairness. Although the purpose test was shelved for thirteen years, it enjoyed a brief renaissance in three cases from 1998 to 2001. Mid-way through that renaissance, the rationales for the purpose test were expounded by Iacobucci and Cory JJ, who were driven to dissent in *Delisle v Canada*, a case where the majority held that denying RCMP officers access to collective bargaining did not infringe the freedom to associate.⁴⁷¹ In 2015, the Court invalidated

⁴⁷¹ [1999] 2 SCR 989 [*Delisle*].

the contemporary version of that legislation in *Mounted Police Association*, which, though not criminal legislation, like s 213(1.1), re-enacted an already “tainted” provision.⁴⁷² As testament to the incisive prescience of Iacobucci and Cory JJ’s dissent, in *Mounted Police Association*, the Court revived the purpose test to overturn the majority in *Delisle*, both in merit and in approach.⁴⁷³ In light of my concession that the purpose test has never invalidated ersatz criminal legislation, the very recent reappearance of the purpose test suggests it is worthwhile to now bring out *Delisle*, which will adhere my dispute with s 213(1.1) to the basic rationales grounding the purpose test.

By focusing on the individual, *Delisle* united the two rationales for the purpose test with an underlying concern for fairness to *Charter* claimants. First, fairness requires that the purpose test remains available as a standalone basis for constitutional challenge, without challenging the effects, because it can be difficult to find and furnish evidence of a defective provision.⁴⁷⁴ This difficulty of discovering and mustering evidence of legislative defects is demonstrated by the painstaking compilation of *Bedford*’s 25,000-page application record. Although *Bedford*’s record gradually mounted across the twenty year wake of the *Prostitution Reference*, since a defective provision is not the same as an ineffective provision, there is also a second rationale attached to fairness. For if effects are the sole basis for dismantling unconstitutional legislation, then an ineffective provision could be insulated from challenge. By its very nature, an ineffective provision is unlikely to generate direct proof of its effects. Thus, the elusive possibility of charges is converted to an illusory prospect for challenging s 213(1.1) because if the sinister uses recorded in Parliament are bore out in practice, they will not bear adducible evidence of enforcement.

⁴⁷² *Mounted Police Association*, *supra* note 248 at para 130.

⁴⁷³ *Ibid* at para 136, holding “we need not consider the effects of the *PSLRA* exclusion independently from those of the imposition of the SSRP as a labour relations regime”.

⁴⁷⁴ *Delisle*, *supra* note 465 at para 75.

To catch an individual in either of these two lacunas would be to deprive that rights-bearer of a justiciable claim and an effective remedy, as in both ineffective and defective scenarios, it is impossible to hold legislators accountable for transgressing their jurisdiction. Effectively imposing a burden of proof that requires applicants to essentially prove a counterfactual could create a disoriented, Kafka-esque onus for individuals. Such an onus is disjointed from the purposive and principled role of the Courts to enforce the *Charter*, and forecloses access to justice. In this vein, *Delisle*'s individual-based rationales spring into institutional-based principles for maintaining the purpose test as a sufficient basis for constitutional challenge. Since a legislative provision with an unconstitutional purpose is incapable of justification under s 1, the purpose test maximizes *Charter* protection and accountability through transparent, articulated legislative reasons, while also minimizing the expenditure of judicial resources.⁴⁷⁵ Understood from both institutional and individual levels, the fairness rationales for the purpose test dovetail with *Bedford*'s concern to avoid saddling claimants with the quantitative burden under s 1, and secures *Downtown Eastside*'s clasp onto access to justice when the Court opened its doors to permit meaningful and effective relief.⁴⁷⁶

Statutory Interpretation

The connection between fairness and meaningful and effective relief suffused another joint opinion by Iacobucci and Cory JJ, but one which was penned for the Court's majority in *Vriend v Alberta*.⁴⁷⁷ *Vriend*'s scrutiny of the legislative record is illuminating for the proposition that the statements by the aforementioned six Government members during Bill C-36 could suffice to prove that s 213(1.1) has an invalid purpose. The applicant, Delwin Vriend, was terminated from

⁴⁷⁵ *R v Big M Drug Mart*, *supra* note 188 at paras 141-142.

⁴⁷⁶ *Downtown Eastside*, *supra* note 65.

⁴⁷⁷ *Vriend*, *supra* note 37.

his job after admitting his homosexuality to his employer. He then challenged Alberta's human rights legislation for deliberately omitting sexual orientation as a prohibited ground of discrimination. While there are no direct citations to Hansard in the Court's recital of the facts, the judgment emphasized that legislators had considered and declined multiple proposals by the Opposition that were introduced to specifically enumerate sexual orientation.⁴⁷⁸ Moreover, "[a]lthough at least one Minister responsible for the [Act] supported the amendment, the correspondence with a number of cabinet members and members of the Legislature makes it clear that the omission of sexual orientation from the [Act] was deliberate and not the result of an oversight".⁴⁷⁹ Nonetheless, the Court was reluctant to strictly apply *Big M Drug Mart's* two-step analytical sequence of testing the purpose first before testing the effects second.⁴⁸⁰

Importantly though, it seems that the entire Court detected the same foul when it came to how the potentially unconstitutional purpose emanated from the legislative record.⁴⁸¹ Both sets of reasons were prepared to draw an adverse inference of an invalid purpose *where legislators had turned their mind to making a particular amendment, but then voted against enacting it*.⁴⁸² In this way, the democratic defect which wrought the constitutional defect in *Vriend* is analogous to the potential wiles that were conceived of for s 213(1.1). So even though it is impossible to identify the specific subjective intent of each individual legislator on a discrete vote, *Vriend* contemplates an approach to the purpose test that accounts for not only what is said on the record and by whom, but then measures the force of those words against the power and voting dynamic that give rise to

⁴⁷⁸ *Ibid* at para 4 (noting that several opposition bills did not proceed past first reading).

⁴⁷⁹ *Ibid* at para 4. The extent of the legislative record relied on to establish the deliberate omission is also unclear from the application judgment, which also refers to correspondence from Ministers and government Members: See *Vriend v Alberta*, 1994 CanLII 8949, [1994] 6 WWR 414 (ABQB) at para 4.

⁴⁸⁰ *Vriend*, *supra* note 37, at paras 92-93.

⁴⁸¹ Cory and Iacobucci JJ represented the majority and read-in the exclusion to remedy the violation, while Major J dissented in part and only against that remedy, as he would have instead issued a suspended declaration.

⁴⁸² *Ibid* at paras 191-192 199, Major J (dissenting in part).

the dispute between the individual and the state. Thus, *Vriend*'s agile approach to legislative intent is promising departure from Cory J's resistance to imputing legislative intent from individual statements in *R v Heywood*. This agility can brace the objective-perceptual approach to legislative intent from Part I of this project.

As for the evidentiary burden in practice, the quantity and quality of legislative statements required to prove an invalid purpose is unclear from the four corners of *Vriend*. But *Vriend*'s subsequent treatment, and in particular, the uptake of joint reasons by Iacobucci and Cory JJ in *Dunmore v Ontario (AG)* signals that less substantial evidence than that submitted in Section B could slope the balance of probabilities to an unconstitutional purpose.⁴⁸³ *Dunmore* also signals that the lack of guidance on evidentiary burdens is related to a lack of precedent. As the third case during the purpose test's renaissance period, the majority speaking through Bastarache J in *Dunmore v Ontario (AG)*, opted not to use the purpose test alone in ruling that it was unconstitutional to exclude agricultural workers from collective bargaining legislation. In balking from the purpose test (and retreating from his own opinion on the merits in *Delisle*),⁴⁸⁴ Bastarache J noted that as a general matter, assessing legislative intent is difficult, and the legislative record for finding an unconstitutional purpose is often unavailable.

Difficulty and unavailability are obviously not the same as impossibility – a distinction that L'Heureux-Dube J, concurring in the result, parsed from the legislative record. With the cutting support of Iacobucci and Cory JJ's reasons in *Delisle*, L'Heureux-Dube J recognized how rare it will be that a legislature will indeed have an invalid purpose in mind.⁴⁸⁵ But that rarity could not be overlooked against a full appreciation of the factual record. She contrasted two statements by

⁴⁸³ 2001 SCC 94, at para 33 [*Dunmore*].

⁴⁸⁴ On the judicial manoeuvring here and resulting concerns for accountability, see Jamie Cameron, "Judicial Accountability, Michel Bastarache and the Charter's Fundamental Freedoms" (2009) 47 SCLR (2d) 323 at 333-337.

⁴⁸⁵ *Dunmore*, *supra* note 483 at paras 123-128.

two different Ministers in the Legislature against an explanation in a media kit and a Minister's letter, all of which pointed to an overreach that, in her view, made the impugned exclusion invalid in its very purpose.⁴⁸⁶ If two statements by two Government members sufficed to find an invalid purpose, then surely it is arguable that even more statements by at least six Government members would come close to meeting the preponderance of probabilities.

Granted, labour relations and the freedom to associate clearly involve different facts than criminal justice and an individual's right to liberty and security. Yet the common theme of vulnerability and inequity of power shared by unorganized agricultural workers and isolated sellers of sex, as groups that bargain with the state for protection, suggests that equal circumspection ought to be applied to legislators' disquieting comments about the potential misuses for s 213(1.1), and it should not go remiss that freedom of association as well as equality were summoned in *Downtown Eastside*, which never proceeded to be adjudicated on the merits.⁴⁸⁷ Besides, if anything, the contextual distinction here militates towards strictly construing these legislators' words – words which, because they are uttered by Government members, carry all the more weight in a strong majority Government where Cabinet effectively controls Parliament.⁴⁸⁸

The need to take seriously what legislators say about penal laws is firmly planted by the common law. In a short but sage pre-*Charter* judgment that is still germane in facts and principle to recent constitutional jurisprudence, Dickson J strictly construed provisions of penitentiary and parole legislation, which, applied broadly, would have forfeited an inmate's statutory credit for

⁴⁸⁶ *Ibid* at paras 129-132.

⁴⁸⁷ *Downtown Eastside*, *supra* note 65.

⁴⁸⁸ *Reference re Canada Assistance Plan (BC)*, [1991] 2 SCR 525 at p 547. See also *Wells v Newfoundland*, *supra* note 112 at paras 53-54; Craig Forcese and Aaron Freeman, *The Laws of Government: The Legal Foundations of Canadian Democracy*, 2nd ed (Toronto: Irwin Law, 2011) at 19-20.

time served upon revocation of parole.⁴⁸⁹ The consequences of criminal legislation demand that it must be made explicitly, as Dickson J set forth from the principles of liberty and the rule of law:

It is unnecessary to emphasize the importance of clarity and certainty when freedom is at stake. No authority is needed for the proposition that if real ambiguities are found, or doubts of substance arise, in the construction and application of a statute affecting the liberty of a subject, then that statute should be applied in such a manner as to favour the person against whom it is sought to be enforced. If one is to be incarcerated, one should at least know that some Act of Parliament requires it in express terms, and not, at most, by implication.⁴⁹⁰

Since both criminal offences and defences “serve to define criminal culpability”, to interpret whether self-defence under s 34(2) of the *Criminal Code* applied to initial aggressors, in *R v McIntosh*, Lamer CJ then propagated this as an “overriding” principle.⁴⁹¹ Felicitously, in *R v McIntosh*, he qualitatively distinguished the criminal context from labour relations when it comes to legislative intent:

The Criminal Code is not a contract or a labour agreement. For that matter, it is qualitatively different from most other legislative enactments because of its direct and potentially profound impact on the personal liberty of citizens. The special nature of the Criminal Code requires an interpretive approach which is sensitive to liberty interests. Therefore, an ambiguous penal provision must be interpreted in the manner most favourable to accused persons, and in the manner most likely to provide clarity and certainty in the criminal law.⁴⁹²

It is difficult to say that 213(1.1) reaches this requisite level of clarity and certainty, given the difficulty of identifying and predicting s 213(1.1)’s impact on liberty. How is a seller supposed to predict when, where, and in what ways they communicate with prospective purchasers? Take the not uncommon phenomenon of millennial university students dating “Sugar Daddies” to fund their

⁴⁸⁹ *Marcotte v Deputy Attorney General (Canada)*, [1976] 1 SCR 108 [*Marcotte*]; *R v Safarzadeh-Markhali*, *supra* note 389 dealt with the statutory cap on crediting sentences for time served during pre-trial custody. The trial judge, whose striking down of the cap was affirmed, had cited *Marcotte* in interpreting the provision (see 2012 ONCJ 494 at para 11, [2012] OJ No 3563). For a recent application of *Marcotte* to strictly construe the offence of bestiality, see *R v DLW*, 2016 SCC 22.

⁴⁹⁰ *Marcotte*, *ibid* at 115.

⁴⁹¹ *R v McIntosh*, *supra* note 302.

⁴⁹² *Ibid* at para 39.

tuition.⁴⁹³ If a university student who receives money after a sexual encounter with a “Sugar Daddy” is standing at a sidewalk on campus at 10:00 pm, and from that sidewalk begins typing a text message to said “Sugar Daddy”, is that student at risk of being arrested, given that people under age 18 attend university, and texting is a form of communication?

Possessing the power to disrupt sellers could lead to any number of consequences that are unintelligible from the language of s 213(1.1). Though the legislation fashions an offence, at best, it backwardly attempts benevolence by brandishing exit programs as a carrot and stick. It enacts a scheme that on one hand, accommodates the fact that individuals will continue to sell sex, and should do so safely, yet on the other, requires them to dispense with safe communication measures in select public locations, or else commit to exiting the trade. Worse is the insidious investigative technique of hanging onto the uncertainty of a charge following arrest. Criminal liability could conceivably depend upon whether sellers would be conscripted into informers or compelled as witnesses to snitch on their clients, thus embroiling sellers in a dilemma of liberty or livelihood.⁴⁹⁴ Let alone illusive charges under s 213(1.), resisting either of these unviable outcomes could expose sellers to actual charges for obstruction of justice or contempt of court.⁴⁹⁵

⁴⁹³ Bellesa, “I’m a Sugar Baby. Here’s What It’s Like to Date a Sugar Daddy,” *Huffington Post Canada* (5 March 2018), online: <https://www.huffingtonpost.ca/bellesa/im-a-sugar-baby-heres-what-its-like-to-date-a-sugar-daddy_a_23296563/?>

⁴⁹⁴ *Cf Bedford, ONCA* at paras 92-94. Because *Bedford’s* final appeal was decided on the security interest alone, the Supreme Court of Canada did not address whether the majority of the Ontario Court of Appeal was correct to reject the claim that the liberty is engaged by the personal life choice to partake in prostitution. Although the majority of the Ontario Court of Appeal was concerned with opening up a right to generate commercial revenue by unlawful means, that holding obviously occurred before Bill C-36 itself accommodated sellers’ need to support themselves economically through immunity. How s 213(1.1) now works against the immunity provisions in Bill C-36 could function in a similar way as the administrative exemptions in *Insite*, *supra* note 71 by refuting the moral and policy choice arguments that the Government would likely offer, and by requiring consideration of the community prohibition against the broad purposes of the statute as a whole. See also *R v Smith*, *supra* note 197 at para 18 (ruling that the right to liberty and security was unjustifiably infringed by the arbitrary exclusion of edible or topical cannabis from the medical marijuana regime).

⁴⁹⁵ As warned by Valerie Scott at the LCA Prestudy (10 September 2014) (Valerie Scott, examined by Hon Serge Joyal).

To be clear: I am *not* claiming that legislators could not or should not have enacted a specific power to apprehend or detain sellers for the sole purpose of either protection or investigation. But that is not what the language of s 213(1.1) – a *prohibition* - purports to do. A prohibition creates a criminal offence; it is concerned with criminal culpability of an accused, not furthering an investigation by authorizing the collection of evidence, and not protecting the public or third parties. Suppose the Department of Justice, in composing the provision, had drafted an investigative power or an apprehension power, rather than a criminal prohibition. The three key components of the operative provision – the subject, the fact-situation, and the legal consequences of conferring power to the state - not liability to individuals – would be entirely different.⁴⁹⁶ On this point, it is noteworthy that Bill C-36 did enact specific investigative powers by adding the new purchasing and advertising offences to the provisions authorizing a warrant for electronic surveillance, and by adding advertisements of sexual services to the evidence for which law enforcement can seek a physical or digital seizure order.⁴⁹⁷ Conceivably, then, drafters could also have provided that a judge may authorize a warrant for apprehension where there are reasonable grounds to believe that a person is communicating “for the purpose of offering or providing sexual services for consideration - in a public place, or in any place open to public view, that is or is next to a school ground, playground or daycare centre”.⁴⁹⁸

Such a provision would have required a different justification commensurate with the incursions into liberty and security, as well as supplemental provisions. And insofar as the desired end of a detention power is to protect vulnerable sellers, that end could have been accomplished by civil legislation at the provincial level, which, though still quite drastic, could have been a

⁴⁹⁶ Sullivan, *Statutory Interpretation*, *supra* note 385 at 15-16.

⁴⁹⁷ *Criminal Code*, *supra* note 2 at ss 164, 164.1, 183.

⁴⁹⁸ *Criminal Code*, *supra* note 2 at s 213(1.1).

potentially less impairing means than the *Criminal Code*.⁴⁹⁹ Alberta, for one, already had civil legislation in force to authorize apprehending prostituted children.⁵⁰⁰ Provincial jurisdiction notwithstanding, enacting an apprehension or investigative power in the *Criminal Code* also would have demanded concomitant considerations for accountability and oversight such as clear criteria to guide law enforcement, and procedural protections for the apprehended person.⁵⁰¹

There is little solace in the fact that neither JUST nor LCA, tasked as they were with imbuing Bill C-36 with democratic character and constitutional rigour, did not amend s 213(1.1)'s communicating prohibition into an investigative provision. Notice how in *Vriend*, the Court accounted for the fact that several Opposition attempts to amend the human rights legislation had fizzled against the discriminatory explanation hissed by Cabinet members. During the fallout of *Vriend*, the Government of Alberta explicitly canvassed public support for overriding sexual orientation as a prohibited ground.⁵⁰² In Bill C-36's legislative process, no Parliamentarian actually proposed to rewrite it to capture the deliberate intent to install s 213(1.1) as an investigative power. However, multiple Parliamentarians from multiple parties moved in *both* houses (the NDP in the House of Commons and the Liberals in Senate) to delete the offence holus-bolus.

Regardless of whether s 213(1.1) was and is in fact deployed to detain "victims" without laying charges so as to investigate the pimps to whom all such victims were presumed beholden, or gripped as a bullhorn to holler at sellers to skedaddle, there was a nexus across the questions and remarks at both Committees: enacting s 213(1.1) would empower police action, short of

⁴⁹⁹ There is a meaningful distinction between the protective purpose of apprehending a child for protection and the punitive purpose of criminal proceedings. For some of the issues involved in fusing these proceedings together in the s 7 context, see *Winnipeg Child and Family Services v K LW*, 2000 SCC 48.

⁵⁰⁰ *Protection of Sexually Exploited Children Act*, RSA 2000, c P-3 (enacting a framework for apprehending children in prostitution).

⁵⁰¹ As another analogy, consider detention for psychiatric examination under s 672.11 of the *Criminal Code*, or in the civil regime, pursuant to s 15 of the *Mental Health Act*, RSO, 1990 c M-7.

⁵⁰² For a comprehensive discussion of the legal and political context, see Roach, *The Supreme Court on Trial*, *supra* note 38 at 220-221, 248-249.

imposing criminal liability. If we take these legislators at their word – and not simply take the Preamble and the Technical Paper at face value – then a substantial segment of Parliament’s reasons (one dimension in the “kaleidoscope” we looked through in Part I’s conception of legislative intent) portrays not just a disconnect between the official objective and predicted effects, but a purpose that, taken alone, appears distorted. This distorted purpose was not sewn by some sleight of the drafter’s hand, but was manufactured through the pontifications of police and Parliamentarians on the public record.

Admittedly, we cannot know whether and how deeply this purpose distorted Parliament’s vision of Bill C-36. But we do know that the distortion began at JUST in July, where it persisted past a motion to delete, and then penetrated the LCA’s Pre-Study in September, its Study in October, and was clearly advanced as a reason against a second motion to delete, and to shore up the final vote by the whole Senate on the entire Bill – the stage from where there was no turning back before the flaw was sealed into law upon Royal Assent.

To sand off a less obvious implication, forgive me for now making a rather plain point: none of the police witnesses who attested to the need for a power to investigate or detain sellers (and that s 213(1.1) would grant them that power) voted on Bill C-36. Plainly, that is because they were not Members of Parliament or Senators. The implication that begins to flow from this is significant to the political warrant for democratic legitimacy and to the legal grounds for legal legitimacy: not all witnesses carry the same democratic pedigree, nor do they exact equal influence on legal quality. Much like we cannot double-count the Justice Minister’s testimony at both Committees as part of the political warrant for Bill C-36, we cannot double-count those officers – who appeared in their capacity as state officials – as part of a political majority in support of s 213(1.1). Otherwise, there is a danger that the intra-institutional rules of Parliamentary privilege,

which are supposed to navigate Parliament towards legislating, deliberating, and accounting,⁵⁰³ will instead lead Parliament astray from those very functions; for those same rules of Parliamentary privilege also govern who is invited to present at Committees, and in a strong majority Government, those rules of privilege might therefore (even inadvertently) inflate the hearings with proponents for the Government's proposed policy. The result would be to convert the Government's choice into a self-fulfilling prophecy, and thereby impair one part of Parliament's institutional legitimacy – its capacity– to improve and develop that policy into legitimate law.

Honing in to focus on the individual actors within Parliament who influence legislative input and output - who are not just from the legislative branch, but are also from the administrative branch - in turn dredges up the subterranean wrong beneath s 213(1.1), and brings forward the symbiosis of institutional, democratic, and legal legitimacy. The conversion process does not clearly begin with a Bill's Introduction, nor finitely end upon Royal Assent. Officials whose opinions were valued as stakeholders when the Executive chose a policy to introduce, and whose advice was again trusted upon as witnesses within the legislative process are not just tasked with enforcing the law, once enacted. They also have an instrumental role within the conversion process which, for s 213(1.1) continues now that the prohibition is in fact the law.

To conclude his cultivation of Fuller's conversion as a process where the substance of enacted law is inextricably connected to and conditioned by the form it takes, Dyzenhaus elucidated a critical moral and legal dilemma confronting the law's claim to authority - a dilemma which s 213(1.1) epitomizes. The dilemma transpires because, in addition to a dissonance between a citizen's subjective moral code and the law's objective legal code, the legal code itself denies the

⁵⁰³ See Part I. B at 19-21.

citizen “dignity as [a] responsible agent”.⁵⁰⁴ In his words, to legitimately reconcile this dilemma, there must be plausible reasons for legislative decisions offered to citizens in a dignified way, for:

*Even if they think that the content of the law should be very different from the content it has been determined to have, the fact that the content offers them reasons of this sort constitutes a reason within their own perspective to grant the law its moral quality.*⁵⁰⁵

For such plausible reasons to salvage the legal surplus value that accrues when normativity is solidified through the legislative process, legislators have only two options:

*Either they can explicitly state that aim, or they can delegate power to officials that permit the officials to achieve the same end, not because this end is explicitly stated in the empowering statute, but because official implementation of the statute is explicitly stated to be unreviewable by judges... As a result, if the form of law is to some extent respected, to that extent it will be interpretable in a way that respects the dignity of those subject to the law.*⁵⁰⁶

Were either of these options pursued when Parliament enacted s 213(1.1)? If we accept that those six Government members meant what they said, then surely not the first option. A prohibition, by its very form, governs citizens at large. It presumes and depends upon judicial review to be a legally enforceable norm; it brings P’s charge that A has breached the *Criminal Code* before J, the judge, for adjudication, during which P’s conduct is also reviewable. So, the first defect beneath s 213(1.1)’s ersatz form is content which lacks generality, and concomitantly, formal equality before the law.⁵⁰⁷ In operation, s 213(1.1) is not a general rule, but is employed to authorize individual action in particular instances. What about the second option? The police who implement s 213(1.1) are not explicitly delegated unreviewable power. Thus, the second defect beneath s 213(1.1) is incongruence. If s 213(1.1) operates in the ersatz way described above, then it effectively delegates

⁵⁰⁴ Dyzenhaus, “Process and Substance”, *supra* note 23 at 303.

⁵⁰⁵ *Ibid.*

⁵⁰⁶ *Ibid.*

⁵⁰⁷ Fuller, *The Morality of Law*, *supra* note 28 at 46-49; Dyzenhaus, “Form and Substance”, *ibid.*

unreviewable *ad hoc* discretion without doing so explicitly, thereby suffering from incongruence between official action and declared rule.⁵⁰⁸

The cause of these defects, according to Dyzenhaus, is “interfer[ence] with procedural principles”, and the consequence is that law is inaccessible to citizens in a way that “removes the possibility of demanding that an official show a legal warrant for his action”.⁵⁰⁹ Lacing together the cause and consequence, if s 213(1.1) is the result of an interference with the legislative process, then it is symptomatic of an impaired institutional capacity, which in turn demonstrates the need for Parliament to offer reasons for its decisions. Thus, in re-enacting the former s 213 into s 213(1.1), despite appeals to s 7, and despite almost unanimous opposition from citizens and experts, Parliament was ill-equipped to apprehend its democratic and legal mandate.

What also makes this wrong subterranean, is not only the two levels of defects – the lack of generality, and the incongruence – but also the difficulty of capturing the wrong in current constitutional doctrine. While the purpose test seems like the closest approximation for uprooting this wrong into a juridical claim, because it can harness the reasons stated on the record according to a thicker conception of legislative intent, the purpose test still does not neatly fit the compound nature of the *Charter* violation. Adjudicating *Charter* claims by analyzing each right in isolation cannot simultaneously encase all of the dimensions of the rights impugned. Layering the s 213 claim in *Downtown Eastside* over the claim in *Bedford* illustrates how the Court’s practice of restraint, passive indeed, may disfigure a harsher picture of the violation.⁵¹⁰ A clearer, starker picture is revealed by vivifying the deprivation of security panoramically and granularly through the prisms of all of the rights impugned: freedom of expression vouchsafes *communicating* for

⁵⁰⁸ Fuller, *The Morality of Law*, *supra* note 28 at 81-83; Dyzenhaus, “Form and Substance”, *ibid*.

⁵⁰⁹ Dyzenhaus, “Form and Substance”, *ibid* at fn 71.

⁵¹⁰ *Bedford 2013*, *supra* note 1 at para 160; Bickel, “Forward: The Passive Virtues”, *supra* note 30 (I am playing with Bickel’s idea of the passive virtue of restraint).

protection, equality rights ensconce social and cultural differences that make groups vulnerable to disadvantage, and freedom of association encapsulates the unique protective value of communitarian strengths. What we see is a deeper, more complex wrong; one that is all the more difficult to remedy. So even though that wrong remains incorrigible and uncrystallized for now, memorializing it in institutional memory – through reasons – is at least a commitment to remedy that wrong in the future.

C. Complexities of Criminal Liability

While the subterranean wrong of s 213(1.1) is symptomatic of institutional dysfunction in primarily a sense of capacity, institutional legitimacy also has an aspect of competency. To demonstrate how competency and capacity are not cognate concepts, but mutually reinforcing, I will end with an example of a patent error that is connected to the subterranean wrong of s 213(1.1). And although examining the purposes underneath s 213(1.1) have revealed a more profound need for Parliament to offer reasons, this final example demonstrates a very practical need for reasons: fixing a wrong interpretation of the consequences of criminal liability.

How legislators reasoned about the prospect and consequences of criminal liability may have exaggerated the decriminalization deception that had originated back in the House of Commons. After JUST amended s 213(1.1) to specify “a school ground, playground or daycare centre” as locations for law enforcement to move in on, s 213(1.1) nonetheless continued to befuddle legislators. During the LCA’s October Study, Senator Plett followed up on assurances by Manitoba’s Justice Minister that Bill C-36 would not be enforced against sellers. But in trying to frame his question, it is clear that Senator Plett did not comprehend the *actus reus* and actor captured under s 213(1.1):

You're saying that it's illegal to buy sex but not illegal to sell sex, is the way I understood it. If it's not illegal to sell sex, why would Minister Swan need to intervene and tell the police not to charge the sex worker?

*Ms. Ekberg's testimony says she's concerned about the criminalization of the sex worker, as are other witnesses. I do not understand something here. They are concerned that they don't want the sex worker criminalized. Swan says he's going to ask the police not to charge the sex worker. If it's not illegal why would Mr. Swan be concerned about that?*⁵¹¹

Because Senator Plett could not disentangle liability for communicating to sell sex from immunity from prosecution for selling sex, his technical misunderstanding apparently stems from the

⁵¹¹ Senate Proceedings (30 October 2014) (Hon Don Plett, examining Ian Carter and Gunilla Ekberg).

incoherence between s 213(1.1)'s communicating prohibition and the purchasing prohibition. As the earlier analysis of Bill C-36's legislative objectives tried to tease apart, some legislators and many witnesses were under the misconception that Bill C-36 decriminalized individuals who sold sex, having cabined their analyses inside the central purchasing offence, and having been captivated by the Preamble and Ministerial statements.

The messaging and marketing from the Preamble and Ministerial statements may have aggravated the antagonization between victimization and criminalization, which may very well have reached its climax with the storied re-enactment of s 213's solicitation offence into s 213(1.1)'s communication prohibition. Regardless of whether they celebrated, castigated, or cautiously critiqued Bill C-36, the gamut of witnesses addressed the detrimental impacts of criminal records, were nearly united in objecting to any policy or law that would brand sellers of sex as criminals. On the first day of JUST's study, Natasha Falle, who represented Sex Trafficking Survivors United, shared that "[t]he first time I ever stood on a street corner, at 17 years old, I was arrested by a police officer." Speaking to how her criminal record for solicitation was a barrier to exiting the sex industry, Falle explained:

.. It wasn't just the youth record. It was also my adult record with soliciting that hindered me from being able to do what other people are able to do, from reintegrating into society. When I was arrested, I basically just gave up. I thought, "This is it. I have a criminal record for prostitution. There's nothing else out there for me. I might as well just accept this environment." What I did was I made the best of that environment; albeit abusive, I needed to embrace it for my own survival.⁵¹²

That same afternoon, the debate about criminal records deteriorated when Government Member Stella Ambler inquired into whether Maggie's, a provincially-funded harm reduction organization, counselled women to exit the sex trade. The Executive Director of Maggie's, Jean McDonald, was

⁵¹² JUST Proceedings (7 July 2014) at 1658 (Natasha Falle, examined by Hon Sean Casey).

interrupted by Ambler, who either must not have read Bill C-36, completely misunderstood how the law works, or both:

Ms. Jean McDonald: It is not my end goal. Exit is not my end goal. I do actually support people who come to me and say, I want to start looking for another job. We are actually planning to have a workshop about how to write a resumé and how to do a cover letter. We offer our clients a space where they can use our computers and do print outs, those kinds of things.

But the thing is this. People know that when they come to Maggie's they're not going to be judged. They're not going to be told that they're bad or that they should want to leave. They're not going to be told, such as the woman from Walk With Me said earlier, that they can build their healing journey in jail. What was that even?

Mrs. Stella Ambler: No one is suggesting that, and there are no provisions in this bill to put prostitutes in jail.

Ms. Jean McDonald: Yes, there are. I absolutely—

Mrs. Stella Ambler: No, there aren't.

Ms. Jean McDonald: There are.

Mrs. Stella Ambler: No, there aren't. We're talking about summary convictions, which do not lead to criminal records of any kind.

Ms. Jean McDonald: What if they're working with—

Mrs. Stella Ambler: This is my time, Mr. Chair.⁵¹³

Noteworthy as this contest is for showcasing how showdowns of ideology can stymie the reasonable disagreement crucial to reasoned debate, it also records an important misapprehension about the law which became more remarkable in its endurance. While it is impractical and implausible to expect legislators to toil through substantive criminal law and unknot the complexities of *Charter* doctrine, it is not a grueling demand to understand basic classifications of criminal offences.

Nevertheless, detached as they are from the frontlines of the criminal justice system, if legally untrained politicians can be afforded a margin of appreciation for misapprehending something so elemental as the punitive consequences of a criminal conviction, then we would at least expect police officers to know first-hand what happens when they fulfil their duties to enforce the criminal law. It therefore defies expectation that the very next morning, while advocating for

⁵¹³ JUST Proceedings (7 July 2014) at 1719 (Jean McDonald, examined by Hon Stella Ambler).

s 213(1.1)'s new communicating prohibition - after Natasha Falle had just spoken to its unconstitutional predecessor, s 213, as a barrier to leaving prostitution - Rick Hanson, the Chief of the Calgary Police Service, claimed that summary conviction offences carry no criminal record:

Mr. Sean Casey: Chief Hanson, do I understand you correctly to say that one of the best ways we can help people involved in prostitution is to give them a criminal record so that will help them out?

Chief Rick Hanson: I don't think you're necessarily giving them a criminal record. If it's a summary conviction offence there is no criminal record. Now there is no criminal record. If you're convicted of a summary conviction offence, they do not have the authority under Canadian law to fingerprint or photograph. Without the ability to fingerprint or photograph you don't have any identification of criminals. So in other words, it is a very low level and you still have the criminal conviction but no record.⁵¹⁴

Amidst the ensuing confusion, the Parliamentary Secretary to Justice Minister MacKay requested a memo from his Department on whether summary conviction offences would be registered on a criminal record.⁵¹⁵

In the interim, after hearing more about how criminal records prevented sellers from exiting the sex trade, such as by halting housing applications and eliminating educational and employment opportunities,⁵¹⁶ record expungement emerged as a promising prospect that could cement the abstract aspirations of Bill C-36's Preamble into concrete, immediate results. With the observation that the Government had just enacted increased fees and longer ineligibility periods for record suspensions, and thereby had raised the barrier even higher for sellers to exit, a panel of witnesses from all political and social hues wholly endorsed what would be "essentially an amnesty" for convictions under the unconstitutional s 213, struck down in *Bedford*.⁵¹⁷

⁵¹⁴ JUST Proceedings (8 July 2014) at 1056 (Rick Hanson, examined by Hon Sean Casey).

⁵¹⁵ JUST Proceedings (8 July 2014) at 1300 (Hon Bob Dechert).

⁵¹⁶ See eg. JUST Proceedings (10 July 2014) at 1015 (Deborah Pond) 1325 (Kate Quinn).

⁵¹⁷ JUST Proceedings (10 July 2014) at 1420. The policy change from pardons to the more difficult "record suspensions" were enacted by omnibus legislation through the *Safe Streets and Communities Act*, SC 2012, c 1.

The momentum from this consensus culminated into a motion to amend Bill C-36 during JUST's clause-by-clause. The proposed transitional provision would have automatically suspended records of convictions under the former s 213.⁵¹⁸ Bob Dechert, the Parliamentary Secretary, opposed the motion proffered by Vice-Chair Boivin because it would have required consequential technical amendments, but also because it “would significantly reduce the deterrent effect of the provision itself”.⁵¹⁹ With exasperation, Vice-Chair Boivin apprehended and expressed how the Government's position was inimical to the purposes publicized by the Government and the Preamble:

If the idea is to lift people out of poverty and their surroundings, it is important for them to have a job. Witnesses have come to talk to us about this. When people have to indicate that they have a criminal record and when that criminal record takes more and more time to be expunged—thanks to Conservative measures adopted a few years ago, including Bill C-10—they are kept in a straight jacket they will not easily get out of. In sum, it will take you a bit longer to help people leave prostitution.⁵²⁰

Despite the full support of the NDP and Liberal members, the Conservative majority defeated the amendment five-to-four.

It strains credulity that the “Standing Committee on Justice and Human Rights”, composed of educated, experienced legislators whose previous backgrounds (before their ascent to the House of Commons) included law and policing (which we would expect qualified them to serve on that very Committee), had to request a memo on whether a summary conviction offence counted as a criminal conviction. This glaring example of institutional incompetency is also a limitation of institutional capacity, because had the Committee's resources included its own independent legal advice (as the British Parliament does),⁵²¹ then this entire misapprehension (as well as the

⁵¹⁸ JUST Proceedings (15 July 2014) at 1310 (NDP Motion by Hon Françoise Boivin)

⁵¹⁹ JUST Proceedings (15 July 2014) at 1312 (Hon Bob Dechert).

⁵²⁰ JUST Proceedings (15 July 2014) at 1315 (Hon Françoise Boivin).

⁵²¹ David Feldman, “Democracy, Law, and Human Rights: Politics as Challenge and Opportunity” in Murray Hunt, Hayler Hooper, and Paul Yowell, eds, *Parliaments and Human Rights: Redressing the Democratic Deficit* (Oxford: Hart Publishing, 2015) 95 at 112-113.

undignified interruption of Jean McDonald to tell her she was wrong when she was right), could easily have been avoided. Summed with the previous failed amendments that formed the overall power dynamic, the deficits in Bill C-36's legislative process might fuel policy recommendations from advocates, commentators, and backbenchers to redistribute Committee powers and refit Parliamentary resources with increased expertise.⁵²²

D. Conclusion

Renewing calls for reform such as sending Bills to Committees earlier, decentralizing the concentration of Cabinet authority, and slackening party discipline could bring this project to a natural close.⁵²³ I fully support these proposals; however, they are often self-avowedly timid in scope, and scant on details. But the most significant limitation of these policy ideas for Canadian Parliamentary reform is that they regard politicians *qua* politicians as both necessary and sufficient agents for action. In another way then, to repeat these ideas would also be to resign what happened during Bill C-36 to political attributes. To do so would be to ignore the integral legal elements of Parliament at work symbiotically and synchronically.

It is also important to note that Bill C-36 was not the first occasion that Parliamentary Committees studied the prostitution prohibitions struck down in *Bedford*. Markedly absent from the deliberations at both the LCA and JUST was Parliament's own 2006 Subcommittee Report, the findings of which are strikingly similar to *Bedford*. Although the four political parties in the Subcommittee could not reach consensus on whether prostitution was best approached as a public health problem or a criminal justice issue (or both), all four parties frankly acknowledged the

⁵²² See eg. Peter Aucoin, Mark D Jarvis, and Lori Turnbull, *Democratizing the Constitution: Reforming Responsible Government* (Toronto: Emond Montgomery Publications, 2011); Chong, Simms, & Stewart, *Turning Parliament Inside Out*, *supra* note 134; David C Docherty, *Legislatures* (Vancouver: UBC Press, 2005); Allison Loat & Michael MacMillan, *Tragedy in the Commons: Former Members of Parliament Speak Out About Canada's Failing Democracy* (Toronto: Vintage Canada, 2014).

⁵²³ *Ibid.*

unacceptable, unequal approach to enforcement, the scarcity of research, and the need for social reform. Broadly viewed, and tracked to its logical end, the Court in *Bedford* was simply nudging Parliament to follow through on what it had already recommended to itself to do, but had failed to implement.

Although a full comparison of the traits on the 2006 Subcommittee with those of the LCA and JUST in 2014 would exceed my own capacity for now, some features of the 2006 Subcommittee are encouraging. When convened into a sublegislative body, without the political pressure of voting on an actual Bill with an impending deadline, politicians were able to take their roles as legislators seriously to conduct a rational, candid, informed deliberation about deeply sensitive issues. Those legislators also suspended their political self-interest to make recommendations in the public interest. One way my future doctoral research could interject into this collective action problem is by comparing Bill C-36's separate bicameral Committees with the quality of the debate at the Special Joint Committee on Physician-Assisted Dying in 2015, which also worked under the crunch of a suspended declaration of invalidity, but under a different Government.⁵²⁴

Whether Bill C-36 in substance responded to the Court's concerns in *Bedford* in a constitutionally satisfactory manner is a conclusion we will have to wait for the Court to pronounce upon. For now, all I can conclude is that the political expectations generated by *Bedford* influenced the duration, quality, and legitimacy of the legislative process. Holding the Government to account for the s 7 rights violation (and perhaps for defending the claim in the first place) collided with Parliament's capacity to engage in lawmaking. *Bedford* moved as though a vector, influencing the magnitude and direction of Parliament's legislative, deliberative, and accounting functions. During

⁵²⁴ Special Joint Committee on Physician-Assisted Dying, *supra* note 282, struck in response to *Carter 2015*, *supra* note 36.

this accelerated reply to the Court, the propulsion of *Bedford*'s judgment may have both shortcut and overshot the legislative process as the case's evidence was recycled, argument was resubmitted, litigants were rebuffed, and ratios became slogans. Trailing the reasons and direction of *Bedford*'s judgment into Parliament's competency and capacity for reasoned apprehension has tracked some free and democratic values, but in many ways, also chased down an unfortunate descent into demagoguery.

Nevertheless, moments of insolence, impulse, and imposture can be withstood when the institutional apparatus is moored to rationality. So ably grasped by legal process is the tie of rationality to legitimacy, for as Lon Fuller put it, "it is the rational core of human institutions that is alone capable of keeping those institutions viable and sound, that can preserve them from deterioration, that can get them back on course after they have temporarily lost their bearings".⁵²⁵ To have faith in the integrity of law, and the dignity of those individuals who bring the law to life and life to law, we must assume that the judges, politicians, and civil servants working within each of the three branches are all rational agents within the Constitution's living tree, and those branches must grow and coordinate together to redress constitutional violations and prevent new ones. I have faith in the rational decision to amend Bill C-36 to include a mandatory review, which is now imminent. Bill C-36 might not be reasonable (or constitutional) legislation, but I want to believe that because Parliament gave reasons, and those reasons included a commitment to future improvement, it means that Parliament only temporarily lost its bearings in this democratic work in progress.

⁵²⁵ Fuller, "Adjudication", *supra* at note 26 at 360-361.

Appendix: Coding Scheme

Committee Meetings

Witness	Position	Evidence	Participation	Legal	Bedford	Miscellaneous
<ul style="list-style-type: none"> •Name •Affiliation •Testifying in personal or associational capacity? 	<ul style="list-style-type: none"> •Support or oppose Bill? •Whole or in part? 	<ul style="list-style-type: none"> •Social science research? •Personal experience? •Professional expertise or observations? •Errors or misrepresentations? 	<ul style="list-style-type: none"> •Quantity or quality of examination noteworthy? •Interrupted by Committee, insufficient time? •Procedural problems? •Consulted before legislative process? 	<ul style="list-style-type: none"> •Legal issues identified •Criminal law? •Constitutional law? •Which <i>Charter</i> provisions and norms identified? •Errors or misrepresentations? •Other case law cited? 	<ul style="list-style-type: none"> •Cite case? •If so, what point? •Participant in case, or other stake? 	<ul style="list-style-type: none"> •External sources cited? (eg. The Economist's Study, UBC Study, opinion polls) •Repeated or overlap in testimony at JUST and LCA? •Respond to other witnesses? •Common themes?